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The Fiduciary Doctrine as a New Pathway: An Alternative Approach to Analysing Native Customary Rights in Sarawak

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The Fiduciary Doctrine as a New Pathway: An Alternative Approach to Analysing Native Customary Rights in Sarawak

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This paper explores the use of the fiduciary doctrine whereby the state is conceived as a fiduciary vis-à-vis her native peoples and attendant equitable remedies are made available for the native customary rights over land in Sarawak. Thus far, most challenges to extinguishment of native customary rights in Sarawak have proceeded on constitutional grounds, with little success. This article draws on the jurisprudence of fiduciary law in other parts of the Commonwealth and argues that this is a viable alternative cause of action against the state.

Sarawak is one of the largest states in Malaysia and is located in the north west of the island of Borneo. According to a 2010 census, Sarawak has a population of approximately 2.4 million people,[1] including a sizeable number of native[2] peoples: 693,000 *Iban,* 192,000 *Bidayuh*, 119,000 *Melanau* and 152,000 others. Native customary rights over land have existed in Sarawak long before it came under the suzerainty of the sultanate of Brunei (Porter, 1967: 10; Ngidang, 2005: 47; Bulan and Locklear, 2008: 22-24) and survived the rule of the White Rajahs, that is, the Brooke administration, from 1841 to 1946.[3] Shortly after Sarawak was ceded to the British government, the Torrens system[4] of land registration was introduced (Porter, 1967: 10-11). Although the Torrens system of land registration recognised native customary rights, these were whittled down by a series of Land Ordinances that zoned land in Sarawak into categories which included a Mixed Zone Land area where non-natives could claim ownership. The process of limiting native customary rights through formal law reached its high water mark with the introduction of the Sarawak Land Code 1958. This Code is significant because it provides a cut-off period for the creation of native customary rights. Native customary land is defined to mean land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1 January 1958, and still subsist as such.[5]

Native customary rights over land obviously pose a challenge to activities such as logging, infrastructure projects and large scale agricultural plantations. It was reported in the *New Straits Times* that native customary land is estimated to cover 1.1 million hectares, about a quarter of Sarawak's arable land (Teo, 2011). Conflict between native peoples and the government over native

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1 <www.statistics.gov.my>

2 Article 161A of the Federal Constitution of Malaysia uses the term 'native' when referring to the indigenous peoples of Sabah and Sarawak. In contrast, the indigenous peoples in Peninsula Malaysia are referred to as 'aboriginal' or *Orang Asli.* See Aboriginal Peoples Act 1954 (Malaysia).

3 Porter, 1967: 10-11 ; Nor Anak Nywai & Ors v Borneo Pulp Plantation & Ors [2001] 6 MLJ 241, 266-267; Superintendent of Land & Surveys Miri Division v Madeli bin Salleh [2008] 2 MLJ 677; see generally Runciman, 1960.

4 For background to the Torrens system see Fox, 1950: 489.

5 Section 2 Sarawak Land Code 1958. Before 2000, Section 5(2) of the Sarawak Land Code provided for six methods native customary land may be created, namely: (a) the felling of virgin jungle and the occupation of the land thereby created; (b) the planting of land with fruit trees; (c) the occupation or cultivation of land; (d) the use of land for a burial ground or shrines; (e) the use of land of any class of rights of way; or (f) any other lawful method. Some have argued that section 5(2)(f) imports *adat* or customary law into the interpretation of the Sarawak Land Code. However, section 5(2)(f) was deleted by the Land Code Amendment Bill. After 1 January 1958, a permit must be obtained from the Minister for the further creation of native customary land.

customary rights over land has been exacerbated by the Sarawak government doubling oil palm plantations in recent years, making Sarawak one of the largest oil palm producing states in Malaysia (Hong, 2011). Starting from the mid-1990s the Sarawak government systematically converted so called 'idle' land into palm oil plantations (Cooke, 2006: 45), and this was seen by the government as absorbing the native population into the 'mainstream' of economic development. The resultant tension between economic development and the protection of native customary rights has led to over two hundred cases being brought in the Sarawak courts relating to disputes over land (Cooke, 2006: 45; Aiken and Leigh, 2011: 825). In recent years, one of the major areas of contention has been the issue of extinguishment of native customary rights. The Sarawak state government has extinguished native customary rights pursuant to the provisions of the Sarawak Land Code 1958 for development purposes, such as the expansion of large scale agricultural uses like palm oil plantations (Cooke, 2002: 189; Cramb, 2011: 274); the laying of a gas pipeline (Hong, 2011); the building of a dam (see *Bato Bagi & Ors v Kerajaan Negeri Sarawak* [2011] 6 MLJ 297); and a proposed pulpwood mill factory.

This paper is divided into two parts. In the first part, a brief overview of native title jurisprudence in Malaysia with particular reference to Sarawak is sketched out. Next, the paper reviews the jurisprudence on extinguishment of native customary rights. A close review of the cases is important, because this section will demonstrate that, so far, most legal challenges against the process of extinguishment of native customary rights have been framed in the context of the Malaysian Constitution. These constitutional challenges have met with little success in the Malaysian courts. This lack of success is the main driver to the second part of the paper where I explore the use of the fiduciary doctrine as a new doctrinal pathway for analysing native customary rights claims in Sarawak. The argument is that because the state is conceived as a fiduciary vis-à-vis her native peoples, this gives rise to a duty of consultation before any extinguishment process commences. A breach of a duty of consultation will attract equitable remedies. While native title jurisprudence in the Commonwealth has long accepted that the state is a fiduciary in relation to her native peoples, the issue of whether a claim premised on fiduciary law is sustainable in this context, and how flexible equitable remedies might be used, remains under-investigated issues. The thesis advanced in this paper is that the fiduciary doctrine can provide a viable alternative cause of action against the state.

