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Research paper



Legal Issues and Challenges in Regulating the Rights to Wayleave in Malaysia

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Abstract

Electricity flows through power lines and other transmission infrastructure to houses, hospitals, offices and other customers' premises. Due to rapid development and industrialization as well as urbanisation, the demand for energy supply had increased in Malaysia. Thus the electricity supply system need to be strengthen in order to avoid frequent tripping and to provide sufficient, quality and reliable system. There are several ways to improve the electricity supply system namely by building higher volt transmission tower and building more substation and power stations. This paper legally analyse the issues faced by the Tenaga Nasional Berhad (TNB), the main electricity supplier in Malaysia in meeting the increasing demand of electricity while at the same time ensuring public rights are protected. In particular, this paper addresses the issues in regulating the rights to wayleave for electricity supply lines. Towards this ends, relevant laws and case studies are presented to provide a bigger perspective on how the rights to wayleave can affect the other basic human rights.

Keywords: *Electricity, Rights to Wayleave, Malaysia.*

1. Introduction

Energy is an important catalyst for development. The primary sources of energy take many forms including nuclear energy, fossil energy like oil, coal and natural gas and renewable sources like wind, solar and hydropower. These primary sources are converted to electricity, which is a secondary energy source. Electricity is produced in power stations and transmitted by high voltage electricity supply lines to electrical substations and then distributed at lower voltages to the consumers [1]. It flows through power lines and other transmission infrastructure to houses, hospitals, offices and other buildings. Tall structures need to be constructed to carry transmission lines and high voltage distribution lines across land, roads and rivers whereas low voltage distribution lines are normally installed on poles along the road sides [1].

In Malaysia, high voltage supply lines in West Malaysia are owned and operated by Tenaga Nasional Berhad (TNB). In East Malaysia, Sabah Electricity Sdn. Bhd. (SESB) monopolise the electricity market in Sabah while in Sarawak, Syarikat SESCO Berhad of formerly known as Sarawak Electricity Supply Corporation is responsible for the generation, transmission and distribution of electricity. However, this paper will only discuss the position of law in West Malaysia.

Electricity demand growth is influenced by economic growth of a country as well as the climate condition. Based on the Peninsular Malaysia Electricity Supply Industry Outlook 2014, in terms of electricity growth, maximum demand of 16,562 megawatts (MW) was recorded on 13th May 2013, which surpass the initial target of 16,324 MW by 1.5% and the 2012 record of 15,826 MW by 4.7%. Sales of electricity has also risen from 97,243GWh in 2012 to 100,566GWh in 2013 [2]. With the increasing demand, TNB needs to build more power stations to generate electricity, substations, upgrade transmission line, wayleave and rentice reserve; and ensure support system like storage, accommodation for standby officers and administrative offices are adequately provided.

TNB has four (4) mechanisms in commencing new project or to upgrade existing facilities. In a case where big power station is to be built, TNB may made an application for alienation of land from the State Authority, by way of land acquisition under the Land Acquisition Act 1960 and finally through direct purchase from the land owner. Whereas, in a case of strip of land below and adjacent to the high voltage supply line it will not involve the three methods mentioned earlier. This strip of land is normally not owned by TNB but leased from the landowners under special agreements known as the wayleave agreement [3]. However, TNB is allowed to enter and carry out work on the land under Electricity Supply Act 1990 (ESA). Once TNB obtain the right, the wayleave rights corridors reserve would be regarded as the "rentice".

2. Literature Review

Way leave can be described as a process to obtain an easement rights over lands for the purpose of installing any electrical system under the Malaysian law. The term wayleave has not been defined under the ESA, thus reference has been made the position in the United Kingdom whereby a wayleave is a means of providing rights for a company to install and retain their cabling or piping across private land in return for annual payment to the landowner [4]. A wayleave is normally a temporary arrangement and does not automatically transfer to a new owner or occupier [4]. It is a form of licence and is personal to the parties, terminable after an agreed period and will not bind the successors in title as agreed in the wayleave agreement [5].

