

COMMERCIALISING MUZARA'A MODEL CONTRACT THROUGH ISLAMIC FINANCE TO HELP MALAYSIAN ABORIGINES

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ABSTRACT

The rights of Orang Asli on land is merely regarded as tenant at will. As a consequence, they will lose their land and rights to the crops that they are skilled full in. This paper aims to highlight the plight and pressures when their land is being taken away from them. This paper also serves to propose Muzaraah as a way to take them out from the current plight to help them to boost their economic skills. Muzaraah system allows the commodities traded with the land owned by the government retained. This paper also proposes a bank could come in as a financial intermediary in providing financing. This paper proposes that once the government has taken away their land, they should be given a right to cultivate the government's land under the Muzara'ah concept. The paper concludes by proposing the model to be adopted to ensure justice is served.

Key words: Muzara'ah, Commercial contract, Islamic Finance, Aborigines

INTRODUCTION

The Aboriginal Peoples Act (1954, revised 1974) is the only law that specifically refers to the Orang Asli. And while the Act provides for the establishment of Orang Asli Areas and Orang Asli Reserves, it also grants the state authority the right to order any Orang Asli community to leave - and stay out of - an area. In effect, the best security that an Orang Asli can get is one of 'tenant-at-will'. That is to say, an Orang Asli is allowed to remain in a particular area only at the pleasure of the state authority. If at such time the state wishes to re-acquire the land, it can revoke its status and the Orang Asli are left with no other legal recourse but to move elsewhere. Furthermore, in the event of such displacement occurring, the state is not obliged to pay any compensation or allocate an alternative site, and may only do so.

Thus, the Aboriginal Peoples Act laid down certain ground rules for the treatment of Orang Asli and their lands. Effectively, it accorded the Minister and Commissioner concerned - or his representative, the Director-General of the Department of Orang Asli Affairs (JHEOA) - the final say in all matters concerning the administration of the Orang Asli and in matters concerning land, to the state authority¹. Classical writings on Shari'ah, some of which date back to twelve centuries ago mentioned three essential sharing-based financing contracts, namely, equity sharing (Musharakah), equity sharing with a sleeping partner (Mudarabah) and crop-sharing (Muzara'ah). They also mentioned three sale-based financing contracts: deferred payment sale (al bay' al 'ajil), forward sale with cash advance (Salam) and manufacturing financing sale ('Istisna'). Lastly, classical writings also mentioned leasing (Ijarah) as a form of financial contracting.

This paper aims to apply the Muzara'a Model to help Orang Asli further. Once the land is taken from them, they are left without any sources back up. In relation to that their life is solely dependent on crops and so as their expertise. Chasing them out from the agricultural land may cause injustice to them. This paper proposes that the barren land under the government's title and acquisition should be given to Orang Asli for share cropping.

RATIONALE FOR THE PROPOSED MODEL

Many of Orang Asli' land being taken away from them. These can be seen in some of the cases as follows;

Koperasi Kijang Mas v Kerajaan Negeri Perak In 1992, the ***Ipoh High Court***, in deciding the case of Koperasi Kijang Mas & 3 others versus Kerajaan Negeri Perak & two others, held that the State Government of Perak had breached the Aboriginal Peoples Act, 1954 (revised 1974) when it accepted Syarikat Samudera Budi Sdn. Bhd's tender to log certain areas in Kuala Kangsar. These areas included lands which have been approved by the State Government as Aboriginal Reserves namely the regroupment schemes of RPS Sungei Banun and RPS Pos Legap. The High Court went on further to hold that Syarikat Samudera accordingly had no rights to carry on logging activities and that only Orang Asli as defined in the Aboriginal Peoples Act had the right to the forest produce in these reserves. An important point canvassed by the State Government was that the lands, although approved had not been gazetted. Justice Malek in a strong opinion held that gazetting was not a mandatory requirement. The approval of the State Government for the lands to be aboriginal reserves had, without the necessity of gazetting, created the reserves and thereafter only Orang Asli have exclusive rights to the forest products in the reserves. This decision has important implications for Orang Asli land rights as official sources indicate that some 29,144.18 hectares of aboriginal lands in 2002 have

¹ Refer to Malay Mail newspaper published on November 28, 1953 whereby Sir Onn Jaafar's speech in the Federal Legislature "now I bring this Bill for the protection and welfare of a community, a comparatively large community who are people of this country". "the aborigines are human beings with human reactions and the idea of this Bill is to provide for their protection as human beings and not as museum pieces or exhibits". Quoted from *Selangor v Sagong Tasi* [2006] p1, CAM.

been approved, but are yet to be gazetted. In respect of these lands therefore, Orang Asli have some measure of statutory protection from encroachment and displacement by many other interests.

