

EVICTON OF UNLAWFUL OCCUPIERS OF LAND IN MALAYSIA – JUDICIAL RESPONSES AND POLICY

by:

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Introduction

Eviction is the act of recovering possession of land that is under the unlawful possession of another. In order to understand the situations under which eviction occurs, it is useful for one to examine when a person is taken to be in unlawful occupation of land and the position under the law relating to such persons. The consequential remedy for one whose land has been trespassed² is to sue for damages under the law of tort. Nonetheless, the more exacting remedy is to dispossess the trespasser and recover possession of the land and one of the swiftest ways to do this is by way of forced eviction. But gone are the days of feudal landlords forcefully storming into a village and burning down houses in exercise of the landlord's power to evict as was depicted by Angela Wright in the village of Skullgoragh in Ireland in her novel *Potato People*. Most countries in the world today have begun to restrict and in some cases, illegalize this self-help remedy for being inconsistent with human rights.

One may enter into a discourse on eviction under four principal branches of law, under trespass to person and property under the law of torts, civil procedure,³ land law and humanitarian law. The discussion in this paper focuses largely on the land law aspects with some reference to humanitarian law with the aim of suggesting law reform.

Occupiers of land or buildings may be lawful occupiers or unlawful occupiers. This paper focuses on the latter.⁴ Such occupiers are either on state land or on private land and are often termed as 'squatters' by the authorities and the media. Malaysia has been grappling with the squatter issue in the face of increasing urbanization since the 1980s. The law in Malaysia is clear: squatters have no rights either in law or in equity, a statement supported by section 48 and 425 of the National Land Code 1965 as well as the Federal Court in *Sidek and Ors v Government of the State of Perak* [1982] 1 MLJ 313. Nonetheless, several cases have come before the courts

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² A person who enters into another's land and remains thereon to the detriment of the present owner is a squatter, plain and simple, see Justice Zainun Ali's decision in *Bukit Lenang Development Sdn. Bhd. v Penduduk-penduduk yang menduduki atas tanah HD(D) 151079 – HS(D) 151601, Mukim Plentong, Daerah Johor Bahru* [1996] 6 MLJ 25.

³ There is growing jurisprudence in Malaysia on the requirements for a summary order of possession under Order 89 Rules of the High Court 1980 which could be the subject of further research.

⁴ Lawful occupiers can also be subject to forced eviction such as in consequence of armed conflict or humanitarian disaster. Malaysia has also seen the displacement of the indigenous people from their 'native customary rights lands' in the face of large infrastructure projects such as hydroelectric dams and highways. See: *Kajing Tubek & Ors. v Ekran Bhd. & Ors* [1996] 2 MLJ 388, *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997] 3 MLJ 23, *Adong b. Kuwau & Ors. v Kerajaan Negeri Johor & Anor.* [1997] 1 MLJ 418 and *Sagong Tasi & 6 Ors. v Kerajaan Negeri Selangor & 3 Ors* [2002] 2 MLJ 591.

where 'squatters' have managed to prove that they have 'triable issues' and should not therefore be summarily dispossessed from the land/ building. Malaysia has been implementing the Emergency (Clearance of Squatters) Regulations 1969 that legalizes forced eviction of squatters by the local authorities. This paper analyses judicial responses to unlawful occupation of land, the application for an order of possession as well as enforcement of forced eviction under the law and concludes on the need for better consolidation and revision of the laws and policies dealing with eviction and the squatter problem in Malaysia.

Some General Concepts

Eviction arises from the perceived notions of 'ownership' and 'possession' in relation to land or premises.⁵ One who evicts another deems this other person as having lesser or no rights whatsoever on the land to justify the act of evicting such person. It is therefore important for us to understand the differences between the concepts of 'ownership' and 'possession'.

Ownership conveys proprietary rights, namely, the right to possess and enjoy the land, the right to control the land, the right to deal with the land (including the right to transfer or dispose the land to others and thus ending ownership rights over the land) and the right to transmit the land upon death.⁶ Possession, on the other hand, means the act of being in physical occupation of land. One who is in possession on land may not actually be the owner of the land. A tenant, lessee and a licensee for example, are in lawful possession of land. One who has the right of possession does not have rights to transfer the land nor to transmit the land upon death but only the right to possess and enjoy the land.

Unlawful possession of land means the act of being in 'wrongful' occupation of land. This means that the occupier is in possession of the land without the formal and legally recognized consent of the owner. In Malaysia, such persons are often referred to as 'squatters'.⁷ The terms 'squatter' in this chapter refers to a person or body who

⁵ The word 'land' includes 'building/s on land', see section 5 definition of land in the National Land Code 1965. For the sake of convenience, in this article, all references to the word 'land' will also refer to buildings or premises on land, unless otherwise stated.

