



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

**Legislators' Briefing Paper No. 2014-1**

**March 2014**

**The need to align all statutory provisions on matters related to land, forestry, conservation and indigenous peoples in Peninsular Malaysia with judicial decisions on indigenous customary land rights.**

**Discussion on:**

- (i) The Aboriginal Peoples Act 1954**
- (ii) The National Land Code 1965**
- (iii) The National Forestry Act 1984**
- (iv) The National Parks Act 1980**
- (v) The Wildlife Conservation Act 2010**
- (vi) The Land Acquisition Act 1960**

**In Penang:**

258, Jalan Air Itam  
10460 George Town  
Pulau Pinang.  
Tel/Fax: +604.2286930/2

**In Sarawak:**

Lot 129A, First Floor  
Jalan Tuanku Taha  
P.O.BOX 216  
98058 Marudi  
Baram, Sarawak.  
Tel/Fax: +6085.756973

For further inquiries please write to:

[SAM\[at\]foe-malaysia.org](mailto:SAM[at]foe-malaysia.org)  
[sarawakoffice\[at\]gmail\[dot\]com](mailto:sarawakoffice[at]gmail[dot]com)

## JUDICIAL DECISIONS REQUIRE URGENT STATUTORY REFORMS TO BE MADE

The following judicial rulings on indigenous customary land rights have rendered that several statutes in Peninsular Malaysia in urgent need of reforms. Failure to do so would cause the various provisions of a host of existing statutes to be incompatible with the decisions from our courts.

1. Indigenous customary land rights/title are a right to life, protected under Article 5 of the Federal Constitution.<sup>i</sup>

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

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

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>iv</sup>

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

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

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

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>viii</sup>

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

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

11. There are six features of the indigenous land title/rights which indicate its proprietary interest.<sup>xi</sup>

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

13. Indigenous land rights extend to forested areas that are

communally shared.<sup>xiii</sup>

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

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

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>xvi</sup>

### **THE NATIONAL LAND CODE 1965 IS SILENT ON THE ICR**

The National Land Code 1965 is silent on the customary land rights and the rights of occupancy of Orang Asli communities. In defining land categories in Peninsular Malaysia, the legislation neither concerns itself with such indigenous land rights claims nor addresses any category of land that is explicitly acknowledged to contain subsisting indigenous customary rights, in any way.

### **THE NATIONAL FORESTRY ACT 1984 HAS LIMITED ICR REFERENCES**

The National Forestry Act 1984 contains only minimal references to address the *usage* of forest resources by Orang Asli communities in forested areas.

Subsection 62(2)(b) of the NFA 1984, which allows for conditions set on royalty payments pertaining to the taking of forest produce to be modified by way of their reduction, commuting, waiving or total exemption altogether, identifies the Orang Asli community as a party to which such modifications may apply.

The subsection does not in any way contextualise the modifications within the context of the people's *rights* to their traditional forests.

### **NO CONSULTATION OR CONSENT IS NEEDED FOR THE RESERVATION OF PRODUCTION FORESTS AND ISSUANCE OF LOGGING LICENCES**

Section 10 of the NFA 1984 which provides for the creation of 11 types of Permanent Reserved Forests, contains no provisions whatsoever to deal with claims on the indigenous customary land rights and all the associated notification process to affected communities – consultations, objections, claims submissions, inquiries and adjudication.

Likewise, the legislation also does not provide for consultations to be held with potentially affected communities, and for their independent consent to be obtained, prior to the issuance of logging or other resource-extractive licences within indigenous territories.

## **NO CONSULTATION OR CONSENT IS NEEDED FOR THE RESERVATION OF CONSERVATION AREAS**

Like the NFA 1984, the National Parks Act 1984 and the Wildlife Conservation Act 2010 also do not have provisions to address the notification process to communities affected by the reservation of conservation areas. Both statutes also do not require for affected indigenous communities to be consulted or for their consent to be obtained prior to the reservation of such areas.

The WCA 2010 only provides for some hunting activities to be undertaken by Orang Asli communities in its network of protected areas, but only for their domestic consumption.

## **THE ABORIGINAL PEOPLES ACT 1954**

Under the Aboriginal Peoples Act 1954, any place inhabited by an aboriginal community that has not been reserved as an *Aboriginal Area* or *Aboriginal Reserve* is simply defined as an *Aboriginal Inhabited Place*.

It has always been the policy of state governments to utilise the APA 1954 when dealing with indigenous customary land rights, including for matters related to compensation following the extinguishment of their rights.

However the APA 1954 is far from adequate in addressing Orang Asli customary land rights, especially in light of all the judicial findings mentioned above. For instance, the legislation:

- (i) neither specifies how such rights can be created nor describes the detailed scope and extent of the indigenous customary land rights, in a manner similar to land legislation in Sabah and Sarawak;
- (ii) provides compensation that is limited to only the loss of crops and properties situated **on** the land;
- (iii) fails to recognise indigenous customary land rights as a form of proprietary interest **in** the land itself – it is therefore inherently incapable of ensuring that **adequate** compensation is paid for the loss of such rights, as required by Article 13 of the Federal Constitution which protects the right to property; and
- (iv) does not provide for mandatory consultations and for consent to be obtained from affected communities in the event of their rights being extinguished or in cases where the peoples' customary territories are affected by logging or other resource-extractive licences.

