

Depending on Fences: A Study on the Laws Relating to the Indigenous Peoples of Malaysia in the Context of Art 8(j) of the Biodiversity Convention

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Introduction

During the Seventh Conference of Parties for the Convention on Biological Diversity 1992¹ (the CBD) held in Kuala Lumpur in February 2004, the Malaysian delegation made a strong stand against the application of international obligations regarding indigenous peoples on its government. The issue at hand revolved around Art 8(j) of the Convention which reads:

8(j) Each Contracting Party shall, as far as possible and as appropriate: Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.²

The Malaysian delegation were adamant that the terms "to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities" be

¹ 31 I.L.M 1992

² There are of course other provisions in the CBD relevant to indigenous peoples and these are: 10(c) (Sustainable use of components of biological diversity) Each Contracting Party shall, as far as possible and as appropriate protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; 17(2) (Exchange of information) Such exchange of information shall include exchange of results of technical, scientific and socio economic research, as well as information on training and surveying programmes, specialised knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16 paragraph 1. It shall also, where feasible, include repatriation of information; 18(4) (Technical and Scientific Cooperation) The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts. However these areas are not within the immediate ambit of this paper.

subject to national laws, i.e. to maintain the status quo of the treaty, rather than to change the text so as to make the clause subject to international law. Their argument was that since there were no international laws in existence on the matter of traditional knowledge, it would be folly to obligate them to an uncertain element. This was a matter of State Sovereignty as a State has a right to choose what it wishes to be bound to and this would be impossible if they are unsure what it is they are signing their name to. They further argued that international law could be subject to North biased rules such as those under the World Trade Organisation and this would ultimately be detrimental to indigenous communities.³

Local indigenous groups and Non Governmental Organisations (NGO) were unhappy with this approach as they wanted the extra protection that international law could provide. In other words there is a lack of confidence in Malaysia's laws to "to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities". What this paper seeks to do is to examine the laws⁴ in Malaysia on this issue in the hope of shedding some light as to whether these fears are founded or not.

Obligations under Art 8(j)

The CBD is a framework convention, in that it provides only the bare bones principles which should be applied to the issue of biological diversity. Details are only laid out in further agreements such as the Cartagena Protocol 2000.⁵ However, it is submitted that general obligations can be determined from the text of the treaty. Examining Art 8(j) would therefore reveal the following broad commitments on Malaysia:

1. The traditional knowledge, innovations and practices which embody the lifestyles of indigenous peoples relevant to the conservation and sustainable use of biological diversity must be protected
2. Such knowledge and practices is to be promoted but only with the involvement and consent of the communities themselves
3. Any benefit from these activities must be shared equitably

The Malaysian laws shall now be examined in the light of these three obligations in order to determine if they are sufficient to do the job in hand.

³ "Struggling to retain traditional way of life", Focus Section, New Sunday Times, 22 February 2004, page 2.

⁴ Malaysia has a rather unique legal system in which legislative powers are constitutionally divided between the Federal government and state governments. This division is further complicated by special powers being given to the states of Sabah and Sarawak. Indigenous issues for Peninsular Malaysia are generally within the jurisdiction of the Federal government, however in Sabah and Sarawak they are within the jurisdictions of the respective states. For the purpose of this paper emphasis is on the laws of the Peninsular although reference will be made time to time to Sabah and Sarawak. It is submitted that this does not pose too much of a shortcoming as many of the problems are equally relevant in all three legal systems. Furthermore in many matters which are related to indigenous issues, such as land rights, these are subject to state laws countrywide with no distinction between the Borneo states and the Peninsular.

⁵ 39 I.L.M 2000

The traditional knowledge, innovations and practices which embody the lifestyles of indigenous peoples relevant to the conservation and sustainable use of biological diversity must be protected

In order to protect the traditional knowledge, innovations and practices of indigenous groups, one must protect their right to land. The lifestyle of indigenous communities in Malaysia are so intertwined with their relationship to the land, that to examine the matter in any other way would be folly. Without land, and by this it is meant land suitable for the traditional lifestyle of indigenous communities, there can be no indigenous practices and without these, then what is there to protect?