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The law in England recognises wayleave as a type of easement used by utility sectors to enter the premises to install and maintain cabling and piping across private land in return for annual payments to the landowner [5]. In this respect, an easement is a right of way which provides access rights for installing and maintaining utility facilities and payment is to be done once for permanent access [5]. Under the Land Law, easement should be registered in the Land Registry. However, in reality, these two terms have different meaning and usage which provide opportunity to individual landowner and service provider to make the best decision. The utilities in England and Wales, prefer wayleaves more than easements to conduct their works. This is due to the very nature of wayleave and easements [5].

The electricity networks England and Wales are owned and operated by The National Grid Company and electricity distribution companies. Licence holders received their powers as provided by section 9 of the Electricity Act 1989 (as amended by the Utilities Act 2000) to develop and maintain an efficient, co-ordinated and economical system of electricity distribution and transmission. Section 10 of, and Schedules 3 and 4 to, the Electricity Act 1989 give the licence holders the requisite powers to enable them to comply with their statutory duties and obligations. This empowers them to install the electric lines and associated equipment (such as poles, pylons, stay wires and transformers) on, over or under private land and to have access to that land for the purposes of inspecting, maintaining, repairing, adjusting, altering, replacing or removing the line or equipment [6]. The right to enter the premises will be granted after negotiation of a contractual arrangement with the landowner and/or the occupier of the land. However, if an agreement cannot be reached through negotiation, the electricity companies will undertake a compulsory procedures and seek a Compulsory Purchase Order under Schedule 3 to the 1989 Act or a "necessary" wayleave under Schedule 4 to the 1989 Act [7].

In Malaysia, the rights to wayleave is governed by the Electricity Supply Act 1990 (ESA) which replaced the Electricity Act 1949. The ESA has been enacted to provide for the regulation of the electricity supply industry, the supply of electricity at reasonable prices, the licensing of any electrical installation, the control of any electrical installation, plant and equipment with respect to matters relating to the safety of persons and the efficient use of electricity [8]. Even though the Electricity Supply Amendment Act was enacted in 2001, not much changes was made to the rights to wayleave, while the Electricity Regulations 1994 remains the law to facilitate the enforcement of the ESA [8].

Although legal mechanisms exist to control and regulate the rights to wayleave, TNB is facing several legal issues pertaining to land matters, planning system and public objections. As the rights to wayleave is given only on a basis of a right of way, ownership of the land still remain with the registered owner and problems arise when property owners cannot be located, deceased with unsettled transfer of ownership, land under lease or sublease and delays by small industries on dismantling and relocation of the premises affected [9]. Another issue is improper development planning which affects the stability of the transmission tower. High voltage lines need high and large tower structure to support the increasing demand of electricity supply but development activities under the rentice such as slope cutting or land trimming can affect the stability of the tower [9]. This should be supervised by a competent Electrical Engineer but most developers do not seek the electrical engineers to supervise the constructions.

New development area, new airports, new industrial areas, extension to existing airports, expansion of river and road reserves will require a new electrical substations, power station, transmission line and underground cable wayleave and rentice reserve to support the increasing demand of electricity supply. In order to avoid the overlapping of a new power transmission with the available power station, the information about the transmission line project should be integrated with the provisions of the development plan [10]. The plan acts as a tool to guide the local planning authority in its decision making process as it contains written statements formulating government policies and future directions [10]. Thus reference to the Development Plan is crucial for TNB to plan their project ahead.

3. Methodology

This study aims to evaluate the issues surrounding the application of the rights of wayleave in Malaysia. Towards this end this study employs the traditional doctrinal analysis of the primary sources of law which includes statutes and relevant related court decisions. The relevant statute for the application of the right to wayleave is the Electricity Supply Acts (ESA).

4. Results and Discussion

4.1. Rights of Wayleave under the ESA

Two important provisions under the ESA relevant to the rights to wayleave are sections 11 and 13 of the ESA. Section 11 of the ESA empowers the licensee to enter into any land, other than State land for the purpose of installing any electrical supply system including to lay, place or carry on, under or over any land other than State land, such posts or some other equipment relevant for such purpose. It does not involve compulsory acquisition of the land when the licensee exercises his power under this section, but an electricity wayleave must be created. The licensee has to pay compensation to the land owner or person who has the interest in the land for the right to use the wayleave.

