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**PEGUAMCARA PEMOHON**

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Ruj: DYL/LHS/34139/yuk**

**PEGUAMCARA RESPONDEN**

**Pejabat Penasihat Undang-  
Undang Negeri Pahang  
Tingkat 3  
Wisma Sri Pahang  
25000 Kuantan  
Pahang Darul Makmur  
Ruj: PUN.PHG.SIVIL.6/2007**

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## **GROUNDS OF JUDGMENT**

10 The Applicants in this case claiming to be from a native tribe called Semalai have made a claim for an area of land which they claim to be part of Aborigine Inhabited Land. The area claimed includes 3 areas called Padang Kepayang, Kampung Bukit Rok and Kampung Ibam (to be referred hereafter as the native customary land) in the

15 district of Bera, Pahang. The native customary land is being claimed on the basis that the Semalais have occupied and inhabited the land for generations.

The claim by the Applicants made by way of Judicial Review

20 application was triggered by the fact that the State Government had given approval for a project to be undertaken on the native customary land being claimed by the applicant.

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5 **Rights of natives under the Federal Constitution**

Under Article 8 of the Federal Constitution although equality and equal protection before the law is a fundamental right, it does not invalidate or prohibit extra protection to the natives.

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Article 8(5)( c ) states as follows:

15 ***“This Article does not invalidate or prohibit-  
Any provision for the protection, well-being or  
advancement of the aboriginal peoples of the Malay  
Peninsula (including the reservation of land)....  
(emphasis mine)”***

20 **Status of customary land in Malaysian context as recognised  
by the Malaysian Courts**

It is to be noted that the Malaysian Courts have given due recognition to the rights of natives over customary land. This is  
25 clear from the various decisions meted out by the highest court of the land.

I will begin with the Federal Court case of **Bato Bagi v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766** where the  
30 issue was not so much the recognition of native customary land but

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5 more under what circumstances this rights over native customary land can be extinguished. Richard Malanjum CJ (Sabah & Sarawak) in para 125 stated as follows:

10 *“As for the argument that the Government stands in a fiduciary position to protect the interest of the natives, I am of the view that such notion has been accepted by our Courts. (See: Kerajaan Negeri Selangor & Ors V Sagong Tasi & Ors (supra). It has also been adopted in foreign jurisdictions. (See for instance the Supreme Court of*  
15 *Canada in Delgamuukw V British Columbia [1997] 3 SCR 1010). It is therefore not unheard of that the Government ought to protect the interest of the natives and stand in a fiduciary position vis a vis the natives”*

20 The Court of Appeal case of **Kerajaan Negeri Selangor & Ors V Sagong Tasi & Ors [2005] 4 CLJ 169** decided 2 matters the 1<sup>st</sup> being that the Malaysian courts recognized common law right over native customary land and the 2<sup>nd</sup> that such rights existed despite the Aborigines Peoples Act 1954 (“The Act”).

25 Gopal Sri Ram JCA stated that the definitive position at common law is that stated by Viscount Haldane LC in the case of **Amodu Tijani V The State Secretary, Southern Nigeria [1921] 2 AC 399**. His Lordship then continued and stated as follows:

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5        ***“First, that the fact that the radical title to land is vested in  
the Sovereign or State (as is the case here) is not an ipse  
dixit answer to a claim of customary title. There can be  
cases where radical title is burdened by a native or  
customary title. The precise nature of such customary title  
10        depends on the practices and usages of each individual  
community. And this brings me to the second important  
point. It is this. What the individual practice and usages in  
regard to the acquisition of customary title is a matter of  
evidence as to the history of each particular community. In  
15        other words it is a question of fact to be decided (as was  
decided in this case) by the primary trier of fact based on  
his or her belief of where on the totality of evidence, the  
truth of the claim made lies”***

20

#### **Common Law Vs Aborigine Peoples Act 1954**

His Lordship Gopal Sri Ram JCA then in **Sagong Tasi’s case** (Supra) further discussed whether the Aborigine People’s Act  
25        1954 excluded the common law.

