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Judicial Decisions on Indigenous Peoples' Land Rights: An Appraisal of Its Effect

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ABSTRACT

This paper highlights the impact of selected judicial decisions on the claims to land rights by the indigenous peoples in Malaysia. A judicial impact study is important because court decisions can alter the status of law that controls social and political behaviour and/or elicit responses from other political actors, thus influencing policy and political outcomes. The Malaysian Courts have played a significant role in developing law that acknowledges indigenous customary rights in Malaysia. For example, the case of Nor Anak Nyawai and Others v Borneo Pulp Plantation Sdn Bhd [2001] 6 MLJ 241 *not only clarified the legal position of native customary rights but also had a profound impact in the Malaysian legal system. The judgment had aided in the reoccupation of the Iban's territories. Sagong bin Tasi & Ors v. Kerajaan Negeri Selangor [2002]* 2 CLJ *591 recognised that indigenous customary land rights were of equal legal status to full ownership or title to the land in Peninsular Malaysia. By applying doctrinal legal research, the three cases selected are, first, the landmark case of Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and Other Appeals [2017] 2 MLRA 91 which led to the amendment of the Sarawak Land Code 1958. The second and third cases are claims by the Orang Asli in Pos Dakoh and Pos Belatim against the government of Kelantan and in which consent judgments were entered. This study would be significant in emphasizing the impact of judicial decisions and the need for courts to ensure that the decision is carried out as well. Regardless of the courts' findings, the government's implementation of such decisions is still insufficient. Nonetheless, certain indigenous groups have re-occupied their territory without the state's consent. As a result, the court decisions have provided people with a significant motivation to physically reclaim their land.*

Keywords: Judicial impact; legislation; policy; indigenous peoples; customary land rights

INTRODUCTION

Despite the fact that judicial decisions have the capacity to become law, to have a significant impact on a large number of people, and even to fundamentally undermine a system of governance, there are not many studies on the impact of the courts. However, researchers working in several other cultures have often discussed the effect of judicial decisions, although they have not necessarily used those words. For example, proponents of inter-branch study of the jurisdiction of courts in larger ongoing policy processes have reported multiple instances in which the activities of lawyers and judges have changed policy outcomes.[1] In short, the definition of judicial impact covers some ways in which courts influence policy, and the field of judicial impact studies will continue to benefit from a critical diversity of investigative approaches, analytical topics, and legal concepts.

As judicial power has become a central player in the construction and implementation of policies decisions, studies on judicial influence have become significant in other countries. For example, Maro Campora has looked at Argentine Supreme Court's recent decisions involving public policy including social security, the environment, and human rights regulation.[2] While political forces oversee enforcing social rights legislation, in countries of the Global South, the role of constitutional courts has become crucial.[3] The court has a duty to guarantee that the decision is carried out as well as to take justiciability into account. According to the author, Maro Campora, which benefited from talks at the 2017 Law and Development Conference in Buenos Aires, Argentina, courts would have to "pick" their battles to enforce social rights resulting from effective litigation, as some cases will need a more nuanced systemic solution than others.[4] The political forces' ability to enforce or not would be determined by a variety of economic and administrative factors. The execution would also be influenced by the societal and political context wherein legal compliance is sought after.

In the US, a number of scholars have researched judicial impact. Patric[5] and Becker[6] who are among the earliest scholars that study the judicial impact, said that such a study is important because courts'

decisions can change the state of law that regulates social and political actions and/or elicit responses from other political actors, influencing policy and political outcomes.

