



Indigenous Issues

[The occasional briefing papers of the Asian Indigenous and Tribal Peoples Network (AITPN)]
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ORANG ASLI'S RIGHTS: Malaysia's Federal Court faces acid test

As we go to the print, Malaysia's Federal Court has not yet delivered its judgement in the case of *Sagong Tasi & 6 Ors vs Kerajaan Negeri Selangor & 3 Ors* involving the land rights of the Orang Aslis, the indigenous peoples of Malaysia. The survival of the indigenous peoples in Peninsular Malaysia, to a large extent, hinges on this keenly awaited judgement.

On 19 September 2005, the Court of Appeal of Malaysia upheld the historic judgment of the High Court sitting in Shah Alam, Selangor of 12 April 2002 in the case of *Sagong Tasi & 6 Ors vs Kerajaan Negeri Selangor & 3 Ors* (2002, 2AMR 2028). The High Court had ruled that the Temuan tribes are the customary owners of the 15.39 hectare (38 acres) plot of land in Kampung Bukit Tampoi village under Dengkil district in Selangor state. These Orang Aslis were forcibly evicted by the Selangor state government in 1995 in order to build a highway linking to the Kuala Lumpur International Airport.

The judgment of the Court of Appeal is consistent with its earlier judgements on similar issues. In the case of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor of 1998*, the Court of Appeal upheld the decision of the High Court that recognized the right of the Orang Aslis over their traditional land and awarded compensation in accordance with Article 13(2) of the Constitution of Malaysia for the losses of fruit and rubber trees which were planted on their traditional lands. The Federal Court dismissed the state of Johor's leave application to appeal.

Despite settled position in law, Selangor state government, United Engineers Malaysia, Malaysian Highway Authority and Malaysian government moved the Federal Court of Malaysia against the decisions of the High Court and the Court of Appeal in the case of *Sagong Tasi & 6 Ors vs Kerajaan Negeri Selangor & 3 Ors*.

I. Non-recognition of land rights and forcible evictions

Orang Aslis literally means the first peoples and they are the indigenous peoples of Peninsular Malaysia. Yet, they are treated like second class Bhumiputras, sons of the soil. Only the ethnic Malays are considered as first class Bhumiputras.

There are an estimated 1,49,723 Orang Asli indigenous peoples in Malaysia and they possess about 1,38,862.2 hectares of land. However, they are not recognized as the lawful owners of the lands. The Malaysian government maintains the obnoxious position that the Orang Aslis "have no rights in the land itself" as they are mere "tenants" on the lands they occupy which the authorities may at any time seize or take under its control by providing compensation for the loss of whatever grown on the land under Section 12 of the Aboriginal People's Act of 1954. Section 12 of the Act provides that "if any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefore and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Director General to be held by him as a common fund for such persons or for such aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the Minister."

Under this Act, indigenous Orang Aslis have been victims of systematic discrimination and forcible evictions by the State and the private companies.

II. Forcible evictions of Temuan Orang Aslis

In 1995, the State government of Selangor forcibly acquired 38 acres of land from 23 families belonging to indigenous Temuan tribe for the construction of the Nilai-Banting highway linking with the Kuala Lumpur International Airport. Their dwelling houses and standing plantations of oil palm, rubber and fruit trees were indiscriminately destroyed. The eviction was done in haste so as to complete the highway project in time for the 1998 Commonwealth Games held in Kuala Lumpur.

The displaced Temuan tribes were given nominal compensation only for trees, fruits, crops and houses in accordance with section 12 of the Aboriginal People's Act of 1954.

Sagong Bin Tasi and 6 other affected Temuan Orang Aslis filed a case against the Selangor state government, United Engineers Malaysia, Malaysian Highway Authority, and Federal Government of Malaysia. As stated above, on 12 April 2002, the High Court sitting in Shah Alam declared that the land belonged to the Orang Aslis because it was their customary and ancestral land. The High Court

ordered the Selangor government to pay compensation for the land in accordance with the Land Acquisition Act 1960, and also ordered United Engineers Malaysia and Malaysian Highway Authority to pay damages for trespassing.

All four defendants appealed before the Court of Appeal against the High Court judgment. The Court of Appeal upheld the verdict of the High Court that the displaced families be given compensation under the Land Acquisition Act 1960 and acknowledged them as owners of that land, not mere occupiers. Court of Appeal Judge Datuk Gopal Sri Ram held that the State, which is enjoined by the law to protect the aborigines, had treated the Temuan indigenous peoples "in a most shoddy, cruel and oppressive manner". Justice Ram also confirmed that some of the Temuan landowners of Bukit Tampoi village were brought to the police station and forced to accept their compensation cheques in front of the District Officer, the Officer in-Charge of Police Department and the State Assembly representative. Judge Ram held that forcible eviction of the families was violative of Article 13(2) of the Federal Constitution which provides that "no law shall provide for compulsory acquisition or use of property without adequate compensation".

The judgment of the Court of Appeal is consistent with the Department of Orang Asli Affairs' 'Statement of Policy Regarding the Administration of Orang Asli of Peninsular Malaysia' of 1961. It states: "The special position of aborigines in respect of land usage and land rights shall be recognized, that is, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically in line with other communities in this country. Aborigines will not be moved from their traditional areas without their full consent."

III. Abuse of justice

The four defendants - the Selangor state government, United Engineers Malaysia, Malaysian Highway Authority, and Federal Government of Malaysia - have now challenged the judgement of the Court of Appeal before the Federal Court of Malaysia. Since then, the hearing has been postponed a few times.

On 5 April 2006, one of the senior judges of the Federal Court, Datuk Richard Malanjum, recused himself from the bench on the ground that he did not want "parties to submit before a person who has set up his mind in this case". Earlier on 8 July 2005, proceeding in a similar case viz. Superintendent of *Lands and*

Surveys, Bintulu versus Nor Anak Nyawai and others at Miri Appeal Court, he had passed a verdict in favor of the native tribes.

When the hearing resumed on 27 April 2006, senior federal counsel Datuk Mary Lim told the Federal Court that the Orang Aslis "have customary rights over items on the land, but not the land itself", and therefore they would only be compensated for the loss of their fruit trees, crops and houses, if and when the government needed to acquire their land. Datuk Mary Lim also submitted that prior to the tribe residing in Kampung Bukit Tampoi in Dengkil for about 210 years, it belonged to the Selangor Sultanate. So they could not have held a native or customary title to it.

The arguments put across by the Federal Counsel are essentially racist. If the Orang Aslis are to be denied their land rights, it would mean that they do not have protection under the common law like the Land Acquisition Act of 1960 and the Constitution of Malaysia at par with other citizens of Malaysia. It will also mean that Aboriginal People's Act of 1954 will prevail over the Constitution and extinguish the rights accorded under the Constitution.

The Federal Court of Malaysia may as well uphold the judgement of the Court of Appeal. But, three of the seven plaintiffs have already died and the others have become quite old. The Federal Court must not only uphold the supremacy of the Constitution but it must also consider that the petition of the defendants is a fit case to be dismissed with exemplary damages for abuse of justice against the '*rakyat miskin*', the poorest-of-the-poor in the country.