



# THE RIGHTS of INDIGENOUS PEOPLES in MALAYSIA

THE UNITED NATIONS DECLARATION ON THE RIGHTS OF  
INDIGENOUS PEOPLES (UNDRIP) AND THE LAW IN MALAYSIA

Commissioned by The Human Rights Commission of Malaysia (SUHAKAM)



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***Info on cover photos***

*Orang Asli guides in a boat ride at Endau River, district of Mersing, Johor.*

*They are from Kampung Peta, located in upper Endau valley which is an entrance to Endau-Rompin National Park.*

*The photos were taken in March 2020 by Izawati Wook.*

# Table of Contents

<b>EXECUTIVE SUMMARY</b> .....	<b>vii</b>
<b>1. INTRODUCTION</b> .....	<b>1</b>
<i>Purpose of the report</i> .....	2
<i>Research methodology</i> .....	3
<b>2. UNDRIP: AN OVERVIEW</b> .....	<b>4</b>
<i>The UNDRIP as soft law</i> .....	4
<b>3. INDIGENOUS PEOPLES IN MALAYSIA</b> .....	<b>5</b>
a. <i>Orang Asli in Peninsular Malaysia</i> .....	7
b. <i>Natives in Sabah and Sarawak</i> .....	8
<b>4. THE UNDRIP AND THE MALAYSIAN LAWS: BASIC PRINCIPLES</b> .....	<b>10</b>
a. <i>UNDRIP: human rights, equality and self-determination</i> .....	10
i. <i>Collective and individual rights</i> .....	11
ii. <i>Right to self determination</i> .....	11
iii. <i>Free, Prior and Informed Consent (FPIC)</i> .....	13
b. <i>The fundamental liberties provided by the Malaysian laws and its applicability to the indigenous peoples in Malaysia</i> .....	16
<b>5. RIGHTS IN RELATION TO LAND AND RESOURCES</b> .....	<b>19</b>
a. <i>UNDRIP on the indigenous peoples' land and resources</i> .....	20
i. <i>Right to ownership and possession of the land and resources</i> .....	20
ii. <i>States' obligations in relation to the land rights</i> .....	20
iii. <i>Right to resources</i> .....	21
iv. <i>Prohibition against forcible relocation</i> .....	22
v. <i>Right to redress for deprivation of land and resource rights</i> .....	23
vi. <i>Environmental and resource conservation</i> .....	23
vii. <i>Right to Consultation and Free, Prior and Informed Consent</i> .....	24
b. <i>Malaysian position in relation to protection of land and resources of the indigenous peoples</i> .....	24
i. <i>Orang Asli in Peninsular Malaysia</i> .....	24
ii. <i>Natives in Sabah</i> .....	33
iii. <i>Natives in Sarawak</i> .....	35
iv. <i>Challenges to the native customary rights in Sabah and Sarawak</i> .....	40
c. <i>The scope of the customary land rights of the indigenous peoples under the common law</i> .....	43
i. <i>Customary right to land</i> .....	44
ii. <i>Rights to resources or foraging</i> .....	46
d. <i>Practice in other jurisdictions</i> .....	47
i. <i>Constitutional protection</i> .....	48
ii. <i>Statutory provisions</i> .....	48
iii. <i>The scope of the rights to land: the use of the indigenous peoples' land and the resources</i> .....	49
iv. <i>Consultation with the indigenous peoples</i> .....	52
v. <i>Determination of the land of the indigenous peoples</i> .....	53
vi. <i>Compensation upon deprivation of the land rights of the indigenous peoples</i> .....	54
e. <i>Recommendations</i> .....	55
f. <i>Challenges to the recommendations</i> .....	57

<b>6. RIGHTS IN RELATION TO CULTURAL INTEGRITY .....</b>	<b>58</b>
a. <i>Right to culture in UNDRIP .....</i>	59
b. <i>Right to culture under Malaysian law and policy .....</i>	62
c. <i>Issues faced by the indigenous groups in relation to cultural rights.....</i>	64
d. <i>Other jurisdictions .....</i>	65
e. <i>Recommendations.....</i>	65
<b>7. RIGHTS IN RELATION TO EDUCATION.....</b>	<b>66</b>
a. <i>Challenges in education involving the Orang Asli and natives in Sabah and Sarawak .....</i>	66
Undocumented children in Peninsular Malaysia, Sabah and Sarawak.....	68
b. <i>The position of education in Malaysian law and policy.....</i>	71
c. <i>The provisions in UNDRIP .....</i>	73
d. <i>Approaches by other jurisdictions .....</i>	74
i. <i>Dialogue and negotiations with indigenous peoples.....</i>	75
ii. <i>Laws that recognize and enforce indigenous cultural and linguistic rights .....</i>	75
iii. <i>Comprehensive education strategy supported by indigenous history and needs.....</i>	76
iv. <i>Promoting indigenous education programs and initiatives administered by indigenous peoples....</i>	78
e. <i>Recommendations.....</i>	78
<b>8. RIGHTS IN RELATION TO ECONOMIC AND SOCIAL CONDITIONS.....</b>	<b>79</b>
a. <i>Economic and social development involving indigenous peoples in Malaysia .....</i>	79
i. <i>The government policy in addressing economic and social issues of the indigenous peoples.....</i>	81
ii. <i>Health and healthcare issues.....</i>	83
b. <i>The provisions in UNDRIP .....</i>	84
i. <i>Economic empowerment and self-sustenance .....</i>	85
ii. <i>Health and health care services.....</i>	86
c. <i>Approaches in other jurisdictions in matter of economic and social conditions: The Philippines and New Zealand .....</i>	87
d. <i>Recommendations.....</i>	90
<b>9. CHALLENGES TO THE RECOMMENDATIONS .....</b>	<b>91</b>
<b>10. CONCLUSION .....</b>	<b>92</b>
<i>THE UNDRIP PRINCIPLES, THE MALAYSIAN LAWS AND POLICIES AND THE RECOMMENDATIONS.....</i>	95
<i>THE ABORIGINAL PEOPLES ACT 1954 (Act 134) AND THE UNDRIP .....</i>	0
<b>LEGAL ROADMAP:.....</b>	<b>0</b>
<i>The Guiding Principles.....</i>	0
<b>APPENDIX 1: UNDRIP .....</b>	<b>1</b>
<b>APPENDIX 2: LIST OF ABBREVIATIONS .....</b>	<b>10</b>
<b>APPENDIX 3: LIST OF LOCAL LEGISLATION REFERRED .....</b>	<b>i</b>
<b>APPENDIX 4: DATA COLLECTION .....</b>	<b>ii</b>
<b>BIBLIOGRAPHY.....</b>	<b>vii</b>

a.	<i>Article/Books / Report</i> .....	<i>vii</i>
b.	<i>Cases</i> .....	<i>xii</i>
c.	<i>Legislation</i> .....	<i>xiii</i>
d.	<i>International Instrument</i> .....	<i>xiv</i>
e.	<i>Other</i> .....	<i>xiv</i>

# THE RIGHTS OF INDIGENOUS PEOPLES IN MALAYSIA:

## THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP) AND THE LAWS IN MALAYSIA

### EXECUTIVE SUMMARY

This report was commissioned by the Human Rights Commission of Malaysia (SUHAKAM) to provide an analysis on the compatibility of Malaysian laws and policies with the principles and provisions of the *United Nation Declaration on the Rights of Indigenous Peoples* (UNDRIP). In analysing the compatibility of the national laws and the UNDRIP, the issues addressed are:

- a. Whether the principles embodied in the UNDRIP are coherent with the principles underlying relevant laws in Malaysia; and
- b. Whether the UNDRIP principles could be integrated into the Malaysian law without irreconcilable conflict.