Indigenous peoples' exploitation of the land and its resources are geared towards sustainability. In Peninsular Malaysia the Orang Asli⁶ approach to the use of natural resources is based on three principles and they are communal ownership where all the sources in a particular area belongs to that community with private ownership limited to cultivated plants and craft work; that all natural resources are owned by god and humans are merely trustees and; the importance of sustainable use to ensure the continuance of natural resources necessary for life.⁷ These ideas are also practiced in the Borneo states. The indigenous groups of Sabah for example have the principle of *gompiguno* or "preserve and use" where resources are taken to the extent that they are needed for that day and no more.⁸ These practices would be meaningless if they were not being actively conducted and it follows that this cannot happen if indigenous communities do not have rights to the land.

The laws with regard to this are not wholly satisfactory. In Peninsular Malaysia, the relevant law is the Aboriginal Peoples Act 1954.⁹ According to this law, land can be alienated as aboriginal areas or reserves. The relevant sections are section 6 and 7 and they read:

Section 6 Aboriginal areas

(1) The State Authority may, by notification in the *Gazette*, declare any area predominantly or exclusively inhabited by aborigines, which has not been declared an aboriginal reserve under section 7, to be an aboriginal

⁶ Orang Asli is the generic name of the indigenous peoples of Peninsular Malaysia, who can be divided into three main branches, the Negrito, Senoi and Proto Malay.

⁷ See Tijah Yok Chopil, "Biological Diversity and the Survival of the Identity of the Orang Asli", in *Indigenous Peoples' Knowledge Systems and Protecting Biodiversity*, eds. Gurdial Singh Nijar and Azmi Sharom, APC, Kuala Lumpur, 2004, at page 41.

⁸ See Gallus Ahtoi, "The Recognition of Indigenous Knowledge in Sabah", in *Indigenous Peoples' Knowledge Systems and Protecting Biodiversity*, eds. Gurdial Singh Nijar and Azmi Sharom, APC, Kuala Lumpur, 2004, at page 77.

⁹ Laws of Malaysia, Act 134.

area and may declare the area to be divided into one or more aboriginal cantons:

Provided that where there is more than one aboriginal ethnic group there shall be as many cantons as there are aboriginal ethnic groups.

(2) Within an aboriginal area -

(i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;

(ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;

(iii) no land shall be alienated, granted, leased or otherwise disposed of to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Director General; and

(iv) no licences for the collection of forest produce under any written law relating to forests shall be issued to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Director General and in granting any such licence it may be ordered that a specified proportion of aboriginal labour be employed.

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal area made under subsection (1).

Section 7 Aboriginal reserves.

(1) The State Authority may, by notification in the *Gazette*, declare any area exclusively inhabited by aborigines to be an aboriginal reserve:

Provided -

(i) when it appears unlikely that the aborigines will remain permanently in that place it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and

(ii) an aboriginal reserve may be constituted within an aboriginal area.

(2) Within an aboriginal reserve -

(i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;

(ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;

(iii) no land shall be declared a reserved forest under any written law relating to forests;

(iv) no land shall be alienated, granted, leased or otherwise disposed of except to aborigines of the aboriginal communities normally resident within the reserve; and

(v) no temporary occupation of any land shall be permitted under any written law relating to land.

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal reserve made under subsection

What should be noted here are subsection (3) in both section 6 and 7. These subsections in effect give complete power for the state government to remove any protection on Orang Asli lands. Their tenure is therefore not secure. Even with such limited protection,

the law is not utilised to its fullest. Out of the 83269.86 hectares of land which the Department of Orang Asli Affairs have requested that state governments alienate as Orang Asli land; only 18587.26 hectares have been placed in the gazette.¹⁰

Furthermore, if the land they are occupying is to be used for other purposes, then they may be forced to leave. As stated in section 10 which reads:

Section 10 Aboriginal communities not obliged to leave areas declared Malay Reservations, etc.

(1) An aboriginal community resident in any area declared to be a Malay Reservation, a reserved forest or a game reserve under any written law may, notwithstanding anything to the contrary contained in that written law, continue to reside therein upon such conditions as the State Authority may by rules prescribe.

