

BATO BAGI V KERAJAAN NEGERI SARAWAK

EXTINGUISHMENT OF NATIVE CUSTOMARY RIGHTS IN MALAYSIA

by Yögeswaran Subramaniam

Despite not seizing the opportunity to settle the law on extinguishment of native customary rights ('NCRs') and the compensation criteria for loss of such lands, the decision of the apex court of Malaysia in *Bato Bagi v Kerajaan Negeri Sarawak*¹ opens the possibility for future decisions to address important issues on Indigenous land rights.

BACKGROUND

Essentially, the appellants brought separate representative actions contending that the extinguishment of their respective NCRs pursuant to s 5(3) of the *Sarawak Land Code* ('SLC') was void as it violated, amongst others, their constitutional rights to life (art 5), equality (art 8) and property (art 13), and privileged status as natives of Sarawak (art 153). In this regard, they sought a declaration that ss 5(3) and (4) of the SLC, enabling extinguishment of NCR and providing for redress in such cases, were void for unconstitutionality. Alternatively, they claimed adequate compensation for loss of lands having regard to their inextricable link to customary lands. The Courts of first instance and Courts of Appeal held that the impugned provisions were not unconstitutional and that extinguishment was done in a proper and valid manner. The appellants then obtained leave to appeal to the Federal Court on the question of whether the impugned provisions were ultra vires of articles 5 and 13 of the *Federal Constitution*.

THE JUDGMENT

The majority of the Federal Court declined to decide the question citing specific facts of the case including the appellants' acceptance of compensation and the impossibility of granting restitution for lands taken.² They also justified the decision by holding that arguments before the Court focused on the appropriateness of the summary procedure employed by the lower courts rather than the legal question posed.³ Raus FCJ dissented and affirmed the decisions of the lower courts, answering the question in the negative.

In dismissing the appeal, the majority however confirmed that the taking of Indigenous lands is not only a deprivation

of the fundamental (and constitutional) right to property but the corresponding *right to life/livelihood* that ought to be adequately compensated.⁴ Further, all three judges applied domestic common law native title jurisprudence in arriving at their conclusions, further reinforcing and entrenching the doctrine in Malaysia.⁵

As for the appellants' submission that the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') be utilized in interpreting constitutional fundamental liberties belonging to Indigenous communities, the Court was divided with Zaki CJ holding that it 'must be read in the context of our constitution'⁶ and Raus FCJ ruling that international norms 'should not be used as a guide' to interpret the Constitution.⁷ Malanjum CJSS did not express any view on the issue.

In respect of the right to due process or a pre-acquisition hearing, Malanjum CJSS held that procedural fairness demanded that holders of NCRs 'be given the opportunity to present their case' before any extinguishment direction.⁸ Conversely, Zaki CJ and Raus FCJ were explicit in ruling that a right to a pre-acquisition hearing, although desirable, was not a constitutional requirement unless expressly provided for under the law.⁹

Malanjum CJSS also questioned whether 'extinguishment' was on equal footing with 'acquisition' of property under art 13, raising a potential legal issue as to whether the legislation had intended NCRs to be extinguished in the first place.¹⁰ As for compensation for loss of NCRs, Malanjum CJSS observed that it must be 'sufficient and reasonable' based on the natives' 'long term' 'total dependency' on the land, suggesting that compensation with due regard to Indigenous perspectives is plausible.¹¹ Further, for the first time in the apex court, Malanjum CJSS endorsed the fiduciary duty owed by the Government to Indigenous communities.¹²

COMMENTARY

This decision is only the second reasoned Federal Court judgment endorsing the doctrine of common law native

title. In a Malaysian context, entrenchment of this doctrine is pertinent in view of the State's continued confrontational approach when faced with such claims.

Further, Malanjum CJSS's dictum enables room for future expansion of the emerging jurisprudence on Indigenous land rights in Malaysia.

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- 4 Ibid [13]-[14], [20] (Zaki CJ); [110]-[111], [115], [123] (Malanjum CJSS).
- 5 Ibid [13]-[14], [20] (Zaki CJ); [118] (Malanjum CJSS); 169 (Raus FCJ).
- 6 Ibid [25].
- 7 Ibid [180].
- 8 Ibid [103].
- 9 Ibid [19] (Zaki CJ); [171]-[173] (Raus FCJ).
- 10 Ibid [121]-[122].
- 11 Ibid [123]-[124].
- 12 Ibid [125], affirming *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289.

- 1 [2011] 6 MLJ 297.
- 2 Ibid [11], [15]-16] (Zaki CJ); [107]-[109] (Malanjum CJSS).
- 3 Ibid [26] (Zaki CJ); [100], [106] (Malanjum CJSS).