Sagong Tasi v Sagong Tasi v Kerajaan Negeri Selangor. Sagong Tasi was among 23 family heads from Bukit Tampoi in Dengkil, Selangor who had 38 acres of their land taken from them for the construction of the Nilai-Banting highway linking with the new Kuala Lumpur International Airport in 1995. Some also had their crops and dwellings destroyed. While they were paid a nominal amount for these, there was no compensation for the land. The authorities maintained that the Orang Asli were mere tenants on state land and as such were not entitled to compensation under the Land Acquisition Act 1960. With the help of a *pro bono* team of lawyers from the Bar Council, the Temuans took their case to the courts. They asserted that they are the owners of the land by custom, the holders of native title to the land and the holders of usufructuary rights (i.e. right to use and derive profit) to the land. They also maintained that their customary and proprietary rights over the land which they and their forefathers have occupied and cultivated for a long time were not extinguished by any law. In April 2002, Justice Mohd ruled that the Temuans did have native title under common law over their lands. And as such compensation was to be paid to them in accordance with the Land Acquisition Act, 1960. The four defendants (the Selangor state government, United Engineers Malaysia (UEM), Malaysian Highway Authority (LLM), and the Federal Government) appealed. In October 2005, Justice Gopal Sri Ram sitting with two others, unanimously threw out the appeal and held that the High Court was not misdirected when it decided, based on a large quantity of evidence and fact that was not challenged, to rule that the Temuans did indeed have proprietary rights over their customary lands. As such, these lands should be treated as titled lands and therefore subject to compensation under the Land Acquisition Act.

In **Adong Kuwaw v In 1997**, the Johor High Court awarded compensation to 52 Jakuns for the loss of 53,273 acres of ancestral lands. The state government had taken the forested land and leased it to the Public Utilities Board of Singapore who subsequently constructed a dam to supply water to both Johor and Singapore. Justice Mokhtar concluded that the Jakuns had proprietary rights *over* their lands, but no alienable interest *in* the land itself. That is to say, while the Jakuns may not hold title to their traditional lands, they nevertheless have the right to use it for their subsistence and other needs. In this instance, the court ruled that while certain lands are reserved for aboriginal peoples, they also have rights to hunt and gather over additional lands - the "right to continue to live on their lands, as their forefathers had lived." Such proprietary rights are protected by Article 13 of the Federal Constitution, which required the payment of "adequate compensation" for any taking of property. In accordance with this, the Jakuns were awarded a sum of RM26.5 million for their loss of income for the next 25 years. With interest accrued, the final payment was RM38 million. This judgment was upheld by the Court of Appeal in 1998, with no leave being granted for appeal to the Federal Court.

OTHER POLICIES AND ACTS THAT AFFECTS THE RIGHTS OF LAND OF ORANG ASLI AS FOLLOWS

Land Acquisition Act 1960

Section 2

"Land means alienated land within the meaning of the State Land Law, land occupied under customary right and land occupied in expectation of title". The land under customary right is not defined. The purposive approach is taken by Gopal Sri Ram, J to be given a wider interpretation so as to achieve the object of LAA ie to ensure adequate compensation be paid for land acquired².

All of these laws give the Federal and State Governments a tremendous amount of leverage against the Orang Asli. (This, at least, is how the above laws, and especially the Aboriginal Peoples Act were interpreted - until, that is, the October 2005 decision of the Court of Appeal in the Sagong Tasi case. Even supposedly sustainable and rights-respecting initiatives such as the Malaysian Timber Certification Council (MTCC) prefer to hide behind the catch-all clause "subject to national laws" knowing full well that such national laws generally favour the interests and greed of the well-placed and well-heeled rather than the Orang Asli inhabitants of the areas they now seek to exploit or appropriate.