Section 11 of the ESA details out the procedure to obtain the right to wayleave. Firstly, Notice of the First Schedule under section 11(2) of the ESA is to be served on the landowner to notify them TNB's purposes to enter their land. Landowners may submit an objection within two weeks as required by section 11(4) of the ESA. If no objection is lodged, TNB may enter the land to carry out the related work. However, if an objection is lodged, the District Land Administrator will hear the landowners' arguments or objections. Upon the conclusion of the enquiry, the administrator may either unconditionally or subject to such term make an order under section 11(7) of the ESA authorising or prohibiting any of the acts mentioned in the said notice. The order shall be in the form set out in the Second Schedule and the State Authority may direct the acquisition of any land or part of any land included in the notice. If there are dissatisfactions pursuant to the decision made, the party may appeal within twenty one days after the order to the State Authority and any decisions made by the State Authority under this section shall be final.

The land where rentice is existed is still owned by the respective land owner. TNB does not owned the rentice but it was leased from the landowners under special agreement known as the wayleave agreement or upon approval of the District Land Administrator or the State Authority. The wayleave agreement consists of the term and condition for the TNB to install and maintain power supply lines and gain access to carry out works and maintenance on the land. The wayleave agreement is governed by section 15 of the ESA. In order to safeguard public safety and to prevent the system from unwanted interference, TNB is responsible to maintain the strip land below and adjacent to the high voltage supply lines.

TNB can also enter into land of others by virtue of section 13 of the ESA which provides that "whenever it is necessary so to do for the purpose of maintain, repairing or upgrading any licensed installation of any part thereof, the licensee, or any person authorized by him in that behalf, may at all reasonable times enter upon any land on, under or over which supply lines have been laid, placed or carried, or upon which posts or other equipment have been erected, and may carry out all necessary repairs, and may, in the course thereof, fell or lop trees, remove vegetation and do all other things necessary to the said purpose." In so doing, TNB will

ensure as little damage as possible and will pay full compensation in accordance with section 16 of the ESA since such damages has not been assessed under section 11 of the ESA.

For the purpose of compensation, the District Land Administrator or TNB will refer the matter to the Valuation and Property Services Department and the Ministry of Finance for the preparation of the valuation reports. The valuation will be based on the market value of the affected land and the market value of the trees existed on the land. The District Land Administrator will conduct hearings or investigations for the compensation pursuant to section 16 ESA for any disturbance, damage or disability arises as a result. In this respect, compensation for disturbance includes payment for the removal of houses, buildings and other permanent structure, compensation for damage includes payment for the removal of trees and plants that may have economic values, while compensation for disability refers to payment for land areas affected by the rentice. Under the wayleave agreement, the rate of compensation paid must be agreed by both the utility and the owner or occupier of the land to avoid future dispute.

The lands under the wayleave agreement or within the Transmission Corridor is still belongs to the registered owner. Thus, the landowner may still utilize the land with the permission by the TNB. Lawful permission is required in order to control the activities carried out under the rentice so that they do not interfere with the operation of the lines. The activity which may be carried out are restricted to growing of trees or plants, vegetables or short term crops less than 2.4 metre high, nursery or farm, car park, oxidation pond or pond rearing fish excluding fishing activities, road or track and temporary storage of materials less than 2.4 metres high.

4.2. The Meaning of Upgrading under the ESA

TNB faces public objection pursuant to section 11(4) of the ESA from time to time. The objections were normally triggered by fear of their own safety and impact on the future value of their land. In Tenaga Nasional Berhad v Ong See Teong & Anor [2010] 2 CLJ 1, the respondents were proprietors and occupiers of respective plots of land in a new village known as Kampung Sungai Terentang in Rawang Selangor. Initially, the respondents and their predecessors had settled in the village in 1940 under the British Colonial administrative directive known as the Briggs Plan and they were issued with a Temporary Occupation Licence. In 1974, LLN, the predecessor of TNB, installed steel poles on the said land to carry a 33 kV transmission line which ran across the village and no one in the village objected to the project. In 1986, the State Government of Selangor alienated the land to the respondents but the document of title did not contain the wayleave agreement. The need to make an endorsement on the document of title is provided under section 15 (3) (b) of the ESA. The endorsement on the title should be made in order to let the registered owner knew about the wayleave and to avoid further issue. Under the Torrens system of land title, the endorsement reflects all facts material to the registered owner's title. Since there was no endorsement, there was no valid issue to be brought before the court.