(2) Any rules made under this section may expressly provide that all or any of the provisions of such written law shall not have effect in respect of such aboriginal community or that any such provisions of that written law shall be modified in their application to such aboriginal community in such manner as shall be specified.

(3) The State Authority may by order require any aboriginal community to leave and remain out of any such area and may in the order make such consequential provisions, including the payment of compensation, as may be necessary.

(4) Any compensation payable under subsection (3) may be paid in accordance with section 12.

From a reading of this section it is clear that the discretion is in the state's hand as to whether a community is allowed to stay or be forced to move. If forced to move, then compensation will of course be paid, but The Aboriginal Peoples Act offers very little in terms of compensation. According to section 11 it is limited only to any rubber or fruit trees planted by the community.

On a positive note, there have been several cases which have been in favour of indigenous peoples and their right to compensation for their land. These shall be discussed here.

In the case of *Koperasi Kijang Mas and 3 others v Kerajaan Negeri Perak and 2 others*¹¹ the High Court held that the state government of Perak had breached the Aboriginal Peoples Act when it had accepted the tender of a logging company to extract timber from land which had been approved by the state government as aboriginal reserves. The right to extract produce from such land rests solely within the hands of the Orang Asli

¹⁰ See Lim Heng Seng, "The Land Rights of the Orang Asli" in *Land Issues in Malaysia*, Consumers' Association of Penang, Penang, 2000, at page 179.

¹¹ [1991] CLJ 486

community there. The interesting thing in this case is that the land was not yet put in the gazette; it was merely approved as an aboriginal reserve. Yet it was held this was sufficient as the act of placing the land in the gazette was not mandatory.

This has serious implications as a lot of the land claimed by the Orang Asli has been approved as reserves but not yet placed in the gazette. Seeing as how this case state that rights exists even in such situations, then it is a further layer of protection for the Orang Asli.

In the case of *Adong bin Kuwan v Kerajaan Negeri Johor & Anor*¹² which was concerned with an aboriginal inhabited place, the Court of Appeal held that the rights of the Orang Asli was not limited to the rights conferred upon them by the Aboriginal Peoples Act, they also had rights under common law. In this case the land in question had been alienated by the state government of Johor. The indigenous inhabitants of the place claimed compensation as the land was their customary land. The court adopted a wide definition of the term "property" to include native customary land and decided that the plaintiffs were entitled to compensation. The compensation is not only limited to the Aboriginal Peoples Act but is subject to common law. Mokhtar Sidin J (as he then was) held at page 430:

These people live from the hunting of animals in the jungle and the collection of jungle produce. These are the only source of their livelihood and income. Can these rights be taken away by the government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from section 11 of the Act. which guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

The case of *Adong* was followed in the case of *Sagong bin Tasi v Kerajaan Negeri Selangor*¹³ where customary land was taken by the state government. The state government claimed that the land was state land and that the plaintiffs had no propriety interest in it. Compensation was paid but only for the loss of fruit trees and the buildings

¹² [1997] 1 MLJ 418

¹³ [2002] 2 MLJ 591

in the community (in other words following roughly the quantum determined by the Aboriginal Peoples Act). It was held by Mohd Noor Ahmad J that the plaintiffs had satisfied the Evidence Act 1950¹⁴ as to their continued residence in the area and thus it was customary land therefore they had a propriety interest in the land. This being the case, following the earlier *Adong* case it was held that the compensation due to the plaintiffs should not be limited only to that provided for by the Aboriginal Peoples Act, but should be subject to a fair compensation as laid out in the Federal Constitution. Therefore the compensation should be based on the Land Acquisition Act 1960¹⁵ which is the law governing the acquisition of land, which was in effect what this matter was about. The compensation provided by the Land Acquisition Act is significantly higher than the one based on the Aboriginal Peoples Act.

