

## **INDIGENOUS PEOPLE AND THEIR NCR LAND ISSUES**

This paper is to be presented at a conference in Kota Padang, Sumatra Barat in July 2012.

### **Purpose of Presentation**

For information, discussion and thereafter for concrete action plans

### **Topic of Presentation**

Indigenous Peoples and their Native Customary Right Land Issues that Affect their Livelihood and Fundamental Rights

### **Brief background**

For the past 15 years or more, legal battles between the indigenous peoples and the State Government of Sarawak associated with alienation of large areas of state or crown land by the State Government of Sarawak to selected companies continue to flood the courtrooms. Although it often started as a normal land dispute, it always concluded in major constitutional controversies when protracted conflicts stemming from the manner of execution of provisional leases by their respective holders had to be adjudicated before a court of law.

The indigenous peoples averred that the land alienated to those companies aforesaid encompassed their ancestral land popularly known as native customary right land (NCR land), which is recognized both by statute as well by tradition and judicial affirmation. Section 5(2) of the Sarawak Land Code (Law of Sarawak Chapter 81) recognizes the creation as well as proprietorship and possession of land acquired in the manner and methods set out therein. The practice of acquiring virgin jungle that was de facto *terra nullius* at the material time and thereafter created the same into NCR land had pre-dated the coming of Europeans to Sarawak. When the White Rajah ruled Sarawak for over a hundred years until 1947 and later the British until 1963, this system of indigenous land tenure was given due recognition via statutes and judicial decisions. It is therefore a practice that has been acknowledged and given legitimate recognition by the colonial masters. Section 5(2) of the Land Code merely gives sanction to and reinforces this traditional land tenure system that has already been well accepted and legally established within the scope of indigenous peoples' socio-political system. Its establishment and recognition were not by acquiescence as but via traditional socio-legal system, judicial and legislative processes.

It would not be inappropriate to mention briefly the nature and manner of alienation of state land by the Government of Sarawak to selected companies or corporate organizations hereinbefore mentioned. Department of Land and Survey, upon approval and instruction of a Minister, will issue a provisional lease over large areas of land for a period of 60 years in return for a certain amount of premium. The reason why it is called provisional lease is because only a perimeter survey has been done. When a final survey has been done, after excising legitimate claims including NCR land, a final title will be issued. Every provisional lease will always contain a specific clause notifying the holder that all legitimate claims including claim over NCR land have to be excised before the issuance of the final title. In other words it is the duty of the lessee to exclude every legitimate claim and the final title would be a clean title free from any encumbrances or illegitimate claim.

But the problem that is now besieging this traditional land tenure system is when the State Government of Sarawak ceases to adhere to the accepted mechanism of identifying the existence of NCR land. Secondly, it is caused by the State Government's refusal to accept the judicially-decided definition and scope of NCR land. Judicial decision expounds that NCR land comprises 'the temuda' 'the pulau galau' and 'the pemakai menoa', which is consistent with the indigenous peoples' view of what should constitute NCR land. But the State Government only recognizes 'the temuda', which is a reversal of its former time recognition.

A landmark case in its own way, Federal Court case of *Nor Anak Nyawai v Borneo Pulp Plantations & Ors* [2001] 6 MLJ 241 touches directly on the definition and scope of NCR land whose decision is consistent with the view of the indigenous people on what should constitute NCR land in its true sense. [ will be discussed in detail below].

