A SYSTEMATIC ANALYSIS OF COURTS' RECOGNITION OF INDIGENOUS CUSTOMARY LAND RIGHTS IN MALAYSIA

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ABSTRACT

It is customary rights of the indigenous peoples to use their land without the state's consent because the land cannot be taken away from the indigenous peoples as they are depending on it for their entire life, culture and physical survival. Mining and quarrying and clearing forests for illegal felling of trees or large-scale cash production have led to a dramatic decline in many indigenous peoples' forests. The current conflict between the demands of rapid development and the preservation of the rights of indigenous peoples is particularly significant because it affects economic life and the preservation of the indigenous peoples' old traditions and cultures. This qualitative study uses systematic literature review to compile articles over a period of 20 years, which were then analysed using the content analysis method by adapting deductive and inductive reasoning. The information will be analysed by means of deductive tables and charts. All academic literature from various academic fields, such as the field of study and the year of publication, will be sorted by a variable.

Keywords: *Orang Asli, land rights, literature review, content analysis, indigenous peoples*

INTRODUCTION

The custom of indigenous peoples to be allowed to use their land without the permission of the state is an indispensable right. To such extent their entire lives, culture and physical survival depend on it, therefore the land cannot be taken away from indigenous peoples. Mining and quarrying and clearing forests for illegal felling of trees have contributed to a dramatic decrease in many indigenous peoples' forests. In the case of Adong[1], the court established that, under the Aboriginal Peoples Act 1954, the Orang Asli had a common law and statutory right to their ancestral lands. The High Court held that, in accordance with their law and custom, the Orang Asli were entitled to the land and the interest therein, as recognised by the common law. Over the years, the recognition of the law that was for the people's land and ownership has changed many times. The extent to which the principles of native titles apply to land claim made by the Orang Asli, the indigenous peoples of Peninsular Malaysia and the natives of Sabah and Sarawak must be taken into account.

[1] Adong bin Kuwau v Kerajaan Negeri Johor [1998] 2 CLJ 665

As for this research, it seeks to venture and explore more on the courts' recognition in the development of the indigenous peoples' land title over the years. The court as the beacon of justice should assume an important role rather than simply interpreting the law, and at the same time to acknowledge the criticism of conservative judiciary. And subsequently to give recommendations to improve the rights of the native with regards to the land claims so that it would conform with the jurisprudence of the international law.

This qualitative study uses systematic literature review to compile articles within 20 years period of time, which was then analysed by adapting deductive and inductive reasoning using the method of content analysis. The data will be analysed through deductive tables and charts. The table provides a preliminary overview of the content of the various critical issues in each work of the years form a range of 2000 to 2020. Data were extracted from Scopus and Heinonline databases. These two types of databases were selected to differentiate between the legal perspectives of the land rights of the Orang Asli and the non-legal of the social sciences perspectives. All academic literatures from different academic fields will be sorted by the variable such as field of study and year of publication.

METHODOLOGY

Preferred Reporting Items for Systematic Review and Meta-Analysis (PRISMA) is a minimum set of items for reporting in systematic reviews and meta-analyses, based on evidence. PRISMA focuses on reporting of reviews of randomised trials, but can also be used for reporting of other types of research, especially evaluations of interventions.

PRISMA is used mostly in medical and pharmaceutical researches but it may also be used in legal and shariah researches. However, the method of PRISMA is separate from systematic analysis, and writing a review paper is the best way to report these numerical findings. It is not appropriate to be reported in the writing of a thesis (in its normal form), but it can assist in the thesis section of literature analysis. We usually use narrative methods to explain the analysis of literature, as in thesis writing.

In order to established the PRISMA framework, the steps that should be taken into account are:

Step 1: The procedures must be determined before the systematic analysis can begin. The articles are then classified using search methods and related databases for the search and compilation of research papers. The first step should not require the inclusion or removal of papers.

Step 2: The consistency checklist can be used in phases to screen the documents. The first screening uses both the inclusion and exclusion criterion as well as the consistency checklist to exclude unnecessary documents.

Step 3: Check to see how the titles of the articles you found match the current study's title. In addition, contain or remove records based on the availability of full-text texts.

Step 4: Then double-check that the articles are written in the language specified. The majority of academics use English, but others may use their native languages, such as French, Japanese, or Spanish. In these measures, the inclusion or omission of papers aims to define duplicate papers. Only the things from the first and second checklists are checked in this process.