The court's ability to influence political and social change has piqued academic interest. Some scholars have followed Patric and Becker in framing their studies explicitly as "judicial impact" investigations, such as Miller, who argued that judicial impact studies could "provide a flow of informed commentary that will serve the purpose of constructive criticism of the Court and its work, and thus assist in keeping the Justices within proper bounds".[7] According to Miller, the importance of the impact study is to help judges to make better decisions.[8] Nevertheless, this concept has still a long way to go as some parts of the field have moved forward along the lines of positivist social science, with little regard for the initial theoretical drive that brought people like Becker and Miller to the field in the first place.[9] Miller and Becker's idea of impact encompasses a number of ways in which courts influence politics, and the discipline of judicial impact studies will continue to benefit from a vital diversity of research methodologies, issues of analysis, and conceptions of law.[10] In conclusion, Becker emphasized that judicial effect is significant because the Court's decisions can alter the status of law that controls social and political behaviour and/or elicit responses from other political actors, thus influencing policy and political outcomes.[11]

This article discusses the immediate effects of three selected judicial rulings on indigenous peoples' claims to land rights in Malaysia. The first case is the famous Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and Other Appeals[12] (hereinafter referred to TR Sandah's case), which led to the amendment of the Sarawak Land Code 1958 Chapter 81 (1958 Edition) [Cap 81]. The second and third cases are claims by the Orang Asli in Pos Dakoh[13] and Pos Belatim[14] against the state government of Kelantan and in which consent judgments were entered in 2018.

The methodology of research used is qualitative approach combining both the doctrinal legal research and interview. Doctrinal legal research evaluates the current statutory provisions and judicial decisions relevant to the subject matter under study. This is a text-based analysis of legal texts, case law, and other relevant published scholarly materials. Interviews were employed to explore the impact of the selected judicial decisions from the perspectives of the indigenous peoples, judges, and representative from the government agencies. The interviews were conducted by the first author between February 2022 and July 2022. The participants were four representatives of the indigenous peoples, former judge who have decided in the customary land rights cases, and representatives from the government agencies i.e., Kelantan State Legal Advisor and the Office of the Director of Land and Mines State of Kelantan.

IMPACT AND COMMON LAW RECOGNITION

Impact analysis is "jurisprudence of consequences."[15] In addition to the explicit requirements, court judgments are based on the greater repercussions and effects they want to produce. Regarding opposing values, the judicial decision must consider any potential social and behavioural significances of the different action plan.[16] The definition of impact covers some ways in which courts influence policy and the field of judicial impact studies will continue to benefit from a critical diversity of investigative approaches, analytical topics, and legal concepts.

The Malaysian courts have issued rulings upholding native title or customary land rights, applying the same standards used by courts in other common law nations. The protection of native customary land rights is derived from the recognition of the common law giving effect to the traditional law and customs of the indigenous communities. The common law is derived from the judicial decisions by the courts of appropriate rank in the hierarchy on the same subject matter which become an established principle. This is the tradition of the court in Malaysia as part of the common law system originated from the English law tradition.[17]

For the Orang Asli, or known as the aboriginal peoples, i.e., the indigenous peoples in the Peninsular Malaysia, their affairs are partly governed by the Aboriginal Peoples Act of 1954 (the APA). The APA establishes a framework that includes both the federal and state levels of government. The objective of the Act is to protect and preserve the rights and interests of the aborigines, including their autonomy, identity, and land, from economic and political competition. However, the laws regarding the recognition of customary land rights in Malaysia, particularly the APA, were inadequate. The APA was enacted in the 1950s, and despite subsequent amendments, it was extremely administrative. It does not address specific questions regarding the

orang asli's rights and how they should be protected and regulated. As for Sabah and Sarawak, the matter pertaining to the natives' land are governed by Sabah Land Ordinance (Cap. 68) and Sarawak Land Code 1958, respectively. Unlike the position of land of the orang asli under the APA, the Sabah and Sarawak's legislations acts recognize native customary land of the natives.