The term “*indigenous peoples*” is used in this report as it is understood in the context of international law. The term refers to certain distinctive groups of peoples who originate from a particular area of land, with priority in time with respect to occupation and use of specific territory, and who are generally marginalised relative to the majority population. In the Malaysian context, these groups include the Orang Asli communities in Peninsular Malaysia and certain native communities in Sabah and Sarawak.

This report identifies factors relating to the goal of incorporating UNDRIP into Malaysian laws. This includes challenges and barriers that may hinder the recommended amendments, their implications, and strategies to address these issues.

The data collection and analysis include doctrinal legal research, comparative research and content analysis. Laws from other selected jurisdictions are also considered for comparison when considering recommendations for law reform at the national level. The research has also included consultations in the form of interviews and focus group discussions involving relevant stakeholders.

In principle, the UNDRIP provides strong affirmation of the rights of indigenous peoples with respect for human rights, as its central element is based on principles of equality and non-discrimination. Other important principles are affirmed as the basis for its wide-ranging provisions, including the *right to self-determination; free, prior and informed consent; right to cultural integrity; protection of livelihood; and right to access quality basic services*.

Analysing the basic principles underlying the Malaysian law, especially as outlined in the Federal Constitution, this report suggests that:

1. *The fundamental rights affirmed in the Malaysian constitutional document, namely the Federal Constitution, are in line with the principles upheld by the UNDRIP. The Federal Constitution affirms fundamental rights of human beings and citizens in*

*Malaysia and acknowledges the need of special protection for indigenous peoples, including the Orang Asli.*

2. *Although the provisions on fundamental liberties are minimal, the scope that they provide allows for expansion of these rights to cater for the internalisation of the UNDRIP provisions through legislation or at least through public policy.*
3. Malaysian laws also recognise the need to protect the indigenous peoples in the country; and some basic rights of the indigenous peoples, with equality and non-discrimination as its core principles. These are the founding principles of the UNDRIP, suggesting that the principles underlying the Malaysian laws are coherent and consistent with the UNDRIP.
4. The UNDRIP recognises extensive standards to be adopted by States with regard to, among others, the right to self-determination, the principle of free, prior and informed consent, land rights, cultural integrity and socio-economic related rights. These principles are also recognised to certain extent in the Malaysian laws.
5. Certain other principles, including the right to self-determination and the principle of free, prior and informed consent, are not specifically provided in the Malaysian laws.

This report also considers several important aspects relevant to the indigenous peoples in Malaysia, including:

1. Protection of land and resources
2. Protection of cultural rights
3. Rights in relation to education
4. Rights in relation to economic and social conditions

For each aspect, the relevant provisions of the UNDRIP are examined and the Malaysian laws affecting these are specifically analysed, with recommendation for changes consistently outlined with the relevant provisions in the UNDRIP.

In conclusion, to protect the rights of the indigenous peoples in Malaysia, it is important for federal and state governments to consider for immediate adoption of the standards promoted in the UNDRIP through legal and policy reform within their jurisdictions. Recommendations for specific actions (as specified in the report) are also specifically outlined to be undertaken by the governments to ensure the immediate adoption of the UNDRIP standards, for the well-being of not only indigenous peoples but all of Malaysian society.

Challenges in implementing the recommendations include:

1. Lack of understanding of the UNDRIP principles and its significance
2. Lack of understanding on the indigenous perspective and issues
3. The current position of the law especially on land related issues
4. The small number of the indigenous peoples
5. Changing culture, challenges and unity of the communities

Changes in the law will require political willingness, public awareness of the significance of protecting the rights the indigenous peoples and strong political reconciliation.

# **THE RIGHTS OF INDIGENOUS PEOPLES IN MALAYSIA: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP) AND THE LAWS IN MALAYSIA**

## **1. INTRODUCTION**

Malaysia is rich with ethnic, linguistic, cultural and religious diversity. While diversity can be a source of strength, it often leads to a divisive social environment. In recognition of this, it must be Malaysia's mission to continue promoting an inclusive society by respecting differences and recognizing that the values of varied cultures may contribute towards societal well-being.

This goal is reflected in Malaysia's new development blueprint, the Shared Prosperity Vision 2030 (SPV 2030), the objective of which is to develop a fair and equitable distribution of economic development at all levels. The aim is to ensure that no section of society is left behind in achieving sustainable development in line with the global 2030 Agenda for Sustainable Development (SDG 2030). This global agenda, in efforts to achieve the 17 goals targeted, seeks to take further effective measures and actions, in conformity with international law, to remove obstacles and constraints, strengthen support and meet the special needs of vulnerable section of society, including indigenous peoples.<sup>1</sup>

As an integral element of the SDGs, the international standard as reflected in the *United Nation Declaration on the Rights of Indigenous Peoples* (UNDRIP), to which Malaysia voted for adoption by the UN General Assembly in 2007, requires actions by States to respect and fulfil their obligations to protect the rights of indigenous peoples. However, a report by the United Nation, 12 years after adoption of UNDRIP, acknowledges that major threats to the rights of the world's indigenous peoples remain. It identifies natural resource extraction, large scale agriculture, infrastructural development, and conservation development as major factors behind violation of the rights of Indigenous Peoples.<sup>2</sup>

The Indigenous Peoples of Malaysia are also facing these problems. As the laws and policies protecting the Indigenous Peoples' land are inadequate, violation of land rights, trespass over customary land, as well as denial of land ownership and difficult access to daily resources are common complaints. For many groups, land remains the most important issue among minority indigenous peoples including relocation, land dispossession or land loss and the absence of land titles, despite applications made in

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<sup>1</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1UN DocA/RES/70/1 (21 October 2015, adopted 25 September 2015) para 23.