The Federal Constitution specifies the division of powers between the state and federal governments. The Constitution's Ninth Schedule divides the various responsibilities, privileges, and jurisdictions into three lists: List 1, the Federal List; List 2, the State List; and List 3, the Concurrent List. In particular, the welfare of the Orang Asli comes under the Federal List while land and forest matters come under the State List. Also, as every state is independent under the Constitution, federal legislation in most cases is not binding on the states.

On the contrary, the Federal Constitution accords substantial powers over land use and natural resource management to the respective States. And though under the Constitution the Federal Government is empowered to make laws it deems necessary to ensure continuity throughout the country, the Federal Government often serves merely as a coordinating entity. As such, federal agencies like the Department of Orang Asli Affairs (JHEOA) would consequently assume only a liaison and cooperative role with respect to the state authorities³.

² refer to Art 8(5)(c) Federal Constitution

³ Legal Correspondent (1992), 'High Court Declares State Government Has No Power To Award Logging Rights To Private Company', *Pernloi Gah*, Issue No. 2, Center for Orang Asli Concerns, Petaling Jaya. Refer also to Nicholas, Colin (2005), 'Who Can Protect The Forests Better? Pitching Orang Asli Against Professionals in Protected Area Management in Peninsular Malaysia', paper presented at the International Symposium on Eco-Human Interactions in Tropical Forests organized by the Japan Society of Tropical Ecology (JASTE), Kyoto University, 13-14 June 2005 and Nicholas, Colin (2005), 'Orang Asli Rights Upheld', *Aliran Monthly*, Vol. 25, No. 8, pp. 37-40.

In fact, we can even say that the Constitution, to some extent, actually discriminates against the Orang Asli. For example, under Article 153, they are left out of the categories of peoples who are accorded special privileges (viz. the Malays and natives of Sabah and Sarawak). This article posits the mandatory duty of safe-guarding the special position on these privileged communities in specific areas of economic activity, education and employment on the Yang DiPertuan Agung.

But in reality, the government has chosen to interpret the vagueness in the Constitution in its favour, rather than to protect the rights and interests of the Orang Asli indigenes. Thus, while the Constitution does authorise the government to enact laws that are in obvious favour of the Orang Asli – “for their protection, wellbeing and advancement” – it has not done so.

The Land Conservation Act 1960 consolidates the law relating to the conservation of hill lands and the protection of soil from erosion and the inroad of silt. Section 5 provides that no person shall plant any hill land with short term crops (i.e. crops that normally complete their life cycle within two years after planting) without an annual permit from the Collector of Land Revenue⁴. Section 6 goes on to prohibit the clearing of hill land⁵. These provisos are detrimental to Orang Asli communities who live in forest and forest fringe areas and who still depend on the traditional products for their subsistence.

The appeal of the aggrieved party is however subjected to the discretion of the Ruler in Council or the Yang di-Pertua Negeri in Council under this section shall be final and no Court shall call in question any such order. This is stated under section 7 LCA 1960 which states that

(1)“Any applicant aggrieved by the refusal of the Land Administrator to issue a permit under section 6 in terms acceptable to such applicant may, within fifteen days of the issue of the Land Administrator's certificate under section 6 (3), or within such further time as the Ruler in Council or the Yang di-Pertua Negeri in Council, as the case may be, may in any case allow, appeal to the Ruler in Council or the Yang di-Pertua Negeri in Council, against such refusal and the Ruler in Council or the Yang di-Pertua Negeri in Council, after hearing such person, or in his absence, as the Ruler in Council or the Yang di-Pertua Negeri in Council shall think fit, may confirm such refusal or order the Land Administrator to issue such permit with or without modifications.

(2) Every such appeal shall be by notice in writing signed by the appellant or his advocate and solicitor and shall be delivered to the Land Administrator, who shall forthwith transmit such notice to the State Secretary, together with a copy of the certificate issued under section 6 (3).

(3) In deciding any such appeal it shall be lawful for the Ruler in Council or the Yang di-Pertua Negeri in Council to receive and take into consideration any signed statement or report of any person as to the condition of the land in question and the desirability or otherwise of the issue of a permit therefore.

(4) The order of the Ruler in Council or the Yang di-Pertua Negeri in Council under this section shall be final and no Court shall call in question any such order.”