Step 5: The first and most important move is to determine your eligibility on paper. Prioritize the use of the content checklist when determining whether or not the papers are qualified. Using any or any of the checklist elements depending on the importance of the papers.
Step 6: The final move entails objectively evaluating the articles in order to achieve the current study's goal.

Insert Search String:

Your query: TITLE-ABS-KEY ("Orang Asli" AND "land rights") AND PUBYEAR > 1999 AND PUBYEAR < 2021

Figure 1: An example of symbols and coding in a search/query string developed in Scopus

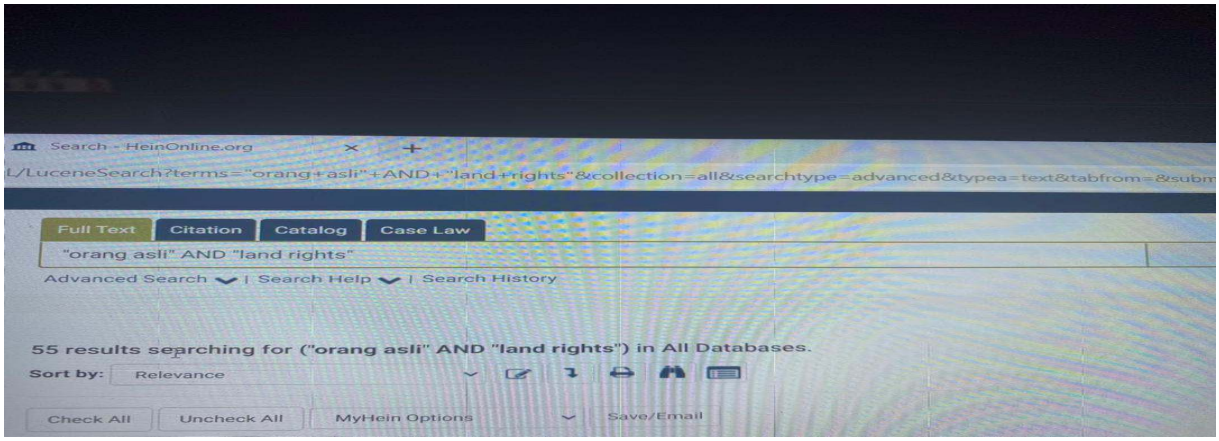
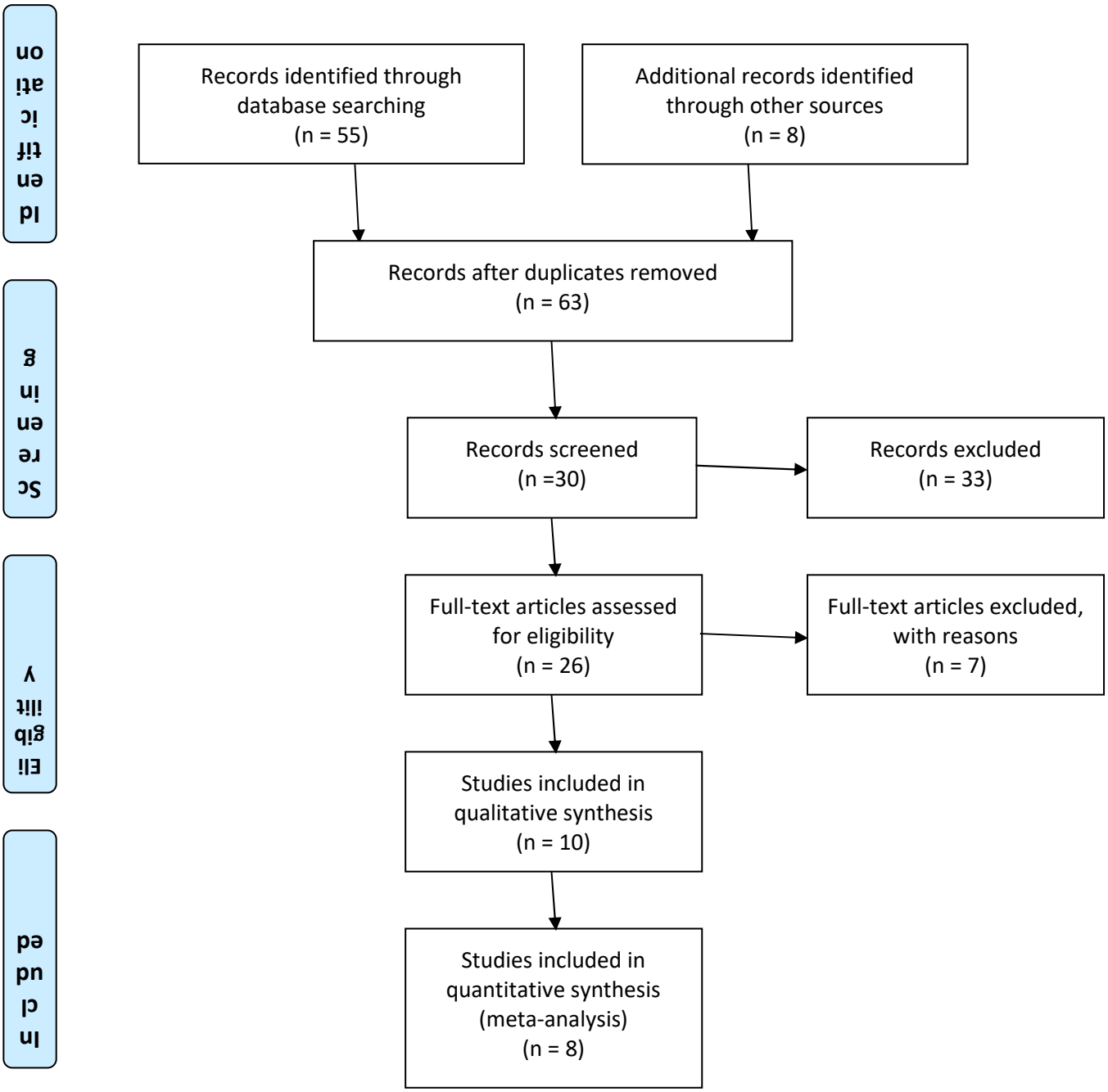