<sup>2</sup> United Nations, 'The State of the World's Indigenous Peoples: Implementing the United Nation Declaration on the Rights of Indigenous Peoples in 2007' (2019) 4 *Economic & Social Affairs ST/ESA/371*: 1-98.

accordance with the law.<sup>3</sup> Some groups have sizable land, but do not have sufficient resources to optimise their income from the land.<sup>4</sup>

Other key issues faced by the local indigenous peoples in all regions include poverty, lack of access to basic needs including quality education including quality teaching staff and aid, quality healthcare services and medicine, sanitation and basic infrastructures especially in rural areas.<sup>5</sup>

For instance, Orang Asli communities, who are minority indigenous communities in Peninsular Malaysia, remain at the lowest rung of society. More than one-third of Orang Asli are living in poverty<sup>6</sup> and suffer from household food insecurity, resulting in malnutrition and chronic energy deficiency.<sup>7</sup> Many also suffer from poor health, with a disproportionately high number of deaths in childbirth and high infant mortality rates, a lower life expectancy compared to the national average, and higher reported rates of infectious and parasitic diseases and malnutrition.<sup>8</sup> In terms of education, the number of dropouts from both primary and secondary schools among the Orang Asli children remains high, with all-round poor academic performance.<sup>9</sup> These facts reflect the serious inequality of these minority communities as compared to the rest of the country's population.

### Purpose of the report

With this background, this report presents the result of a study and analysis of the compatibility of the relevant federal and state laws, as well as policies, including the

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<sup>3</sup> Apart from published research reports, these issues are highlighted in all focus group discussions conducted under this study in the Peninsular Malaysia, Sabah and Sarawak.

<sup>4</sup> Finding from Focus Group Discussion conducted in Sarawak on 26 January 2020.

<sup>5</sup> Apart from published research reports, these issues are highlighted in all focus group discussions conducted under this study in the Peninsular Malaysia, Sabah and Sarawak.

<sup>6</sup> Economic Planning Unit, 'Strategy Paper 02: Elevating B40 households towards a middle-class society', Eleventh Malaysia Plan, Putrajaya, May 2015, p. 8, <[www.epu.gov.my/sites/default/files/Strategy%20Paper%2002.pdf](http://www.epu.gov.my/sites/default/files/Strategy%20Paper%2002.pdf)>, accessed 15 June 2017. Poverty rate is for year 2014.

<sup>7</sup> See e.g., Nor Haidanadia Hasni et al, 'Food Security among Orang Kintak in Pengkalan Hulu, Perak' (2017) 7(3) *International Journal of Academic Research in Business and Social Sciences*; Pei Chong Su, Geeta Appannah, Norhasmah Sulaiman, 'Household food insecurity, diet quality, and weight status among indigenous women (Mah Meri) in Peninsular Malaysia' (2018) 12(2) *Nutrition research and practice*.; Hwei Lim and Chee Heng Leng, 'Nutritional status and reproductive health of Orang Asli women in two villages, Kuantan, Pahang' (1998) 4(1) *Malaysian journal of nutrition* 31-54.; Goy Siew Ching et al, 'Applying territorial approach to rural agribusiness development in Malaysia's aboriginal (Orang Asli) settlements: A comparative study of Pos Balar, Kelantan and Pos Sinderut, Pahang' (2016) 12(4) *Malaysian Journal of Society and Space* 12 109 .

<sup>8</sup> See, e.g., Colin Nicholas, *The Orang Asli and the Contest for Resources*: (International Work Group for Indigenous Affairs, 2000) 33-6 ('*The Orang Asli and the Contest for Resources*'); Yvonne AL Lim et al, 'Intestinal Parasitic Infections Amongst Orang Asli (Indigenous) In Malaysia: Has Socioeconomic Development Alleviated The Problem?' (2009) 26(2) *Tropical Biomedicine* 110.

<sup>9</sup> Suhakam, *Status of Education Rights of the Orang Asli Children* (Report, 2010); Sharifah Md Nor et al, 'Dropout prevention initiatives for Malaysian indigenous Orang Asli children' 8(1) *The International Journal on School Disaffection* 42-56; Ramlee Abdullah et al 'Teaching and learning problems of the Orang Asli education: Students' perspective' 9(12) *Asian Social Science* 118-124.

## The Rights of Indigenous Peoples in Malaysia

Malaysian Federal Constitution and the principles and provisions of the Declaration. In analysing compatibility, the questions considered are:

- c. Whether the principles embodied in the UNDRIP are coherent with the principles underlying the laws in Malaysia; and
- d. Whether the UNDRIP principles may be integrated into the Malaysian law without irreconcilable conflict.

In other words, in addition to coherence and the possibility of integration, this study considers whether there are any provisions in the Malaysian law which contradict or opposes the UNDRIP principles.

For this, the report summarily reviewed provisions in the UNDRIP and examined the laws and policies in Malaysia relevant to the content of the UNDRIP, including the legal provisions which may contradict the UNDRIP provisions. It also considered the implementation of the laws and policy in practice in Malaysia. A comparative approach was also adopted to look for practices in other selected jurisdictions.

In addition, with view towards harmonisation of the UNDRIP provisions with the Malaysian laws, the study sought the perspective from selected stakeholders as to issues and challenges as well as their perspectives on the UNDRIP provisions and how these provisions could be incorporated in Malaysia. In particular, the study identified factors relating to the goal of incorporating UNDRIP into Malaysian laws and policies, including challenges or barriers that may hinder the recommended amendments and to outline remedial strategies to address it. Another important component of the study is it has identified direct and indirect implications of the incorporation of UNDRIP into Malaysian laws and policies.

### Research methodology

Method of data collection and analysis comprises:

- a. Doctrinal legal research: to identify and analyse the relevant laws and policy including the scope and implications applicable at national level.
- b. Comparative research and content analysis: to analyse the relevant instruments in international law and other selected jurisdictions for comparative purposes in considering recommendations for law reform.
- c. Consultations in the form of interviews and focus group discussions involving relevant stakeholders have also been conducted. A list of participants involved in the consultations is attached in Appendix 1.

## 2. UNDRIP: AN OVERVIEW

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) <sup>10</sup> specifically affirms the rights of indigenous peoples.<sup>11</sup> The document is one of several international instruments which reflect the response to ongoing global historical discrimination against these communities that deny them their fundamental rights.<sup>12</sup>

UNDRIP provides reference for the protection of indigenous rights.<sup>13</sup> It affirms the legal existence of indigenous peoples by recognizing them as legal subjects, and it renders international law applicable to their relations with States.<sup>14</sup> It particularly lays out the individual and collective rights of indigenous peoples worldwide as distinct peoples. It also sets minimum standards for their recognition, participation and due process.<sup>15</sup>

On the part of the indigenous peoples, the UNDRIP is 'the formal recognition of their existence, of their right to their own identities, of their right to self-determination, of their cultures and their heritage, and of their rights as peoples, communities and collectivity'.<sup>16</sup>

It is the first international instrument to formally recognize indigenous peoples' right to self-determination.<sup>17</sup> It provides formal guidance for issues facing indigenous peoples including effective participation; free, prior and informed consent; traditional knowledge; access to genetic resources; decentralization; recognition of territorial rights; natural resource management; and development with identity.