As regard to section 7(4), the exclusion of judiciary systems seems to allow a tribunal to misinterpret the law without worrying about court interference and the tribunal became the final judge of the law. It seems to be an immune law which stands on its own without any power of interference from any judicial review⁶ and work as a bar for an appeal or writ of *habeas corpus*, *certiorari* or *mandamus*. This ouster clause should not be in existence at all.

The Land (Group Settlement Areas) Act 1960 (Act No. 530), Revised 1994

The Land (Group Settlement Areas) Act 1960 enables land agencies such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and other agencies such as the Pahang Tenggara Development Authority (DARA) to take over State land and to develop them for the purpose of land settlement which culminates in the issue of titles to the settlers. Frequently Orang Asli traditional areas have been converted to such land schemes with them not enjoying both the fruits of the programme nor being entitled to such titles for the land.⁷

⁴ No person shall clear any hill land or interfere with, destroy or remove any trees, plants, undergrowth, weeds, grass or vegetation on or from any hill land: Provided that it shall be lawful for the Land Administrator, on the application of the owner or occupier of any hill land, to authorise by permit in writing under his hand, subject to such terms and conditions and to such extent and in such manner as may be specified in such permit -(a) the clearing of such hill land for the purpose of cultivation; (b) the clearing or weeding of such hill land under lawful cultivation.

(2) Any person who fails to comply with any terms or conditions prescribed in a permit issued under subsection (1) shall be deemed to have contravened this Act. (3) Whenever the Land Administrator declines to issue a permit under this section in terms acceptable to the applicant he shall, on being requested so to do by the applicant, forthwith issue to him a certificate under his hand setting forth the nature of the permit asked for and the grounds of such refusal and the date of issue of such certificate.

⁵No person shall plant any hill land with short-term crops: Provided that the Land Administrator may issue an annual permit to plant specified short-term crops to any applicant who satisfies him that such cultivation will not cause appreciable soil erosion, and in such permit may prescribe the area of the land and the terms and conditions under which such cultivation is permitted

⁶ Judicial review is the power of a court to review the actions of public sector bodies in terms of their constitutionality. In some jurisdictions it is also possible to review the constitutionality of the law itself

⁷ For details refer to write up by Colin Nicholas, Orang Asli, Rights and Solutions. At

http://www.suhakam.org.my/c/document_library/get_file?p_l_id=30217&folderId=30507&name=DLFE-11801.pdf

Protection Of Wildlife Act 1972 (Act No. 76), Revised 1976, 1991

A law that expressly mentions the Orang Asli (or 'aboriginal community') is the Protection of Wildlife Act of 1972 (Act 76). Wildlife Reserves and Sanctuaries may be declared by the state under this legislation. In such areas, an Orang Asli may shoot, kill or take certain wildlife for the purpose of providing food for himself or his family⁸.

National Forestry Act Of 1984

Another law that is applicable to the Orang Asli is the National Forestry Act of 1984, which provides for the administration, management and conservation of forests and forestry development in the states. It also states that forest produce is property of the state and that harvesting requires a license. Basically, it treats the Orang Asli harvesters of such forest produce (e.g. rattan and *petai*) as labourers of the traders who hold the necessary licences (or '*bund*' as they are called in Perak) from the Forest Department.

National Parks Act 1980 (Act No.226)

The National Parks Act (Act 226) of 1980, is an act to provide for the establishment and control of National Parks and for matters connected therewith. While usufructuary rights of the Orang Asli may not be curtailed in such parks, their right to own and control their traditional territories certainly come under serious jeopardy.

THE HISTORY OF ABORIGINAL PEOPLE ACT 1954

When Convention No.169 on Indigenous and Tribal Peoples was adopted, the International Labour Conference (Geneva, June, 1989) observed that in many parts of the world these peoples do not enjoy the fundamental human rights to the same degree as other members of the national societies to which they belong, and recognized their aspiration to exercise control of their own institutions, their own livelihood and their economic development.

The new Convention, which revises ILO Convention No.107 (1957), applies to tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations, and to those peoples of independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

The basic concepts of the Convention are respect and participation. Respect for the culture, spirituality, social and economic organization and their identity, all constituting essential premises regarding the *enduring nature* of indigenous and tribal peoples. Convention No. 107 was intended to provide protection, but it also assumed that the problem of indigenous and tribal populations was one that would disappear with the gradual integration of these peoples into the societies in which they lived. Convention No. 169 also presumes that indigenous and tribal peoples are able to speak for themselves and to take part in the decision-making process as it affects them and that they have a *right* to take part in this decision-making process, and that their contribution will be a valuable one in the country in which they live.