Figure 2: An example of symbols and coding in a search/query string developed in Heinonline

The Prisma flowchart (Moher, 2013)



Based on the PRISMA chart above, the databases (Figure 1 and Figure 2) as explained earlier are Heinonline and Scopus. The search words that are used are "Orang Asli" and "land rights" as these words are the main keywords for the research as it would explain the origin of the Orang Asli land rights. Even though Malaysia as keyword is not particularly selected, the Orang Asli is referred to Orang Asli in Malaysia.

The result is then confined to period of 20 years which are from 2000-2020. Records found on Heinonline are 55 articles whilst in Scopus there are 8 records found. After the duplication steps have been conducted, none was found in this research because the database are different in nature, one from the legal perspective whilst the other from the social science (non legal perspective). The total records found based on the keywords search are 63 articles.

The records are screened and after screening only 30 records are relevant and the balance of 33 are then eliminated. The screening is done by reading the abstract to look for its relevancy to the research beforehand.

The next step is to read the articles in full to search for the relevancy of the research in which only the rights of the Orang Asli as to the land and the effect of such rights being taken away are considered. Hence only 27 articles were found to be of these categories and 7 are then excluded.

10 articles are selected to be discussed further in this write up as the most relevant and interesting and also to be included in the qualitative synthesis analysis to the research whilst 8 articles are included in quantitative analysis.

All of the steps set out by PRISMA have been completed. The flow diagram described above is the flow of data through the various stages of a systematic analysis. It maps out the number of listed, included and excluded records and the grounds for exclusions.

RESULTS

YEAR	TOTAL	%
2020	1	12.5
2015	1	12.5
2013	1	12.5
2011	1	12.5
2010	1	12.5
2009	1	12.5
2006	1	12.5
2004	1	12.5
Total	8	100

Table 1: Number of Publications in Scopus by year

From the Scopus database in Table 1, on the land rights of the Orang Asli, we can see that there are not many publications as only 8 articles were found. The range of period of 2000 to 2020 has extracted articles starting from 2004 onwards and the frequency of articles published based on the keywords are 1 every 2 to 3 years.