### The UNDRIP as soft law

The UNDRIP was adopted by the UN General Assembly, with 143 votes in favour, including Malaysia, 4 against, and 11 abstentions. The four countries that voted against the adoption and which later endorsed the UNDRIP were Australia (2009); New Zealand, Canada and US (in 2010). Countries that endorse UNDRIP recognize and affirm the rights articulated therein and pledge to work toward their realization.

The last paragraph of the preamble proclaims that the UNDRIP is a standard of achievement 'to be pursued in a spirit of partnership and mutual respect'. In view of

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<sup>10</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, Agenda Item 68, UN Doc A/RES/61/295(2 October 2007, adopted 13 September 2007)(*'UNDRIP'*).

<sup>11</sup> *Convention concerning indigenous and tribal peoples in independent countries*, Opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

<sup>12</sup> *UNDRIP*, UN Doc A/RES/61/295 (n 10), see, eg, Preamble para 18; art 2; art 46(3).

<sup>13</sup> PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011) 227; Athanasios Yupsanis, 'The ILO Convention No. 169 Concerning Indigenous and Tribal People in Independent Countries 1989–2009: An Overview' (2010) 79 *Nordic Journal of International Law* 433, 433.

<sup>14</sup> Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observation' (2008) 30 *Michigan Journal of International Law* 177, 179.

<sup>15</sup> David Fautsch, 'An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform' (2009-2010) 31 *Michigan Journal of International Law* 449, 450.

<sup>16</sup> United Nations, 'The State of the World's Indigenous Peoples: Implementing the United Nations Declaration on the Rights of Indigenous Peoples in 2007' (2019) 4 *Economic & Social Affairs ST/ESA/371*: 1-98.

<sup>17</sup> *Ibid.*

numerous number of support for the adoption of the UNDRIP, it is considered to play a significant role in future legal development.<sup>18</sup>

*Being an instrument without legal force, UNDRIP is regarded as soft law as it is endorsed by governments and forms part of accepted international law norms. This means the UNDRIP has no legal force at the international law. However, although with “soft law” status, as affirmed by the United Nation, the UNDRIP has established a universal framework with minimum standards for the survival, dignity and well-being of indigenous peoples in the world.<sup>19</sup>*

The Declaration is particularly significant at local level in Malaysia as it is also used as a framework for human right institution i.e. Suhakam in monitoring the implementation of indigenous peoples’ rights at the national level. On the part of the indigenous peoples, human rights institutions are frequently seen as more accessible and approachable in terms of problem resolution in view of challenges faced by indigenous peoples in accessing the national court systems.<sup>20</sup>

### 3. INDIGENOUS PEOPLES IN MALAYSIA

This study focuses on communities considered as ‘indigenous peoples’ in Malaysia from the perspective of international law. Under international law, ‘indigenous peoples’ refer to certain distinctive groups of peoples who originate from a particular area of land and are generally marginalised relative to the majority population.

Although there is no accepted legal definition of indigenous peoples<sup>21</sup> in international instruments such as the UNDRIP and the Conventions concerning Indigenous and Tribal

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<sup>18</sup> Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10(1) *Melbourne Journal of International Law* 27, 27-28; Claire Charters, 'Indigenous Peoples and International Law and Policy' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 161, 177-181; Anaya S James, 'International Human Rights And Indigenous Peoples: The Move Toward The Multicultural State' (2004) 21(1) *Arizona Journal of International & Comparative Law Vol* , 14-6.

<sup>19</sup> 'Declaration on the rights of indigenous people' *United Nations Department of Economics and Social Affairs: Indigenous Peoples* (Web page) <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

<sup>20</sup> United Nations, 'The State of the World's Indigenous Peoples: Implementing the United Nation Declaration on the Rights of Indigenous Peoples in 2007', (2019) 4 *Economic & Social Affairs ST/ESA/371*: 1-98.

<sup>21</sup> Macklem (n 14) 203. See also the commentary on the dispute by Benedict Kingsbury, 'Indigenous Peoples in International Law: A Constructivist Approach to Asian Controversy' (1998) 92(3) *The American Journal of International Law* 414.

Peoples in Independent Countries (ILO Convention No. 169),<sup>22</sup> there are four criteria which are considered essential:<sup>23</sup>

**Criteria for the definition of indigenous peoples:**

1. Priority in time, with respect to occupation and use of a specific territory;
2. The voluntary perpetuation of cultural distinctiveness;
3. Self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and
4. An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

Under UNDRIP, self-identification as indigenous is a fundamental criterion.<sup>24</sup> Self-identification is qualified 'to determine their own identity or membership in accordance with their customs and traditions'. UNDRIP also emphasizes common historic experiences or marginalization.<sup>25</sup> The term 'peoples' (with an 's') is used to convey recognition of the existence of organised societies with an identity of their own, rather than mere groupings sharing certain racial or cultural characteristics.

Based on these characteristics, it is generally recognised that the indigenous peoples in Malaysia are the Orang Asli communities in Peninsular Malaysia and natives in Sabah and Sarawak who are minority in number and fulfil the above criteria. These three communities are commonly known as "Orang Asal" which reflect the concept of 'indigenous peoples' from the perspective of international law, especially the UNDRIP.

In a recent legislation passed by the Parliament, *Access to Biological Resources and Benefit Sharing Act 2017* (Act 795),<sup>26</sup> the term "Indigenous Community" for the purpose of the legislation, is defined to mean:

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<sup>22</sup> Article 16, ILO Convention No. 169 recognises the application of the principle of FPIC where the government must seek consent from indigenous peoples before removing them from their customary lands. This provision requires that the places to which they are moved be at least equivalent to their places of origin and to have a similar level quality and legal status. The government must negotiate with and seek the participation of indigenous peoples regarding development (Article 2, ILO No 169) in several areas, including the development of natural resources and soil (Article 15, ILO No 169) with good faith (Article 16(2) ILO No 169) (Article 16, 2, 15, ILO No 169).

<sup>23</sup> Working Paper on the Concept of "Indigenous People" by the Chairperson/Rapporteur, Erica-Irene A Daes, E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996), on definition of indigenous peoples adopted by the United Nations Working Group of Indigenous Peoples, cited in *Communication on Human Rights: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, UN Doc E/CN.4/2003/90 (21 January 2003) [99].

<sup>24</sup> UNDRIP, UN Doc A/RES/61/295 (n 10) art 33.

<sup>25</sup> Ibid Preamble paras 6- 7.

<sup>26</sup> The Act is yet to come into force. The date of Royal Assent: 9 October 2017. The date of Gazette: 17 October 2017.