**Today, all such inadequacies are clearly in conflict with judicial decisions which have confirmed that indigenous peoples' customary land rights are a form of proprietary interest to and in the land itself.**

## LAND ACQUISITION ACT 1960 IS NOT USED DESPITE JUDICIAL RULING

Although the Land Acquisition Act 1960 has been ruled to apply for the compensation process for the loss of the indigenous customary land rights, in the same way the loss of land held under a documentary title is compensated for, there has been no written policy to direct the implementation of this court decision. States are still inclined to use the APA 1954 for the purpose of compensating Orang Asli land, despite the court having ruled that this legislation is inadequate within the meaning of Article 13 of the Federal Constitution.

## APA 1954: THE LOSS OF CUSTOMARY LAND RIGHTS ON STATE LAND

Section 11 of the APA 1954 provides for payment of compensation for the fruit or rubber trees if the State land on which an Orang Asli community resides is to be taken away. The provision stipulates that the amount of payable compensation shall be that which **'appears just'** to the state authority:

### 11. Compensation on alienation of State land upon which fruit or rubber trees are growing

- 11(1) Where an aboriginal community establishes a claim to fruit or rubber trees on any State land which is alienated, granted, leased for any purpose, occupied temporarily under licence or otherwise disposed of, then such compensation shall be paid to that aboriginal community as shall appear to the State Authority to be just.
- 11(2) Any compensation payable under subsection (1) may be paid in accordance with section 12.

## APA 1954: THE LOSS OF CUSTOMARY LAND RIGHTS ON GAZETTED TERRITORIES

Section 12 of the APA 1954 provides that compensation **may** be paid for the loss of recognised rights in *Aboriginal Areas* or *Aboriginal Reserves* (no specific mention on *Aboriginal Inhabited Places*) either directly to the affected persons or through a common fund held by on behalf of the affected people, to be administered as prescribed by the Minister:

### 12. Compensation

If any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefor and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Commissioner to be held by him as a common fund for such persons or for such aboriginal community as shall be

directed, and to be administered in such manner as may be prescribed by the Minister.

#### **APA 1954: RIGHTS WITHIN PRODUCTION AND CONSERVATION FORESTS**

In respect of their rights to traditional territories that have been reserved for the establishment of Malay Reservations or production or conservation forests, section 10 of the APA 1954 merely states that the people are not obliged to leave such areas and that the regulatory measures of such reserved areas may be modified to accommodate the Orang Asli communities residing in the locality.

However, if the state decides it so, the people may after all be required 'to leave' or 'remain out' of such areas, with some compensation payments:

##### **Aboriginal communities not obliged to leave areas declared Malay Reservations, etc.**

- 10(1) An aboriginal community resident in any area declared to be a Malay Reservation, a reserved forest or a game reserve under any written law may, notwithstanding anything to the contrary contained in that written law, continue to reside therein upon such conditions as the State Authority may by rules prescribe.
- 10(2) Any rules made under this section may expressly provide that all or any of the provisions of such written law shall not have effect in respect of such aboriginal community or that any such written law shall be modified in their application to such manner as shall be specified.
- 10(3) The State Authority may by order require any aboriginal community to leave and remain out of any such area and may in the order make such consequential provisions, including the payment of compensation, as may be necessary.
- 10(4) Any compensation payable under subsection (3) may be paid in accordance with section 12.

#### **APA 1954: FURTHER STATUTORY INTRUSIONS INTO LAND RIGHTS**

Section 19 stipulates that the Minister may make regulations on the creation, nature and regulation of aboriginal settlements within *Aboriginal Areas* and *Aboriginal Reserves*, the manner of evidencing and the recording rights of occupancy granted to the people, prohibitions on the planting of any specified product on lands over which rights of occupancy have been granted, the felling of jungle within *Aboriginal Areas* and *Aboriginal Reserves*, the harvesting of forest produce in *Aboriginal Areas* and the taking of wild birds and animals by the people.

---

<sup>i</sup> *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan (Commission of Education Service) & Anor* at the Court of Appeal in 1996. *Director-General of the Department of Environment & Anor v. Kajing Tubek & Ors & Other Appeals* at the Court of Appeal in 1997.

<sup>ii</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.

<sup>iii</sup> This was explicitly emphasised in *The Selangor State Government & Ors v. Sagong Tasi & Ors* by the Court of Appeal in 2005 and in *Madeli 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>iv</sup> Please see iii.

<sup>v</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 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>vi</sup> Please see iii. 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>vii</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>viii</sup> Please see iii.

<sup>ix</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>x</sup> *ibid.*

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

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

<sup>xiii</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>xiv</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.

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

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