



**SAHABAT ALAM MALAYSIA  
– FRIENDS OF THE EARTH MALAYSIA**

**Position Paper**

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**Landmark judicial decisions on the indigenous peoples' customary land rights/title in Malaysia 1991 – 2011:**

**Legal implications of the failure in instituting policy and legislative reforms**

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**This document is endorsed by the following organisations and individuals:**

- 1. Jaringan Orang Asal dan NGO Tentang Isu-Isu Hutan / Network of Indigenous Peoples and Non-Governmental Organisations on Forest Issues (JOANGOHutan)**
- 2. Jaringan Orang Asal SeMalaysia / The Indigenous Peoples' Network of Malaysia (JOAS)**
- 3. Jaringan Tanah Hak Adat Bangsa Asal Sarawak / The Sarawak Native Customary Land Rights Network (TAHABAS)**
- 4. Sarawak Indigenous Lawyers Association (SILA)**
- 5. Save Rivers Network**
- 6. Dr. Yogeswaran Subramaniam, Advocate & Solicitor, High Court of Malaya**

**JOANGOHutan** consists of the following organisations:

Borneo Resources Institute of Malaysia (BRIMAS), Sarawak  
Center for Orang Asli Concerns (COAC), Selangor  
Indigenous Peoples Development Centre (IPDC), Sarawak  
Institute for Development of Alternative Living (IDEAL), Sarawak  
Keruan Association (Penan), Sarawak  
Partners of Community Organisations (PACOS Trust), Sabah  
Peninsular Malaysia Orang Asli Association (POASM)  
SACCESS, Sarawak  
Sahabat Alam Malaysia (Friends of the Earth Malaysia)  
Save Our Sungai Selangor (SOS Selangor), Selangor  
Sinui Pai Nanek Sngik (SPNS/'New Life One Heart'), Perak-based Orang Asli  
community group

**JOAS** comprises 33 *Orang Asli* communities and community organisations or networks.

## I INTRODUCTION

Beginning from the early 1990s, more and more indigenous communities all over Malaysia began to resort to civil litigation in order to seek redress for the violations of their customary land rights.<sup>1</sup>

Subsequently, the decisions produced by the judiciary in such cases began to provide several clarifications in law on the many contentious questions on the nature, scope and extent of the indigenous customary land rights/title, especially on rights that are without any land reservation status or any form of documentary title. In doing so, the judiciary also began to elaborate in greater detail on the legal theory and principles behind the continued exercise of such rights within the modern legal framework.

Many of these questions were related to the lack of legal clarity of the '**customary**' land title, which are rights obtained from the authority of traditional '**customs**' and laws that are commonly acknowledged and enforced by members of a community, as opposed to the '**documentary**' land title, which are rights obtained from **documents** issued by the state under the authority of legislation.

Unfortunately however, these landmark judicial developments have thus far failed to be integrated into any policy or legislative reforms by Malaysian executive authorities and legislatures.

From the point of view of the law, this policy and legislative inaction raises many questions. Can the executive arm and legislatures in the country, both at the federal and state levels, continue to ignore legal findings from the judiciary? What are the legal costs and implications of this deliberate neglect in law to existing policies and statutes, current governance practices and the legality of products obtained from indigenous territories in Malaysia, without the consent of the affected communities?

## II JUDICIAL DECISIONS ON THE INDIGENOUS CUSTOMARY LAND RIGHTS/TITLE AND THE FLEGT-VPA

As will be discussed below, the continued failure of the country to introduce the necessary reforms to its policies and legislation in order to ensure that they are aligned with judicial decisions on the indigenous customary land rights/titles ruled in the last 20 years, may give rise to a host of uncertainties in law and governance, including the legality of Malaysian timber products that have been harvested from lands where indigenous peoples claim their customary land rights/title without the consent of affected communities or any process to clearly extinguish and compensate the rights of the affected people.

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<sup>1</sup> Indigenous peoples for the purpose of this document include both the aborigines (*orang asli*) of Peninsular Malaysia, as well as the natives (*anak negeri*) of Sabah and Sarawak.

First and foremost, the current definition of legal timber of the FLEGT-VPA, is still problematic:

Timber harvested by licensed person from approved areas and timber and timber products exported in accordance with the laws, regulations and procedures pertaining to forestry, timber industry and trade of Malaysia.