## The Rights of Indigenous Peoples in Malaysia

A Group Of Persons comprising— (a) in the case of Peninsular Malaysia, aborigines as defined in the Aboriginal Peoples Act 1954 [Act 134]; or (b) in the case of Sabah and Sarawak, natives as defined in Clause (6) of Article 161a of the Federal Constitution, and who speak an aboriginal or a native language and habitually follow and embody an aboriginal's or a native's traditional way of life, customs and beliefs.

This however does not deny the fact that majority indigenous communities are indigenous to the land within the context of national law and policy. Specifically, the Federal Constitution provides for a special position to certain groups of communities who are indigenous to Malaysia namely:

- a. the Malays: the word Malays is loosely defined as a 'person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay customs'.<sup>27</sup>
- b. the natives in Sabah and Sarawak: refers to a person belonging to the ethnic communities in Sabah and Sarawak specified under Art 161A (6)
- c. the aboriginal peoples.

The aboriginal peoples are also known as the 'Orang Asli'. The term is widely used in policy statements since 1980s and appeared to have gained acceptance among these communities.

### a. Orang Asli in Peninsular Malaysia

The term Orang Asli is a Malay phrase for 'original peoples' or 'first peoples'. Orang Asli are communities which are referred to as 'aboriginal peoples' in a number of legislations in Peninsular Malaysia. These laws include the *Federal Constitution*,<sup>28</sup> the *Aboriginal Peoples Act 1954*, the *National Forestry Act 1984*<sup>29</sup> and the *Wildlife Conservation Act 2010*.<sup>30</sup>

Specifically, under the *Aboriginal Peoples Act 1954*, the aboriginal peoples are defined using characteristics including language, way of life, custom and belief as well as lineage or blood relation to the aborigines.<sup>31</sup> An aboriginal ethnic group is defined as 'a distinct tribal division of aborigines as characterized by culture, language or social organization ...'. It may also include any group that is declared by the state authority as such.<sup>32</sup> An aboriginal community



FIGURE 1: ORANG ASLI COMMUNITIES

<sup>27</sup> *Federal Constitution* (Malaysia) art 160(2).

<sup>28</sup> *Federal Constitution* (Malaysia) art 8(5)(c); Article 45(2); Ninth Schedule Federal List Item 16.

<sup>29</sup> *National Forestry Act 1984* (Malaysia) ss 40(3), 62(2)(b).

<sup>30</sup> *Wildlife Conservation Act 2010* (Malaysia) s 51(1).

<sup>31</sup> *Aboriginal Peoples Act 1954* (Malaysia) s 3.

<sup>32</sup> *Ibid* s 2.

is defined as the ‘members of one aboriginal ethnic group living together in one place’.<sup>33</sup>

The Orang Asli population was 178,197 according to government data as of 2010.<sup>34</sup> This amounts to about 0.5% of the total Malaysian population.<sup>35</sup>

The Orang Asli communities are classified into three groups, i.e. the Negrito, Sen’oi and Proto-Malay. These distinctions are made according to their religion, social organisation and physical characteristics.<sup>36</sup> These three main groups comprise 18 different sub-groups, as reflected in Figure 1.

### b. Natives in Sabah and Sarawak

The Federal Constitution refers to peoples who are indigenous to Sabah and Sarawak as ‘native’ - Article 161A.

#### Sarawak

Specifically, in relation to Sarawak, a native is a person who is a citizen and either belongs to the races specified in clause (7) of art 161A as indigenous to the state or is of mixed blood deriving from those races - Art 161A(7). A person may also acquire a native status through a declaration made by court under s 20 of the *Native Court Ordinance 1992*.

#### Sabah

In relation to Sabah, a native is defined under the Federal Constitution as a person who is a citizen; the child or grandchild of a person of a race indigenous to Sabah; and was born either in Sabah or to a father domiciled in Sabah at the time of birth - Art 161A(7). Similar definition is also provided in Article 41(10) of the *Constitution of the State of Sabah*.

List of Native in Sarawak	
Art 161A(7) Federal Constitution	
1.	Bukitans
2.	Bisayahs
3.	Dusuns
4.	Sea Dayaks
5.	Land Dayaks
6.	Kadayans
7.	Kalabits
8.	Kayans
9.	Kenyahs (including Sabups and Sipengs)
10.	Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits)
11.	Lugats
12.	Lisums
13.	Malays
14.	Melanos
15.	Muruts
16.	Penans
17.	Sians
18.	Tagals
19.	Tabuns and
20.	Ukits

<sup>33</sup> See Ibid.

<sup>34</sup> ‘Bilangan Orang Asli Mengikut Etnik sehingga Mac 2018’ *Portal Data Terbuka Malaysia* (Web page, 2018) [http://www.data.gov.my/data/ms\\_MY/dataset/bilangan-penduduk-orang-asli-mengikut-etnik/resource/2845394c-0e37-4b46-841a-d982b0ddf7ee](http://www.data.gov.my/data/ms_MY/dataset/bilangan-penduduk-orang-asli-mengikut-etnik/resource/2845394c-0e37-4b46-841a-d982b0ddf7ee).

<sup>35</sup> The Malaysia population is recorded at 32.4 million at 2018 according to data by Department of Statistic, Malaysia.

<sup>36</sup> Iskandar Carey, *Orang Asli: The Aboriginal Tribes of Peninsular Malaysia* (Oxford University Press, 1976); Sharon Carsten et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, 1997).

## The Rights of Indigenous Peoples in Malaysia

In addition, the term native in Sabah is also defined to mean:

<b>Section 2(1) of the <i>Interpretation (Definition of Native) Ordinance 1952</i></b>	
(a) any person both of whose parents are or were members of a people indigenous to Sabah; or	The native status under this category is acquired by origin.
(b) any person ordinarily resident in Sabah and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof; or	The native status under these categories is acquired by a Native Court order.
(c) any person who is ordinarily resident in Sabah, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people or of a people indigenous to the State of Sarawak or the State of Brunei, has lived as and been a member of a native for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1059/63; or	In other words, the categories of peoples under paragraphs (b)-(d) could only acquire native status upon a court declaration as such. <sup>37</sup>
(d) any person who is ordinarily resident in Sabah, is a member of a people indigenous to the Republic of Indonesia or the Sulu group of islands in the Philippine Archipelago or the State of Malaya or the Republic of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63	

As reflected by the situation in Peninsular Malaysia, indigenous communities who are a majority with strong political and economic position is not regarded as indigenous peoples as understood under international law.

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<sup>37</sup> Section 2(3) provides: *No claim by any person to be a native by virtue of the provisions of paragraphs (b), (c) and (d) of subsection (1) shall be recognised as valid unless supported by an appropriate declaration made by a Native Court under section 3.*

## 4. THE UNDRIP AND THE MALAYSIAN LAWS: BASIC PRINCIPLES

The UNDRIP affirms basic principles which are fundamental to the provisions that the Declaration outlines. It is specifically consistent with the principle of respect to human rights, upholding principle of equality of all human beings in line with the general framework of human rights which are well established under the international law.