⁶ These rights and interests in land are often described as a 'bundle of rights', see Denise R. Johnson, "Reflections on the Bundle of Rights", *Vermont Law Review* Volume 32:247 at 250. The writer terms this as the 'physicalist' definition and attributes this notion to William Blackstone, the 18th century, English legal writer. Today however, one acknowledges the 'bundle of rights AND obligations' of a land owner as the rights and interests created by a land owner over his land must take into account the obligations arising out of the relationships created. Thus, under the National Land Code 1965, for example, the registered proprietor who charges his land to a bank is also the 'chargor' and the bank is the 'chargee', both having rights and interests recited both, in their contractual agreement, the Charge Annexure, as well as the National Land Code provisions. This similarly applies to the lessor-lessee relationship in respect of a lease agreement and a registered lease and the grantor-grantee relationship arising out of an agreement to grant an easement over the land through a registered easement.

⁷ Although those championing the rights of such persons in urban areas often refer to them as 'urban pioneers'. The word 'squatter' is not used in Malaysia's National Land Code 1965 ('NLC'). NLC uses the terms 'unlawful occupation' and 'adverse possession' when dealing with 'squatters'.

occupies land or premises without the lawful consent or agreement of the legal owner, whether through a lease or license.

The Squatter Phenomenon in Malaysia

Three types of land can be identified as suffering from the squatter phenomenon. These are 'state land'⁸, 'alienated land'⁹ and 'reserved land'¹⁰. Such lands are usually 'taken' by persons when left idle for many years. The lands are then used for various purposes including residence, cultivation, business and industry. In the case of state and reserved lands, it is often the case that enforcement action, if any, is only taken after several years of occupation by the 'squatters'. In the case of alienated/ private land, timeous action will be taken in most cases by the land owners by a notice of eviction and if this fails then through court order of possession.¹¹

The squatter phenomenon brings with it several resulting problems such as:

- i) Sub-standard housing accommodation due to insufficient public facilities and infrastructure;¹²
- ii) Lack of water supply and sanitation;¹³
- iii) Health problems;¹⁴
- iv) Social problems;¹⁵
- v) Environmental degradation;¹⁶

The multifarious issues and problems arising from the squatter phenomenon above should be sufficient reason for the government to put in place a suitable response and consequently, an appropriate legal framework to minimize such phenomenon. Forced eviction by the local authorities has for some time been a part of the existing legal framework in Malaysia, yet it has not been able to effectively contain the

⁸ State lands are all lands in the state that has not yet been alienated, not being mining lands, reserved lands and reserved forests, see s.5 National Land Code 1965 ('NLC').

⁹ Alienated lands are lands that have been alienated to persons and bodies who thereafter hold documents of titles relating to such lands, *ibid*.

¹⁰ Reserved lands are lands that have been reserved for public purposes e.g. roads, TNB sub-stations, reservoirs, etc., *ibid*.

¹¹ A summary order of eviction under Order 89 Rules of the High Court 1980.

¹² A good depiction of this appears in Seong-Kyu Ha; "Substandard Settlements and Joint Redevelopment Projects in Seoul", *Habitat International* Vol. 25, Issue 3, September 2001, pp. 385-397.

¹³ See Mirsoeed Moosavi; "An Introduction to Environmental Challenges of Life in Slum Settlements of Tabriz" (2011), 2nd International Conference on Humanities, Historical and Social Sciences IPEDR Vol. 17 (2011).

¹⁴ Dilapidated housing is associated with exposures to lead, asthma triggers (including mold, moisture, dust mites and rodents) and mental health stressors such as violence and social isolation, see Hood E 2005. Dwelling Disparities: How Poor Housing Leads to Poor Health. *Environmental Health Perspective* (2005) 113:A310-A317. <http://dx.doi.org/10.1289/ehp.113-a310> accessed on 14 October 2011.

¹⁵ High unemployment and cramped conditions have led to social problems such as alcoholism, drug addiction, domestic violence, child labour, sexual promiscuity, juvenile delinquency, etc.

¹⁶ Squatters along river banks are major contributors to river pollution in Malaysia, see Sharifah Zubaidah Syed Abdul Kader, Maizatun Mustafa; "Legal and Institutional Framework for Pollution Prevention in Malaysian Rivers" [2008] 4 MLJ lxxv.

squatter phenomenon. The plight of the evictees are time and again highlighted by the media, raising issues such as the evictions being in violation of human rights and bringing the land developer and the government to task for their inability to provide alternative and suitable housing accommodation, particularly for the underprivileged living in urban and semi-urban areas.¹⁷ On the other hand, the government and legal land owners are challenged with issues such as the need to identify 'genuine' squatters, raising funds to compensate the squatters and/or provide alternative housing accommodation¹⁸ as an outcome of negotiations as well as 'damage control' when there is no other alternative left but to resort to forced eviction.

