



INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN BUSINESS & SOCIAL SCIENCES



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To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v12-i11/14981> DOI:10.6007/IJARBSS/v12-i11/14981

Received: 11 September 2022, **Revised:** 14 October 2022, **Accepted:** 27 October 2022

Published Online: 07 November 2022

In-Text Citation: (Hussain et al., 2022)

To Cite this Article: Hussain, F., Hamin, Z., Ariffin, N. I., Alang, K., Rahmat, N. E., & Zain, N. R. M. (2022). Wildlife Hunting Rights of the Aborigines in Peninsular Malaysia: A Dilemma Protecting Humans or Animals? *International Journal of Academic Research in Business and Social Sciences*, 12(11), 1434 – 1442.

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Vol. 12, No. 11, 2022, Pg. 1434 – 1442

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INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN BUSINESS & SOCIAL SCIENCES



www.hrmars.com

ISSN: 2222-6990

Wildlife Hunting Rights of the Aborigines in Peninsular Malaysia: A Dilemma Protecting Humans or Animals?

Faridah Hussain¹, Zaiton Hamin², Nur Izzati Ariffin³, Kemala Alang⁴, Nur Ezan Rahmat⁵ & Nor Razinah Mohd Zain⁶

¹Faculty of Law, Universiti Teknologi MARA (UiTM), Malaysia, ²Faculty of Law, Universiti Teknologi MARA (UiTM), Malaysia, ³Master Graduate, Kulliyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University Malaysia, ⁴Messrs, Balasingam & Co, Advocates and Solicitors, No 31, 1st Floor, Jalan Melayu, 50100, Kuala Lumpur, Malaysia, ⁵Faculty of Law, Universiti Teknologi MARA (UiTM), Malaysia,

⁶International Islamic University Malaysia, Institute of Islamic Banking and Finance (IIBF).

Email: zaiton303@uitm.edu.my, nurizzatiariffin14@gmail.com, kemala_2010@yahoo.com, nurezan@uitm.edu.my & mumtaz_razi@iiium.edu.my

Corresponding Author's Email: faridah355@uitm.edu.my

Abstract

In Malaysia, the native customary rights of the indigenous people, known as the 'Orang Asli', are rather broad, including fishing, hunting, and foraging that flow from site-specific occupation and livelihood. However, in the modern era, despite the protection of the old pre-independence legislation, the Aboriginal Peoples Act of 1954, the aborigines' exercise of such rights appears to be problematic as the more recent legislations, such as the Wildlife Conservation Act 2010, invoke several restrictions on fishing or hunting in the forest areas occupied by the aborigines. Additionally, most local literature mainly focuses on the aborigines' land rights; consequently, hunting rights have remained under-researched. Given the dearth of academic research on this right, this paper examines how the 2010 Act infringes on the aborigines' hunting rights and, broadly, their traditional way of life. This paper adopts a qualitative research methodology, employing a doctrinal content analysis that would provide a subterranean understanding of the tension between the legal protection of wildlife and the aborigines' rights in Malaysia. The findings revealed that the native rights and social interests of the aborigines are mainly ignored, overlooked and appear to be superseded by the interests of wildlife animals.

Keywords: Orang Asli, Native Rights, Hunting Rights, Wildlife, Conservation

Introduction

The term 'Orang Asli' is a Malay phrase for 'original people' or 'first people'. As the minority groups and indigenous people of Peninsula Malaysia, there are three primary tribes - Negrito, Senoi and the Malay Proto, representing eighteen ethnic aboriginal groups (Carey, 1976; Orang Asli Department, 2020). Each group has its language, culture, economy, religion, social

organisation, and physical characteristics and is found in different parts of Peninsular Malaysia (Carey, 1976; Wook, 2015). As of December 31, 2020, there are 206,777 of them living mainly in Pahang, Perak, Selangor, Kelantan and Johor. The prominent tribe is Senoi, which comprises 55 per cent of the aborigine population (Orang Asli Department, 2020).