Examining these principles, it may be argued that as the fundamental rights are affirmed in the Malaysian constitutional document, i.e. the Federal Constitution, our constitutional framework are consistent with the principles upheld by the UNDRIP. In particular, the Federal Constitution affirms fundamental rights of human being and citizen in Malaysia and acknowledges the need of special protection for indigenous peoples, i.e. the Malays, the natives in Sabah and Sarawak and the Orang Asli. Although the provisions on fundamental liberties are minimal, the scope that it provides allow for expansion of these rights to cater for the internalisation of the UNDRIP provisions through legislation or at least through public policy.

This part outlines the basic principles underlying the provisions in the UNDRIP. On this framework, the Malaysian constitutional provisions are analysed specifically in relation to the fundamental liberties provisions in the Malaysian Federal Constitution, the special provisions for indigenous peoples and the Orang Asli.

### a. UNDRIP: human rights, equality and self-determination

UNDRIP specifically provides affirmation of the basic human rights and fundamental freedoms of the indigenous peoples similar to those recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.<sup>38</sup>

UNDRIP also affirms that the indigenous peoples and individuals are free and equal to all other peoples.<sup>39</sup> In this context, individuals of indigenous groups have ‘right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity’.<sup>40</sup>

UNDRIP: The basic underlying principles		
Collective and individual rights	Right to self determination	Free, Prior and Informed Consent (FPIC)

<sup>38</sup> UNDRIP, UN Doc A/RES/61/295 (n 10) art 1.

<sup>39</sup> Ibid art 2.

<sup>40</sup> See *ibid*.

### i. Collective and individual rights

The basic rights provided for in UNDRIP, including all human rights and fundamental freedoms protected by international law as mentioned in the instrument,<sup>41</sup> may be exercised by indigenous peoples collectively as a community, as well as individually as a person. In fact, the UNDRIP marks a significant departure in international human rights law with the recognition of the collective rights of the indigenous peoples. Throughout the text of the UNDRIP, rights are attributed to both indigenous peoples in collective, as well as to indigenous individuals.<sup>42</sup>

The collective dimension is recognized as a prerequisite for the realization and enjoyment of individual rights. At the same time, they are indispensable to the existence, well-being and integral development as peoples.<sup>43</sup> States are to respect the collective aspect of the relationship of the indigenous peoples to their land which is important for their cultural and spiritual values.

### ii. Right to self determination

One of important components of UNDRIP is the recognition of the right to self-determination of indigenous peoples. Article 3 of UNDRIP states:

Indigenous peoples have right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economy, social and cultural development.

Prior to the adoption of the UNDRIP, the right to self-determination of all peoples has been recognized in various international law instruments (Figure 2).

However, the indigenous people have arguably been excluded as the beneficiaries of the right to self-determination, hence the express provision on right to self-determination in the UNDRIP. Article 3 of the UNDRIP is identical to Article 1 of two human rights international covenants, namely the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to self-determination of indigenous peoples covers four important dimensions: political, economic, social and cultural. In other words,

#### International instruments affirming right of all people to self-determination

- Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly (Resolution 1514 (XV));
- United Nations General Assembly Resolution 1541 (XV) on Principles Which Should Guide Members in Determining Whether or Not an Obligation Exist to Transmit the Information Called for Under Article 73E of The Charter
- United Nations Charter
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)

FIGURE 2: SELF DETERMINATION

<sup>41</sup> Ibid art 1.

<sup>42</sup> See commentary, e.g., Theo van Boven, 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010) 174, 177.

<sup>43</sup> UNDRIP UN Doc A/RES/61/295 (n 10) Preamble para 22.

## The Rights of Indigenous Peoples in Malaysia

indigenous communities are free to determine their political status and free to pursue economic, social and cultural development. All these dimensions are closely related to the recognition of the rights over natural resources.

Article 4 of UNDRIP recognizes the autonomy or self-government of the indigenous peoples at domestic level in matters of their internal and local affairs. This includes the right to manage finances for the purposes of their life. Article 4 states:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

These two provisions are manifestation of political dimension.

However, ambiguity remains regarding the definition of self-determination in international law that leads to different interpretations of self-determination between indigenous peoples, States and scholars. For example, Argentina refuses to recognize the right to self-determination of indigenous people, because it is not supported by any international legal instrument.<sup>44</sup> Japan has also refused to accept such rights, because they were only applicable in the context of colonial rule, and especially those who demanded independence from colonialism.<sup>45</sup>

Nevertheless, indigenous people have demanded that the right to self-determination be defined justly. For example, representatives from the National Aboriginal and Islanders Legal Services Secretariat of Australia proposed to accept original definition of the right to self-determination.<sup>46</sup> The definition must also be based on principles of equality and non-discrimination.<sup>47</sup> Some representatives of other indigenous organization, including the Sami Council, have described the right to self-determination as dynamic and not static.<sup>48</sup>

According to Daes, the right to self-determination of the indigenous peoples can be defined as the independence and integrity of and respect for indigenous peoples.<sup>49</sup> It is the freedom to live according to their customs and beliefs that are respected by the majority of the society. Hannum elaborates that the right to self-determination is not limited to political aspects, but also includes the economic, cultural and social aspects.<sup>50</sup> Moreover, Anaya suggested that the principles of the right to self-determination is based

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<sup>44</sup> *Consideration Of A Draft United Nations Declaration On The Rights Of Indigenous Peoples* UN Doc E/ CN.4 / 1995 / WG.15 / 2/Add.1(10 October 1996) [6].

<sup>45</sup> Mr. José Urrutia, Chairperson-Rapporteur, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, UN Doc E / CN.4 / 1997/102(10 December 1996) [338]-[340].

<sup>46</sup> Mr. Luis-Enrique Chávez, Chairperson-Rapporteur, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32* UN Doc E / CN.4 / 2000/84 (6 December 1999) [79].

<sup>47</sup> *Ibid* 59.

<sup>48</sup> *Ibid* [47], [53], [71] [82].

<sup>49</sup> Erica Daes, 'The Concept of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples' 2002 14 *St. Thomas Law Review* 259.

<sup>50</sup> Hannum, 'Rethinking Self-Determination' 1993 34, *Virginia Journal of International Law* 1-69.

on freedom and equality.<sup>51</sup> The implementation can be evaluated by assessing whether the indigenous peoples have the freedom to choose and determine their own way of life.<sup>52</sup>

### iii. Free, Prior and Informed Consent (FPIC)

FPIC is an established principle recognised under the international law and promoted to govern the relationship between states and indigenous peoples.<sup>53</sup> This principle has been recognised in several international instruments such as Conventions concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169).<sup>54</sup> However, the study will focus on the provisions of FPIC in UNDRIP, which are superior in that they cover all aspects with the additional element of 'prior' that is absent from Article 16 (2) of ILO No 169.