Given the clarity of these landmark judicial decisions on the nature, scope and extent of the indigenous customary land rights/title, the VPA licensing system must never sanction timber harvested from indigenous lands without their consent and where their rights have never been extinguished in accordance to the law and adequately compensated for. As have been pointed out by JOANGO Hutan and JOAS in their various submissions to the FLEGT-VPA multi-stakeholder consultation process from 2007 to 2008, it is imperative that the definition of legality is incorporated with the following clauses:

... and that such timber and its products shall be free from indigenous customary claims, and free from indigenous territorial boundaries...

Secondly, some of the legal positions espoused by the Federal Government of Malaysia during the multi-stakeholder consultation, were in themselves highly contradictory to the findings of the country's judiciary.

**Since the FLEGT-VPA is established precisely to ensure legal compliance and good governance, the credibility of the process will be greatly compromised if it finds it acceptable to support legal positions as well as policy and legislative inaction that are contradictory to the Partner Country's judicial decisions.**

Last but not least, the possible exclusion of particular regions from the VPA will not in any way resolve all issues pertaining to indigenous customary land rights. **Issues such as poor forestry governance and the failure to respect indigenous peoples' rights in Malaysia are not a regional problem, they are a national one.** The belief that the violations of indigenous customary land rights is only limited to particular regions in Malaysia is deeply erroneous.

### **III LEGAL IMPLICATIONS ON EXISTING POLICY, LEGISLATIVE PROVISIONS & GOVERNANCE PRACTICES**

The series of landmark judicial decisions on indigenous customary land rights/title may have the following implications in policy, law and governance:

1. They raise the question whether it is lawful for states to continue issuing licences for logging, plantation or any other resource extractive activities, on land claimed under indigenous customary land rights/title, without the consent of affected communities, or at the very least, any prior process to extinguish their rights and pay adequate compensation for the loss of the rights.

**This in turn raises the question on the legality of the products obtained through such licences.**

2. They raise the legal possibility that activities such as timber harvesting, carried out in indigenous lands without the consent of the people, where the people's rights have never been extinguished through a clear process and with the payment of adequate compensation for the loss of such rights, **may constitute as unlawful trespass and be liable to claims of damages and exemplary damages.**

This question applies whether or not the land concerned is under any reservation status or title.

3. They raise the question on whether it is lawful for states to persist in its policy interpretation that may be contrary to judicial findings on the indigenous customary land rights/title.

For example, the Sarawak State Government has been documented to make the following claims that may have the effect of contradicting the findings of the court:

- (i) indigenous customary land rights/title do not extend to the higher forest, a claim that is contrary to traditional indigenous laws.
- (ii) hunting and the gathering of forest produce do not create rights, a claim that is contrary to traditional indigenous laws.
- (iii) there is a significant difference between 'native customs' (*adat*) and 'native customary law' – customs may be freely practised, but they are without lawful effect as for customs to have the effect of 'customary law', they must have the sanction of legislation, a claim that is contrary to Article 160(2) of the Federal Constitution, which defines that law includes 'customs and usage having the force of law'.
- (iv) the practice of native customs does not necessarily give rise to rights over land.
- (v) written laws of the state, include customs that have been codified, must take precedence over native customs.

**It is important to note that similar claims which are in conflict with judicial rulings have also been adopted by the Federal Government of Malaysia during the multi-stakeholder consultations of the FLEGT-VPA in 2008.**

4. They suggest that indigenous customary land rights/title have greater land tenure security than that recognised by executive agencies. It is thus

legally incorrect for states to continue treating such land as if it is not encumbered by indigenous customary land rights/title.

5. Often, the reservation of production forests will terminate or reduce indigenous customary land rights – without effectively procuring the consent, consulting, notifying and adequately compensating affected communities.

This failure in governance raises the question whether it is lawful for states to continue doing so and whether it is lawful for logging or plantation licences as well as licences for other resource extractive activities to be issued over such land under the assumption that any subsisting rights have been successfully extinguished in accordance with the law.

6. They raise the legal acceptability of the continued failures of executive policy and administrative measures in addressing customary land rights as an incidence of proprietary interest within the meaning of Article 13 of the Federal Constitution, which protects the rights of citizens to private property.