I. Native Title Jurisprudence in Malaysia, with Particular Reference to Sarawak

Before examining the issue of extinguishment of native customary rights over land in Sarawak, this section presents a brief sketch of native title jurisprudence in Malaysia with particular reference to Sarawak by examining several key decisions. The starting point of native title jurisprudence in Malaysia is the landmark decision of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 affirmed [1998] 2 MLJ 158 (*Adong*).[6] In *Adong,* the plaintiffs were heads of families representing a group of aboriginal people living around the Sungai Linggiu catchment area, and the defendants were the government of the State of Johor. The plaintiffs claimed that the government had alienated their traditional and ancestral land (*kawasan saka*) to a state corporation. In turn, the state corporation entered into an agreement with the government of Singapore to build a dam and supply water to both Singapore and the State of Johor. As a result, the defendants restricted those areas and prohibited the plaintiffs from entering the land to forage.

One unusual feature of *Adong* is that the defendants did not seriously dispute that the plaintiffs were inhabitants of the area or the size of the land area claimed. As McHugh explains, the legal building blocks of native title jurisprudence involve the following steps: '(a) recognition (the consistency/sovereign compatibility gateway test); (b) proof; (c) nature and extent; (d) extinguishment (and the relationship of aboriginal title to the exploitation of land by third parties' (McHugh, 2011: 112). In *Adong*, the plaintiffs did not have to deal with very difficult evidentiary issues usually found in

[6] See Hooker, 2001: 199; and Bulan, 2001: 83. See also Thio, 2006: 428.

(b) and (c) because they were not seriously contested by the government. *Adong* therefore primarily dealt with the question of recognition of aboriginal land rights. The questions of proof and the nature and extent of the rights followed simply from the determination of the issue of recognition. The state government did not adopt such a non-confrontational approach in subsequent litigation.

Adong was heard in the first instance by Mokhtar Sidin JCA. Drawing from 'international common law' (Hooker, 2001: 199. 203) on native title, the learned judge relied on key native title cases from, *inter alia*, jurisdictions such as United States, Africa, Canada and held that the plaintiffs could assert a common law right to the land (see Gilbert, 2007: 583). In a crucial passage, Mokhtar Sidin JC writes:

> My view is that, and I get support from the decision of *Calder*'s case and *Mabo*'s case, the aboriginal peoples' 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 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. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in the *Calder* case at p 156 where His Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...'. I would agree with this ratio and rule that in Malaysia the aborigines` common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

Furthermore, Mokhtar Sidin JCA held that the plaintiffs' rights were a form of statutory rights protected by the Aboriginal Peoples Act 1954. Section 10 of the Aboriginal Peoples Act 1954 preserved the rights of aboriginal peoples to occupy and collect forest produce. The learned judge pointed out that, pursuant to section 11, the state must pay compensation when acquiring any land where there are fruit and rubber trees claimed by aboriginal people. In the present case, the learned judge held that art 13 of the Malaysian Federal Constitution (which provides that no law shall provide for the compulsory acquisition or use of property without adequate compensation) was wide enough to include the notion of the plaintiffs' rights under common law and statutory rights.

In terms of quantification of compensation, the learned judge was disinclined to award the plaintiffs the market value of the land, which was stated to be RM 75,000 per acre. Mokhtar Sidin JCA said that the plaintiffs suffered deprivation of: (a) heritage land; (b) freedom of inhabitation or movement; (c) produce of the forest; (d) future living for their families; and (e) future living for their descendants. Although Mokhtar Sidin JCA said that the Singapore government had paid the Johor government around RM 6,000 per acre, he awarded the plaintiffs RM 500 per acre for the loss of the land. This amounted to a global sum of RM 26.5 million. Alternatively, Mokhtar Sidin JCA said, as there were 424 aborigines in that area and the aborigines' income was estimated to be RM 300 per month per person, and as he pegged income lost at 25 years for each person, the total loss of income was thus calculated to be RM 26.5 million.[7] The defendants appealed against the decision in *Adong* but the appeal was dismissed by the Court of Appeal ([1998] 2 MLJ 158) and the Federal Court.[8]

In the context of Sarawak, the Aboriginal Peoples Act 1954 does not apply in that state. Sarawak unlike Peninsular Malaysia had always recognised native customary rights over land since the earliest times. As mentioned above, the Sarawak Land Code provides for the protection of native customary rights over land if these rights were created prior to 1 January 1958. Thus, the battle ground in Sarawak is the extent of native customary rights over land. In this regard, one of the most important cases in Sarawak is *Nor Anak Nyawai & Ors v Borneo Pulp Plantation & Ors* [2001] 6 MLJ 241

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7 According to the author's calculation, this alternative method of calculation should, in fact, have yielded a sum of RM 38.16 million.

8 The Federal Court dismissed the appeal without giving reasons.

(Hooker, 2002: 92). The plaintiffs were representatives of the Iban tribe and the defendants were Borneo Pulp Plantation Sdn Bhd (the first defendant), Borneo Pulp and Paper Sdn Bhd (the second defendant) and the Bintulu Superintendent of Lands & Surveys (the third defendant). The third defendant had issued title to an area of land to the first defendant. It was the plaintiffs' contention that they had native customary rights known in the Iban language as *temuda, pulau* and *pemakai menoa* over a certain land area included in the first defendant's land title, and the second defendant had trespassed and damaged the land by clearing the land and planting trees for use in a paper mill. In a wide-ranging judgment brimming with indignation,[9] Ian Chin J began his judgment by citing *Adong* for the following proposition:

> … the common law respects the pre-existing rights under native law or custom though such rights may be taken away by clear and unambiguous words in a legislation. I am of the view that is true also of the position in Sarawak. ([2001] 6 MLJ 241, 245).