Judicial Responses to the Position of Squatters on State and Private Land

Before British occupation of Malaya, the original Malay inhabitants recognized rights to land based on opening up of waste or virgin land. This was the concept of *tanah mati* ('dead or waste' land) and *tanah hidup* ('living land') and the right to cultivate *tanah mati* under Malay customary tenure.¹⁹ In *Abdul Latif v Mohamed Meera Lebe* (1824) 4 Kyshe 249, Claridge, J. observed as follows:

"There are 2 kinds of land, first 'living land' and second, 'dead land'. With regard to dead land, nobody has property rights to it, (when) there is no sign of it being under cultivation by someone (then) certainly nobody can lay a claim to that land. If someone cultivates it into a rice field, be it *huma* or *ladang* or *sawah* or *bendang*, no one can proceed against him. That is what is understood as 'living land'."

In *Sahrip v Mitchell & Anor.* (1870) Leic.466, Sir Benson Maxwell, CJ made the following observation when recognizing the application of Malay customary tenure:

"It is well known that by the old Malay law or custom of Malacca, while the sovereign was the owner of the soil, every man had nevertheless the right to clear and occupy all forest and wasted land, subject to the payment, to the sovereign, of one tenths of the produce of the land so taken."

The right to possess land by being the first to pioneer the opening up of jungle area and then commencing continuous cultivation was therefore recognized in Malaya before the introduction of the Torrens system in the late 18th century.

The concept of 'waste' or 'dead' land is no longer a valid legal notion under Malaysia's present land law. Section 40 of the NLC declares all lands and minerals

¹⁷ An active non-governmental organization that provides advice and assistance to urban pioneer groups in Malaysian cities particularly Kuala Lumpur is the *Jawatankuasa Sokongan Peneroka Bandar* (JPSB - 'Urban Pioneer's Support Committee').

¹⁸ The Kuala Lumpur City Hall relocates squatters at transit long-houses or the 'PPR's (*Projek Perumahan Rakyat*) pending the building of better and more permanent accommodation. These so-called 'temporary' abodes have turned out to breed the same problems that occur in squatter settlements. For a good account of this, see

<http://thestar.com.my/metro/story.asp?file=/2009/5/11/central/3801439&sec=central>

¹⁹ Which is akin to the Islamic principle of *Ihya-al-mawat* (rehabilitating dead land).

that have not been disposed of as belonging to the State Authority. One who chances upon waste or unused state land in Malaysia and decides to 'pioneer' the opening up of such lands by cultivating or settling there, is taken to be a 'squatter' on State land.

An explanation for the development of the squatter problem on State lands in Malaysia is offered by Good, J. in *Kuppu v Brown & Anor*. [1960] 1 MLJ 59 as follows:

"The desire in mankind for a place of one's own- a roof over one's head- is so strong that men will build dwellings on land over which they have only the flimsiest claims to occupancy. The urge to build has in this country created what is known as the squatter problem, the erection of dwelling houses on State land and land held under Temporary Occupation Licence issued by the Collectors of Land Revenue has caused much litigation, generally resulting in decisions disadvantages to the squatters."²⁰

The law and judicial stance in Malaysia is not in favor of those who 'open up' and stay on land for many years. Since the introduction of the Torrens system of titles and interest by registration, Malaysia no longer recognizes adverse possession of State land.²¹ One who is in unlawful occupation of State land commits a statutory offence under section 425 of the NLC, punishable upon conviction with a fine not exceeding RM10,000 or 1 years' imprisonment, or both. Section 341 of the NLC protects the title of the registered proprietor of land against any claims of adverse possession by squatters. Based on the above and decided cases therefore, the length of time that an occupant had been on property will not have the effect of turning unlawful occupation into a lawful occupation.²²

Two types of trends are discernable in relation to cases on unlawful occupation of land that are brought to the courts. The first trend is where the occupiers seek a declaration that they have a right to stay on the land by relying on long user as well the representations made by state officials in relation to their stay on the land. In such cases, the courts have held that the law is clear that unlawful occupiers are not entitled to such declaration.²³ The second trend is where the legal owner of the land applies for an order of possession under the rules of court. The factual pattern that

²⁰ At para. 16 of the case.

²¹ Adverse possession means 'possession as of wrong' but long possession matures the wrong into a right, see Sharifah Zubaidah Syed Abdul Kader; "Rights and Powers of the State Authority", Chapter 3 in Ainul Jaria Maidin, et. al.; *Principles of Malaysian Land Law* (2008), Malayan Law Journal Sdn. Bhd. at p.113. Adverse possession was recognized under Malay customary tenure in relation to one who cultivates 'dead land' having the first right to possess such land as long as the land is kept continuously cultivated and a tithe of 1/10ths of the produce is paid to the sovereign, see Maxwell, WE; "The Law and Customs of the Malays With Reference to the Tenure of Land" (1884) *Journal of the Malayan Branch of the Royal Asiatic Society* 13:75.220.