These rights and interest to and in the land are similar to the modern incidence of documentary land titles, especially within the context of the compensation process for their deprivation and damage. Therefore, the deprivation of the indigenous customary land rights and resources must be compensated in a clearly adequate fashion and amount.

In the Peninsula, the Land Acquisition Act 1960 has been ruled to apply for the compensation process for the loss of the indigenous customary land rights/title, in the same way the loss of land held under a documentary title is compensated for.

However, to date, there has been no written policy to direct the implementation of the court decisions recognising the the Land Acquisition Act 1960 as the mode of computing assessment for the loss of Orang Asli customary land. States are still inclined to use the Aboriginal Peoples Act 1954, despite the court having ruled that this legislation is inadequate within the meaning of Article 13 of the Federal Constitution.

Further, this decision also raises the following questions whether in equivalent circumstances:

- (i) Should the Land Acquisition Ordinance 1950 enforced in the state of Sabah be similarly applicable?
- (ii) Whether the compensation process in Sarawak, where compensation rules for the loss of indigenous customary land rights/titles are drawn by the State Executive Council as provided

for under sections 3 and 15 of the Sarawak Land Code 1958, can be deemed as 'adequate'?

7. They raise the question on the legality of any action by the Federal and State Governments that may be deemed as inconsistent with their fiduciary duties towards indigenous peoples, such as the failure in providing land tenure security and in protecting the land and its resources from being utilised without their consent.
8. They raise the question on the legal acceptability of the manner in which the respective State Governments interpret territories conceded to be under indigenous land rights/title, as there is an absence of field investigation and an enquiry process to allow the right of the affected indigenous peoples to be heard.

For example, the method of using colonial aerial photographs by the Sarawak State Government to unilaterally determine indigenous customary land, has even been criticised by the judiciary as being inadequate.

#### **IV NOTE ON THE RIGHT TO LIFE AND THE BREACH OF FIDUCIARY DUTIES**

In the near future, more civil litigation can be expected to pose to the judiciary the questions on the violations of the right to life of indigenous peoples and the breach of fiduciary duties of states to protect the customary land rights of indigenous peoples.

In the former, the question of the unconstitutionality of specific statutory provisions or executive directives or decisions may be posed to the judiciary, in respect of the indigenous customary land rights, on the basis that such provisions and policy decisions may have had the effect of depriving affected indigenous people, their right to life, which is protected under Article 5 of the Federal Constitution.

The success of any such civil litigation may also demand that fundamental statutory and policy reforms to be instituted in order to ensure that the indigenous customary land rights/title are not treated in a subordinate or similar manner to land interests held under current property and resource statutes – as unlike the latter, such rights constitute the right to life itself.

In the latter case, questions may be posed to the judiciary on the legality of any action by Federal and/or State Governments that may be deemed as inconsistent with their fiduciary duties towards indigenous peoples.

The content of the fiduciary duties in essence, is a duty to protect the welfare of the indigenous peoples, including their land rights, and not to act in a manner inconsistent with those rights, and to provide remedies where an infringement occurs.

Therefore, the act of extinguishing indigenous customary land rights without consultation, notification and adequate compensation, the act of issuing licences for logging, plantation and other resource extraction activities on indigenous customary land without the people's consent, and the failure to provide land tenure security for indigenous customary land can all be regarded as a failure in fiduciary duties.

**In the future, if all such litigation is successful at the apex court in the country, they would have very deep consequences on existing practices pertaining to, among others, land acquisition, rights termination, compensation as well as the issuance of licences for activities that may cause the deprivation or loss of the indigenous customary land rights/title.**

## **V CLOSING**

The policy and legal inaction discussed in this paper is indicative of a wider incidence of poor land and forestry governance in Malaysia that is systemic in nature.

Despite an array of judicial decisions on the indigenous customary land rights/title over the last two decades, the executive machinery at both the state and federal levels in Malaysia have continued to operate in the same manner as it had before – issuing licences for logging, plantation and other resource extractive activities without prior consultations, disregarding the authority of pre-existing traditional laws and customs of the people, from which inherited claims of rights on customary land are rooted.

Some of these decisions, (please refer to Annex), have very wide-ranging legal implications on existing policies and statutes. Ultimately, the failure to implement these decisions is a failure in good governance and a failure to live up to the doctrine of separation of powers in democratic governance.