Drawing from a rich source of historical and academic work, Ian Chin J accepted the concepts of *pemakai menoa, temuda* and *pulau galau.* He made the following points:

(a) the following description '*[p]emakai menoa* is an area of land held by a distinct longhouse or village community, and includes farms, gardens, fruit groves, cemetery, water and forest within a defined boundary (*garis menoa*)' ([2001] 6 MLJ 241, 249) was accepted as accurate;
(b) *temuda* is farm land which includes land deliberately left 'to fallow for a period of time to allow for the soil to regain its fertility and for the regeneration of the forest produce' ([2001] 6 MLJ 241, 250); and
(c) *pulau* 'is a term for primary forest preserved to ensure a steady supply of natural resources like rattan and timber and for water catchment, to enable hunting for animals to be carried out and to honour distinguished persons. ([2001] 6 MLJ 241, 250)

In a significant passage, Ian Chin J said where there is evidence of a longhouse:

> … you can expect lives to revolve around them and the various activities relating to *temuda* and *pulau* are expected to be carried out within the *pemakai menoa*. I am prepared to go as far as to say that if you find a longhouse with a sizable number of families in a remote area, you must expect the activities of hunting, fishing, gathering of forest produce and farming to have been carried out. You can expect to have been carried out within an area surrounding the longhouse that can be covered by a half-day foot journey unless delimited by the presence of another longhouse in the vicinity. It then becomes only a question of delimiting the extent of the perimeter of the *pemakai menoa*.' ([2001] 6 MLJ 241, 293)

Ian Chin J therefore declared that the plaintiffs were entitled to exercise native customary rights over the disputed land area. He awarded an injunction against the first and second defendants and their servants or agents restraining them from entering into the area. Also, the title issued to the first defendant (which included the disputed area) was declared to be void and the learned judge said he expected the third defendant to take the necessary steps to rectify the title. Obviously, the High Court's decision in *Nor Anak Nyawai* was a major triumph for native peoples in Sarawak. The immediate ramification of the decision is that native peoples would have a legitimate claim for *pemakai menoa*, that extends to a half-day journey by foot from the longhouse.

Unsurprisingly, the defendants appealed against the High Court decision. Victory for the native peoples became short-lived when Ian Chin J was overturned on the facts by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors* [2006] 1 MLJ 256. Hashim Yusoff JCA who delivered the judgment of the Court of Appeal endorsed the proposition that native customary rights are recognised by common law although such rights may be taken away by clear and

9 Use of emotive language in native title jurisprudence is not uncommon. See Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1, para 78.

unambiguous words by legislation after payment of compensation. However, he insisted that there must be evidence of continuous occupation and that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition' ([2006] 1 MLJ 256, 269).[10] On the facts, the Court of Appeal relied on: (i) aerial photographs of the disputed area in 1951 showing the area to be covered by jungle; and (ii) the testimony of a former headman that there was no *temuda* in the contested area. As such, Hashim Yusoff JCA said that the 'claim for the area to be under native customary rights is a non-starter' ([2006] 1 MLJ 256, 273).

The Court of Appeal's overruling of *Nor Anak Nyawai* on the facts leaves the precedent value of Ian Chin J's High Court judgment uncertain. The crucial question remains: what is the legal status of the concept of *pemakai menoa*?[11] On one interpretation, the Court of Appeal merely disagreed with Ian Chin J's finding of fact, leaving intact his observations about *pemakai menoa*, *temuda* and *pulau galau* as good law. This interpretation is supported by the fact that Hashim Yusoff JCA in *Nor Anak Nyawai* accepted Ian Chin J's description of these terminologies as accurate (see [2006] 1 MLJ 256, 263). In the High Court of Sarawak, David Wong J in *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd* [2010] 4 MLJ 204[12] also adopted this interpretation, saying 'the Court of Appeal differs from the High Court only in respect of the factual evaluation of evidence in which they found that the plaintiffs there had failed in proving 'Pemakai Menua' in the disputed area' ([2010] 4 MLJ 204, 215). However, it must be pointed out that the authority of *Agi ak Bungkong* is susceptible to attack because this case was recently overturned on procedural grounds by the Court of Appeal (*Superintendent of Lands and Surveys Department Bintulu Division & Anor v Agi ak Bungkong & Ors* [2012] 1 MLJ 335).

Supporters of the proposition that actual occupation is not necessary to establish native customary rights also rely on the Federal Court's decision of *Superintendent of Land & Surveys Miri Division & Anor v Madeli Salleh* [2007] 6 CLJ 509. In *Madeli Salleh*, Arifin Zakaria FCJ observed that actual physical presence was not necessary to establish native customary rights. The learned judge said that '[t]here can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering' ([2007] 6 CLJ 509, 532). In contrast, another interpretation of the Court of Appeal's judgment in *Nor Anak Nyawai* has been advanced by Peter Crook (Crook, 2005: 71, 88 – 92; Aiken and Leigh, 2011: 825, 863). Crook points out that the Court of Appeal's reliance on the aerial photographs and the absence of evidence of *temuda* in dismissing the claim seemed to limit the application of native title to areas where native peoples have cultivated the area, as opposed to foraging or hunting rights over land. Such an interpretation has also been put forward by Datuk JC Fong, the sometime State Attorney-General of Sarawak who argued many of these native title cases, in his recent book (Fong, 2011: 72-78). Datuk Fong's thesis is that the only native customary rights over land recognised by the law apply to land cleared and planted by natives who continue to occupy the area.