As encouraging as these cases may be, the fact remains that they are about compensation, they do not deal specifically with the **right** of indigenous peoples to their land. As pointed out earlier, whatever rights that the Orang Asli may have over their land is dependent on the land being either placed in the gazette by the state as a reserve, or at least to be approved as a reserve. This right is limited because it can be taken away albeit with compensation.

However, the issue is not all about compensation; it is also about the right of a people to live according to their traditional lifestyles. Even when the communities make attempts at settling into less nomadic existence and thus falling into a more mainstream lifestyle, their land is still subject to being taken away. As in the case of the communities at the 6th mile Cameron Highlands Road and Kampung Lenek Station. A settled community found their ancestral lands, on which they had cultivated rubber and fruit trees, were placed in the gazette as Malay reserve land and they were forced to move. A similar story happened for the community in Bukit Tunggul who were first forcibly relocated to make way for the building of a university campus and then told to move again for a golf course. In the case of Kampung Besut (which is the community involved in the *Sagong Tasi* case), the community was moved to swamp land totally unsuitable to their needs.¹⁶ In the absence of a right to their traditional lifestyle and in pursuance to this a right to land, then such instances will continue to happen.

Arguably such a right could be implied from Art 5 of the Federal Constitution which reads: No person shall be deprived of his life or personal liberty save in accordance with the law. However in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors*¹⁷ which was about the the displacement of communities due to a Hydroelectric project in Sarawak,¹⁸ Gopal Sri Ram J held:

¹⁴ Laws of Malaysia, Act 56

¹⁵ Laws of Malaysia, Act 486

¹⁶ See note 10 at page 180

¹⁷ [1997] 3 MLJ 23

¹⁸ For a description and excellent critique of this case see Gurdial Singh Nijar, "The Bakun Dam Case: A Critique", [1997] 3 MLJ ccxxix

"...they will suffer deprivation of their livelihood and cultural heritage by reason of the Project... This complaint certainly comes within the scope of the expression "life" in Article 5(1) of the federal Constitution. For where there is deprivation of livelihood or one's way of life, that is to say, one's culture, there is deprivation of life itself... However, in the present case, as earlier observed, the State of Sarawak will extinguish the respondent's rights in accordance with the provisions of existing written law obtaining in the State.... Since, in this instance, life is being deprived in accordance with an existing and valid law, the requirements of Article 5(1) are met."¹⁹

This approach of interpreting constitutional rights narrowly without reference to an overarching principle, is not uncommon in Malaysia and it is unfortunate that where the courts are quite willing to ensure that compensation for land taken in fair, there is no sign of any movement towards the recognition of indigenous rights to exist in their customary and traditional manner, which by its very nature requires a right to land.

Such knowledge and practices is to be promoted but only with the involvement and consent of the communities themselves

With regard to the issue of the consensual promotion of traditional practices and knowledge, there are two main angles to be considered. Firstly the value placed on such knowledge and secondly the legal mechanisms that are available for a consensual system to take place.

There is doubt amongst some indigenous groups as to whether the worth of their belief systems and their practices are truly acknowledged by the government. Gallus Ahtoi illustrates governmental cynicism towards indigenous practices with the case of the Keningau District in the wake of Typhoon Greg in 1997.²⁰ Indigenous management systems work on the premises that all life forms are interconnected. This being the case, care has to be taken that there is no wholesale destruction of a biological resource as this will affect other sources. In the case of hill paddy planting for example, the land cleared for planting is given time to recuperate after a few years use in order for the soil to be enriched once more. The secondary forests that grow on the cleared site are also useful for a variety of purposes. However these methods of conservation are not acknowledge and in fact, as in the case of the Keningau District, was blamed for the catastrophic effects (primarily land slides) on the community which came with Typhoon Greg. Blame that should have been pointed instead to the logging areas near by, because other communities which followed similar traditional practices as Keningau did not suffer the same fate.

He also points out that governmental approaches towards conservation can differ significantly from those of indigenous peoples. Whereas the former tends towards non use, the latter favours wise use. An example given is the village of Sinungkalangan where

¹⁹ See note 17 at page 43

²⁰ See note 8.

their traditional lands were gazetted as a Commercial Forest Reserve and the Dusun people of that area were prevented from practicing the lifestyle which they have been living for seven generations.