In deciding the cases involving native customary land rights, the courts had also referred to the positions of common law in Australia and Canada. The common law position is important because native title principles recognized in Australia and Canada have been influential in shaping the development and establishment of land rights recognition by the common law in Malaysia.[18] The courts in Adong bin Kuwau v Kerajaan Negeri Johor [1998] 2 CLJ 665, Sagong Tasi & Ors Kerajaan Negeri Selangor Tasi [2002] 2 MLJ 591 (hereinafter referred to Sagong Tasi case), Nor Anak Nyawai and Others V Borneo Pulp Plantation Sdn Bhd and Others [2001] 2 CLJ 769 (hereinafter referred to Nor Anak Nyawai's case), and Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 have affirmed the claims by the indigenous peoples to the recognition of the customary land by the common law. The courts in Malaysia were influenced in these decisions by the Australian Mabo (No. 2) and Canadian Calder cases as authorities for the presence of a native title in Malaysia under the doctrine of common law, as common law is the major source of Malaysian law. Even now, it is the origin of and one of the most significant contributors to Malaysian jurisprudence.

In Sarawak, Nor Anak Nyawai's[19] decision not only clarified the lawful position of customary land rights of the natives, but also had a profound effect on developing the jurisprudence. The judgment had also aided the reoccupation of the Iban's territories. Apart from that, in the Peninsular Malaysia, the Sagong Tasi[20] case established that customary land rights had the similar legal standing as having complete title to the land.

The preceding instances of the cases demonstrated that the common law recognises the pre-existence of such rights under native laws or customs, which was confirmed by the Federal Court in Madeli Salleh v. Superintendent of Lands & Surveys & Anor in 2007.[21] Acceptance of the notion of indigenous customary law before statute law has further legal implications for other parts of indigenous customary land rights. The recognition that the lawfulness of such rights does not depend on any executive, parliamentary, or judicial pronouncement is an essential legal implication of the pre-existence premise. As a result, to assess the legality of indigenous customary land rights claims, one must look to the customary laws of the affected community rather than statutory laws. The present legislation will only be relevant for deciding whether any notice issued under its authority in plain and unambiguous language has successfully eradicated such rights at any time.[22]

THE GOVERNMENT'S RESPONSE FROM THE JUDICIAL DECISIONS

Courts are a component of the government. They make public policy and are an important part of the legislative and regulatory process, which is central to political action.[23] As argued by Shapiro, if legislatures are political and executives are political, then courts must be political as well, because all the three components of government are tightly entwined in the legislative process and perform the tasks of the other two at times.[24] The courts were said to be political because of the consequence that flow from it. Nevertheless, the effectiveness of the courts depends on the public belief that courts are impartial agencies when conflict arose before them. Moreover, judges have the authority to rule that certain actions of public institutions are unlawful and to rule against the government in a specific instance. This is, thereby, a major check on the State's authority over individuals.[25]

Change in government policies can also result from a change in political representation. In 2018, Pakatan Harapan won the general election with its manifesto,[26] among others, sought to execute various human rights reforms, including the recognition and protection of the dignity and rights of Malaysia's indigenous peoples, as well as to "work to implement the proposals of the National Inquiry into the Land Rights of Indigenous Peoples report by SUHAKAM."[27] Based on this report, SUHAKAM had provided input for the study of the expert mechanism on the rights of indigenous peoples to promote and protect of the rights of indigenous peoples with respect to their cultural heritage.[28]

The manifesto also vowed to recognise the indigenous peoples' lands in Peninsular Malaysia, Sabah, and Sarawak, as well as to "create a redress process to guarantee the impacted party is suitably

paid" in cases where land was wrongfully acquired. This should include returning the original land to its owners, or giving alternative property of equivalent quality if this is not practicable. Nonetheless, the said manifesto has clearly been put to rest with the change of government under the administration of Tan Sri Muhyiddin Yassin (2021-2021) and Dato' Sri Ismail Sabri (2021-2021). With the later election and government shift to a coalition government, would there be newly implemented laws or policies that would be incorporated for better acknowledgment and protection of the indigenous people's customary lands?