Perhaps, the difficulty with interpreting the Court of Appeal's judgment in *Nor Anak Nyawai* lies in the inherent contradiction of the reasoning of the court. As Dr Ramy Bulan and Amy Locklear perceptively point out:

> Despite reversing the High Court on the issue of occupation, the Court of Appeal affirmed that the Iban customary practice of *pemakai menoa* existed as an established custom relating to land. With respect, the Court of Appeal's decision is a contradiction in terms. On the one hand, it endorsed the High Court's decision and affirmed that the practice of *pemakai menoa* was part of the Iban customary practice. On the other hand, it narrows occupation to settlement and cultivation, which is only part of the *pemakai menoa.* This contrast is at odds with the basic concept of the *pemakai menoa.* (Bulan and Locklear, 2008: 66)

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[10] Hashim Yusof JCA quoted this from *Sagong bin Tasi* [2002] 2 MLJ 591.

[11] For a discussion of the case see Bulan, 2007: 54.

[12] See also *Mohamad Rambli bin Kawi v Superintendant of Lands Kuching & Anor* [2010] 8 MLJ 441.

This issue will therefore have to be revisited by either the Court of Appeal or Federal Court at some stage.

Overall, the picture which emerges from this brief description of native title litigation in Malaysia is a patchy one. While *Adong* represents a major breakthrough in establishing native title jurisprudence in Malaysia by recognising these rights in the context of Peninsular Malaysia, the success rate of native peoples in pursuing their customary rights over land post *Adong* has not been good. As mentioned above, *Adong* is unusual because the government had not seriously disputed several questions of fact such as the plaintiffs' claim of being inhabitants of the land or the size of the land area in question. However, in subsequent cases in Sarawak such as *Nor Anak Nyawai,* these important questions of fact have been hotly contested by the state government. The state government has also brought numerous procedural challenges to defeat native title claims. As a result, many native title claims have succeeded in the High Court in Sarawak only to be subsequently overturned by the appellate courts on either a finding of fact or procedural grounds. This leaves the precedent value of the High Court decisions in doubt.

Extinguishment of Native Customary Rights over Land in Sarawak: The Right to Life Argument

On 23 November 1996, the Sarawak State Legislative Assembly passed the Land Code (Amendment) Bill, which contained subsections 5(3) and (4) of the Sarawak Land Code (Tawie, 1997). These two subsections are crucial because they provide for the process of extinguishment of native customary rights over land in Sarawak. The stipulated process of extinguishment is as follows. First, the relevant Minister issues a direction which is (i) published in the Gazette and one newspaper circulating in Sarawak; and (ii) exhibited on the notice board of the District Office for the relevant land area. If no claims are made within 60 days from the date of publication or exhibition, then any native customary rights are extinguished without payment of compensation. Second, any person who wishes to make a claim for compensation must submit a claim to the Superintendent within 60 days from the date of publication or exhibition of the notice. After submission of such a claim, the Superintendent makes a decision on the matter. Any person who is dissatisfied with the decision of the Superintendent may, within 21 days from the date of the decision, require the matter to be referred to arbitration. Upon receipt of the notice of arbitration, the Superintendent shall direct that any compensation payable to the person who desires to have his claim or matter referred to arbitration, be deposited in the High Court pending the outcome of the arbitration proceedings.

The wide ambit of the subsections 5(3) and (4) of the Sarawak Land Code is obviously a source of grave concern for native peoples. A prominent native customary rights lawyer, Mr. Baru Bian, was quoted as saying shortly after the Bill was passed:

> Just how many of us read the Government Gazette? Even lawyers like myself don't read the Gazette. And how many people in the rural areas read newspapers which publish the notification? (Tawie, 1997)

Besides the fact there may be a lack of adequate notice provided to those affected, there is also the problem of the logistical difficulty in obtaining the necessary evidence to be submitted to the Superintendent within the stipulated 60 days in order to support a claim for native customary rights. Recall that under the Sarawak Land Code native customary rights are rights lawfully created prior to 1 January 1958 that still subsist as such. Requiring claimants to be able to produce satisfactory evidence dating back to 1958 within the stipulated time frame of 60 days imposes an extremely onerous obligation (Leigh, 2001: 119).

Unsurprisingly, the legality of subsections 5(3) and (4) was challenged in the courts. One of the first legal challenges was *Jalang anak Paran & Anor v Government of the State of Sarawak* [2007] 1 MLJ 412. In *Jalang,* the claimants' native customary rights were extinguished by a direction called the Land (Extinguishment of Native Customary Rights) Pulpwood Mill Site at Ulu Batang (Tatau) (No 3)

Direction 1997, which took away their land for an intended pulpwood factory. The plaintiffs sued the state government in 1999 and argued that the provision in the Sarawak Land Code used to extinguish their rights were unconstitutional. Counsel for the plaintiffs argued that native customary rights were protected by art 5 of the Malaysian Constitution which states that '[n]o person shall be deprived of his life or personal liberty save in accordance with law'.[13] He stressed that these native customary rights were 'more than a right to property and in fact are a right to life which encompasses the right to livelihood and all the facets that are integral part of life itself' ([2007] 1 MLJ 412 at para 8). David Wong J, who decided this matter in the High Court, did not find this argument persuasive. He said the basic principle is that native customary rights may be taken away by laws passed by the Federal Parliament or State Legislature if these laws were clear and unambiguous and that compensation was provided for the extinguishment. Wong J read the relevant provisions of the Sarawak Land Code harmoniously with art 13(1) of the Federal Constitution, which provided that '[n]o person shall be deprived of property save in accordance with the law.' As such, Wong J seemed to have read the requirement of adequate compensation into the Sarawak Land Code even though it was not explicitly stated in that statute. In other words, the learned judge held that any legislation for extinguishment of native customary rights which provides for adequate compensation is safe from being regarded as unconstitutional.