Another aspect to be considered is religion. Because religion and indigenous practices relating to their surrounding biological diversity are completely symbiotic Tijah Yok Chopil and Gallus Ahtoi are of the opinion that aggressive missionary activities to convert indigenous peoples have the effect of ultimately taking indigenous communities away from the lifestyle and practices of their forefathers. This ultimately is a question of attitude and prejudice where mainstream thought and belief systems are considered to be superior to indigenous thoughts and beliefs systems. Unless this imbalance is rectified and a degree of respect is accorded towards indigenous communities and their way of life, it is difficult to see how substantial headway can be made with regard to bringing their knowledge within the protection of the law and promoted as required by Art 8(j).

As to the existing legal system, Malaysia has a poor record when it comes to public participation in official decision making processes. There are only two avenues for public participation in decision making and they are the Town and Country Planning Act 1976 (TCPA)²¹ and the Environmental Impact Assessment (EIA) as provided for by section 34A of the Environmental Quality Act 1974.²²

The provisions in the TCPA are not relevant here, but the EIA process can be used by rural indigenous groups especially for large scale projects which will affect them, such as forestry and hydro electric projects. If the project is large enough, a detailed EIA report may be required and in such circumstances, the public have a right to voice their views. It is a fairly weak right as there is no obligation for the Department of Environment to take those views into consideration in the final decision making, but it is all there is.

Unfortunately, even this weak right was been circumnavigated (at least for the residents of Sarawak) by the Bakun Dam case. In this case, in order to get around the element of public participation, the Federal government and the Sarawak state government colluded to transfer the power of conducting EIA away from the Department of the Environment (a federal body) to the state government of Sarawak. Naturally the provisions of the Sarawak law have no public participation element.²³

Public consultation is not a normal part of the Malaysian legal system and it is of no surprise that the Aboriginal Peoples Act makes no reference for public participation at all.

²¹ Laws of Malaysia, Act 172.

²² Laws of Malaysia, Act 127.

²³ Although the Ministerial Order making the switch was overruled by the High Court (*Kajing Tubek & Ors v Ekran Bhd & Ors* [1996] 2 MLJ 388) for being *ultra vires* due to retroactivity, the Court of Appeal (see note 17) held that the Sarawak government ought to have the power to conduct EIA and not the Federal government seeing as how the EIA in question was about a dam, the dam was placed on land and land is a state matter. For a critique of this questionable interpretation of the Constitution see Azmi Sharom "Understanding the Environmental Quality Act 1974" in *Current Legal Problems in Malaysia*, University of Malaya Press, 1998, ed. Mimi Kamariah Majid, at page 13.

In such a climate is it not understandable that to accept that the Malaysian law is sufficient to live up to the obligations of Art 8(j) is perhaps rather naïve.

In fairness, the National Policy Biological Diversity 1998²⁴ does include indigenous peoples in its concerns. Principle seven of the policy reads:

The role of local communities in the conservation, management and utilisation of biological diversity must be recognised and their rightful share of benefits should be ensured.

This is supported by the "Strategies for Effective Management of Biological Diversity" part of the policy. There are 15 strategies all together, each with several action plans. The relevant strategies and action plans are:

Strategy II: Enhance sustainable utilisation of the components of biological diversity. Action plan: Facilitate participation of local communities in traditional sustainable use of biological resources

Strategy IV: Strengthen the Institutional Framework for Biological Diversity Management. Action plan: Establish a national centre for biological diversity with the task of coordinating of programmes, implementation, monitoring, evaluation, priority setting and information management. The participation of the private sector and non-governmental organisations should be included where appropriate.

As encouraging as the policy is, it must be remembered that out of 15 strategies and scores of action plans, only one has direct reference to indigenous groups. Furthermore the National Policy on the Environment²⁵ has no provisions for public participation and no mention of indigenous peoples at all. The national Policy on Biological Diversity is a small step in the right direction but seen in the larger context of the entire legal system, it appears that the promotion of indigenous knowledge and practices, with their consent, is only likely to occur, in an ad hoc and disjointed manner, if at all.