According to the Human Rights Report in 2020, although the judiciary has declared that the Orang Asli have constitutional rights to their traditional lands, non-government organizations (NGOs) alleged that the government has neglected to respect these judicial rulings.[29] The government may confiscate this land provided it compensates the owner. There have been clashes between indigenous groups and timber companies for land, and indigenous people were exposed to exploitation mainly due to the uncertainty in land tenure. Two Orang Asli groups in Kelantan and Perak states erected blockades at the gates to their villages to demonstrate against the logging activity in the vicinity. Villagers stated in the report they made to the police that their community had been "pawned away" by the Kelantan administration. In September, the Federal Court ordered the state of Johor to pay RM 5.2 million ($1.2 million) in compensation to Orang Laut Seletar village residents, who were required to migrate in 1993 to make way for development. Additionally, the court ruled that a distinct land area occupied by the locals be registered as an Orang Asli township. The settlement was dubbed a "major triumph" for the Orang Asli by lawyer Tan Poh Lai, who stated, "This is recognition that the area they were forced to leave was genuinely indigenous customary land."[30] This outcome serves as a source of encouragement for all Malaysian Orang Asli.

The state government of Sarawak tried to restrict the means by which indigenous peoples may acquire local customary rights in response to the High Court decision in Nor Anak Nyawai. The Sarawak Land Surveyors Bill 2001, enacted in response to the Nor Anak Nyawai judgment, prohibits the usage of community maps in court. A licensed surveyor's map is required to illustrate the delimitation of the borders of any land, including state land and land owned under native customary rights. Such modifications, according to the representative from Sarawak Dayak Iban Association, an indigenous rights campaigner in Sarawak, are a severe hurdle to future trials.[31] He considered the changes that occurred as a result of the Nor Nyawai judgement as consistently bad. In terms of the effects of the policies, the study painted a more positive image. The litigation, according to Elizabeth Wong, chair of the Selangor Orang Asli Land Task Force and member of the state executive committee for tourism, environment, green technology, and consumer affairs, was crucial in raising long-term awareness of Orang Asli issues. It also had a direct impact on official policy formation and decision making in the state of Selangor. In addition, she claimed that the Sagong Tasi case, particularly when it was in the final stages of appeal in Federal Court, impacted how Orang Asli were treated in the state of Selangor, calling it "momentous in the sense that from that then on, we genuinely took choices based on that case."[32]

In Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor[33], the Jakun community is obliged to evacuate a part of land that is a fragment of the Endau-Rompin National Park in Johor, pursuant to general notice. The Jakun community petitioned the Court for a judicial review, arguing that they do indeed have customary land rights over a specific area of land within the National Park, their village, and the neighbouring areas, where they have maintained their respective traditional connections to the lands through their customs and practices. Based on the evidence submitted by the Jakun people, the High Court concluded that they had established their common law customary land rights, both in settlement and 'hunting and foraging' territories.

The state government appealed the ruling in civil appeal No. J-01 (A) -397-12 / 2015, however after several sessions of talks, the Orang Asli settled to a court-sanctioned consent arrangement between the government and the Orang Asli on the subsequent conditions: that the Endau Rompin National Park would continue as a national park; the forest reserve would continue as a forest reserve, but the Orang Asli would leave their usual areas intact with the promise that the state would never log into a certain vicinity and furthermore that they have the right to use the forest according to the traditional Jakun practices and activities in accordance with the law.

The courts do recognize indigenous peoples' rights to land, while the verdicts may or may not be

satisfying to the communities. However, the scope and applicability of such recognition are determined by both state legislatures and executives. The government has a history of putting governmental and commercial interests ahead of indigenous populations' rights. So, can the court be transformed into a more forceful advocate for human rights? A stronger voice with the potential to influence laws and policies?