Article 7 is the other of the central provisions of the Convention. It states that these peoples have the right to decide their own development priorities and to exercise control over their own economic, social and cultural development. With regard to regional and national plans and programmes affecting them directly, indigenous and tribal peoples shall participate in their formulation, implementation and evaluation. Moreover, plans of overall economic development for the areas inhabited by indigenous and tribal communities have to be designed with a view, among other things, to improve their living conditions, employment opportunities, and educational attainments. In addition, governments are required, whenever appropriate, to carry out, in cooperation with the indigenous or tribal peoples concerned, studies in order to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The cooperation of indigenous and tribal peoples must be sought also in the design, execution and evaluation of health and education services, including vocational training schemes.

The closest thing to statutory legal recognition of Orang Asli land rights is to be found in the Aboriginal People's Act. The provisions of this Act has to be understood against its historical context. It was enacted by the British Colonial Government when faced with a communist insurgency in pre-independence Malaya.⁹ Orang Asli communities were known to provide food, labour, and intelligence to communist insurgents. Some even joined the communists and took up arms against the British Government. Quickly realising the importance of winning over the Orang Asli, the British Colonial Government established a Department of Aborigines and set up 'jungle forts' in Orang Asli areas which served to provide welfare, health and education to the Orang Asli. The Aboriginal Peoples Ordinance was legislated in 1954 with the aim of exerting control over Orang Asli communities.

The Aboriginal People's Act, successor to the Aboriginal Peoples Ordinance, empowers the Minister concerned to declare, via publication in the gazette, certain plots of land to be protected aboriginal reserves and areas. However the Aboriginal People's Act does not treat the Orang Asli as legal owners of these aboriginal reserves or areas nor does it mandate compensation for the

⁸ Section 52 NPA 1980 " Notwithstanding anything in this Act, any member of an aboriginal community (as defined in the Aboriginal Peoples Ordinance, 1954) may shoot kill or take the wild animals and the wild birds described in Schedules Two and Four as deer, mouse deer, game birds and monkeys for the purpose of providing food for himself or his family".

⁹ Nicholas, Colin (undated) 'The Orang Asli of Peninsula Malaysia', Report by Centre of Orang Asli, <http://www.xlibris.de/magickriver/oa.htm>

Malaysian Government's acquisition of these reserves. While section 10 recognizes that compensation 'shall' and must be paid by the Malaysian Government for acquisition of Orang Asli's crops, section 11 merely states that the authorities 'may' pay compensation for the acquisition of aboriginal reserves or areas. This imports a degree of discretion in the compensatory process. Furthermore sections 6 and 7 allow the Minister to extinguish by declaration the status of aboriginal reserves and areas. This power in reality renders the Malaysian Government's section 11 compensation duties, if any, ineffectual, as they can be circumvented by a simple status revocation of the acquired aboriginal reserves and areas.

Under this Act, the Orang Asli are effectively tenants-at-will of the Malaysian state. In addition, not all inhabited Orang Asli land have been declared aboriginal reserves or areas, leaving them unprotected from governmental acquisition or third party encroachment. Recently, Orang Asli communities in Pos Gedung and Kampung Sungei Bil have been forced to acquiesce to logging activities on their traditional land as these had not been declared an aboriginal reserve or area, leaving them trapped within a legal vacuum.¹⁷ Furthermore the meagre protections offered by the Aboriginal People's Act are unreal and impractical as most of the Orang Asli do not know the existence or implications of this Act and are unable to petition the Malaysian Government for the protections owed to them under this Act

SALIENT FEATURES OF ABORIGINAL PEOPLE ACT 1954

A major portion of the Act deals with lands inhabited by aboriginal people and related matters thereto. Three categories of land are recognised under the Act, ie;

- I. Aboriginal inhabited place
- II. Aboriginal area
- III. Aboriginal reserve

Weaknesses Of Aboriginal People Act 1954

Section 2¹⁰

This section failed to extract a clear definition on the types of ethnic groups recognised by the law. This is due to the fact that orang Asli can be divided into various groups and ethnics according to their place of settlement either in peninsular Malaysia or Sabah and Sarawak. They can be classified to any of these groups; Bateq, Jahai, Mendriq, Kensi, Kintaq, Lanoh, Temiar, Semai, Jahut, Mah Meri, Semelai, Semaq Beri, Che Wong, Temuan, Temoq, Jakun, Orang Kanaq, Orang Laut and Orang Seletar.