Any benefit from these activities must be shared equitably

There is yet to be passed any Federal legislation in Malaysia specifically determining the equitably sharing of benefits from indigenous knowledge, but there are two pieces of state legislation which can be used to that end. These are the Sabah Biodiversity Enactment 2000²⁶ and the Sarawak Biodiversity Centre Ordinance 1997.²⁷ Both pieces of state legislation are designed primarily for the governance of bio prospecting.

²⁴ Ministry of Science Technology and the Environment, 1998.

²⁵ Ministry of Science Technology and the Environment 2002.

²⁶ Sabah Enactment No 7 of 2000.

²⁷ Sarawak Government Gazette Part I ("Main Series") 4th December 1997, Vol V, No 2.

Both establish a Biodiversity Council which are responsible for the establishment and management of a Biodiversity Centre. The Sarawak Biodiversity Centre's²⁸ duties include the gathering of information pertinent to biological diversity and its uses, record keeping of these sources, to conduct surveys on the state's biodiversity, to conduct research in the area and to establish programmes for the utilisation, conservation, protection and sustainable development of biodiversity. To this end a permit system is established where all efforts of bio-prospecting must first be approved. Failure to do so would be an offence with the enactment determining the penalties.

The Sabah Council and Centre also have similar duties. The difference between the Sabah law and the Sarawak law is that the Sabah law has specific mention of indigenous peoples. With regard to equitable sharing of rights and profits from bio prospecting the Sabah law has this to say:

Section 9(j)

One of the duties of the Biodiversity Centre is the "establishing or caused to be established a system for the protection of biological resources so that the indigenous and local communities shall, at all times and in perpetuity, be the legitimate creators, users, and custodian of such knowledge, and shall collectively benefit from the use of such knowledge"

Section 17(b)(viii)

And in applying for an access license, the applicant must make clear "the benefits, whether economic, technical, scientific, environmental, social or otherwise, that may derive to the state and the concerned communities and the proposed mechanisms or arrangements for benefit sharing"

Whereas the Sarawak law only has this to say:

Section 23

No permit shall be issued by the Council except in accordance with rules made by section 35, and subject to the condition that the applicant enters into an agreement stipulating-

- a. the terms and conditions for research and the use of biological resources; and
- b. the manner and mode of protection of any patent or intellectual property rights related to any invention or discovery made consequent upon such study or research

²⁸ Section 5.

However since January 1999 there came into force in Sarawak the Regulations on Access, Collection and Research 1998;²⁹ a subsidiary legislation of the Sarawak Biodiversity Centre Ordinance 1997. The regulations lay down the details with regard to the collection of and research on biological resources in the state. Anyone wishing to collect any biological resources from the state will require a permit and will be accompanied by one of the Sarawak Biodiversity Centre's staff.³⁰ Furthermore any activity conducted must be through a research agreement and the content of the agreement must include (although is not limited) to the following conditions:

Research Agreement Regulation 14(2)

- The Council is to have access to data, reports, studies and results of the research
- The Sarawak government to have intellectual property rights over any discovery relating to the research and sharing of such rights with parties to the agreement is to be determined
- The Sarawak government is to have rights to license any patent or intellectual property and also to the benefits from such licensing
- Confidentiality of data, reports, studies or results obtained from research is to be determined
- Programmes for transfer of technology, skills and knowledge derived from the research including training of local scientists and their participation in the research must be included
- Ownership of data and results from research is to be determined

According to regulation 17, where there is a discovery of compounds, chemical or curative agents that have value, (e.g. pharmaceutical or medicinal), then any application for copyright or patent must be done according to the research agreement. This can only be done with the written consent of the Sarawak Biodiversity Centre. From these regulations it can be seen that there is tight control over all legitimate research conducted in the state of Sarawak. With regards to indigenous peoples, the regulations on ethnobiology provide some heartening rules.