The local literature suggests that the traditional or native rights of the Orang Asli are derived from three primary sources, namely the Federal Constitution, which provides for the unique position of Orang Asli as provided by Article 8 (5)(c) (Nicholas, 2010), the statutory rights under the Aboriginal Peoples Act 1954 (hereinafter 'the APA') and the common law principle of equality, involving the native rights of the aborigines. However, at the other end of the spectrum, hunting by the aborigines is regulated by the Wildlife Protection Act of 2010 (hereinafter 'the WPA'), whereby the Orang Asli are only allowed to hunt for sustenance or consumption of ten species listed in Schedule Six of the WPA (Kimbrough, 2013). Consequently, the tension between the needs and native rights of the aborigines and wildlife conservation is imminent. Within this context, this paper seeks to examine the extent to which the WPA 2010 infringes on the aborigines' hunting rights and, broadly, their traditional way of life, survival and livelihood. This paper is significant to developing and protecting the Orang Asli in Peninsular Malaysia while focusing on reaching a win-win resolution between exercising the rights of Orang Asli to hunt and protecting wildlife.

The first part of this paper examines the methodology adopted in this paper. The second part reviews the literature emphasising the protection of aborigine's rights and wildlife conservation and diversity affecting the way of life of the indigenous people. The third part, which is the crux of the paper, explains the legal position of the aborigines as provided by the APA and the dilemma they faced in exercising their hunting rights due to the restrictions imposed under the WPA 2010. Finally, the last part concludes the paper and contends that the aborigines' hunting rights, survival, and livelihood have been severely affected by recent legislation protecting and conserving wildlife. Balancing the two competing interests mentioned above would require an appropriate and holistic approach.

Methodology

This paper adopts a qualitative research methodology, which provides a deeper understanding of the aboriginal ethnic group and their hunting rights (Silverman, 2013). The primary sources of this paper are the Aboriginal Peoples Act 1954 and the Wildlife Conservation Act 2010. The secondary sources include textbooks, journal articles, newspaper articles and online sources. For data analysis purposes, the doctrinal approach is adopted, employing a literature review on the protection of the rights of the aborigines and wildlife conservation and biodiversity. Further content analysis is done on the legal protection for the aborigines and wildlife in Peninsular Malaysia.

Literature Review

Issues Affecting the Orang Asli

Previous literature highlights various issues about the aborigines and their traditional way of life. Such issues relate to the access to forest resources and livelihood sustenance (Murali, 2004), the preservation of catchment areas that should be preserved to ensure no water shortages (Kasmo, 2003), and the conservation of the eco-system (Leal, 2008), the policies towards achieving sustainable timber harvesting and the conservation of forests (Noor, 2022)

The literature also suggests that the indigenous peoples have a mystical connection to nature and valuable natural resource management strategies (Sandran, 2022), and they fight for their land rights and livelihoods (Weinlein, 2017). In addition, they strive to recognise their identities, ways of life and right to traditional lands, territories and natural resources (Sandran, 2022; United Nations Permanent Forum).

The local literature indicates conflicting views on the aborigines' customary rights over land. On the one hand, the literature contends that generally, Orang Asli lives on State land and not on the benevolence of the State (Wook, 2015). On the other hand, a local commentator asserts that Orang Asli is trapped as wards of the State with limited autonomy, rights and control over their resources (Idrus, 2011). Hence, there is a need to empower them over their customary lands (Hamzah, 2012; Subramaniam, 2010). However, in deciding the issue of restitution of indigenous lands and resources, the Malaysian courts are slow, and the case is costly (Subramaniam et al., 2018).

Several commentators observe that for wildlife conservation to be effective in forests with indigenous peoples, there needs to be greater recognition of indigenous customary rights, particularly regarding their use of natural resources (Nicholas, 2010; Wook, 2015). The literature highlights that the legislation regulating the use of natural resources should ideally include provisions for the needs of indigenous peoples and biodiversity (Aziz, 2013). They mentioned that, in reality, legislative weaknesses often exist, resulting in negative impacts, either on indigenous peoples' livelihoods, their surrounding biodiversity, or both (Aziz, 2013). In empowering the Orang Asli, on August 9, 2009, World Indigenous day was formally celebrated by the Government of Selangor (Nicholas, 2010). It is said that the Orang Asli community are entrapped in modernity (Gomes, 2004). There was a suggestion that implementing the U.N. Declaration of the Rights of Indigenous Peoples 2007 ('UNDRIP') should be a priority within Malaysia (Wood, 2021).