The plaintiffs appealed against the judgment of David Wong J. In the Court of Appeal in *Jalang* [2011] 3 MLJ 13, para 10, Syed Ahmad Helmy JCA described Counsel's argument that native customary rights were a right to life more fully than the High Court. It was argued that native customary rights 'are not just property rights but they are to the natives their life support system, a link to their culture and their spiritual values and have existed since time immemorial; they are a right to life itself.' In other words, Counsel for the plaintiff, Mr. Baru Bian,[14] submitted passionately:

> … if natives are stripped of their N[ative] C[ustomary] R[ights], their human existence will be threatened. When they lose their land, their source of food, medicine and life support system which includes their economic, cultural and social way of life will be taken away. If these things are taken away from any human being, they would eventually, either as individuals or as a community, cease to exist. This is more so for indigenous people such as the plaintiffs whose very survival is intrinsically linked to their lands. ([2011] 3 MLJ 13, para 11)

Despite Counsel's best efforts, the Court of Appeal dismissed the appeal. Syed Ahmad Helmy JCA held that 'native customary rights can be extinguished in accordance with law and with payment of compensation. There is no law, either constitutional or statutory which decrees that it cannot be terminated or extinguished at all.' ([2011] 3 MLJ 13, para 15)

In *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another Appeal* [2011] 6 MLJ 297, the plaintiffs' native customary rights were extinguished by the 'Land Direction (Extinguishment of Native Customary Rights) (Kawasan Kebanjiran Bakun II) (No 26) 1997'. The state had built a dam known as the Bakun Dam which caused the plaintiffs' land to be flooded. The plaintiffs claimed that the extinguishment provisions were unconstitutional and sought a declaration that the relevant provisions in the Sarawak Land Code were void. The Sarawak government retaliated by taking out an Order 14 A rule 1 application to determine a number questions or issues of law that would eventually dispose the whole matter in this case. It was argued that these issues were suitable for determination as preliminary issues without going to full trial. Much of the judgment was therefore concerned with the issue of whether this matter could be disposed of, pursuant to an Order 14A application. The learned judge, Abdul Aziz Abdul Rahim J, said that on the pleadings, this matter was essentially concerned with the constitutionality of certain provisions in the Sarawak Land Code. As such, it was appropriate

[13] An argument also made by Bulan, 2001: 83.

[14] Mr Bian is reported to be now handling over a hundred cases involving native customary rights.

to hear it as an Order 14A application. With respect to the constitutionality argument, Abdul Aziz Abdul Rahim J held:

> It is crystal clear from the reading of the section that a customary rights may be extinguished in the manner stated...provided that compensation or alternative replacement land with the same rights [is made]...I do not know how much clearer the language of a statute must be before it can be said that it is constitutional to take away such customary rights. ([2011] 6 MLJ 297 at para 28)

The judge held that the relevant provisions of the Sarawak Land Code were clear enough to permit the extinguishment of native customary rights. Abdul Aziz Abdul Rahim J read 'compensation' in the relevant section in the Sarawak Land Code to mean 'adequate compensation'. He decided 'the deprivation of the property is not unconstitutional, so long as there is adequate compensation for his loss of property which would take into account, amongst other things, the loss of use of the property from which he may be able to derive his livelihood' ([2011] 6 MLJ 297 at para 34). A subsequent appeal by the plaintiffs was dismissed by the Court of Appeal in a judgment dealing mainly with the procedural jurisprudence of Order 14A ([2011] 6 CLJ 387).

Both *Jalang* and *Bato Bagi* were consolidated before the Federal Court (see [2011] 6 MLJ 297) (Subramaniam, 2011: 28). In the Appeal before the Federal Court, leave was granted to appeal on the following question:

> Whether s 5(3) and (4) of the Sarawak Land Code relating to the extinguishment of native customary rights are ultra vires art 5 of the Federal Constitution read with art 13 of the Federal Constitution …

The claimants in the *Bato Bagi* claimed, *inter alia*, they were not aware of the gazette notification and the time requirement for them to submit their claims. Furthermore, the claimants alleged that the compensation paid was grossly inadequate because it did not take into account the significance of their rights over the land.

Although the Federal Court dismissed the appeal, the judges did not speak with one voice. Chief Justice Zaki Azmi aligned himself with Richard Malanjum, the Chief Judge of Sabah and Sarawak. Zaki Azmi CJ took the view that the government was empowered to extinguish the rights of the plaintiffs if this was done for public purposes and development. If the plaintiffs were unhappy about the state government's decision to extinguish their rights, they should have applied for the matter to be heard in arbitration pursuant to the Sarawak Land Code. Any subsequent dissatisfaction with the arbitrator's decision could then be redressed by an application for judicial review. The Chief Justice also said that while it would be good practice to conduct a pre-acquisition hearing, such a hearing was not a legal right. Hence, the provisions of the Sarawak Land Code could not be avoided on that account.

Richard Malanjum CJ (Sabah and Sarawak) who gave the lead judgment focused much of his reasoning on the procedural aspects of Order 14 A. He held that the there was no basis to say the High Court was wrong in proceeding with the Order 14A hearing. Malanjum CJSS said that since the main focus of the submissions had been about the procedural aspect of Order 14 A, the Federal Court had not been assisted by Counsel regarding the arguments relevant to the issue of the constitutionality of the Sarawak Land Code. Malanjum CJSS said that 'such an important issue is best left to another occasion when it is fully ventilated instead of being made just a side issue.' Malanjum CJSS also made the following interesting points:

> (i) the courts below should have been put on guard as to adverse effect of the impugned sections to the livelihood and very existence of the natives. By merely looking at the impugned sections, it gives one the impression that it is too vague, too broad, unfettered and untrammelled in that they may be open abuse. That surely cannot be within the spirit of the fundamental rights embedded in the F[ederal] C[onstitution], in particular arts 5, 8 and 13([2011] 6 MLJ 297, 323 – 324);