Ethnobiology is defined by regulation 2 as:

“the knowledge or information pertaining to the uses by the natives of the State of biological resources for medicinal, food, health or other purposes including the classification, indigenous nomenclature, conservation techniques and general sociological importance of such biological resources to them”

Any ethnobiological research requires a permit (regulation 25) and there must be a research agreement. There must also be according to regulation 28(1), payment to the

²⁹ Swk. L.N. 121

³⁰ Regulation 4 and 8.

natives as a reward for sharing knowledge, regardless of whether the knowledge was used commercially or not. With regard to intellectual property rights:

Regulation 28(2)

“Where ethnobiological research, based upon knowledge or information supplied by the natives or their traditional practices or the use or application of biological resources, leads to the development of any pharmaceutical or medicinal compound or any health or nutritional product, the patent or intellectual property right to such compound or product, shall be shared with the natives who supplied the knowledge or information relating to the said practices, application or use of biological resources, to such extent as may be determined by the Council in consultation with the natives concerned”.

These laws are very encouraging as they provide some sort of legal protection for indigenous rights on their knowledge and expertise. It remains to be seen however how well it will work and if there is any dissatisfaction amongst indigenous communities, whether their rights will be upheld in a court of law. It must also be remembered that these laws are only applicable to Sabah and Sarawak; indigenous peoples on the Peninsular have no such protection.

Conclusions

The Malaysian laws regarding indigenous peoples are far from ideal. At the root of this problem is the lack of formal recognition of indigenous rights to practice their way of life; rights which are inexorably linked to land. Such rights which may exist are limited at best. There is also a lack of understanding as to the value of the land which cannot be measured solely by monetary means. Compensation is well and good but when a society's existence and identity is so closely linked to the land they inhabit, then the value goes beyond that of the payment of cash for the loss of property.

There have been suggestions made by the Department of Orang Asli Affairs to amend the Aboriginal Peoples Act and some of these are promising. For example, it has been suggested that a stronger obligation be placed on state authorities to gazette reserves for the Orang Asli. Furthermore, any land that has been taken from the Orang Asli is to be replaced with land of a similar size and type. However, the emphasis of the act and the proposed amendments are still economic in nature. In the proposed amendments, any Orang Asli land taken out of the gazette is to be handed to the Department of Orang Asli Affairs to develop in co-operation with any private or government body they think fit.

This reflects how the act and its proposed amendments are paternalistic in nature with the prevailing ethos being that the Department of Orang Asli Affairs should be given the

authority to determine developmental issues for the communities. It is very much a top down rather than a grassroots based law. This leads us to the fact that Malaysian law is very poor when it comes to bringing indigenous communities into official decision making processes. This is an endemic problem not limited only to indigenous groups but also all citizens of the nation. It can be seen in the Sabah and Sarawak laws on biodiversity for example. Although the Sabah Biodiversity Enactment and the Sarawak Biodiversity Centre Ordinance are indeed encouraging pieces of legislation, there are some serious shortcomings. They both do not provide, for example, for the compulsory inclusion of indigenous representation in their Councils. Furthermore the Sarawak law was passed without public discussion, nor was there any participation by indigenous communities.³¹

There is a Malay saying which goes, *Harapkan pagar, pagar makan padi*. When, very roughly, translated means, *One depends on the fence, but the fence eats the paddy*. To put faith in the Malaysian legal system as it stands, to ensure that the rights of indigenous peoples as stated in Art 8(j) of the CBD is protected, is very much depending on a most dubious fence.

There is much that still has to be done and the first step would be a formal recognition of the rights of the indigenous communities in the country to live their lives according to the traditions of their forefathers. This can take the form of an actual Constitutional amendment or by a courageous interpretation of the Constitution by a court of law, preferably the Federal Court. With such a right then it will give indigenous communities the legal standing which they need to defend their culture and identity (which are intimately linked to their knowledge systems on biological diversity), either through litigation or through meaningful participation in official decision making. Only with such a right can it be said that Malaysia is able to begin to live up to its obligations under Art 8(j) of the CBD.

31 "Will Sarawak's Biodiversity Centre Safeguard Indigenous Community's Interest?" by MC Wong, *Rengah Sarawak* 23.4.00, <http://www.rengah.c2o.org/>