In addition, the section failed to define customary land (which is normally used to defend occupation of land based on their customary right).

Section 3 (1) (a)-(c)¹¹

Linguistically, the definition of Orang Asli is more on cultural perspectives which more emphasise given on the way of life, culture and language and not to the ethnicity based group which bearing the real identity of the group. There are some Orang Asli who speaks other languages as a result of mix marriage. Based on this definition, they can no longer be considered as Orang Asli in the eyes of the law. From other dimensions, this definition seems to psychologically, restrict development against Orang Asli. It is to maintain as Orang Asli, your way of life should be like Orang Asli as described by the Act. This is also against the fundamental rights of human being i.e. the right to self determination.

Section 3(3)

The section seems to give a de jure power to the Minister in deciding whether any person can be recognised as aborigine or not. Section 4¹² and 5¹³

¹⁰"aboriginal ethnic group" means a distinct tribal division of aborigines as characterised by culture, language or social organisation and includes any group which the State Authority may, by order, declare to be an aboriginal ethnic group

¹¹ (1) In this Act an aborigine is - (a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons; (b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or (c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.

(2) Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall be deemed to have ceased to be an aborigine by reason only of practising that religion.

(3) Any question whether any person is or is not an aborigine shall be decided by the Minister.

¹² The Commissioner shall be responsible for the general administration, welfare and advancement of aborigines: Provided that nothing in this section shall be deemed to preclude any aboriginal headman from exercising his authority in matters of aboriginal custom and belief in any aboriginal community or any aboriginal ethnic group.

¹³ 1) The Yang di-Pertuan Agong may appoint a Commissioner for Aboriginal Affairs, and as many Deputy Commissioners for Aboriginal Affairs and other officers as he may consider necessary for the purposes of this Act.

(2) It shall be lawful for the Commissioner to do all acts reasonably necessary and incidental to or connected with the performance of his

The welfare and development of Orang Asli are given exclusively to the Commissioner of Orang Asli appointed by YDPA. Which open to any races and cultural groups not necessarily comes from Orang Asli tribes. Practically, this will affect the welfare itself seems other than orang asli are lacking in understanding their own culture and belief. It is to be mention here that the culture and belief of orang Asli are not something controlled solely by Headman or the commissioners. Orang Asli also are religiously and culturally tied up to the witchdoctor, healerman or *lembaga*, etc. it is propose that Orang Asli should be given a right to choose and vote their own Commissioner in representing their own interest either state, Federal or within their own tribes.

Section 6(1)

Aboriginal area may be declared by notification in the Gazette by the state authority. In legal terms the word may should be replaced with must. The de jure power of declaring the land as aboriginal is lies within the state authority without consulting Orang Asli.

Section 6(3)

The state authority may revoke any declaration of an aboriginal area. The sole de jure power to revoke or vary any declaration to aboriginal area lies in the hand of state authority. This is detrimental to the forest product cultivated by Orang Asli and jeopardize the rights of Orang Asli.

Section 8

The word “may” is not a must. The rights of occupancy is just a mere tenant at will which is not permanent. Refer to National Land Code tenancy without registration is only allowed for 3 years. Nothing in this section shall preclude the alienation or grant or lease of any land to any aborigines who have no interest over the land.

Section 9

This section is confusing. No aborigine is allowed to transfer, Lease, charge, sell, convey, assign, mortgage or dispose of any land except with the consent of Commissioner of Orang Asli or otherwise declared to be void and of no affect. All the transactions stated in this section is clearly within the jurisdiction of National Land Code. And the abovementioned rights of transactions have never been given to Orang Asli.

Section 10

The state authority is given de jure power to order any removal from areas declared to be Malay reserve. Vide section 10(3), the state authority can require any aboriginal community residing in any area declared to be Malay reservation, forest or game reserve to leave and remain out (subject to a discretionary power to pay compensation).

Section 11

Compensation on alienation of State land upon which fruit or rubber trees are growing excluded other important fruits and trees¹⁴ for Orang Asli so as any building erected on that land. The determination on adequacy of compensation is solely de jure power of state authority. Vide section 11 APA 1954 people in West Malaysia are only allowed to be compensated for trees and not for the land itself.