His Lord ship begun by determining the purpose the Act was  
enacted referring to proximately contemporaneous material that  
included an article in the Malay Mail quoting Dato Sir Onn Jaffar’s  
30        speech in the Federal Legislature, the debate in the Federal

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5 Legislative Assembly and, the policy statement issued by the  
Jabatan Hal Ehwal Orang Asli Department (JHEOA). After  
referring to the above materials His Lordship concluded at p 185 as  
follows:

10 ***“Now, the extrinsic material to which I have referred makes  
it abundantly clear that the purpose of the 1954 Act was to  
protect and uplift the First Peoples of this country. It is  
therefore a human rights statute. It acquires a quasi  
constitutional status giving it pre-eminence over ordinary  
15 legislation. It must therefore receive a broad and liberal  
interpretation”***

In p 186 His Lordship further stated:

20 ***“There is therefore no doubt in my mind that the 1954 Act  
calls for a construction liberally in favour of the aborigines  
as enhancing their rights rather than curtailing them”***

In my mind apart from the decision of the Court of Appeal above to  
25 which I am bound, the fact that the Act was enacted at all is a  
testimony that the rights of aborigine over the land occupied has  
been given due recognition.

What the Act seeks to do if at all is to define the rights and limits of  
30 the land area over which the aborigines can lay a claim to. It is

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5 necessary to define the limits as well as gazette this limits to  
protect the land from being encroached and trespassed by  
unrelated individuals or groups. A further reason could be that  
rapid development of the country necessitates for a boundary to be  
fixed to encompass the actual requirement of the particular  
10 aborigine group.

Having determined that both common law and statute recognizes  
native customary land I now move on the facts of the case at hand.  
As observed by Gopal Sri Ram JCA in **Sagong Tasi's case** finding  
15 of facts form the substratum of the case for making out customary  
community title amply supported by cogent evidence.

In this case I have made the following finding of facts:

20 **1) Semalais are an identifiable aborigine group**

In making a finding that the Semalais are an identifiable native  
aborigine group I relied on the testimony of Dr Colin George  
Nicholas (SP1) in court as well as his affidavit in support of the  
25 application of the applicants.

I accepted the evidence of Dr Colin as an expert based on his  
qualifications and achievements. The qualification are too  
numerous to note everything down but can be seen from his bio



5 data. The qualifications and bio data of Dr Colin are contained in his affidavit (Bundle C).

I noted however that Dr Colin was a partisan witness as he had shown his partiality in supporting the application of the applicants  
10 by filing an affidavit and from my observation he was at the side of the applicants throughout the trial and he sat in court in jotting down notes. To me being a partisan witness does not make SP1 an unreliable witness. Further SP1's findings are based not only his research but more on the research done by other persons whom  
15 he has quoted extensively.

The Defendants also did not produce an expert of their own to dispute the findings and opinion of SP1 and therefore the evidence of SP1 can be accepted and considered as it is unchallenged.

20

In his affidavit, Dr Colin has outlined in detail the presence of natives loosely called Orang Asli in the Peninsular Malaysia since thousands of years ago. I do not purport to go into the details of this early arrival suffice to say I am satisfied of the presence of  
25 Orang Asli in peninsular Malaysia. This fact has also not been challenged by the Defendants.

Dr Colin further speaks of presence of Orang Asli in the region of Pahang and this is borne out by the writings of various authors  
30 studying the matter. More important is that this early writings

5 confirm that amongst the Orang Asli groups present in Pahang are the Semalais.

Amongst others Dr Colin referred to the publication of Pater P. Schebesta an ethnographer in the ***Bulletin of the School of***  
10 ***Oriental and Asian Studies*** in 1926. It was stated in this publication that:

15 ***“within the category “Jakun” the Semalai are specifically associated with the Bera River Drainage Area. In addition he estimates (at page 274) that the Semalai population to be about 2000”***

There are a number of other references of the presence of Semalais in the Bera region as stated by Dr Colins as stated from  
20 paragraphs 31 to Para 37 of his affidavit (Bundle C).

As a conclusion I am satisfied that the Semalais are identifiable aborigine native groups who have existed in the Bera region for a very considerable period of time.

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## **2) Applicants are the decedants of Semalais**

The 1<sup>st</sup> applicant in order to show that he and other members of the  
30 community are descendants of the early Semalais in the region

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5 produced a family tree dating back many generations. The  
information contained in the family tree was by the word of mouth  
which to me an acceptable means of information being carried from  
generation to generations. I noticed that the 1st applicant and the  
native community as a whole took great pride in retracing their  
10 ancestry perhaps more than other races in Malaysia.

