

Much in common (law): Malaysian law on customary lands, territories and resource rights

By Toni Bauman, Research Fellow, Native Title Research Unit, AIATSIS.

On 25-26 January 2011, I presented at a conference in the Faculty of Law at the University of Malaya in Kuala Lumpur together with three other Australians working in native title; Mick Dodson, Frank McKeown and Greg McIntyre. The conference, 'The Law on Customary Lands, Territories and Resource Rights: Bridging the Implementation Gap' was organised by the Centre For Malaysian indigenous Studies and the Centre For Legal Pluralism and indigenous Law at the University of Malaya, in conjunction with

the European Forest Institute, the Forest Law Enforcement Governance and Trade (FLEGT) Asia Support Program, the International Work Group for indigenous Peoples and the Malaysian Bar Council. The conference was led by a Kelabit woman, Associate Professor of Law and Director of the Centre for Malaysian Indigenous Studies, Ramy Bulan, who was a gracious and tireless host, and was ably supported by long term activist, Dr Colin Nicholas, who is a member of the Bar Committee for Orang Asli Rights and Coordinator of the Centre for Orang Asli Concerns (COAC).

Indigenous communities in Malaysia can be divided into Peninsular Malaysia Orang Asli (about 141,230

in 2008 or less than 1% of the total 27 million Malaysian population) and those living in Sabah and Sarawak in Borneo (broadly around 30% of the total Borneo population of 12.6 million), with the largest numbers in Sarawak.

As is the case in Australia, terminology to describe indigenous peoples is a matter of debate. The term 'Orang Asli' has been used to refer to aboriginal peoples in Peninsular Malaysia, whereas the term 'Orang Asal' is used to refer collectively to the indigenous peoples of Malaysia, including those who come from Borneo. Both Orang Asli and Orang Asal literally mean 'original people'. However the term Orang Asal is constantly under debate, as are alternative terms to further distinguish regional groupings.



Orang Asal participants and some international speakers at the conference on Law on Customary Lands, Territories and Resource Rights: Bridging the Implementation Gap Conference. Photo by Colin Nicholas (COAC).

The Malaysian legal system based as it is on the common law, has much in common with Australia (though their Court system varies slightly from ours). The conference aimed to locate Malaysian indigenous

customary law rights in a growing international jurisprudence and human rights law. There have been a number of landmark decisions handed by the Malaysian courts which have taken note of precedents from other common law jurisdictions. At the same time, indigenous Malaysians are struggling to achieve recognition in land development and negotiate on equal terms with large corporations involved in, as the conference flier describes, 'logging, to oil palm and industrial tree plantations and forests estates, to mega hydro electricity generation projects' and they 'pay the heaviest price through relocation, displacement, dispossession and encroachments on their livelihood'. There is grave concern for their cultural and economic survival.

The conference program was rich with many preeminent speakers and moderators including indigenous Malaysians, and it was an honour to meet them. Moderators included:

- Ramy Bulan, Associate Professor of Law, Kelabit woman and Director of the Centre for Malaysian Indigenous Studies, University of Malaya;
- Mr Steven Thiru, Co-Chair of The Bar Committee on Orang Asli Rights;
- Juli Edo, Associate Professor, Orang Asli Anthropologist, Faculty of Arts and Social Science, University of Malaya
- Mr Gerawat Galla, Advocate and Solicitor, and President of, Kelabit National Association ;
- Dato' Robert Jacob Ridu, former Speaker of Sarawak Council Negeri;
- Yogeswaran Subrmaniam, Advocate and Solicitor, and PhD Scholar at the University of New South Wales; and
- Mr Andrew Khoo, Chair of the Bar Council Human Rights Committee and Member of the Bar Committee on Orang Asli Rights.

There were many resonances as court cases were described in the Orang Asal battle for recognition. Jerald Gomez, one of the counsels for Sagong Tasi in *Sagong Tasi v Kerajaan Negeri Selangor* [2002] described legal and practical hurdles, requirements of proof, considered the judgments of the High Court, Court of Appeal and finally the Federal Court and the distribution of compensation benefits.

Presenter Baru Bian, whose legal firm is handling over one hundred pending Sarawak cases and created the landmark case of *Nor ak Nyawai vs. Borneo Pulp Plantation Sdn Bhd & 2 Ors* [2001], described some of the contemporary legal issues facing claimants in native customary rights cases including how the implementation of the law in Sarawak has given rise to many conflicts between the native customary land owners.