Year	Total	%
2000-2005	18	33
2006-2010	18	33
2011-2015	11	20
2016-to date	8	14
Total	55	100

Table 2: Number of Publications in Heinonline by year

Meanwhile, Heinonline has produced 55 articles from the period of 2000 to 2020 on the related keywords as per the above Table 2. We can see as a result from the refined search most of the articles were published during the first 10 years which are 66% and 33% for the period ranging from 2000 to 2005 and 2006 to 2010 respectively. Only 19 articles were published from 2011 to date.

SUBJECT AREA	Column1
Arts and Humanities	2
Economics, Econometrics and Finance	1
Environmental Science	2
Materials Science	1
Physics and Astronomy	1
Social Sciences	6

Table 3: Number of Publications in Scopus by Subject Area

Table 3 concludes on the number of articles published according to subject area. Highest number of publications has been found in the social sciences research areas. While the least is in the field of economics, econometrics and finance, materials science and physics and astronomy with 1 article each for respective research areas.

DISCUSSION

Over the years, there have been significant development on the Orang Asli land rights title in Malaysia. The literatures have indicated the title of land accorded to the Orang Asli has whittled away as the years gone by. It was a very trying periods for the Orang Asli in claiming the rights over land. Even though protections were said to be established over the years for the Orang Asli, the Orang Asli are still been marginalized and left in the poorer section of the economic as compared to the other races in Malaysia. By focusing on the review to the literatures in recent areas, we have discovered that court played an important role as the last bastion of

justice. The literatures below are from two perspectives which are legal and non-legal (social sciences). From the legal perspectives the literatures talk about law cases, courts decisions and statutory recognition of the Orang Asli land rights, whilst from the view of the social sciences it is more concerned with the well being and the livelihood of the Orang Asli in connection with customary rights over land.

LEGAL PERSPECTIVE

Subramaniam, Yogeswaran (2017). Director of Forest, Sarawak v TR Sandah Tabau (Sandah): Judicial Curtailment of Native Customary Rights in Malaysia.

Development of indigenous rights through the courts carries the degree of unpredictability and is subject to regress through **judicial conservatism**. In this respect, the strategy of sustained denial and resistance against common law NCR, as employed by the Sarawak government for more than 15 years, has culminated in a judicial precedent more consonant with State land and resource priorities and policies. It also suggests that constitutional recognition of the indigenous rights is no guarantee of liberal judicial interpretation. However, the minority decision in Sandah promised for better recognition of the indigenous title in the future.

Yogeswaran Subrananiam (2013). Affirmative Action and the Legal Recognition of Customary Land Rights in Peninsular Malaysia: The Orang Asli Experience.

Express constitutional and legal protection of Orang Asli customary land rights that places extensive power over Orang Asli and their lands in the state has not translated to the effective recognition and protection of Orang Asli rights, or for that matter, equality for Orang Asli due to complex web of historical and cultural prejudices against the numerically inferior Orang Asli, hierarchical, differentiated and contested definitions of indigeneity in Malaysia as well as Malaysia's subsequent push for economic progress which is linked to ethnic Malay-centric affirmative action. Even if the federal government has formed the political will to legally recognise Orang Asli customary land rights, there is every possibility that such recognition will likely be a product of legal, political, economic and pragmatic compromise that is negotiated with state governments and other stakeholders, the extent of which may again serve to short change the Orang Asli. Only the passage of time will provide answers to these issues.

Gray, S. (2002). Skeletal Principles in Malaysia's Common Law Cupboard: The Future of Indigenous Native Title in Malaysian Common Law.

The recognition of a Malaysian doctrine of common law native title in the Adong bin Kuwau and the Nor Anak Nyawai cases is an encouraging sign for Malaysian indigenous people, whose rights to land have long been suppressed or ignored. Admittedly the form of native title recognised in these two cases is significantly less favourable to the aspirations and interests of Malaysian indigenous people than that recognised in Australia. This comment is particularly true of the Adong bin Kuwau case, but may be made also of aspects of the Nor Anak Nyawai case, particularly the suggestion at one point that native title is merely a licence, and the failure to award compensation for any damage done to the land. It seems clear that native title law in Malaysia is currently in a period of considerable uncertainty. While the decision of the High Court at Johor Bahru in the Adong bin Kuwau case was upheld on appeal to the Federal Court,

the Federal Court declined the opportunity to set out authoritatively the principles of native title law operating in Malaysia. Some recent cases give hope to break the soporific spell that had been cast by a conservative judiciary, a weak legislature and a manipulative executive since 1988.