## ANNEX: SUMMARY OF LANDMARK JUDICIAL DECISIONS ON INDIGENOUS CUSTOMARY LAND RIGHTS/TITLE 1991 - 2011

### **Concluded Cases**

Below is a summary of landmark judicial decisions on indigenous customary land rights/title in Malaysia that have either been affirmed by the Federal Court, the country's highest, or remained unchallenged at the lower courts.

These decisions serve to legally describe and clarify the nature, scope and extent of the indigenous *customary* land title and rights, which are rights derived from *customs*, as opposed to the modern *documentary* land interests, whose entitlements are derived from documents issued under the authority of a legislation.

Therefore, unlike the *documentary* land interests, the indigenous *customary* land rights/title have their origins in and are given their content by the traditional laws acknowledged by, and the traditional customs observed by, the indigenous inhabitants of the territory.

### **16 Landmark Judicial Findings on Indigenous Customary Land Rights/Title in Malaysia**

#### **1. Indigenous customary land rights/title are a right to life, protected under Article 5 of the Federal Constitution**

In 1996, the Court of Appeal ruled that 'life' in Article 5 must be interpreted broadly i.e. that life would include all those facets that are an integral part of life itself and those matters which go to form the quality of life, including the right to livelihood.<sup>2</sup>

In 1997, the right to livelihood and cultural heritage for indigenous peoples was subsequently recognised as falling under the definition of the right to life on the basis that 'where there is deprivation of livelihood or one's way of life, that is to say, one's culture, there is deprivation of life itself.'<sup>3</sup>

#### **2. Indigenous customary land rights/title is recognised by common law<sup>4</sup>**

The common law as developed domestically by the Malaysian courts

<sup>2</sup> *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan (Commission of Education Service) & Anor* at the Court of Appeal in 1996.

<sup>3</sup> First recognised in *Director-General of the Department of Environment & Anor v. Kajing Tubek & Ors & Other Appeals* at the Court of Appeal in 1997.

<sup>4</sup> First recognised in *Adong Kuwau & Ors v. The Johor State Government & Ors* at the High Court in 1996, which was upheld by the Court of Appeal in 1998 (appeal to the Federal Court was dismissed without reasoned judgement). It has since been universally acknowledged in *Nor Nyawai, Sagong Tasi, Madeli Salleh* and other cases. *Madeli Salleh* concluded at the Federal Court in 2007.

recognises indigenous customary land title and rights which, except where they have been extinguished, reflect the legal entitlement of the indigenous inhabitants, in accordance with their laws or customs to their traditional land.

Although in the general sense land rights/title usually denote a document, the term common law 'indigenous title' or in local terminology, the 'native customary rights', 'Orang Asli customary title' or 'Orang Asli customary land rights' in this context, do not denote any documents but only a right acquired in law.

The indigenous land title is therefore an indigenous 'customary' land right, as opposed to a 'documentary' land right.

### **3. Radical title of the state is subject to indigenous customary land rights/title<sup>5</sup>**

By the common law, while states may acquire a radical title to the land, they do not acquire absolute beneficial ownership of the land. The rights or interests of the state are still subject to and are burdened by any indigenous land rights over such land.

### **4. Indigenous customary land rights/title are pre-existing rights – their legitimacy are determined by referring to indigenous customs and laws, and not to modern legislation<sup>6</sup>**

The common law respects pre-existing indigenous customary land rights. Indigenous customary land rights/title, therefore do not owe their existence to modern statutes and legislation, but instead to traditional laws and customs – its nature can only be ascertained by reference to indigenous traditional laws and customs. If an indigenous community substantially maintains its traditional connection with the land by acknowledging the laws and observing the customs of the group, the traditional indigenous rights of the group to the land continue to exist.

### **5. Indigenous customary land rights/title can only be extinguished or terminated through clear and unambiguous words in a legislation<sup>7</sup>**

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<sup>5</sup> This was explicitly emphasised in *The Selangor State Government & Ors v. Sagong Tasi & Ors* by the Court of Appeal in 2005 and in *Madelis Salleh v. The Superintendent of Lands and Surveys, Miri & Anor* by the Federal Court in 2007. It was however first implied in *Adong Kuwau & Ors v. The Johor State Government & Ors* at the High Court in 1996, which was upheld by the Court of Appeal in 1998 (appeal to the Federal Court was subsequently dismissed without reasoned judgement). It was also subsequently elaborated in greater detail in *Nor Nyawai* by the High Court in 2001 and although the people lost at the Court of Appeal in 2005 on grounds of insufficient evidence, this legal principle was thoroughly accepted.