I also made a site visit to the disputed area and observed that the  
1<sup>st</sup> applicant and the other members of the community who were  
present were familiar with the landmarks and were able to identify  
15 the various earlier settlements, structures and geographical  
spaces. They could also identify the grave of their ancestors  
nestled in dense jungle and marked with objects like pots.

I was satisfied that the applicants were truly the descendants from  
20 a continuous line of the earliest Semalais having set foot in the  
Bera area especially in the area of dispute.

### 3) The area claimed has been amply identified

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Dr Colin had studied the various maps and writings and concluded  
that ***“the Semalai Orang Asli without doubt the earliest  
inhabitants of the Bera area” (Para 48 of affidavit Bundle C).***

5 I do not wish to go into details but I agree with this above  
conclusion of Dr Colin based on his reasoning given in Para 38 to  
47 of his affidavit (Bundle C).

The history of the earliest settlements of the Semalais on the Bera  
10 river until its existence till today is well expressed by Dr Colin from  
Para 61 to 69 of his affidavit (Bundle C).

I wish to emphasise here that there were various unsuccessful  
attempts to gazette at least 2,023.47 hectares which formed part of  
15 customary land the boundaries which were determined using  
natural terrain of rivers and hills.

Although the size of the land can be determined from the  
correspondences the boundaries of the area remain uncertain but  
20 can be determined with the help of the applicants. In this respects I  
agree with the 1<sup>st</sup> applicant the boundaries should follow the  
natural terrain rather than mechanically marking the boundaries.

In this case I also decided that the Semalais did not surrender  
25 occupation of any part of the customary land although after the big  
flood in 1975 they were forced to abandon the area called Padang  
Kepayang. The movement out of the area was more out of safety  
rather than abandonment of their rights. I therefore have  
determined that any setting of boundaries must include the Padang  
30 Kepayang area.

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**Status of customary land against Malay Reserve Land and FELCRA**

10 Even before looking at any legislation it is my finding that the rights over the land accrued to the Semalais the minute they sat their foot in the Bera region. The rights over the land do not begin from the time the Court recognizes the right or the State recognizes the right. It accrues very much earlier.

15 Having determined this any other alienation after the period when the right first accrued is illegal and can be regarded as an encroachment. This includes the area gazetted as Malay reserve land in 1923 or the setting up the FELCRA scheme.

20

**Land sought for foraging and hunting is it justifiable?**

25 It must be recognized that not all area of land is occupied by the aborigine people for the sole purpose of cultivation of crops or other subsistence but rather a large area of land is required to roam and forage.

To me if the law recognizes the rights of the aborigines over land it must also give rights and recognition of the customary activities carried out by the aborigines which includes hunting, roaming and

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5 foraging the jungle. The instinct to roam, hunt and forage the jungle is an in built instinct of the aborigine people which cannot be extinguished by providing them with modern amenities.

10 It was argued by the Defendants that the applicants had been relocated and provided with school, hospital and other modern amenities. In fact during my visit to the area in dispute I noticed that the 1<sup>st</sup> applicant in this case and his other community members were well settled with having comfortable homes.

15 It was argued by the Defendants as the applicants had been given all the facilities by the State Government they could not claim the land for the mere purpose of foraging and roaming the jungle.

20 I heard the testimony of the 1<sup>st</sup> applicant who testified as SP2 and I was satisfied and convinced by his testimony that foraging and roaming of the jungle was something which the community could not give up despite being given all the comforts of modern living.

25 The extent to which the aborigine community was to be allowed to satisfy their inborn instinct is something which the Act sets to define. To me the area of the land to be alienated for the purpose of the aborigine community should take into the facts of each case taking into consideration the size of the community and to what extent they should be allowed to roam and forage.