(ii) [t]here is hardly any guideline or basis upon which extinguishment of native customary rights may be done...The millions of natives whose livelihood and their future generations depend entirely on the land can be made landless by a stroke of the pen in any event. They may end up as squatters in their own lands where they and their ancestors have been living for generations, preexisting (sic) even the impugned sections ([2011] 6 MLJ 297, 324);

(iii) [t]he question is whether the impugned sections can be said to be 'clear and unambiguous' considering their far-reaching effects upon being exercised on the lives of the natives such as being made landless and deprived of their sources of livelihood. ([2011] 6 MLJ 297, 325);

(iv) [t]here is no principle in law which states that extinguishment is on equal footing as acquisition. This, in my view gives rise to the issue of whether legislation intended at all that native customary rights could be extinguished in the first place! Perhaps this point requires thorough deliberations when the need arises ([2011] 6 MLJ 297, 326); and

(v) [i]n considering the quantum of compensation, the relevant authority should not attempt to evaluate native customary rights purely from monetary aspect. All relevant factors must be taken into account such as the natives belong to the land and are part and parcel of it instead of being the owners, their total dependency on the land and its surroundings, and how their daily livelihood depends on the land...the amount of compensation must be reflective of the long term effect which the extinguishment is going to inflict upon the natives ([2011] 6 MLJ 297, 326).

By comparison to Richard Malanjum CJSS, Raus Sharif FCJ was less tentative. He held that native customary rights over land may be extinguished with adequate compensation. He said that the extinguishment provisions were not unconstitutional. Prior consultation before extinguishment might be the right thing to do but it was not a legal requirement. A failure to hold consultation therefore cannot make the act of extinguishment unconstitutional.

It is hard to disagree with the critics of the *Bato Bagi* decision who have characterised this judgment as an instance where the Federal Court abdicated its responsibility to interpret the Constitution (Yatim, 2011). With the exception of Raus Sharif FCJ, the other two judges (Chief Justice Zaki Azmi and Chief Judge Richard Malanjum (Sabah and Sarawak)) refused to state their views definitively on the issue of extinguishment of native customary rights and the constitutional challenge. While Richard Malanjum CJSS did make some tentative statements that might form the basis of possible future constitutional challenges, his observations are, at most, *obiter dicta*. One would have thought that it was incumbent on the Federal Court to state their views with clarity considering the public interest in this issue, and the fact that there are hundreds of cases pending in Sarawak. Furthermore, there is a glaring internal inconsistency with *Bato Bagi* which makes this decision indefensible. If the validity of the relevant provisions in the Sarawak Land Code vis-a-vis the Malaysian Constitution is uncertain, then on what basis are the lower courts to dispose the matter pursuant to Order 14A? The Federal Court appeared to have postponed these difficult issues for a future appellate court. *Bato Bagi* therefore essentially leaves native title jurisprudence in Malaysia in a state of limbo.

II. The State as a Fiduciary – A Duty to Consult before Invoking the Extinguishment Provisions in the Sarawak Land Code?

The review of the case law above demonstrates that the constitutional challenges to subsections 5(3) and (4) of the Sarawak Land Code have been largely unsuccessful, especially at the appellate court level. In this section, the author explores another possible doctrinal pathway distinct from the property paradigm, that is, the use of the fiduciary doctrine to re-frame the state's duties in relation to the issue of extinguishment of native customary rights. Drawing from Canadian jurisprudence,[15] it will be

[15] For an excellent summary see Christie, 2006: 139.

argued that if the state is conceived of as a fiduciary to its native peoples, this would result in the state being under a duty to consult native peoples before extinguishing native customary rights. In other words, the argument that is made here is that the fiduciary doctrine tempers the state's power in relation to the invocation of subsections 5(3) and (4) of the Sarawak Land Code. A failure to comply with such a duty to consult would enable those affected by such a breach of fiduciary duty to appeal to the flexible remedies available in equity.

There are several possible objections to the thesis advanced here. First, it might be argued that a private law doctrine founded in equity may not be used to avoid a statute. Second, it could also be said that the thesis advanced in this paper, which is premised on fiduciary law, stretches the concept of the fiduciary to breaking point. And finally, it may be argued that the idea of the state being regarded as a fiduciary must be derived from public, and not private, law. With regard to the first argument, it must be made clear that I am not claiming that the fiduciary doctrine may be used to avoid the statutory extinguishment procedure in the Sarawak Land Code. Rather, the argument here is much more modest – that the state's fiduciary duty is regarded as a co-extensive duty that must be discharged in carrying out the process of extinguishment of native customary rights.[16] Consistent with case law in other parts of the Commonwealth, this fiduciary duty generates a duty of consultation by the state with its native peoples before the extinguishment process is carried out. In other words, the power of the state is tempered by its fiduciary duty to its native peoples and the provisions of the Sarawak Land Code are not in any way challenged, eliminated, or undercut by the equitable doctrine. If the state goes ahead with the extinguishment process in breach of its fiduciary duty and the process is completed, the extinguishment of the native customary rights is valid as per the statutory regime. However, my contention is that if the extinguishment is carried out in breach of the state's fiduciary duty to its native peoples, this may attract certain remedial consequences in equity.

As to the second objection, my response is that the jurisprudence in this area specifically recognises the state's fiduciary duty in this context to be *sui generis*.[17] Thus, any fears that the use of fiduciary doctrine in this area will distort the doctrine in other areas of private law is misplaced. Finally due to space constraints, I do not propose to enter into the difficult debate regarding the public-private law distinction. It would be sufficient to say for the purposes of the thesis advanced here that if a fiduciary duty exists on the state's part, the courts should be empowered to grant relief associated with a breach of fiduciary duty regardless of whether such a duty arises from public or private law. Also, as will be demonstrated below, the Malaysian courts have consistently rejected the notion that a duty to consult arises from the Malaysian Constitution. Thus, in order for the argument that there is a duty to consult to succeed, a new doctrinal pathway must be adopted.