<sup>6</sup> Please see # 3.

<sup>7</sup> First implied in *Adong Kuwau & Ors v. The Johor State Government & Ors* at the High Court in 1996, which was upheld by the Court of Appeal in 1998 (appeal to the Federal Court was subsequently

If there is no extinguishment of indigenous customary land rights by clear and unambiguous words contained in legislation or any executive action permitted by such legislation, these rights continue to exist.

**6. Enactment of modern statutes does not abrogate existing indigenous customary land rights/title<sup>8</sup>**

Legislation such as the Aboriginal Peoples Act 1954, the Sarawak Land Code 1958 and the Sabah Land Ordinance 1930 and various other colonial and post-independence executive and legal documents have not abrogated pre-existing indigenous customary land rights/title.

Such legislative and executive documents may endeavour to regulate the rights, but they did/do not have the effect of automatically terminating indigenous customary land rights/title, unless these documents have indicated so in clear language.

The courts have construed and recognised both statutory law and common law indigenous rights in a complementary and conjunctive manner.

**7. Modern legislation is only relevant to determine the extent to which indigenous customary land rights/title have been extinguished<sup>9</sup>**

Please see #4, #5 and #6.

**8. Indigenous common law rights/title over land are *sui generis* (unique and contextualised) rights, a form of *proprietary* interest protected under Article 13 of the Federal Constitution. Their deprivation must be compensated *adequately* and on *just terms*.<sup>10</sup>**

Generally, the indigenous peoples' common law rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the

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dismissed without reasoned judgement). It was subsequently elaborated in greater detail in *Nor Nyawai* by the High Court in 2001 and although the people lost at the Court of Appeal in 2005 on grounds of insufficient evidence, this legal fact was thoroughly accepted. It has since been universally acknowledged in *Sagong Tasi*, *Madeli Salleh* and other cases. *Madeli Salleh* concluded at the Federal Court in 2007.

<sup>8</sup> Please see #3. This finding was also elaborated in great detail in another Sabah case *Rambilin Ambit v. Ruddy Awah* at the High Court in 2007, which was upheld by the Court of Appeal in 2010 (leave to appeal at the Federal Court was dismissed in 2011).

<sup>9</sup> First elaborated in great detail in *Nor Nyawai Ors v. the Sarawak State Government* in the High Court in 2001 and although the people eventually lost at the Court of Appeal in 2005 on grounds of insufficient evidence, this legal fact was thoroughly accepted. It has since been universally acknowledged in *Sagong Tasi*, *Madeli Salleh* and other cases. *Madeli Salleh* concluded at the Federal Court in 2007.

<sup>10</sup> Please see #3.

land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. Indigenous rights therefore are the rights of the indigenous peoples to continue to live on their land as their forefathers had done.

These rights, under both the common law and statutory law are property rights protected by Article 13 of the Federal Constitution. The deprivation of any property right under an executive exercise pursuant to powers given by statute, must be with *adequate* compensation. For compensation to be *just*, it has to be *adequate*.

**9. Compensation for the deprivation of indigenous *customary* land title, being proprietary rights, must encompass the loss of the land itself<sup>11</sup>**

The proprietary interest of the indigenous peoples in their customary and ancestral lands is an interest *in and to the land*. Hence the loss of such rights must be compensated for the deprivation of heritage land, freedom of inhabitation or movement, produce of the forest and the future living of the affected persons and their descendants as well as **for the loss of interest to the land itself**.

In Peninsular Malaysia, the Land Acquisition Act 1960 must be used in the compensation process of indigenous territories. This legislation provides stronger provisions for mandatory compensation for the loss of land itself, unlike the Aboriginal Peoples Act 1954, which was ruled to be wanting in protecting the rights of Peninsular Malaysia's indigenous peoples within the meaning of Article 13 of the Federal Constitution which protects the rights to private property.