Section 12

The word “may” again invites undetermined intention and something which in law cannot be guaranteed. The exclusive rights to determine the adequacy of compensation is given solely to the state authority and they may choose not to pay if he thinks fit according to his discretionary power. The compensation obviously is not a mandatory, it gives the state authority the option to pay. The compensation paid is given to the Commissioner of Orang Asli according to the methods prescribed by the minister without any involvement of Orang Asli. Referring to Article 13(2)¹⁵ Federal Constitution it reflects to the fundamental basic of human rights on right to property. This article clearly states that no person is allowed to be taken away of his property without any adequate compensation.¹⁶ Furthermore there is no specific mechanism to determine the value of adequacy for a “just” compensation¹⁷. It is interesting to note that section 12 was proposed to be amended by the judges in *Selangor v Sagong Tasi* to suit the spirit of Art 13(2) of the Federal Constitution.¹⁸

functions under this Act including the conducting of research into any aspects of aboriginal life.
(3) All the powers of the Commissioner under this Act shall be exercisable by the Deputy Commissioners.
(4) Every person appointed under this Section shall be deemed to be a public servant within the meaning of the Penal Code [*F. M. S Cap. 45*].

¹⁷ Per Gopal Sri Ram “ sec 12 is a pre merdeka provision. It must be interpreted in a modified way so that it fits in with the Federal Constitution.in *Selangor v Sagong Tasi* [2006] CAM

¹⁸ The phrase in sec 12 should be changed as “the state shall grant adequate compensation therefore.” By interpreting word may for shall and by introducing aequate before compensation, the modification is complete, *ibid*.

The proposition of law as enunciated in the two cases of Adong Kuwau and Nor Anak Nyawai reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in the Australian case of *Mabo (No. 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria*, where the Privy Council in an appeal from the Supreme Court of Nigeria held that radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. Although the instant case dealt with individual rights and not communal rights, the principle applicable was the same¹⁹. The Federal court in *Superintendent of land & surveys Miri division & anor v. Madeli Salleh Federal Court, Putrajaya*²⁰ wholly agreed with the view expressed in *Adong Kuwau* and *Nor Anak Nyawai* that common law respects the pre-existence of rights under native laws or customs.

Section 14

The power to exclude any persons from aboriginal areas, aboriginal reserves are given solely to the Minister. This is to include the welfare and interest of Orang Asli. The right to self determination of Orang Asli failed to be given a high consideration because it limits the will and determination power of Orang Asli themselves to decide with whom they are supposed to deal and mingled with. This is once again contravening Art 9(2) Federal Constitution. It is also interesting to note that even though the power to determine the rights to enter aboriginal areas including interest and welfare of orang Asli is vested upon the ministers, but yet no such power is issued to evict any blockade, trespass or encroachment to Orang Asli's land by any minister which is clearly affect the welfare of Orang Asli.

MUZARA'A CONTRACT

Share-cropping; an agreement between two parties in which one agrees to allow a portion of his land to be used by the other in return for a part of the produce of the land. Muzara'a refers to literally joint act of planting. The terms refers legally to a contract for a planting compensated with part of the produce. The Maliki defined it as a partnership in crops. The Hanbali defined it as a landlord giving a farmer access to work his land or plant it with an agreement to share the crops²¹. In summary, muzara'a is an investment contract involving agricultural land. The two parties are the landlord and the worker or the farmer. The contract specifies that crop is to be shared between the parties according to agreed upon shares. There are three Parties involved in the contract :

1. Landlord
2. The farmer/worker
3. The object of contract is the land's usufruct if the farmer provided the seeds and the farmer's labor if the landlord provided the seeds. Maliki ruled that once the seeds are sown or seedless bulbs are planted, the contract becomes binding.

Conditions of the Rukn :

1. Contracting parties
2. The crops
3. The plant
4. The contract object
5. The method of planting
6. The period of muzaraa

How Can It Be Done?