DIRECTOR OF FOREST, SARAWAK V. TR SANDAH AK TABAU

The landmark case of the Federal Court, Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and other appeals [2017] 3 CLJ 1 ("TR Sandah") has a major consequence on all present and forthcoming native cases in Malaysia. The Federal Court ruled that the native customary rights (NCR) of the indigenous peoples of Sarawak over land founded upon the concept of continuous occupation does not extend to areas where the natives traditionally access hunting, fishing, and collecting of plants and herbs to search for their essential needs. The court held that "the rights of the natives are confined to the areas where they settled and not where they foraged for food".[34]

The Federal Court judgment in *TR Sandah* is largely concerned with indigenous groups' rights to their common forest reserves, or *pulau galau*, as well as the whole of their provincial rights, or *pemakai menoa*. Despite the existence of precedents, the Federal Courts held in 2016 that the *pulau galau* and *pemakai menoa*, in contrast to the cultivated areas, i.e., temuda, whose existence the state frequently concedes, are customs devoid of legal force under Article 160(2) of the Federal Constitution. *TR Sandah* judgment has restricted the validity of native customary rights to settled, cleared, and cultivated areas (*temuda lands*). It was determined that the written laws of Sarawak did not provide the larger traditional territory (*pemakai menoa*) and communal forest (*pulau galau*) with the requisite "force of law" for the natives to establish a customary claim to them.

Nevertheless, Justice Zainun, in her dissenting ruling, said, "In general, for a custom to be regarded as conferring legally enforceable rights, such customs must be immemorial, certain, reasonable, and acceptable by the locality". She further viewed; the definition of "law" pursuant to Article 160(2) makes customary law a necessary component of the system of justice.[35] Emanating from the well-known Australian case of Mabo & Others v. The State of Queensland (No 2) (1992) 175 CLR 1 ("Mabo (No 2)") and the English case of Tyson v. Smith [1838] 112 ER 1265, Justice Zainun proceeded on to decide that: "Custom is a source of unwritten law…". [36] In this respect, the existence of native customary rights necessitates a thorough examination of each community's customs and practices. It is self-evident that customary rights do not derive from the statute. Rather, the customary rights are acknowledged as a repository for unwritten laws. In other words, it is highlighted that customary law is a fundamental aspect of the Malaysian legal system recognized by the constitution of Malaysia, which regulates law as, "customs and usages having the force of law".[37] Custom and customary law are a component of an embodiment of the unwritten law which is a historic common law norm or practice that has become an integral part of a community's accepted and anticipated behaviour. Thereby, native customary land rights are unique i.e., sui generis not comparable to the rights provided by statutes.

In an effort to appease the anger of the natives over the decision in 2016 of the Federal Court in TR Sandah, the Sarawak State Government revised and amended the Sarawak Land Code in July 2018 by way of the Land Code (Amendment) 2018 to create Native Territorial Domain as a new category of land to be utilized and held by a community under a communal grant. The amendment was implemented to lessen the effect of the TR Sandah judgment by permitting perpetual title issuance for communal native customary properties classified as *pemakai menoa* and *pulau galau*.[38]

Yet, the amendment has been criticized for being restrictive and "short-changing" the natives because it establishes a legal limit of 1,000 hectares per title. In the past, courts have allowed communal customary claims in excess of 10,000 hectares. This is not an ideal situation. In addition, there are fears that the legislative amendments would only allow indigenous peoples and communities the ability to use the land, but not ownership. The locals of Sarawak continue to dispute this revision and demand the incorporation of the notions of pemakai menoa and pulau galau into the Land Code.[39]

The Sarawak Land Code was revised to include section 6A as below:-

Native territorial domain

6A.—(1) Any native community may, within a native territorial domain, claim usufructuary rights exercised and enjoyed by members of that community.

(2) Any claim under subsection (1) shall be made to the Superintendent in such form as may be provided by the Director with all evidence in support of such claim: Provided that—

(a) any area claimed as native territorial domain shall not exceed five hundred hectares; or

(b) the Minister may, with the approval of the Majlis Mesyuarat Kerajaan Negeri in accordance with the Rules made herein, allow a claim of up to one thousand hectares.