The elements of FPIC are defined as follows:<sup>55</sup>

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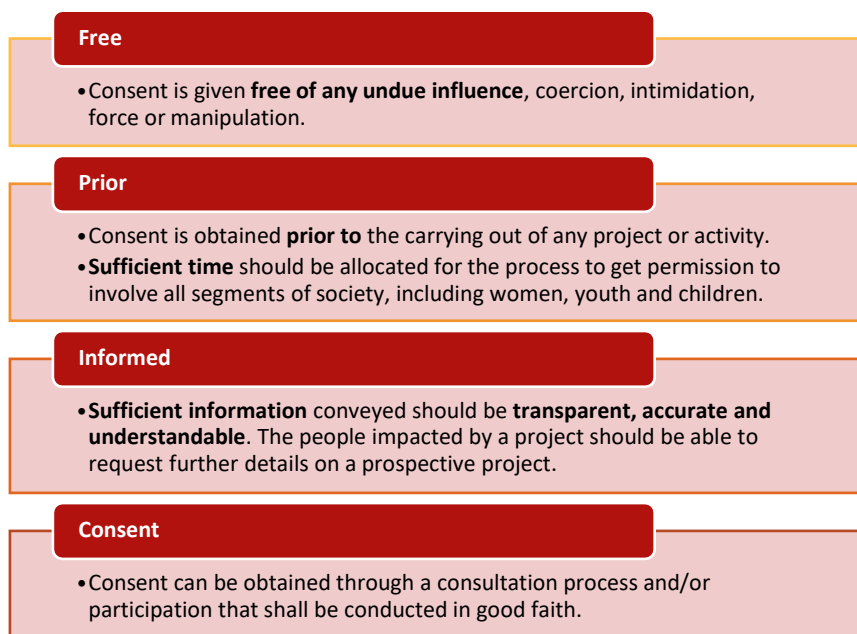
<sup>51</sup> Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004).

<sup>52</sup> Daes (n 47).

<sup>53</sup> See Muhammad Hassan and Rohaida Nordin, 'Self- Determination And Free, Prior And Informed Consent Of The Orang Asli' (2018) *The European Proceedings of Social & Behavioural Sciences* 815-823.

<sup>54</sup> Article 16, ILO Convention No. 169 recognises the application of the principle of FPIC where the government must seek consent from indigenous peoples before removing them from their customary lands. This provision requires that the places to which they are moved be at least equivalent to their places of origin and to have a similar level quality and legal status. The government must negotiate with and seek the participation of indigenous peoples regarding development (Article 2, ILO No 169) in several areas, including the development of natural resources and soil (Article 15, ILO No 169) with good faith (Article 16(2) ILO No 169) (Article 16, 2, 15, ILO No 169).

<sup>55</sup> Human Rights Council, *Free, prior and informed consent: a human rights-based approach- Study of the Expert Mechanism on the Rights of Indigenous Peoples* 39th sess, Agenda Item 3 and 5, UN Doc A/HRC/39/62 (10-28 September 2018).



**FIGURE 3 ELEMENTS OF FPIC**

There must be enough information conveyed to the peoples impacted by a prospective project. This includes the nature, size and scope of a project or activity; the objectives of a prospective project; the time period; the locations involved and affected; the assessment of impacts, such as economic, social, cultural, environmental; potential risks and benefits for equal sharing; the parties involved in executing the project; and the procedures related to the project.<sup>56</sup>

Under UNDRIP, the FPIC is required in three situations as elaborated in the following table:

- a. Relocation from ancestral land
- b. Any action which affects cultural, intellectual, religious and spiritual property
- c. Law-making process and administrative decisions

Actions affecting indigenous peoples	UNDRIP provisions
Relocation from ancestral land	Indigenous peoples cannot be removed from their ancestral land unless the principle of FPIC is complied with and all compensations have been paid to the indigenous peoples involved. <sup>57</sup>

<sup>56</sup> See Ibid.

<sup>57</sup> UNDRIP, UN Doc A/RES/61/295 (n 10) art 10.

	<p>In case that indigenous peoples' land being seized, taken, used, occupied or damaged without their FPIC, the indigenous peoples are entitled to claim such restitution or compensation that is reasonable and fair.<sup>58</sup></p> <p>If mutual agreement has been reached, compensation may also be paid in the form of land, territories and natural resources to value equivalent to that which has been taken. <sup>59</sup> Compensation in the form of land is important to the indigenous peoples as it represents their identity.</p>
<p>Any action which affects cultural, intellectual, religious and spiritual property</p>	<p>The UNDRIP also requires FPIC for any decision making affecting the values, customs and culture of indigenous peoples.</p> <p>Redress must be provided by States including restitution with respect to the cultural, intellectual, religious and spiritual property of the indigenous peoples taken without their free, prior and informed consent or in violation of their laws, traditions and customs.<sup>60</sup></p>
<p>Law-making process and administrative decisions</p>	<p>FPIC is also required as part of the process of introducing or adopting any legislative or administrative measures that might affect indigenous peoples.</p> <p>The government must consult and cooperate in good faith with the indigenous peoples through their own representative institutions in order to obtain FPIC prior to adopting any project that affects the ancestral lands, territories and natural resources of indigenous peoples.<sup>61</sup> These include utilisation or exploitation of mineral, water and other resources.</p> <p>Further, the term 'good faith' in Articles 19 and 32 (2) requires the government to be transparent in obtaining FPIC from indigenous peoples.</p> <p>The government must also provide an effective mechanism to minimise any undesirable impacts such</p>

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<sup>58</sup> Ibid art 28.

<sup>59</sup> Ibid art 32 (2).

<sup>60</sup> Ibid art 11(2).

<sup>61</sup> Ibid art 19.

as pollution, poor economy, sensitive culture and others.<sup>62</sup> This is important to preserve the environment as it affects the traditional life of indigenous peoples who are reliant upon the forests and natural resources.<sup>63</sup>

## b. The fundamental liberties provided by the Malaysian laws and its applicability to the indigenous peoples in Malaysia

Part II of the Malaysian Federal Constitution safeguards the basic liberties or rights of individuals and citizens in the country, including the following:

- a. Civil and political rights of individuals (freedom of speech, assembly and association, and of religion); and
- b. Protection of individual rights (including liberty of person, due process of law, prohibition on slavery, protection against retrospective criminal laws, equality before the law, freedom from discrimination in the provision of education and the rights to property).

The fundamental liberties provided by the Federal Constitution do not only apply to all citizens in Malaysia but also the indigenous peoples including the Orang Asli and minority natives in Sabah and Sarawak.