The proposed model can be short term and long term. It Depends on the types of crops and plants agreed ahead. This proposal is made to alleviate the current hardship that is faced by the community of Orang Asli. Further more the proposal is for the benefit of the minority group and to evade injustice from being done on them. Indeed it serves as economic assistant to boost the economic condition of Current Orang Asli. The government may provide the land, animals, seeds, livestock and other tools. while the other provides only a labor. The government will allocate lands and seeds and the types of crops and plant conditions must be known to both parties. It must be a kind of plant that conventionally grown as farming labor is applied. The contract period must be known to both. The period is determined by the agreement. Thus, the contract is defective if the farmer is not given access to the land for part of the period or if either party dies prior to its expiration. In summary, Abu Yusuf and Muhammad deem muzara'a to be a valid contract if it satisfies eight conditions;

1. Eligibility of the contracting parties
2. Specifications of the contract period

¹⁹ *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (foll); *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (foll); *Mabo (No. 2)* (foll); *Amodu Tijani v. Secretary, Southern Nigeria* (foll). (paras 22 & 23)

²⁰ [civil appeal no: 01-1-2006 (q)] *Alauddin mohd sheriff FCJ, Arifin zakaria FCJ, Azmel Maamor FCJ*, 8 october 2007 reported in [2007] 6 CLJ 509

²¹ *Al-Kasani (Hanafi)* Vol 6, p175, *Ibnu Qudamah (Vol 5, p382)*

3. Fertility of the land and possibility of tiling it
4. Giving access to farmer
5. Product must be shared according to unidentified shares to effect the essence of partnership
6. Identification of the parties responsible for providing seeds, to avoid disputes and identify the object of the contract as either the land's usufruct, or the farmer's labor.
7. Specifying the shares of both parties the one providing the seeds and the one not providing them.
8. The genus of the seeds must be known.

The crop must be known to all parties. This ruling follows the fact that different crops affect the land differently. The ruling also based on juristic approbation does not render disclosure of the type of crop a condition to the contract, giving the farmer full discretion in selecting the crop. The planted crops must be eligible for growth in standard agricultural conditions. The contract is deemed to be defective if the following conditions are not met. Nature of the produce must be specified in the contract since it resembles rent, ignorance would render the lease defective. The produce must be shared between the contracting parties, thus the contract is deemed defective if all the products are given only to one of them. Shares in the produce must be specified otherwise the contract would contain ignorance that may lead to dispute. The produce must be divided according to unidentified shares. Thus, if the parties are guaranteed a fixed amount, or the output of a fixed part of the land, the contract would not be valid, since that may be equal to the total produce. Alternatively, financing of the agricultural production can be obtained from a bank on muzaraah principles as follows;

1. Profit loss sharing mudharabah based contract
2. Wakalah contract executed between the bank and the government to appoint aborigines to cultivate the land. The money will be disbursed by the bank and the profit based on the agreed ratio.

CONCLUSION & FINDINGS

The concept of Muzara Model is a very straightforward model to be introduced to the Orang Asli's community in Malaysia. However, despite all the protections, despite all the good intentions, and despite all international posturing, the sad reality is that the Orang Asli today justifiably fear for their identity, culture and especially for their traditional lands. Some of the lands that were approved for gazettement as Orang Asli Reserves as far back as the 1960s, were never administratively gazetted thus placing these lands in serious jeopardy of being lost to others. And for no fault of the rightful customary owners. In fact, some of these areas have already been reclassified as state land or Malay Reserve Land or given to individuals and corporations – without the Orang Asli's knowledge, let alone consent. The above discussion might as well serve as a method of financing for financial institution in agricultural financing. Indeed Islamic Finance provides a whole spectrum of modes of financing to suit every need of each people. This gives flexibility to the banks and customer to choose its suitability to serve their own needs and niche. This Model is one of the proposed methods to assist Orang Asli. Once the land is taken away from them, they will have no recourse towards their land when they are only regarded as tenant at will. The Model proposed could be the benchmark to assist Orang Asli in Malaysia. The government should assist them to polish their agricultural skills in cooperation with the agricultural ministry and not merely possess their land by force. Certainly the paper concludes with the following findings for some policy considerations;

- i. Muzara Model is a contract that can assist both parties; be it the government and the also the Aborigines.
- ii. The Model proposed instilled a humanistic sense in Malaysian government policy. Merely giving compensation will merely work in short term. Apart from compensation, their skills need to be instilled for long term survivorship.
- iii. This Model suggests that government is a caring society and consequently evading all negative accusation on the treatment of Orang Asli.

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