Datuk Kong Hong Ming, Advocate at the High Court of Sabah and Sarawak noted the efforts of activists in bringing cases to the court. Prior to 2007, claims

were 'frustrated or defeated either by the decision making process managed by the government land administrators or by the misapplication of the provisions in the Land Ordinance (Sabah Cap 68), which has been the sole legislation in land law for the State of Sabah since 1930'. He noted that the judgment of the Kota Kinabalu High Court in *Rambilin Bte Ambit v Ruddy Bin Awah* [2007]('Rambilin'), had been particularly important in raising the hopes of indigenous peoples. Rambilin was a judicial review by the High Court in Sabah and Sarawak. The Court said that natives in Sabah have a right to enter state lands and to establish customary rights on the land. That right has not been extinguished by any legislation. Nevertheless, decisions of the local courts in *Adong Bin Kuwau* [1997], *Nor Anak Nyawai* [2001]; *Sagong Bin Tasi* [2005], *Rambilin* [2007] and *Madeli* [2007] are not being accepted by the government or the land administrators as legal precedents. Lim Heng Seng, former Chairman of the Industrial Court, also noted that the Courts have held that both the federal and state governments owe fiduciary duties to the Orang Asli, founded on Article 8(5) of the Federal Constitution and the 1961 Statement of the Policy Regarding the Administration of Orang Asli in West Malaysia.

International speakers came from Australia, New Zealand, the Philippines (Bridget Hamad-Pawid, Commissioner of the newly established National Commission on Indigenous Peoples), Thailand, Indonesia and India. In the Australian context, Professor Dodson spoke about the Yawuru native title agreement in Western Australia and exclusive possession. Greg McIntyre, (as did Canadian Professor Bradford Morse, now Dean of the Faculty of Law at Waikato University, Hamilton) provided comparative information about the common law circumstances surrounding extinguishment of native title by the state in countries such as the United States, Canada, Australia, New Zealand, Malaysia and South Africa and 'bundle of rights' approaches. My presentation on engagement with government and practical 'on-ground' issues around consultation and Free Prior and Informed Consent (FPIC), clearly resonated with the audience (as was

my experience in Papua New Guinea at a recent conference in Madang on Asian investment in the Pacific). Tony Williams-Hunt pointed out, that in spite of the Malaysian Government's support for the Declaration on the Rights of Indigenous Peoples it appears to disregard the necessity for FPIC in its interventions in land policy matters pertaining to the Orang Asli and has ignored the core issues raised when Orang Asli have protested.

Other presentations considered:

- carbon trading including in West Papua;
- the social, cultural and economic effects of the loss to the state when large forest areas were formally gazetted and managed using modern scientific management practices;
- community mapping using a three dimensional model and computers which would be very useful in the Australian context;
- the role of traditional knowledge and the involvement of the local indigenous community in forest resource management;
- contradictions in the *Wildlife Conservation Act 2010* and Orang Asli rights; and
- climate change.

Associate Professor Ramy Bulan, in her presentation, pointed out that what appears to be a step forward in the perimeter surveying of native customary 'untitled' lands by the government, could well contain a number of issues of concern. This surveying occurs in Sarawak under section 6 of the *Sarawak Land Code 1958*, which allows the Minister to declare and gazette any state land to be Native Customary Rights land for the use of any community having a native system of personal laws. Concerns raised include: conflicts between the state and native peoples who claim pre-existing rights to the lands based on their native laws and customs; limiting factors in the use of aerial photos pre 1958 as the basis of survey; Native rights in Communal Reserve being regarded as mere licences and subject to degazettement at the discretion of the Director of Lands and Surveys ; whether communal reserve equates with communal ownership; and the restrictiveness of the

interpretation of the law. The state's view is that lands that are not surveyed and without title are state lands and belong to the government. Concerns were also expressed that surveying based primarily on aerial maps produced by the government would only cover the immediate influence of the longhouse and that customary lands, traditionally occupied beyond that could be lost. Associate Professor Bulan's view was that the existing section 18 of the Land Code could in fact be used to grant titles in perpetuity to the persons who could prove 'customary tenure amounting to ownership'.

Most noteworthy in comparing Australia and Malaysia is that there is no 'native title industry' in Malaysia. Most cases are prepared by lawyers on a pro bono basis. Anthropologists have been rarely if at all used – though what might be described as the anthropological role performed by Dr Colin Nicholas, who has a background in development studies, political sociology and resource economics, was championed on many occasions during the conference. Taking up this theme, Dr Frank McKeown noted that anthropologists were ubiquitous in the native title process in Australia, particularly in the role of expert in litigation, and that anthropological expertise is sought in every stage of the process. It was acknowledged that there is a need for the involvement of more anthropologists in claims in Malaysia since the burden of proof is very similar in demonstrating prior and continuous occupation according to indigenous law and custom.

A publication from the conference will be forthcoming and further details of the conference are available electronically in the conference booklet from toni.bauman@aiatsis.gov.au

P.S. Since the conference another historic High Court decision has been made in Malaysia in favour of Ibans from Kampung Merekai (Rumah Luang). See here for the press release: <http://www.facebook.com/notes/borneo-independent-news-service/high-court-decides-in-favour-of-ibans-from-kampung-merekai-rumah-luang-in-anothe/10150108634803337>