(3) If the Director approves the claim, the Superintendent shall issue a native communal title, describing the area as a native territorial domain, which shall be used exclusively by the native community for agricultural purpose or such other purposes as may be approved by the Majlis Mesyuarat Kerajaan Negeri and subject to any other terms and conditions that the Director may impose: Provided that the native communal title shall—

(a) be issued in the name of a person or body of persons who shall hold the native territorial domain in trust for the native community named in the native communal title in accordance with rules made hereunder;

(b) be in perpetuity, free of any premium, rent or other charges; and

(c) not be assigned or transferred to any person who is not a member of the native community named therein.

(4) In the event that the Director rejects the claim, any person aggrieved by his decision may within thirty days from the date when the decision of the Director is conveyed to him, appeal to the Minister who shall consider the appeal.

(5) Where any question shall arise as to whether any person is a member of the native community named in the native communal title issued under subsection (3), the person or body of persons in whose name the native communal title is issued shall refer the same to the District Native Court for a decision, and such reference shall be instituted and dealt with in accordance with rules made under the Native Courts Ordinance, 1992 [Ord. No. 9/92].

(6) Any claim for a native territorial domain shall not be made or allowed in respect of any area or land where, before the coming into force of this section, there is a final decision by a court of competent jurisdiction that no usufructuary rights have subsisted or have been lost or abandoned by members of the native community making that claim. [Add. Cap. A179]

Besides counteracting the politically detrimental effects of this judgment the 2008 amendment also demonstrated the Government of Sarawak's commitment to protecting proprietary interests in communal areas, ostensibly in recognition of these communities' long-standing practice of maintaining traditional communal areas for community resources and sustenance.[40] Notwithstanding the best intents of acknowledgement and protection, the establishment of the native territorial domain has changed the character of such common areas, whose geographical location, area, and borders were previously decided by the communities' traditional practices but are now changed into a statutory title that is area-limited and subject to proof and legislature willpower.[41]

A representative from the Sarawak Dayak Iban Association (SADIA), was of the opinion that whatever the court's decision, the situation in Sarawak will not change. This is due to the politics of money in Sarawak.[42] However, he believed that sustainable mechanisms are the best option for the indigenous peoples. Quite a few cases are successful in the mitigation of impacts, even though the parties lose their case in court and have no legal claim to the land in question. This approach is an effective way to identify and settle native customary rights completes as one of the elements in the sustainable mechanism is the recognition of people's rights, thus making all disputes must be resolved through consensus and meetings. The concept of sustainability is also one of the government's pledged strategies for achieving sustainable development objectives. He also believes that the concept of mutual recognition would be a part of the plan that will unite everyone. Thus, the government's policies can be altered to promote sustainable indigenous practices.

POS BELATIM

In Kelantan, after the High Court declared in 2017 that the Temiar-Orang Asli of Pos Belatim has native title rights to 9,360 hectares of their traditional territory, the state administration agreed during the appeal stage to seek a peaceful resolution with the Orang Asli in this case.[43] The Orang Asli was agreeable to such a settlement, particularly in view of the impending *TR Sandah* judgment. Following this, a consent judgment was recorded in the Court of Appeal on 13 April 2018. Under the settlement, the Kelantan state government reserve the land under s 62 of the National Land Code and subsequently to

make land grant under s 42 of the same of the land areas which are settled or cultivated by the Temiar. Besides, it was also agreed that the remaining forest and catchment areas will continue to be recognised as forest reserves or protective forests, with logging prohibited. The Temiar inhabitants are also given an exception from the requirement of permit under the relevant legislation to allow the Temiar to access the Perias Permanent Reserve Forests for the purpose of their traditional subsistence and cultural activities.[44] Furthermore, logging would be prohibited in the previously recognised alienation areas which was earlier approved by the State Government to Perbadanan Pembangunan Ladang Rakyat Negeri Kelantan (PPLRNK) as well as thirty water catchment regions. The logging ban in water catchment areas was implemented to protect their clean water supplies and the rivers that are essential to their way of life. The settlement terms are mainly consistent with the terms of the High Court judgement and in compliance with the State land laws and policy according to the perspective of the State administration. In an interview with a representative of the State government, it is said that if the court's decisions are not in line with the State Government policy, the settlement would not have been reached.[45]