In 2005, the appellant decided to implement a project known as Central Area Reinforcement Project (CAR project) to increase electricity supply to Kuala Lumpur and the Klang Valley. A high voltage grid with a capacity of 270 kV covering a distance of 60 kilometers had to be installed through the village along the same path as the existing 33 kV transmission line. The owners and residents protested and persuaded the appellant to find an alternative route. In June 2007, the appellant issued a notice in pursuant to section 13 of the ESA. The respondents filed an application in the High Court for a judicial review to quash the appellant's decision in issuing the said notice; to declare the notice null and void; and for an injunction restraining the appellant from carrying out the proposed works under section 13 of the ESA. The respondents claimed that the appellant had under the guise of "upgrading" the existing transmission line attempted to enter into their land with an ulterior motive to acquire it and no compensation for such acquisition was ever adequate. The High Court dismissed the respondent's application but the Court of Appeal reversed the High Court decision and appeal was made to the Federal Court. The principal issue raised on appeal was in relation to the interpretation of the word "upgrading" under section 13 of the ESA. Augustine Paul FCJ in delivering the judgment held that:

"Section 13 of the ESA must be read and understood in the context of the purpose for which it was enacted, that is to say, to serve the interests of the public in the supply of electricity at reasonable prices. The need for electricity supply will increase from time to time with the rising population and industrial development. Such needs can be met only with changes in the electrical installations which can be even of a very major nature. The unqualified use of the word "upgrading" in section 13 of the ESA supports the view that an upgrading exercise can go to any extent."

The definition of the word "upgrading" should be addressed according to case by case basis. It is impossible to lay down any universal standard to determine the degree of upgrading. It is also interesting to note the dissenting judgment of Per James Foong FCJ who said that "the proposed structure and the extent of the transmission line to be laid across the said land was exceedingly extensive as compared to the existing. It involved the removal of the entire existing structure and be replaced by an enormous configuration to uphold weightier transmission cables than the present. This did not constitute upgrading. The proposed work was an installation of something totally new. It exceeded the degree that can be considered as upgrading by the common sense of the word read in the context of the other two purposes: "maintaining" and "repairing".

In March 2014, TNB was finally granted approval by the Selangor State Government to proceed with the CAR project, however using diverted route from initial conflicting route of only 1.0 km to a new 11.0km which has cost TNB excessively quadruple from RM15 million to RM90 million and longer period of time for completion of thirty (30) months as compared to the original six months [11]. The project which was planned and approved in 2003 and was targetted to complete in 2007 had undergone strong opposition and objections from the community and interferences by the politicians since 2006 and prohibited TNB to utilize its existing 33kV rentice for line upgrading project.

4.3. The Right to Enter and Adequate Compensation

The right to enter under section13 of the ESA differs from the right to enter under section 11 of the ESA. In the former, TNB may only enter any land for the purposes of maintaining or upgrading work, whereas section 11 of the ESA gives power to TNB to enter for installing or constructing new infrastructure. It is pertinent that TNB clarifies its purpose of entering the land as wrong application will trigger legal action and challenges by the registered owner. In the case of I&P Seriemas Sdn Bhd and Anor v Tenaga Nasional Berhad and 4 others (Civil Appeal No.B-01-9-01/2014) TNB proposed to commence a project to upgrade its transmission line from PMU Olak Lempik to Banting. The land affected by the project includes the land belonging to the First Appellant, I&P Seriemas Sdn Bhd and the Second Appellant Dusun Durian Plantations Ltd, respectively. Acting in pursuant to section 13 of the ESA, TNB notified the Director of Land and Mines Selangor of its intention to enter the lands. Both owner of the lands were also being notified. During the enquiry session to determine the necessary compensation, both landowners were no satisfied with the amount and lodged a report to the State Authority. As a result, the State Authority ordered TNB to acquire the lands under the Land Acquisition Act 1960 but TNB refused to review the amount of the compensation. The High Court reviewed the decision and held that the State Authority had exceeded its jurisdiction as section 13 of the ESA which does not permit the State Authority to make such order. The main issue on appeal was that TNB had wrongly relied on section 13 of the ESA. The Court

of Appeal agreed with the appellant's submission that TNB ought to have utilized section 11 of the ESA so that an appropriate order can be made by the State Authority under section 19 (9) of the ESA.