**10. Unlawful entrance upon indigenous customary land may constitute as trespass<sup>12</sup>**

Entrance upon indigenous customary land without any consent of the concerned community and the destruction of resources and properties thereon is unlawful and may constitute as trespass, liable for claims of damages and exemplary damages.

**11. Features of the indigenous land title/rights which indicates its proprietary interest<sup>13</sup>**

- (i) it is a right acquired in law and not based on any document of title;

<sup>11</sup> First recognised in *Sagong Tasi & Ors v. The Selangor State Government & Ors* at the High Court in 2002, which was upheld by the Court of Appeal in 2005.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.* These features were also acknowledged by the Court of Appeal in 2005 in *Nor Nyawai*.

- (ii) it does not require any conduct by any person to complete it, nor does it depend upon any legislative, executive or judicial declarations;
- (iii) indigenous title is a right enforceable by the courts;
- (iv) indigenous title and interest in indigenous land is not lost by colonisation, instead the radical title held by the sovereign becomes encumbered with indigenous rights in respect of the indigenous land;
- (v) indigenous title can be extinguished by clear and plain legislation or by an executive act authorised by such legislation, but compensation should be paid; and
- (vi) the indigenous people do not become trespassers in their own lands by the establishment of a colony or sovereignty.

**12. The area and size of indigenous territories is a question of fact in each case<sup>14</sup>**

The size of an indigenous settlement is a question of fact in each case. Therefore, its size is to be determined by the customs and usages of each community.

**13. Indigenous land rights extend to forested areas that are communally shared<sup>15</sup>**

The nature of the indigenous customary land title must be ascertained by reference to the traditional laws and customs of the indigenous inhabitants of the land. Accordingly, customs and laws providing rights in forested areas to hunting, fishing and timber harvesting and produce gathering activities are lawful and valid. Specific sacred areas and areas for ceremonial activities within forested areas should also be protected and recognised.

**14. Codification of indigenous customs on land rights does not invalidate rights not expressly mentioned in such codification<sup>16</sup>**

<sup>14</sup> *ibid.* This limitation was also acknowledged by the Court of Appeal in 2005 in *Nor Nyawai*.

<sup>15</sup> First recognised in *Adong Kuwau & Ors v. The Johor State Government & Ors* at the High Court in 1996, which was upheld by the Court of Appeal in 1998 (appeal to the Federal Court was subsequently dismissed without reasoned judgement). It was subsequently elaborated in greater detail in *Nor Nyawai* by the High Court in 2001 and although the people lost at the Court of Appeal in 2005 on grounds of insufficient evidence, this legal principle was thoroughly accepted. It has since then been acknowledged in *Madeli Salleh* which was concluded at the Federal Court in 2007.

<sup>16</sup> First recognised in *Nor Nyawai & Ors v. The Sarawak State Government & Ors* at the High Court in 2001, and although the people lost at the Court of Appeal in 2005 on grounds of insufficient evidence, this legal principle was thoroughly accepted. This recognition was also acknowledged in *Agi Bungkong & Ors v. The Sarawak State Government & Ors* at the High Court in 2010.

The indigenous customary land rights and title require an examination of the customs and practices of each individual community. This involves a factual inquiry and not whether the customs appear in a statute book. The various codes of indigenous customs therefore must be seen as a *non-exhaustive* legislative document.

This view is consistent with Article 160(2) of the Federal Constitution which defines that law includes 'customs and usage having the force of law'.

**15. States have a fiduciary duty to protect indigenous peoples' land rights/title<sup>17</sup>**

The fiduciary duty of the state to indigenous peoples will involve the responsibility of the state to protect the welfare of the indigenous peoples including their land rights and not to act in a manner inconsistent with those rights, and to provide remedies where an infringement of their rights occurs.

**16. Indigenous peoples continue to have rights over land that has been approved for reservation even if it has yet to be officially gazetted<sup>18</sup>**

The Malaysian courts have held that the approval of the state to create a Forest Reserve had already effectively created it, even if it had yet to be officially gazetted. In these areas, only indigenous communities have the right to forest produce (including timber).

**Case Awaiting Appeal**

**Landmark Judicial Findings on  
Indigenous Customary Land Rights/Title in Malaysia vis-à-vis gazetted  
production forest  
(Concluded at the High Court and Awaiting Appeal)**

**Indigenous customary land rights/title may exist in Forest Reserves (unless explicitly extinguished)<sup>19</sup>**

- Indigenous customary land rights/title are a right established through the habit of a people and not from written law.
- The radical title of the state is subject to the indigenous customary land rights/title.