The first hurdle in establishing the state's duty to consult is to identify the precise source of such a duty (Isaac and Knox, 2003: 49). It is extremely unlikely that the source of this duty might be found in the Malaysian Constitution in relation to a right to property as interpreted by the Malaysian courts. In *Bato Bagi*, the Federal Court specifically rejected the argument that a pre-acquisition hearing is a legal right under the Malaysian Constitution. Hence, a more promising doctrinal foundation for the duty to consult arises from the government's *sui generis* fiduciary relationship with native peoples.[18] In Canada, the Crown's fiduciary relationship has been long been accepted. As the Supreme Court of Canada said in *R v Sparrow* (1990), 70 DLR (4th) 385 (S.C.C.) at 408:

> … the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

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[16] This argument may be analogised with directors' duties in company law. Although the company director is under certain statutory duties, he or she is also under an equitable fiduciary duty to the company.

[17] See, for example, *R v Guerin* [1984] 2 SCR 335.

[18] *R v Guerin* [1984] 2 SCR 335. See also Tan, 1995: 440.

While some commentators (Tan, 1995: 440; Bryant, 1993: 19) have worried about the doctrinal 'fit' between orthodox fiduciary doctrine and the state-aboriginal relationship, the proposition that the state is a fiduciary to her native peoples has taken root in many jurisdictions, including Canada and Australia. Under Malaysian law, it is similarly accepted that the state government is a fiduciary vis-a-vis her native peoples. For example, the Malaysian Court of Appeal in the well-known decision of *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289 endorsed the trial judge's pronouncement that the Selangor State government was a fiduciary to aborigines ([2005] 6 MLJ 289, paras 50 – 51).[19] In a passage approved by the Court of Appeal, the trial judge said that the government had 'a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs' ([2005] 6 MLJ 289, 314). Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal in *Sagong bin Tasi*, held that the Selangor State government should have gazetted a certain land area as Aboriginal land. The failure to gazette amounted to a breach of fiduciary duty on the state government's part and 'it hardly now lies in their mouths to say that no compensation is payable because of non-gazettation which is their fault in the first place' ([2005] 6 MLJ 289, 326). Is such a fiduciary duty also present in the context of the Sarawak State government and her native peoples, bearing in mind that the Aboriginal Peoples Act 1954 applies only in Peninsular Malaysia? Based on current Malaysian case law, the answer to this question is in the affirmative. In *Bato Bagi*, Richard Malanjum Chief Judge (Sabah and Sarawak) accepted the proposition set out in *Sagong bin Tasi* that the government stands in a fiduciary position to protect the interests of the natives ([2011] 6 MLJ 297, 326). Furthermore, Malanjum CJSS pointed out that the fiduciary doctrine has been adopted by the Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 SCR 1010. However, in *Bato Bagi* the learned judge said that this was not one of the main planks of the submission before the Federal Court and he declined to discuss the issue any further. Under Malaysian law it is thus relatively uncontroversial that the state government is a fiduciary in relation to her native peoples.

What remains untested in the Malaysian jurisprudence is whether the fiduciary doctrine may, without reference to the Constitution or any statute like the Aboriginal Peoples Act 1954, generate positive duties on the part of the state government? In *Sagong bin Tasi*, Gopal Sri Ram JCA suggested that a failure to gazette certain area of the land as aboriginal land pursuant to the Aboriginal Peoples Act 1954 amounted to a breach of fiduciary duty. A possible interpretation of *Sagong bin Tasi* is that this is an illustration of how the fiduciary doctrine appears capable of generating positive duties for the state government, in this case, an obligation to gazette certain land as Aboriginal land. The interesting question is this: can the fiduciary doctrine generate a duty of consultation before the state invokes the power of extinguishment? The thesis advanced in this paper is that this is certainly possible, given developments in Canada. As Lamer CJ said in *Delgamuukw v British Columbia* [1997] 3 SCR 1010:

> Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. *There is always a duty of consultation.* Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. (emphasis added)

[19] The fiduciary principle was also recently applied in *Mohamad Nohing & Ors v Pejabat Tanah Dan Galian Negeri Pahang & Ors* [2013] 1 LNS 174.

This passage clearly suggests that the state's fiduciary relationship with aboriginal peoples may generate an obligation to consult in decisions taken with respect to their land. Although *Delgamuukw* was not a decision involving an extinguishment of aboriginal land rights, the same principle ought to be applicable in cases of extinguishment. Extinguishment of native customary rights over land represents the highest form of interference with the way of life of native peoples and a strong case may be made that there ought to be a duty of consultation on the part of the state government. The source of this duty of consultation arises from the accepted Malaysian position that the state is a fiduciary in relation to her native peoples and must therefore act accordingly. In short, the argument advanced here is that the duty of consultation can be framed as arising from the state's *sui generis* fiduciary duty to its native peoples, rather than a right to a pre-acquisition hearing pursuant to the right to property enshrined in the Malaysian Constitution.

At this juncture, a sceptic might ask: why does it matter whether a duty of consultation is framed as arising from the fiduciary doctrine? The response to such scepticism is that the constitutional route was rejected by the Malaysian Federal Court in *Bato Bagi*. In other words, an argument framed as a right to a pre-acquisition hearing based on a right to property is doomed to fail in the Malaysian courts. In contrast, a duty of consultation might have a better chance of success, if characterised as arising from the state's fiduciary duty, rather than the right to property in the Malaysian Constitution. Looking at the previous constitutional challenges to the Sarawak Land Code, the courts seem to adopt the doctrine of deference in this regard, and are quite reluctant to strike down relevant provisions as being unconstitutional. It may be that if the claim is couched in fiduciary law terms, the courts might be less reluctant to accept such an argument since this does not entail declaring portions of the Sarawak Land Code to be unconstitutional.