Providing public amenities to the community has always been the underlying objective of TNB. In doing so, private land may be sacrificed for better public facility. Thus, the issue regarding land acquisition and adequate compensation may be brought up by the land owner who is affected by the project. In Malaysia, right over the land or property by the citizen is guaranteed under the Federal Constitution (FC). According to Article 13 of the FC 'a private property cannot be compulsorily acquired or used unless it is legally done accordance with the law and the deprived owner is compensate with an adequate damages'. Article 13 (1) further provides that 'no person shall be deprived of property save in a law' while Article 13 (2) states that 'no law shall provide for the compulsory use or acquisition of property without adequate compensation'. These constitutional provisions needs to be satisfied in cases where land is acquired under section 3 (1) of the Land Acquisition Act 1960, i.e. when the State Authority acquire any land which is needed (a) for any public purpose; (b) by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; or (c) for the purpose of mining or for residential, agricultural, commercial, industrial or recreation.

It is interesting to note that Article 13 of the Federal Constitution applies to land acquisition by the state authority regardless of the status of the land, be that reserve, non-reserve or customary land. In the case of Sagong Tasi & Ors. v. The State Government of Selangor & Ors., the state government who has acquired the strip of land which were not owned by occupied by the native Temuan tribes for over hundreds of years was ordered to pay the tribes compensation in for the loss of land at market value of the property as opposed to merely loss based on deprivation of livelihood. The judge gave a broad construction to 'land occupied under customary title' under s 2 of the Land Acquisition Act so as to bring natives customary lands within its scope. The purposive approach taken by the Court of Appeal in providing mandatory adequate compensation for loss of lands under section 12 of the Aboriginal Peoples Act 1954 brings the provision in line with Article 13(1) of the Malaysian Federal Constitution.

The definition for 'public purpose' under section 3 (1) (a) of the Land Acquisition Act is still debatable. The Land Acquisition Act 1960 is silent on this aspect and it is left for the court to interpret. Hashim Yeop Sani J, in the High Court case of S. Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1MLJ 201, said that "the expression public purpose is incapable of a precise definition. No one in fact has attempted to define it successfully. What all the textbooks have done is to suggest the tests to be applied in determining whether a purpose is a public purpose. Various tests have been suggested. But in my view it is still best to employ a simple common test, that is, to see whether the purpose serves the general interest of the community". Alternatively, public purpose can be defined as the general interest of the community as a whole and not a group of persons. This is not sufficient to form a valid reason to acquire land for public purpose and may lead to abuse especially in the case of private property acquisition for "economic development". In the case of Syed Omar bin Abdul Rahman Taha Alsagoff v Government of Johor [1979] 1 MLJ 49, plaintiff's land measuring 5,700 acres was compulsorily acquired; 2,000 acres were used for the construction of the Johor Port while the remaining portion of the land was marked as future development. Plaintiff challenged the acquisition on various ground including bad faiths but failed.

It is submitted that the land acquisition based on economic development purpose' under section 3 (1) (b) of the Land Acquisition Act must be carefully judged to avoid injustice. Attempts have been made by the judges in other jurisdictions to differentiate the real or hidden motives of the authorities when acquiring private land. In New Zealand, the court as early as 1925 in a very old case of Municipal Council of Sydney v Campbell [1925] AC 338 (PC) rejected a compulsory acquisition by the Municipal Council of Sydney for the proposed extension of Martin Place to Macquarie St. in Sydney. After examining the evidence presented before the court, the court found that the real motive for acquiring the land was for the purpose of enjoying the increase in the values of the land planned for future development and to recoup municipality losses. Should the counsel in Syed Omar's case highlighted this judgement, Syed Omar may have won the case as clear ulterior motives can be proven due to the land's rocketing market value.

5. Conclusion

In fulfilling the gap of demand in electricity, TNB has to plan for new project either through new installation, upgrading, maintenance or repairing work for the existing facility. Before commencing their works, TNB need to obtain permission under specific provisions of the ESA. The power to enter the land should be correctly applied, otherwise the noble responsibility of TNB as a service provider will be challenged in court and caused unnecessary delay and higher cost. As a consequence, good service cannot be delivered to the general public. It is thus pertinent for a clear wayleave agreement to be drafted and agreed by both TNB and affected parties prior to the commencement of TNB's new or upgrading projects.

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