POS DAKOH

According to a report by Jaringan Kampung Orang Asli Semenanjung Malaysia (JKOASM), Pos Dakoh, which is also known as Pos Balar consists of 11 villages with a Temiar population of around 900.[46] Conflict arose in Pos Dakoh following a project implemented by the State Government of Kelantan, known as Peoples' Estate Programme (Program Ladang Rakyat), or commonly identified as forest estates. Under the program, a total of 199,352 hectares of forest in Kelantan was set aside which part of these areas include 13 Orang Asli villages.[47] The villages affected are Kampung Kuala Wook, Kampung Kuala Wias and Pos Pasik at Gunung Stong Selatan Forest Reserve, Pos Pulat, Kampung Kuala Bering, Pos Gob and Pos Simpor at Balah Forest Reserve, Depak, Angkek, Pos Bihai, Pos Belatim, Pos Balar and Pos Blau at Perias Forest Reserve. The program however has led to the encroachment of the Temiar land by private companies through logging.[48]

The Temiar responded by constructing barricades around the Pos Balar community of Kampung Barong to prevent loggers from invading their land. Beginning on August 22, 2015, the blockades kept the loggers at bay for the period of 43 days. The Temiar subsequently filed a complaint in October 2015 against Ladang Rakyat and the loggers, as well as the Kelantan State Government, its Director of Forestry, and PTG Kelantan. The case was however postponed for two years while the Temiar attempted to compel the loggers and state officials to submit relevant records.[49] At the start of hearing of the case in October 2017, all parties decided to seek for a negotiated settlement, with encouragement by the presiding judge who also later serve as the mediator.[50] Following four rounds of the mediation sessions, the parties were able to announce a settlement in the following two months, which was then memorialised in the form of a consent order. The counsel in charge of the case has included in their Pro Bono Report the description of how the Temiar people protected their ancestral home until the end of the case.[51]

At the outset, the State Legal Advisor of Kelantan was considering giving land grant to individuals for populated and cultivated areas. However, the four Temiar representatives named in the proceedings, during a meeting with the judge in chamber, argued that the Temiar had lived as a community and expected to do so in the future, and that they did not want to be divided by individual land grant. As such, the presiding judge requested that title be issued and held in trust by two Tok Batin, or chiefs, of the eleven affected communities. However, it was eventually determined that land titles for these lands would be alienated upon application by the Temiars at a time and in a manner convenient for them.[52]

Furthermore, according to the Pro Bono stories, the Temiars were worried about the access to clean water. Through its legal counsel, the State assured that logging permits for the forest regions would only be granted for selective tree felling and replanting. It was eventually determined that land titles for these lands would be alienated upon application by the Temiars' at a time and in a manner convenient for them. The learned judge found their case to be valid and directed the current Assistant Legal Advisor to find a solution to defend Temiars' rights in this matter. The State also promised to guarantee the Temiars' hunting, fishing, and gathering rights in their traditional areas within the Perias and Betis Permanent Forest Reserve. As a result, the parties were also able to reach an agreement on the conservation of water catchment areas that, if logged, would considerably pollute the main river.