²² See *Toh Kheng Heng & Anor. v Ahmad Fauzi bin Mohd Taufek* [1994] 1 CLJ 547; *Suhaimi Itam Shaari & Yang Lain v Angamal Rajoo & Yang Lain* [2008] 10 CLJ 573; *Cahaya Ideal (M) Sdn. Bhd. v Orang-orang Yang Mengenal Diri Sebagai 'Pongga' & Ors.* [1999] 3 CLJ 257.

²³ See *Sidek and Ors v Government of the State of Perak* [1982] 1 MLJ 313; *Government of Negri Sembilan & Anor. v. Yap Chong Lan & 12 Ors.* [1984] 2 MLJ 123; *Kabra Holdings Sdn. Bhd. v Ahmad bin Sahlan* [1992] 2CLJ 817 and *Lebbey Sdn. Bhd. v Chong Wooi Leong* [1998] 5 MLJ 368.

can be identified in such cases is that the land was formerly State land and the occupiers have been on such land since then. State officials and /or politicians have, by their words or actions, encouraged the occupiers to stay on the land. The state authority subsequently alienates the land to a developer or state development agency to be developed into a large scale project. The developer who is now the registered proprietor of the land then applies for a summary order of possession²⁴ to evict the occupiers. The decision in such cases will be based on whether the squatters are pure squatters (*'squatters simpliciter'*)²⁵ or 'occupiers with licence or consent'. Those who have managed to come within the term 'occupiers with licence or consent' are occupiers who have been able to show a strong arguable case that they were granted a licence to stay on the land in lieu of the State alienating the land to them. In such cases, the court will not grant a summary order of possession but will advise that such case should go for full trial.

The *locus classicus* under the first trend is the case of *Sidek bn Hj Muhammad & Ors. v Government of Perak* [1982] 1 MLJ 313. In 1950, the appellants, who were from Kedah, North Perak and Selangor, came to Teluk Anson and opened up a jungle area. The appellants were squatters. As more and more squatters came to settle in the area, the state government re-organised the settlement which resulted in new settlers being placed in the lands where the appellants were already in occupation. It was alleged by the appellants that the District Officer promised each settler family would be given 3 acres of *padi* land subject to successful interviews. There were also articles in *Utusan Melayu*, quoting *Bernama* as the source, stating that the State Director of Land and Mines had said that each pioneer settler family would be given 5 acres of *padi* land. After interviews were held, the appellants were unsuccessful and were subsequently given notice to stop work and to vacate the area. The appellants brought action seeking a court declaration, *inter-alia*, that they are entitled in law and in equity to be in possession of the land originally pioneered, opened up and occupied by them. The respondents averred that the appellants' claim were baseless as they were illegal occupiers of state land and sought to strike out the appellants' action. The action was struck out by the High Court on the basis that the appellants were trespassers on state land and that there can be no adverse possession of state land. The appellants' appeal to the Federal Court was dismissed on the grounds that the appellants had no cause of action either in law or in equity as they were squatters. The Federal Court also cited the offence under section 425 of the NLC and stressed that the only way to obtain state land is by way of making a formal application for land under the NLC.

As regards the position of squatters under the law, Justice Raja Azlan Shah (CJ, as he then was) in this case, alluded to the right of a legal owner of land to turn out such squatters without even going to court for an order of possession. This refers to the 'self-help' remedy under the law of torts. The learned judge observed as follows:

²⁴ A summary order is an order made before full trial and is based purely on affidavit evidence. See Order 89 Rules of the High Court 1980.

²⁵ See *Bukit Lenang Development Sdn. Bhd. v Penduduk-penduduk yang Menduduki Atas tanah HS(D) 151079 –HS(D) 151601, Mukim Plentong Daerah Johor Bahru* [1996] 6 MLJ 25

“It is well established that a court of equity will never assist squatters to resist an order of possession illegally acquired, it will never intervene in aid of wrongdoers...We would like to say this at once about squatters. The owner is not obliged to go to the courts to obtain an order of possession. He is entitled if he so wishes, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law. He can even use force, so long as he uses no more force than is reasonably necessary. He will not then be liable either criminally or civilly. This however is not to be encouraged because of the disturbance that might follow but the legality of it is beyond question.”²⁶

The learned judge went further on to comment on the intention of parliament when it came to the plight of the landless:

“It cannot have been intended by Parliament in enacting the National Land Code that every person who was in need of land should be able to sue the government for it or to take the law into his own hands for the purpose. So, the courts must, for the sake of law and order, take a firm stand. We can sympathise with the plight in which the appellant find themselves. But we can go no further. They must make their appeal elsewhere, not to us.”²⁷

It is evident therefore that the court in making its decision against the squatters, confined itself to the role of upholding the law and protecting public interest. One may wonder whether ‘law and order’ can still be upheld by the courts today through the making of decisions such as this in an age where squatters begin demonstrating and bringing their case to the media, supported by human rights activists that cite their ‘human rights’ against forced eviction and their right to housing accommodation against the authorities.