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5 In the case of **Alextor Ltd V Richtersveld Community [2003]**  
12 BCLR 130 the extent of the right was stated as follows:

10 *“In the light of the evidence and of the findings by the SCA  
(Supreme Court of Appeal) and the LCC (Land Claims  
Court) we are of th view that the rerall character of the title  
that the Richtersveld Community possessed in the subject  
land was right of communal ownership under indigenous  
law. The content of that right included the right to  
exclusive occupation and use of the subject land by  
members of the Community. The Community had the right  
15 to use its water, to use its land for grazing and hunting and  
to exploit the natural resources, above and beneath the  
surface.”*

20 Further I would agree with Dr Colin when he stated in Para 143 of  
his affidavit (Bundle C) *“Thus, while the nature of their  
economic activity has changed over time, their dependence  
on the land for sustenance and wellbeing still remains the  
same”*. Dr Colin was referring to the change of activities of  
25 Semalais from purely subsistence activities to more cash-based  
activities such as rubber and oil palm cultivation as well as small  
businesses.

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5 **In the light of the above findings I made the following orders:**

1. I declared that the portion of the Malays Reserve Land encroaching upon the land as claimed by the Semalais as an illegal encroachment and has to be de-gazetted.

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2. I declared that the land utilized by FELCRA that encroaches upon the land claimed is an illegal encroachment and has to be vacated and the boundaries set up be removed with the cost to be borne by FELCRA.

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3. I directed the relevant land authorities with the assistance of the applicants immediately take measures to identify and draw the boundaries of the claim using natural boundaries of rivers and hills and take steps to gazette the identified area the size which corresponds as close as possible to the area claimed. I directed that this exercise right up to gazetting take not more than 1 year.

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4. I disallowed the applicants claim for damages although there was an encroachment and breach of fiduciary duty on the part of the State as I could not detect any tangible loss suffered by the applicants apart from suffering inconvenience.

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I directed cost to be taxed before the Senior Assistant Registrar.

In trying this matter I noted a number of weaknesses in the record keeping of the relevant authorities when discovery of documents

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5 was directed by the Court. From the feedback received by the  
counsels appearing for both the parties in this case it was observed  
that the records of customary land were not kept in proper manner  
and many documents including correspondence of the natives and  
native bodies with the authorities were missing. It could not be  
10 determined whether this was due to sheer carelessness of the  
authorities or it was purposely done by design. To complicate  
matters the witnesses called by the Respondent to assist the court  
took an indifferent attitude towards the issues at hand and were  
generally ignorant of the matters at hand to be of any assistance.  
15 This lackadaisical attitude on the part of the authorities needs to be  
rectified.

20 **Dated this: 18<sup>th</sup> MARCH 2013**



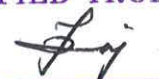
25 **(DATO' HAJI AKHTAR BIN TAHIR)**

**Judge**

**High Court of Malaya**

**Temerloh, Pahang Darul Makmur**

30 **SALINAN YANG DIAKUI SAH  
(CERTIFIED TRUE COPY)**



**(ROHAYA BINTI ABD RAHMAN)  
SETIAUSAHA KEPADA HAKIM  
Y.A. DATO' HAJI AKHTAR BIN TAHIR  
MAHKAMAH TINGGI MALAYA  
TEMERLOH, PAHANG DARUL MAKMUR**

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5 **PEGUAMCARA-PEGUAMCARA**

Encik Lim Heng Seng, bersama ... bagi pihak Pemohon-Pemohon  
dengan Cik Fara Nadia binti Hashim, dan  
10 Cik Lisa Tan Yu Wan, T/n Lee Hishamuddin, Allen & Gledhill

Dato' Mat Zaraai bin Alias, ... bagi pihak Responden (1) & (2)  
bersama Tuan Kamal Azira bin Hassan  
15 Pejabat Penasihat Undang-Undang Ng. Pahang

Tuan Noor Hisham bin Ismail, ... bagi pihak Responden (3) & (4)  
bersama Puan Muzila bt Mohamed Arshad  
20 Pejabat Peguam Kanan Persekutuan

**KES-KES YANG DIRUJUK**

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1. **Bato Bagi v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766.**
  2. **Kerajaan negeri Selangor & Ors V Sagong Tasi & Ors [2005] 4 CLJ 169.**
  3. **Amodu Tijani V The State Secretary, Southern Nigeria [1921] 2 AC 399.**
  4. **Alextor Ltd V Richetersveld Commounity [2003] 12 BCLR 130.**

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## AKTA DAN RUJUKAN

Article 8(5)( c );

10 ***Federal Constitution.***

Pater P. Schebesta an ethnographer in the ***Bulletin of the School of Oriental and Asian Studies.***

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