Izawati Wook, Customary Land Of The Indigenous Peoples In Peninsular Malaysia: An Analysis On The Orang Asli Land Claim Cases

Although limited, the common law provides some protection to customary land of the Orang Asli by recognizing their rights to the customary land that they have been living for a long time including access to the resources from the land. The right to customary land arose from the exercise of their custom recognized as a source of law.

Bulan, R. (2001). Native Title As Proprietary Right Under The Constitution In Peninsula Malaysia: Step In The Right Direction.

It is submitted that the court in Adong gave a material remedy with one hand but took away with the other something of great intrinsic value. This was a missed opportunity for the courts to spell out clearly the right to livelihood of the aborigines and others with a similar way of life. that the land had already been taken, the dam had been built and the people had already been displaced. What appears to be in the forefront of the court's mind was to ensure prompt redress by an award of monetary compensation. There is indeed a great need for the court to be creative and vigilant in the protection of fundamental liberties. Of course, judges should not usurp the functions of the government departments but it is their duty to check any improper exercise of administrative discretion. although the rights of the natives in the East Malaysian states of Sarawak and Sabah to customary land tenure are recognised under a different statutory regime, the principles in Adong may influence the way such issues are viewed in these states. In particular, in matters of extinguishment of rights, the introduction of livelihood as a right to life would invoke the expanded doctrine of procedural fairness in judicial review of administrative decisions.

S. Robert Aiken And Colin H. Leigh (2011). Seeking Redress In The Courts: Indigenous Land Rights And Judicial Decisions In Malaysia. Modern Asian Studies

While the courts' recognition of native title at common law promises to provide at least some communities with greater security of tenure, there is an urgent need for governments to recognize, demarcate, and protect indigenous lands. Meanwhile, it can reasonably be expected that the juggernaut of development will continue to forge ahead inexorably, asserting power and control over indigenous communities and progressively incorporating more and more of their lands and resources into national and global markets.

Subramaniam, Y. (2011). Rights denied: Orang asli and rights to participate in decision-making in peninsular malaysia.

Malaysian courts have on occasion applied customary international law and international treaties through the medium of the common law. Malaysian courts appear to have thus far also taken a relatively liberal approach to the assimilation of international standards into the common law in respect of Indigenous customary land rights claims. Unfortunately for Orang Asli, their relative success in pursuing civil claims for customary land rights has not elicited

any legislative response towards the recognition of Orang Asli customary land and resource fights. It highlights the significant challenges faced by Orang Asli who bring these claims to the civil courts.

SOCIAL SCIENCES PERSPECTIVES

Luke Swenson & Andrew McGregort (2008). Compensating for Development: Orang Asli experiences of Malaysia Sungai Selangor Dam.

Compensations given to the displacements of Orang Asli from their home to make way for the building of the dam may be seen to have improved over the years but there are still concern on the actual wellbeing of the Orang Asli for the loss of access to place.

Wan Ahmad Hazman, Aminah Mohsin, Mohd Sharil (2020). Land Ownership For Orang Asli in Malaysia: Current Situation

The new Land Policy announce by government on 2009 seems not as what Orang Asli want, so the new approach on Orang Asli land ownership must be consider by the authority. Win-win situation and think out of the box is the key to a new land policy regarding Orang Asli land ownership. Land ownership is the key to help Orang Asli out from the poverty zone and will raise their living standard as par as other community in Malaysia.

Rusaslina Idrus (2011). The Discourse and Protection of the Orang Asli in Malaysia

The Orang Asli are thus trapped between a protectionist law that positions them as wards of the state with limited autonomy, rights, and control over their resources, on the one hand, and the post-independence policy of hyper-development under which they are deemed to be failed subjects on the other hand. The Orang Asli's perceived failure to fit into the majority's model of development feeds into a vicious circle that reinforces the idea of the Orang Asli as needing guidance and protection.

CONCLUSION

As a conclusion, the research is to provide the extent of recognition by the Malaysian court in relation to land claims made by the Orang Asli, the indigenous peoples of Peninsular Malaysia. The scholars have thus developed the recognition over the years and the theoretical framework from the judicial perspectives. This development of philosophical influence has become a reason for the researchers to dwell into the criticisms of the major cause of the unpredictability and uncertainty in the development of indigenous peoples' customary land rights. As far as this research is concern, not many studies have been conducted on the indigenous peoples' court related decision.

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