A leading case demonstrating the second trend is the case of *Bohari bin Taib & Ors. v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 143. In this case, the forefathers of the appellants were pioneer settlers of agricultural lands in Sabak Bernam, Selangor. The appellants had applied for titles to the land between 1971 and 1976 and had received information from a Selangor State Executive Council member that their applications had been approved. However, following a new policy that land would only be given to genuine ‘landless’ farmers, the state government only granted temporary occupation licences to the appellants on the understanding that separate titles to the land would be issued to the appellants as long as they continue cultivating the lands and remain as ‘landless’. After the expiry of the TOLs in 1984 however, the respondent handed over the lands to the Federal Land Consolidation and Rehabilitation Authority (FELCRA). The respondent then, on behalf of FELCRA brought an action in court to summarily dispossess the appellants from the lands without even offering any sort of compensation to the appellants for the eviction. The High Court allowed the respondent’s application and the appellants appealed to the Supreme Court.

²⁶ Sidek’s case, at p. 314.

²⁷ Sidek’s case at p.314, para (f) right column.

The appellant's contended that as they had fulfilled the administrative conditions imposed by the respondent relating to the alienation of lands to them, they had a legal expectation to be issued with land titles and that it was wrong for the respondent on behalf of the state government to "shoo them away under Order 89 as trespassers pure and simple".²⁸ The appellants further contend that they are not squatters of state land in the popular and normal sense, but "are either licencees holding over or lawful occupiers of state land with the continued consent of the State Executive Council under the approved alienation."

The Supreme Court allowed the appeal and held that the summary order of possession under Order 89 of the Rules of the High Court 1980 is only proper to be granted in respect of *squatters simpliciter* who have no rights whatsoever and not against those who were lawful occupiers with licence or consent. It was held that the appellants in this case had 'triable issues' with regard to the continued consent of the State Authority after the expiry of the TOLs based on the earlier approval for alienation and therefore they were not *squatters simpliciter* but occupiers with licence or consent. This was therefore a case not suitable to be decided on affidavit evidence alone but should go for full trial.²⁹

Although *Bohari's* case may bode well for squatters of state land, one must be reminded that it does not in any case establish any sort of legal status in respect of 'occupiers with licence or consent'.³⁰ The decision in *Bohari's* case merely asserts that such occupiers cannot be summarily dispossessed but their claim to lawful possession of such land should be litigated in a full trial. What these occupiers have is additional time to still occupy such land pending the granting of an order of possession after full trial, if any.

Emergency (Clearance of Squatters) Regulations 1969

In Malaysia, local authorities in metropolitan areas such as Kuala Lumpur and Shah Alam have embarked on 'cleansing' its areas from squatter settlements that are viewed as 'eye-sores' and a hindrance to development. The law that is used to achieve this is the Emergency (Clearance of Squatters) Regulations 1969 ('ECSR').³¹

²⁸ Decision delivered by Mohd. Azmi, SCJ, see para. (4) of the case.

²⁹ The approach in *Bohari's* case was later applied by the Federal Court in *Shaheen bt Abu Bakar v Perbadanan Kemajuan Negeri Selangor* [1998] 4 MLJ 233.

³⁰ Contrary to the assertion of some writers that have used cases like *Bohari* and *Shaheen* to assert that the courts have begun to recognise a category of persons termed as 'urban pioneers' who are not 'mere squatters' and should not be displaced at will, see for example, Tim Bunnell and Alice M. Nah, "Counter-global Cases for Place Contesting Displacement in Globalising Kuala Lumpur Metropolitan Area" in Yong-Sook Lee, Brenda S.A Yeoh (eds.) *Globalisation and the Politics of Forgetting*, Routledge (2006).

³¹ Made under the *Emergency (Essential Powers) Ordinance* 1969. The proclamation of emergency in Malaysia on May 15th 1969 was due to the May 13 racial riots. The National Operations Council was formed to act as the executive and this was headed by the Deputy Prime Minister, Tun Abdul Razak, as the 'Director of Operations'. This proclamation of emergency has not been lifted as at the date of writing although it was announced by the Prime Minister during his Malaysia Day 2011 address that the government is looking at lifting the proclamations of emergency in Malaysia soon.

This regulation was borne out of the concern of the government at that time concerning communist insurgents stoking racial feelings that may have caused the racial riots. The Emergency Ordinance of 1969 gave very wide powers to the King to make regulations for “securing public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community.” The main target of the ECSR was to demolish ‘squatter huts’ on state or private lands in Malaysia. It is possible that squatter huts and the proliferation of squatter settlements at that time were deemed undesirable especially in terms of public safety and security.