Besides those series of legal battles aforementioned, the indigenous peoples are also target of political divides and oppression on matters of joint venture development of NCR land. Under what is termed as *New Concept NCR Land Development policy* that is being actively advanced and advocated by the current administration, the indigenous people are persuaded to participate in a joint-venture land development programme by surrendering their NCR land to be developed into commercial oil palm plantation by selected companies on an equity ratio of 60:30:10—[60% by joint venture company, 30% by land owner and 10% by a management agency appointed by the government]. The indigenous people feel that this new land development in its actual operation has not fulfilled its intended main objective as expressed in its official documents. For many years the expected dividend as promised is either not been paid at all or only a nominal token has been paid, which in their view is a breach of the fundamental term of the joint venture contract and far falling short of improving their socio-economic lives. The painful effect that is most felt not by those who are not getting their promised dividend but by those who decline to participate in this so-called voluntary programme. Senior members of the cabinet and other government officials are given to accusing those who decline to participate or not willing to let their land to be utilized for this land development programme as anti-government or anti-development or saboteur.

#### **Example of cases and their effects on the Livelihood and Fundamental Rights of the Indigenous People.**

The issuance of provisional leases over NCR land leaves a far-reaching and horrifying effect on social, economic and political fabric of the indigenous society in Sarawak. Some of these horrifying effects are but not restricted to serious violation of fundamental rights, loss of major source of livelihood, and destruction of their land and forest.

*Nor Anak Nyawai*, being a Federal Court case, should have put all issues associated with native customary right land in Sarawak to its finality. But on the contrary more controversies and constitutional conflicts have emerged. The State Government of Sarawak continues its refusal to recognize or accept the definition and scope of Native Customary Land as expounded by the High Court. Both the Court of Appeal and Federal Court did not expressly

affirm the definition and/or scope of what rightly constitutes Native Customary Right Land. But on the other hand neither of the courts rejected the definition and scope expounded earlier by the High Court. The Plaintiff lost their appeal at the Federal Court only on question of fact and not on question of law. Therefore in principle, by inference, the definition and scope of native customary right land as expounded by the High Court should be the ratio decidendi as it stands and should have put the matter to rest. But the absence of expressed affirmation by the Federal Court has given room to the State Government of Sarawak to consider it as mere obiter dictum and refuses to be bound by the definition and scope of native customary land that the High Court has set out. The High Court held that native customary right land should rightly include ‘the temuda’, (land that has been cultivated and continues to be cultivated or left fallow for indefinite length of time) ‘the pulau galau’ (land forming part of the temuda but has never been cultivated and left for future use by its original occupier as part of the individual or family real property asset and inheritance) and ‘the pemakai menoa’ (an area of land not meant for cultivation but used for collection of jungle produce, timber resources, hunting of games, foraging, etc., forming common asset of the community and determines the physical boundary and territorial limit with other indigenous people of the same or of different communities or tribes). This definition of the scope of native customary right land is consistent with the argument advanced by the plaintiffs but strongly disputed and rejected by the all the defendants, especially the 3rd defendant, the State Government of Sarawak. The defendants contended that the scope of native customary right land should only constitute the temuda alone. The contention of all the defendants is that, both pulau galau and pemakai menoa as the indigenous peoples called them, are part and parcel of state land and by default the indigenous people have no proprietary or communal rights or interests thereon. In consonant with its refusal to recognize the definition and scope of native customary right land as expounded by the High Court, the State Government of Sarawak continues to issue provisional leases and licensed planted forest to corporate bodies over land that the indigenous peoples claimed as their rightful pulau galau and pemakai menoa.

From 27 February 2012 until 14 March 2012, Human Rights Commission of Malaysia [SUHAKAM] conducted a National Inquiry by way of public hearing on issues associated with the Rights of Indigenous Peoples to their Native Customary land at various locations throughout the State of Sarawak. In the course of this public hearing, evidences were adduced before the panel that the State Government continues to issue provisional leases to selected corporate bodies with some affecting what the indigenous community claimed as their *pulau galau* and *pemakai menoa*. The indigenous peoples who were directly affected and came to testify before the panel of inquiry considered the issuance of provisional leases by the State Government over their *pulau galau* and *pemakai menoa* as a serious violation of their proprietary and communal rights. This latest testimony is evidence that issues pertaining to native customary land are far from being resolved.