Wildlife Conservation and Biodiversity

The literature indicates that local communities' perceptions of protected areas are essential. Therefore, the involvement of local communities in transboundary wildlife conservation is now viewed as an integral part of regional development initiatives (Ntuli H. et al., 2019). Society should endorse the human-wildlife relationship, which often leads to legal discussions between lawmakers and stakeholders to avoid misinterpretation of the law (Cretois, B., 2019). Reversing biodiversity loss is a global imperative that requires setting aside sufficient space for species. Hence, commercial wildlife ranching offers a viable option for conserving enormous mammalian herbivore biodiversity (Taylor, 2021).

Additionally, the literature indicates that tourists' connection to a species had a significant and favourable influence on the pro-conservation behaviours for individual species and general biodiversity. As such, safari and zoo wildlife tourism could produce conservation outcomes (Skibins, 2013). Several commentators recommended that a quantitative and visual GIS approach to scenario planning could maintain the abundance and diversity of wildlife populations (Suzuki, 2016).

The literature also highlighted that wildlife crime is increasingly gaining prominence in global environmental debates (Jacobsen, 2012). Moreover, such crime generates substantial

financial returns to few individuals and has far-reaching implications on ecology, economy and global security (Kideghesho, 2016). As such, the seriousness of these implications provides sufficient rationale for reconsidering and intensifying efforts to combat this crime (Kideghesho, 2016). In addition, biodiversity valuation studies often address the willingness to pay (WTP) for species survival (Jacobsen, 2012). Finally, the literature suggests that the legislation regulating the use of natural resources should include provisions for the needs of indigenous peoples and biodiversity. However, legislative weaknesses often exist in reality, resulting in negative impacts on indigenous peoples' livelihoods, their surrounding biodiversity, or both (Aziz et al., 2013).

Legal Protection for the Native Customary Rights

Within the global context, the indigenous people have difficulty maintaining their knowledge systems, languages, stewardship rights, ties to lands and waters, and the biocultural integrity of their territories (Fernandez et al., 2021). Moreover, the native rights to land and resources have beset the indigenous people worldwide for years. For example, in Nigeria, such issues involve claiming damages on the native title to the land (See *Amodu Tijani v The Secretary Southern Nigeria* [1921] 2 AC 399) and the right of communal ownership under the indigenous law (See *Alexkor Ltd v Richtersveld Community* (2003) 12 BCLR 130).

In Australia, the issue of traditional title (*Mabo & Ors v State of Queensland & Anor* (1986) 64 ALR 1) and the welfare of the aboriginal people have been problematic (*The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1). However, in the *Mabo* case, the court held that the native rights over the indigenous people's land exist and will continue to exist despite a change in sovereignty and the adoption of the Torrens System. This case is in line with an earlier Canadian case *Calder v A.G. of British Columbia* [1973] SCR 313, where Judson J held that the native's rights include the right to live on their land as their forefathers had lived. Therefore, that right has not been lawfully extinguished.

In the local context, the unique position of the indigenous people in Sabah and Sarawak has been entrenched in the Federal Constitution under Article 153. However, this provision does not extend or cover the aborigines living in Peninsular Malaysia. Nevertheless, the rights of the indigenous people can be found in Article 8 (5)(c), which allows for the enactment of special rights for such people. One such enactment is the APA 1954, as amended in 1974. Since the APA's creation, the aborigines' fundamental human rights have been acknowledged. In *Kerajaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors* [2005] 6 MLJ 289, the court held that the APA 1954 acquired a quasi-constitutional status of pre-eminence over ordinary legislation and was considered a human rights statute. Nevertheless, the Act is silent on the rights of the aborigines to hunt any protected wildlife for their sustenance or the sustenance of their family members.