The local authority may, through this law, enter into any state, reserved, mining or forest land to demolish squatter huts. A ‘squatter hut’ is defined as “any house, hut, shed, stall, lean-to, shelter, roofed enclosure or any extension or structure attached to any building or other erection, of whatever materials and whether used for the purpose of a human habitation or otherwise which has been erected or is in the course of erection otherwise than in accordance with a plan approved by a local authority or in respect of which a licence issued by a local authority has been cancelled, withdrawn or has expired and is situated on any land.” (Regulation 3)

Regulation 4 of the ECSR sanctions forced eviction. It empowers the local authority or its agents or servants to enter land, by day or by night, to summarily demolish any squatter hut on such lands. The authority may also remove any person or movable property in any squatter hut. The local authority is not bound to serve any notice of eviction on the evictee where the land is not private land.

In the case of private land, the local authority may direct an owner of land to demolish any squatter hut erected on his land (Regulation 6). Where an owner is not able to demolish such hut, the owner may, upon depositing a sum of money, request the local authority to carry out the demolition of the hut. In such a case, the local authority is to give to the occupier a 7 days notice in writing (Regulation 7).

A local authority has the power to enter private land and demolish a squatter hut therein even without the request of the landowner. This is provided by Regulation 10(1) which reads as follows:

“If in the opinion of a local authority it is expedient and necessary to do so having regard to the public interest then notwithstanding regulations 6 and 7, the local authority, its agents or servants may, after giving 7 days’ notice in writing to the occupier:

- (a) enter by day or by night any private land for the purpose of summarily demolishing any squatter hut; and
- (b) remove any person or any removable property in any squatter hut; and
- (c) summarily demolish any squatter hut on the land.

The action taken under the ECSR is severe in that the authorities may enter such land at any time of the day or night to demolish dwellings as well as remove the occupants and property from the land. No provision is made for compensating the evictees or providing temporary accommodation. Nonetheless, it is noted that the severity of action allowed under the ECSR is compounded by 2 elements. The first is the necessity to give due notice of impending eviction to the occupiers of private land (although 7 days may be too short a duration!) and the second, is the right given to the owner of any movable property removed from the squatter hut to claim such property within a period of 14 days. It is noted however, that the requirement of notice is absent in respect of action that commences on other than private land. This should not be the case as a squatter on public land is no different from a squatter on private land. Both should be entitled to notice before such drastic eviction action is taken in respect of their buildings, property and person.³²

In *Yusuf bin Awang & Ors v Datuk Bandaraya Shah Alam & Anor.* [2008] 1 MLJ 732, the appellants were occupiers of two pieces of land in Kapar, Klang. The respondents had served a notice under regulation 10 of the ESCR informing the appellants that they have constructed and are occupying squatter huts and have committed an offence under the Regulations. The notice also required the appellants to remove any person or movable property and demolish their respective squatter huts within 7 days, failing which the respondents would take the necessary action without further notice. The appellants applied to court for a declaration that the notices issued by the respondents were null and void as the notices were not dated. The appellants also applied that the respondents be restrained from evicting the appellants, including harassing and threatening them. The appellants applied for and were granted an injunction by the High Court to restrain the respondents from evicting them. The High Court also allowed the declaration that the notices of eviction were null and void. Majlis Bandaraya Shah Alam appealed to the Court of Appeal which allowed the appeal. It was held that the occupiers had failed to show that they were in lawful occupation of the property. They had also failed to show that their buildings were not squatter huts as they had not produced plans by the local authority approving the said buildings. Being squatters, the occupiers have no right in law or equity, citing *Sidek's* case with approval.

Justice James Foong, JCA dissented and held that the undated notices were void. The learned judge was of the view that the undated notices were null and void as it was important for the respondents to know when they were expected to pack up and leave. The 7 days period was inserted by the drafters of the Regulations on humanitarian grounds to allow the occupier to leave before drastic action is taken to demolish the huts.

The occupiers appealed to the Federal Court on the ground that the 7 days notice under the Regulations was subject to or inconsistent with section 72 of the Street, Drainage and Building Act 1974 and section 30 of the Town and Country Planning Act

³² The necessity of giving notice in such cases was stressed by Justice James Foong in his dissenting judgment in the Court of Appeal in *Datuk Bandaraya Shah Alam & Anor. v Yusuf bin Awang & Ors.* [2007] 7 MLJ 327.

1976 (Requisition Notice requiring 30 days notice) and therefore void. The appeal was dismissed on the ground, inter-alia, that the regulations have effect notwithstanding anything inconsistent in any written law. As the Regulations have never been repealed, the Regulations still have effect notwithstanding inconsistency with the Street Drainage and Building Act 1974 or the Town and Country Planning Act 1976.³³

The phrase 'if in the opinion of a local authority it is expedient and necessary' above was examined by the Court of Appeal in the same case.³⁴ In that case, Majlis Bandaraya Shah Alam, the 2nd appellant had issued to the respondents a 7 days notice under Regulation 10 of the ECSR. It was argued by the respondents, inter-alia, that, Majlis Bandaraya Shah Alam had received 'instructions' from the State Executive Council to demolish the squatter huts on the said land and thus, the decision to take action under Regulation 10 of the ECSR was not that of the local authority as is required by Regulation 10. The Court of Appeal however, held that the State Authority determines the policy for the State and is empowered under s.9 of the Local Government Act 1976 to give directions to the local authority. The action under regulation 10 was therefore valid.