An objection that might be marshalled against the thesis advanced in this paper is that, since subsections 5(3) and (4) of the Sarawak Land Code explicitly prescribe a procedure for the extinguishment of native customary rights without any reference to a duty to consult, such a duty is inconsistent with the provisions of the statute. In other words, the recognition of a duty of consultation undermines the extinguishment procedure set out in the Sarawak Land Code. On reflection, this argument is not fatal to the thesis advanced. The response is that a duty of consultation might not necessarily be inconsistent with subsections 5(3) and (4) of the Sarawak Land Code. In other words, a duty of consultation does not undercut the extinguishment provision in the Sarawak Land Code. Rather, the fiduciary duty should be seen as a co-extensive duty that exists as part of the state government's obligations to her native peoples.[20] The position taken here is that the recognition of the duty to consult does not have the effect of rendering the provisions of subsections 5(3) and (4) void. Gordon Christie points out that the language of the Canadian jurisprudence on a duty to consult suggests that the power of the state is 'tempered', and not challenged, eliminated, or undercut' by such a duty (Christie, 2006: 139, 145) Similarly, it is argued that while it is not denied that the state government has the power to extinguish native customary rights through clear and unambiguous legislation and payment of adequate compensation, the procedure of extinguishment is 'tempered' by the equitable fiduciary doctrine that requires the state government to engage and consult native peoples before invoking the statutory extinguishment procedure. Furthermore, subsections 5(3) and (4) of the Sarawak Land Code do not explicitly exclude the state government's fiduciary duties. Under orthodox fiduciary doctrine, a fiduciary may exclude his or her fiduciary duties. If the state government wanted to exclude its fiduciary duty, it could have done so explicitly. Absent such an exclusion of duty, the state government's fiduciary duty persists and must be taken into account when it exercises the power of extinguishment. Therefore, when invoking subsections 5(3) and (4) to extinguish native customary rights over land, the state government must exercise the power consistently with the fiduciary obligation that encompasses a duty to consult.

[20] The argument is that public and private law in this regard are mutually constitutive: see Moran, 2009: 1.

Looking at the procedure for extinguishment set out in subsections 5(3) and (4) of the Sarawak Land Code, using the fiduciary duty to temper state power results in a fairer and more balanced process. Recall that two powerful criticisms marshalled against the extinguishment procedure are, first, the possible lack of notice given to native peoples who might have a claim over the gazetted land; and, second, insufficient time given to native peoples to substantiate their claim to the Superintendent before the claim is referred to arbitration. If a duty to consult is a prerequisite before subsections 5(3) and (4) of the Code can be invoked, then the state must embark on a consultation process with native peoples who might have a claim over the land.[21] It is only after such a consultation process is duly completed that it may invoke the power pursuant to subsections 5(3) and (4) of the Code to extinguish their rights. Therefore, the duty of consultation would effectively fulfil two important functions. First, it would give native peoples who might be affected by the state government's plan notice of the impending extinguishment process. Second, it would also give them extra time to gather evidence to substantiate their claim of native customary rights over the affected land.

If the argument that a duty of consultation arises from the state's fiduciary duty is accepted, then the next tricky question is this: what are the implications of a breach of such a duty? Dr David Tan perceptively observes:

> Breach of fiduciary duty brings into play a scintillating spectrum of remedies. They include: injunction, prohibitory and mandatory, rescission of transactions between beneficiary and fiduciary; declaration and enforcement of constructive trust in respect of assets acquired in breach of duty; account of profits wrongly made and equitable compensation for loss inflicted by breach of duty.

Remedies in fiduciary law jurisprudence are very context-specific. Thus, an advantage with using the fiduciary doctrine is that the courts may tailor an appropriate remedy depending on the facts of the case. For example, if the state government proceeds to publish an intended extinguishment notice in the government gazette and newspaper without consulting affected native peoples, they could seek the necessary declaration against the state. The declaration would halt the extinguishment process and compel the state to fulfil the obligation to consult with native peoples. What happens if a relevant declaration was not sought and the extinguishment procedure has been completed? Again, the appropriate remedy would depend on the facts of the case. If, for example, the property was alienated to a third party for a monetary consideration, the affected native peoples might seek either a constructive trust or an account of profits over the gains made by the state. However, if the state did not alienate the land to a third party for consideration but extinguished native customary rights over land by building an infrastructure project such as a dam, affected native peoples might appeal to the remedy of equitable compensation. The remedy of equitable compensation might be quantified with reference to the jurisprudence on 'the loss of a chance' in making a claim.

Conclusion

This paper has suggested using an alternative challenge based on the fiduciary doctrine as a new doctrinal method for analysing the extinguishment of native customary rights in Sarawak. This fiduciary doctrine does not invalidate the extinguishment provision in the Sarawak Land Code. Rather, it is a co-extensive duty on the state's part that is imposed in equity. The argument advanced here is that, drawing from Canadian jurisprudence, the state's fiduciary relationship with native peoples 'tempers' the state's power in her dealings with native peoples. Such a fiduciary duty is capable of generating a duty of consultation. As such, the process of consultation is crucial before the extinguishment provision in the Sarawak Land Code is exercised by the state. A failure on the state's part to consult would result in those native peoples who are affected being able to appeal to the flexible remedies available in equity.

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[21] See *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 2004 SCC 73.

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