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

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
sarawakoffice[at]gmail[dot]com
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 Asal 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.\(^1\)

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

\(^1\) 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.
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.

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 JOANGOHutan 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 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.

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.’

**2. Indigenous customary land rights/title is recognised by common law**

The common law as developed domestically by the Malaysian courts 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**

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.
Case Awaiting Appeal

<table>
<thead>
<tr>
<th>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)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indigenous customary land rights/title may exist in Forest Reserves (unless explicitly extinguished)</td>
</tr>
<tr>
<td>• Indigenous customary land rights/title are a right established through the habit of a people and not from written law.</td>
</tr>
<tr>
<td>• The radical title of the state is subject to the indigenous customary land rights/title.</td>
</tr>
<tr>
<td>• Indigenous customary land rights/title are a right to life, protected under Article 5 of the Federal Constitution.</td>
</tr>
</tbody>
</table>

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


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.


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.


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


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