In cases involving the use of the ECSR, the court is not concerned with whether the occupiers were squatters but is more concerned with whether the structures on the land comes within the definition of 'squatter hut' under the regulations.³⁵

Forced Eviction under the International Human Rights Dimension

The Office of the High Commissioner on Human Rights³⁶ defines 'forced eviction' as 'the involuntary removal of persons from their homes or lands, directly or indirectly, attributable to the State'. It entails the effective elimination of the possibility of an individual or group living in a particular house, residence or place, and assisted (in the case of resettlement) or unassisted (without resettlement) movement of evicted persons or groups to other areas.'³⁷

Forced eviction was not initially viewed as an issue of human rights, but more as necessary 'collateral' of development and especially of urban renewal. In the late 1980's however, forced eviction began to be recognized as a possible violation of human rights. Consequences of forced evictions for families and the communities include damaged and destroyed property, broken networks and support systems,

³³ It is expressly provided in s.2 (4) of the Emergency Ordinance 1969 that "an essential regulation, etc. shall have effect notwithstanding anything inconsistent therewith contained in any written law..."

³⁴ *Ibid.*

³⁵ See the Federal Court judgment in *Yusuf bin Awang & Ors v Datuk Bandaraya Shah Alam* [2008] 1 MLJ 732 where it was held that as long as the occupiers could not prove that the buildings or structures was erected in accordance with plans approved by the local authority, the structures are 'squatter huts' within the Regulations.

³⁶ The Office of the High Commissioner of Human Rights (OHCHR) is the United Nations arm that spearheads human rights efforts in the world.

³⁷ From the World Conference on Human Rights in Vienna in 1993.

livelihood strategies are compromised, lost of access to essential facilities and services and sometimes violence against the evictees.³⁸

In 1992, the United Nations Conference on Environment and Development adopted Agenda 21 that states: “people should be protected by law against unfair eviction from their homes or land.”³⁹ In 1993 the United Nations Commission on Human Rights asserted that “forced evictions are a gross violation of human rights”.⁴⁰ In 1996, the United Nations Conference on Human Settlements (UNHABITAT) adopted the Habitat Agenda which commits governments to protect “all people from, and providing legal protection and redress for, forced evictions that are contrary to the law, taking human rights into consideration” and “when evictions are unavoidable, ensuring, as appropriate, that alternative suitable solutions are provided.”⁴¹ Malaysia was a party to all the above conferences.

The most far-reaching international standards on forced eviction can be found in the United Nations Committee on Economic, Social and Cultural Rights General Comment No. 7 on Forced Evictions.⁴² Other than demanding that States refrain from carrying out forced evictions, it goes on to state that where evictions are considered to be justified “the State parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with affected persons”.⁴³ Thus the need for consultation with the evictees to explore feasible alternatives is an essential element that should be present in any proposal on dealing with the eviction of squatters.

It is also provided that “legal remedies or procedures should be provided to those who are affected by eviction orders”.⁴⁴ The only legal remedy available in Malaysia for those affected by eviction orders in Malaysia is to appeal against the order for possession granted by the court or in a case under the ECSR, to challenge the action by showing that the building is not a squatter hut. Other remedies are quasi-legal, such as to make an official complaint to the Human Rights Commission of Malaysia (SUHAKAM) and to approach local politicians and NGOs to support their plight.

It is also relevant to state that Malaysia is not a signatory to the International Convention on Economic, Social and Cultural Rights (‘ICESCR’) and is therefore not bound by the international standards on forced eviction as propounded by the Committee above. Nevertheless, it is suggested that any proposed policy response and legal framework to replace the ECSR in the future should take into account, both, national interests as well as humanitarian law standards and guidelines relating to forced eviction.

³⁸ Jean du Plessis; “The Growing problem of Forced Evictions and the Crucial Importance of Community-Based, Locally Appropriate Alternatives”, *Environment and Urbanization* 2005 17:123.

³⁹ Agenda 21, Chapter 7, para. (b)

⁴⁰ Commission on Human Rights Resolution 1993/77, para. 1.

⁴¹ Habitat Agenda, para. 40(n).

⁴² This committee was established to oversee the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1985 by member States.

⁴³ para. 14 of the General Comment

⁴⁴ Ibid.

An Alternative to Forced Eviction?

From the above discussion, one must acknowledge that unlawful occupation of land is a real and pressing issue for all stakeholders, be it the government (including the State Authority and the local authorities), the land owner as well as the squatters themselves. The law in Malaysia, in dealing with the squatter problem, is government and land owner 'centric'. Apart from sympathizing with the plight of squatters⁴⁵ and describing the Essential (Clearance of Squatters) Regulations 1969 as 'draconian'⁴⁶, courts in Malaysia have not gone further than restating the law against squatters.