On 7th December 2017, consent judgment was entered between the State Government and the four Temiar men who are the representatives of their communities. The consent judgment included a declaration that Pos Dakoh (RPS Balar) be gazetted as "Penempatan Tetap Orang Asli Pos Dakoh (RPS Balar)". Areas surrounding this area was also gazetted as a "Protected Area" and therefore no logging is to be allowed in these areas. Below is the summary of the consent order:

1. Permanent Forest reserves along the Perias and Betis rivers near Pos Balar have been declared as locations where indigenous people and the Temiar tribe have the right to hunt, fish, and forage for subsistence.
2. The Temiar's settled and cultivated areas will be classified as territory allocated for the permanent settlement of Pos Balar's indigenous people and will be transferred to them upon application.
3. The approval for alienation of the Pos Balar land and the granting of logging rights over the property are revoked, and the land is declared as a conservation area, clear of logging activities, in which the Temiar have the same hunting, fishing, and foraging freedoms.
4. That logging activity be forbidden in 28 selected sites surrounding the Betis, Jumpes, and Telor rivers, of which 23 are designated water conservation areas.[5]

A representative from Jaringan Kampung Orang Asli Kelantan (JKOAK) during an interview conducted in June 2022, said that the decisions of the courts have a good impact since individuals are able to file claims and acquire a verdict, despite the protracted nature of the process. However, they are dissatisfied with how the federal and state governments carry out court orders. Even though settlements have been reached in the Pos Dakoh and Pos Belatim cases, the state government has yet to execute the verdict, with the reason of budgeting constraint in measuring the area to gazette.

Despite the fact that the court was the final option, the Orang Asli decided to go to court to execute the verdict. They want the government to act immediately in response to the court's rulings in order to preserve the forest where they lived.[54]

CONCLUSION AND RECOMMENDATIONS

There are not many studies on judicial impact even though decisions of the court do form law and have the power to influence many people and may even implicate a system of government in a fundamental sense. However, such study is important because the courts' decisions can change the state of law that regulates social and political actions and/or elicit responses from other political actors, influencing policy and political outcomes.

When the Court makes rules that contradict the policies of other government agencies, the officials of those agencies must decide whether and how to change their policies to conform with the Court's regulations. This is how the rulings of the courts affect the law and policies. There have been a number of notable cases that uphold native title or customary rights to land by applying principles used by courts in other common law countries. Thus, the effect of the decisions has significantly changed the law and influenced the policies of the government.

As discussed above, the courts' decisions in *TR Sandah,* Pos Belatim and Pos Dakoh have significantly impacted the law or the policies of the government. In Sarawak, subsequent to the TR Sandah decision, the Sarawak Land Code was amended to Native Territorial Domain as a new category of land to be utilized and held by a community under a communal grant. Meanwhile in Kelantan, as has been seen in the cases of Pos Belatim and Pos Dakoh, the government policies were altered to address the land of the Orang Asli in Kelantan.

Nevertheless, notwithstanding the courts' decisions, the government's execution of the decisions is still lacked in its implementation. As a result, some groups have re-occupied their land without the permission of the state. The rulings apparently have provided a powerful impetus for them to physically recover their land.

Going to court is simply the beginning of a lengthy battle. The indigenous peoples, along with their lawyers and team, must participate in a constant and joint effort to guarantee that the court's order is carried out. And although the judicial procedure is lengthy, expensive, and uncertain, the impact of the judicial decision has unquestionable rewards. Indigenous peoples may benefit from alternative forms of compensation even when their traditional lands are not returned. Furthermore, indigenous communities may benefit from stronger unity, a greater sense of empowerment, and cultural revitalization. And there must be political will to solve the real problem that is measuring the land in order to give it to indigenous communities and regulating indigenous property rights. The lack of an appropriate budget and political will must be overcome for the implementation to take effect.

And so, can the court be transformed into a more forceful advocate for human rights? A stronger voice with the potential to influence laws and policies? I believe this is only feasible if the court decisions adapt to the changing times and the justices' decision-making authority is contingent on the support of the other branches of government for implementation and enforcement. Nonetheless, the courts have evolved into an essential part of our government system, serving as a separate and coequal body that interprets the law, determines policy, upholds the Constitution, and protects individual rights.

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