There were more than 100 cases heard by SUHAKAM during the National Inquiry, and one of the cases heard on 27 February 2012 at Dewan Masyarakat Serian was Case No. K19: the case of People of Melikin and Kampong Ensebang versus Million Everrich Sendirian Berhad. This case was on violation of NCR Land where Million Everrich was given provisional lease by the State Government that contained NCR land therein but Million Everrich refused to excise those areas where NCR land exist.

On 4 March 2012, SUHAKAM National Inquiry at Dewan Suarah Sibn in Cases K77 and K80 also saw similar situation. In these two cases: K77 and K80, Syarikat Sarananas Sdn Bhd was given Provisional Lease over areas affecting NCR land belonging to ethnic Melanau in Kampong Kebuwau along the Igan River.

On 12 March 2012 at Dewan Suarah Miri, in Case K177—Shin Yang Sdn Bhd versus Osman Bin Abdullah also saw a dispute involving NCR land where the PL holder has totally deprived the NCR land owner by a stroke of a pen via issuance of PL to a company closely associated with the Chief Minister.

There hundred more cases that cannot be enumerated here. The above are just the tip of the iceberg. The violation continues with the so-called replanting of the deforested land with new foreign species alien to the land of Borneo.

The various articles contained in the United Nations Declaration on the Right of Indigenous Peoples [UNDRIP] have made special mention of the requirement to protect Indigenous Peoples' rights to land. Article 26 (1) of UNDRIP specifically mentions the Indigenous Peoples' rights to their traditional land in the following words:

“Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”.

Article 26 (3) further reinforces the above rights in the following words:

“States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned”.

Recognition of indigenous peoples' right to land they have traditionally owned is not merely a domestic affairs but also that of international level. Although Malaysia is a party to this very important international document, on record, Malaysia has never taken any step or effort to ratify the same. The position or attitude taken by Malaysia may merit deep examination in the light of serious allegation by the indigenous people on the violation of their constitutional rights to native customary land by the state.

Finally it might be desirable that we examine the provision of Section 5 of Land Code of Sarawak [Laws of Sarawak Chapter 81] that spells out the method of acquisition and recognition of native customary right land. Specific mention must be had of Section 5(2)(f) that was deleted in 2000, which reads, “The methods by which native customary rights may be acquired are--(a)...(b)...( c)..(d)...(e)..and (f) any other lawful methods”.

It has been argued that Section 5(2)(f) hereinabove cited fits squarely into the method by which *pulau galau* and *pemakai menoa* had been acquired by the indigenous people. This line of argument doesn't earn favour and rejected by the State Government of Sarawak. Pertinent point to ask is, if Section 5(2)(f) has no bearing whatsoever on any of the methods set out in that provision, why was there a necessity to delete the same? It is definitely a point of interest to explore.

### **Solutions to the problems**

- Legislative reforms—the people of Sarawak and NGOs have to push for necessary legislative reform, especially amendment to the State Land Code by restoring the previous protections contained therein
- Judicial process through court battles—NCR land owners must continue to file cases in court that have merit.
- Pressure from NGOs and via public interest litigation
- Series of public rallies and demonstrations calling for reform
- Through the ballot box—change of government through electoral process.

### **Effect on Indigenous People**

- Loss of ancestral land to the rich companies
- Become poorer—no longer have enough land for sustainable farming
- Mass migration from rural to urban seeking for jobs as there is no more land left. Not everybody can get job in town since certain academic qualification is necessary
- Social problem on the rise—and there is no mechanism as yet to address this problem.

### **Conclusion**

- Land grabbing has reached a serious level to the point of causing serious socio-economic problem to the indigenous people
- Only the court of law is more effective in restoring indigenous peoples' right— but slow, costly and the indigenous people do not have the moral and financial stamina to sustain such protracted legal battles.
- Better solution—NGOs play a more active role in pushing for reform and giving continuous educational training to the indigenous people.

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