When a squatter is dispossessed under Malaysian law, there is no formal policy response on how to mitigate the displacement. Neither is there a legal obligation to compensate the evictees nor to provide alternative housing.

After 54 years of achieving independence and after the evolution of 10 Malaysia Plans, the Malaysian government finally launched the National Housing Policy on 10th February 2011, the three objectives of which will hopefully create a more focused direction and strategy in the provision of adequate housing, particularly for the underprivileged group.⁴⁷ It is observed however, that the policy omits to mention about the existing squatter problem and the ways in which it will be handled which infers that no new strategy is in the offing with regards to the forced eviction of squatters to make way for the new developments envisioned by the policy.

What must be appreciated by policy makers as well as legislators is that although the initial entry of the evictee into the land may be unlawful, the eviction process often causes 'direct or indirect violence, the permanent loss of homes and property, severe declines in the evictees' living standards and appalling housing and living conditions during displacement.'⁴⁸ It is clear that forced eviction should only be carried out as a last resort, and that if any, it should be well regulated so as to ensure that the adverse after-effects are minimized to a large extent in any policy response and legal mechanism formulated by the Malaysian government to handle squatters should the ESCR be repealed in future.

The United Nations Human Rights Committee has prepared guidelines dealing with development-based eviction and displacement, entitled, Comprehensive Human Rights Guidelines on Development-Based Displacement.⁴⁹ Preventive action is encouraged in that states are required to take 'preventive measures to avoid and/or

⁴⁵ Justice Raja Azlan Shah in *Sidek's* case, *ibid*.

⁴⁶ Justice Suriyadi in the High Court in *Yusuf bin Awang's* case at p. 272 of the case.

⁴⁷ The three objectives are 1) providing adequate and quality housing with comprehensive facilities and a conducive environment; 2) enhancing the capability and accessibility of the people to own and rent houses; 3) setting future direction to ensure the sustainability of the housing sector.

⁴⁸ See Scott Leckie "Towards a Right to Security of Place" in *Forced Migration Review* (Issue No.9, April 2002), pp. 16-17. The author in this article proposed that evictees and victims of development-induced displacement be included under the term 'Internally Displaced Persons' (IDPs).

⁴⁹ See E/CN.4/Sub.2/1997/7.

eliminate underlying causes of forced evictions, such as speculation in land and real estate'. States are further asked 'to review the operation and regulation of the housing and tenancy markets and, when necessary, intervene to ensure that market forces do not increase the vulnerability of low-income and other marginalized groups to forced eviction.'⁵⁰ The guidelines also propose that 'eviction-impact assessments' be carried out before the initiation of any development project that could result in eviction.⁵¹ The guidelines do not dismiss the need for evictions but stress that some important procedures and processes should be followed, namely:

- i) The exploration of all possible alternatives to evictions;
- ii) Dialogue and consultation with all affected persons before the decision to evict is taken;
- iii) When eviction is the only measure left, to ensure the adequate service of notice to affected persons;⁵²
- iv) During the eviction process, the mandatory presence of government officials or their representatives on site should be ensured;⁵³
- v) Evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected;
- vi) Evictions must not take place in inclement weather, at night, during festivals or religious holidays, prior to elections, or during or just prior to school examinations.⁵⁴
- vii) After the eviction, competent authorities should ensure that evicted persons and groups, especially those who are unable to provide for themselves, have safe and secure access to: a) essential food, potable water and sanitation; b) basic shelter and housing; c) appropriate clothing; d) essential medical services; e) livelihood sources; f) fodder for livestock and access to common property resources previously depended upon; g) education for children and childcare facilities.⁵⁵
- viii) Identified relocation sites must fulfill the criteria for adequate housing including, inter-alia, services, materials, facilities and infrastructure such as potable water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services, and to natural and common resources, where appropriate.

Among the remedies prescribed for forced evictions are compensation, restitution and return as well as resettlement and rehabilitation.

⁵⁰ para. 30 of the guidelines.

⁵¹ para. 32 of the guidelines.

⁵² The eviction notice should contain a detailed justification for the decision, including on: a) absence of reasonable alternatives; b) the full details of the proposed alternative; and c) where no alternatives, all measures taken and foreseen to minimize the adverse effects of evictions, see para. 41 of the guidelines.

⁵³ para. 45 of the guidelines.

⁵⁴ The ESCR is clearly against this aspect of the guidelines!

⁵⁵ Para. 52 of the guidelines.

Malaysia may also want to study the experiences of other developed nations in handling the squatter problem and providing adequate housing. Hong Kong's Housing Department, for example, has a long and reputable history of handling urban squatters and providing housing to those in genuine need. Singapore's Housing Development Board's (HDB) good track record may also hold some valuable lessons from Malaysia to learn from.