The recognition of the native rights of the indigenous people in Australia in the *Mabo* case mentioned above is affirmed by Mokhtar Sidin JCA in *Adong b Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418. This decision is followed in a later case of *Nor Anak Nyawai & 3 Ors v Borneo Pulp Plantation Sdn Bhd & 2 Ors* [2001] 2 AMR 2222; [2001] 6 MLJ 241.

As discussed earlier, under section 51(1) of the WPA 2010, the aborigines may hunt any protected wildlife as specified and listed in the Sixth Schedule for their sustenance or the

sustenance of their family members. However, such a list includes the threatened pig-tailed macaque and sambar deer and two species of rare leaf monkeys, while wild squirrels that Organ Asli commonly hunts are excluded from the list. This list calls into question how policymakers gathered information to inform the APA (Kimbrough, 2013). Furthermore, one of the restrictions on hunting rights under section 51(2) is that any protected wildlife hunted must not be sold or exchanged for food, monetary gains, or other things. Besides, section 51(3) of the same Act provides the penalty whereby any contravention of section 51 will attract a fine not exceeding ten thousand ringgit or imprisonment for a term not exceeding six months or both. Furthermore, the creation of wildlife reserves and sanctuaries under the WPA has further restricted the aborigines' movement in the forest, which they had freely roamed before for generations (Wook, 2015).

The law also recognised the traditional way of life of the aborigines to acquire forest resources or produce for their sustenance and consumption in a designated area, which is the declared aboriginal reserve. This position is decided in the case of *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] CLJ 486. Such an aboriginal reserve area is within the power of the State authority to decide. Under section 7 (1) of the APA, the State Authority may declare any area exclusively inhabited by the aborigines to be an aboriginal reserve area. Furthermore, the law provides broad powers to the State authority under section 7(3) to revoke wholly or partly or vary any declaration in an aboriginal area which he had made. The problem for the aborigines in these reserve areas is that they would need written permission from the Director General to exercise their hunting rights, which would curtail their customary hunting rights.

Conclusion

The legal analysis above indicates that since *Adong's* case in 1997, the Malaysian superior courts have recognised and repeatedly reaffirmed the aborigines' customary native rights by virtue of the special position of the Orang Asli under Article 8(5)(c) of the Federal Constitution. Accordingly, these pre-existing rights enjoyed by them as the first peoples of Peninsular Malaysia should perpetuate to exist and could only be removed by plain and apparent words in the legislation and not by the creation of reserves or any economic or political policies of the State or Federal Government. Moreover, the APA's relatively benevolent and paternalistic nature indicates that its legislative intent is to protect and preserve the rights and interests of the aborigines, including their autonomy, identity and land from competing economic and political forces. Yet, despite the APA 1954, the legal position of the native customary rights, particularly their hunting rights, remains ambiguous. Furthermore, the effect of the more recent WPA 2010 has, to a large extent, limited the type of animals the Orang Asli could hunt, the areas where their traditional hunting activities could be carried out, and the purpose of such hunting. Such restrictions to protect and conserve wildlife have infringed on the aborigines' hunting rights, survival, and livelihood. Hence, the current Director General of Orang Asli, the State and Federal governments should be mindful of the tension between the two competing interests and rights and attempt to address them in accordance with the Sustainable Development Goals (SDG) No 16 on peace, justice, and strong institutions which suggest that the promotion of the rule of law at the national and international level is paramount. Besides, the Malaysian government should be conscious of the Indigenous and Tribal Peoples Convention 1989 ('ILO 169') and the U.N. Declaration on the Rights of Indigenous Peoples adopted in 2007 ('UNDRIP'), which are specific and mutually reinforcing instruments providing the framework for the universal protection of indigenous

and tribal peoples' rights. Balancing these two competing interests would require appropriate and holistic strategies and approaches. Unless and until there is a political will to adopt such strategies to protect the aborigines, their future survival and justice remain a legal mirage.

Acknowledgement

The authors would like to express their gratitude to the Faculty of Law, Universiti Teknologi MARA (UiTM) Shah Alam, Malaysia, which facilitated the writing and publication workshop as well as funding of this paper.

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