<sup>17</sup> Please see #10. This finding was also once again acknowledged by the Federal Court in 2011 in *Bato Bagi*.

<sup>18</sup> *Koperasi Kijang Mas & Ors v. The Perak State Government & Ors* at the High Court, 1991.

<sup>19</sup> First recognised in *Andawan Ansapi & Ors v. Public Prosecutor of Sabah* at the High Court in 2011.

- Indigenous customary land rights/title are a right to life, protected under Article 5 of the Federal Constitution.

The combination of the above facts renders that without any explicit extinguishment notice and with the evidence of continuous occupation, indigenous customary land rights/title, may continue to exist in a gazetted forest.

## References

*Adong Kuwau & Ors v. The Johor State Government & Anor* [1997] 1 MLJ 418; *The Johor State Government & Anor v. Adong Kuwau & Ors* [1998] 2 CLJ 665.

*Agi Bungknng & Ors v. The Sarawak State Government & Ors*. Decision delivered by Honorable Justice David Wong Dak Wah at the High Court of Sabah and Sarawak in Kota Kinabalu on January 21, 2010. Case file number 22-93-2001-III(I).

*Andawan Ansapi & Ors v. Public Prosecutor of Sabah*. Decisions delivered by Honorable Justice David Wong Dak Wah at the High Court of Sabah and Sarawak in Kota Kinabalu on March 4, 2011. Case file number K41-128 of 2010.

*Bato Bagi & Ors v. Sarawak State Government & Another Appeal* [2012] 1 MLRA 1.

*Kajing Tubek & Anor v. Director-General, Department of Environment* [1997] 4 CLJ 253; *Director-General, Department of Environment & Anor v. Kajing Tubek & Ors* [1997] 3 MLJ 23.

*Koperasi Kijang Mas & Ors v. Kerajaan Negeri Perak & Ors* [1991] 1 CLJ 486.

*Madeli bin Salleh (Suing as Administrator of the Estate of the deceased Salleh Bin Kilong) v. Superintendent of Land & Surveys, Miri Division and Government of Sarawak* [2007] 6 CLJ 509.

*Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769; *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal* [2005] 3 CLJ 555.

*Rambilin Ambit v. Ruddy Awah*. Civil Suit K 22-71-2000; *Rambilin Ambit v. Assistant Collector for Land Revenue, Pitas*. Judicial Review No. K 25-02-2002; & *Rambilin Ambit v. Director of Land & Surveys, Sabah, Assistant Collector for Land Revenue, Pitas & Registrar of Titles*. Judicial Review No. K 24-240-2002; Decision delivered by Justice Ian H.C. Chin at the High Court of Sabah and Sarawak in Kota Kinabalu. July 9, 2007.

*Ruddy Awah v. Rambilin Ambit*. Decision delivered by Honorable Justice David Wong Dak Wah at the High Court of Sabah and Sarawak in Kota Kinabalu. March 16, 2012. Case file number KK24-145-2011.

*Sagong Tasi & Ors v. The Selangor State Government & Ors* [2002] 2 CLJ 543; *The Selangor State Government & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169.

*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.

**For further reference, please see the following case laws from various foreign jurisdictions, which were extensively referred to in many of the Malaysian decisions cited above, most notably in *Adong Kuwau, Nor Nyawai and Sagong Tasi*:**

*Amodu Tijani v. Secretary of State, Southern Nigeria* [1921] 2 AC 399.

*Calder et al. v. Attorney-General of British Columbia* [1973] SCR 313.

*Delgamuukw v. British Columbia* [1997] 3 SCR 1010.

*Oyekan and Ors v. Adele* [1957] 2 All E.R.785.

*Pareroultja & Ors v. Tickner & Ors* [1993] 117 ALR 206.

*Mabo and Anor v. the State of Queensland and Anor (Mabo No 1)* [1988] 166 CLR 186.

*Mabo and Ors v. State of Queensland (Mabo No 2)* [1992] 107 ALR 1.

*The Wik Peoples v. the State of Queensland and Ors* [1996–1997] 187 CLR 1.