Apart from the provisions, the Federal Constitution also provides for several provisions giving special treatment for certain groups indigenous to the country i.e. the Malays and natives in Sabah and Sarawak especially in Art 153. Art 153(1) provides:

It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.

Aspects which are required by the constitutional provision to give reservation of certain proportion are:

- a. Positions in the public service (other than the public service of a State);
- b. Scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government; and
- c. Permits or licences for the operation of any trade or business whenever required by federal law.

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<sup>62</sup> Ibid art32 (3).

<sup>63</sup> See above n 51.

## The Rights of Indigenous Peoples in Malaysia

This special position, or affirmative action, for certain indigenous peoples provided in the Constitution, is considered necessary to allow the state to take remedial measures to remove disabilities of vulnerable communities in order to achieve equality in society.<sup>64</sup>

The *Constitution* also affirms the protection of religions and languages of other communities regardless of Islam and the Malay language being given special positions.<sup>65</sup> The principles clearly attempt to accommodate the pluralism already in practice and allude to the respect for communities and the communal nature of the society.<sup>66</sup>

In relation to the Orang Asli, there are several provisions including in the Federal Constitution and the Aboriginal Peoples Act 1954.

Under the *Federal Constitution*, the special position of the Orang Asli, referred to as the 'aborigines', is recognized. Apart from the general provisions, including those that aim to safeguard the fundamental liberties of all citizens which are equally applicable to the Orang Asli, there are specific provisions particular to the Orang Asli as follows:

- a. The Federal Constitution provides for equal treatment under the law for all people (Art 8). However there is a saving clause in the provision which allows for positive discriminatory legislation to be enacted for the 'protection, well-being or advancement' of the aborigines (Art 8(5)(c)).<sup>67</sup> This validates the special legislation for the Orang Asli such as the *Aboriginal Peoples Act 1954* (APA), which provides for the welfare of the Orang Asli.

*Federal Constitution* art 8(5)(c): 'This Article [Art 8] 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) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service'.

Art 8(1) states: 'All persons are equal before the law and entitled to the equal protection of the law'.

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<sup>64</sup> Huang-Thio, S. M., 'Constitutional Discrimination under the Malaysian Constitution' (1964) 6(1) *Malaya Law Review* 1, 6; Harry E Groves, 'Equal Protection of the Laws in Malaysia and India' (1963) 12(3) *American Journal of Comparative Law* 385.; In *Fan Yew Teng v Public Prosecutor* [1975] 2 MLJ 235, 238: Lee Hun Hoe CJ held in respect to art 153, these provisions cannot be questioned and are necessary to assist the less advanced or fortunate in the light of conditions prevailing at the time of independence.

<sup>65</sup> Art 3(1): 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.' Freedom to profess and practise religion is safeguarded in Art 11(1).

<sup>66</sup> Izawati Wook, "The Rights of the Orang Asli in Forests: Towards Justice and Equality", (PhD Thesis, Victoria University, 2014) ("The Rights of the Orang Asli in Forests").

<sup>67</sup> *Federal Constitution* (Malaysia) art 8(5)(c): 'This Article [Art 8] 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) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service'. Art 8(1) states: 'All persons are equal before the law and entitled to the equal protection of the law'.

- b. The welfare of aborigines is specifically placed under the jurisdiction of the Federal Government.<sup>68</sup> Even so, it is the responsibility of the states' executive authority to ensure compliance with any federal law applying to the states and not to impede or prejudice the exercise of the executive authority of the Federation.<sup>69</sup>
- c. Within the composition of the Senate in the Parliament, there must be members who 'are capable of representing the interests of aborigines'.<sup>70</sup>

### **Aboriginal Peoples Act 1954 (Act 134)**

The Aboriginal Peoples Act 1954 (Act 134) is a specific statute providing for the affairs of the Orang Asli. The Act was inherited from British colonial rule and has a precursor in the Perak Aboriginal Tribes Enactment 1939. The 1954 law, which was initially referred to as the Aboriginal Peoples Ordinance (1954) and later revised as the Aboriginal Peoples Act (1974), was essentially an adoption of the 1939 Enactment. The earlier law, based largely on recommendations by H D Noone, a field ethnographer and curator for the Federated Malay States Museum Department, was an attempt to protect the way of life of the Orang Asli communities.<sup>71</sup>

The Act establishes a specific framework comprising both levels of government, federal and state. The ultimate objective of the Act is to protect and preserve the rights and interests of the aborigines including their autonomy, identity and land from competing economic and political forces. At the federal level, a special position is created, the Director General of Orang Asli Affairs. This position, as an agent of the Federal Government, is assisted by a government agency, the Orang Asli Advancement Department,<sup>72</sup> also funded by the Federal Government.

The law establishes extensive powers over the lives of the Orang Asli which are entrusted to the Director General. At the level of state, the power to control land and resources is a legal duty, as established by the present common law, on state authorities. The duty includes declaring areas to be occupied by the Orang Asli to the exclusion of others.

The legislation, while paternalistic, in the historical context represents a benevolent intention to protect the interests, autonomy and the way of life of the aborigines as minorities. It covers most aspects of their lives, including defining who is Orang Asli, their education and their security.<sup>73</sup>

In view of the provisions on fundamental liberties and special position of indigenous peoples in Malaysia, as well as provisions welfare of the Orang Asli, the law in Malaysia provides for some protection of the rights of indigenous peoples.

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<sup>68</sup> *Federal Constitution* (Malaysia) Ninth Schedule Federal List Item 16.

<sup>69</sup> *Ibid* art 81.

<sup>70</sup> *Ibid* art 45(2).

<sup>71</sup> Rusaslina Idrus, 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) 29(Suppl\ 1) *Malaysian Studies* 53 citing H D Noone, 'Report on the settlements and welfare of the Ple-Temiar Senoi of the Perak-Kelantan watershed' (1936) 19(1) *Journal of the Federated Malay States Museums* 1.

<sup>72</sup> The name of the department in Malay is Jabatan Kemajuan Orang Asli (JAKOA). Previously it was known as Orang Asli Affairs Department or Jabatan Hal Ehwal Orang Asli (JHEOA).

<sup>73</sup> Wook, "The Rights of the Orang Asli in Forests" (n 64).

Unfortunately, these provisions are inadequate to address many issues faced by indigenous peoples. The Aboriginal Peoples Act 1954, for instance, creates an extensive power over the Orang Asli communities which affect autonomy of the communities and the exercise right to self-determination. However, there is no constitutional provision that prevent the expansion of the rights through other sources of law including legislation as well as the judicial decisions. In fact, as will be seen below, judicial decisions in Malaysia have developed a principle of recognition of customary land rights of indigenous people supported by the constitutional framework.

### 5. RIGHTS IN RELATION TO LAND AND RESOURCES

Indigenous communities, as recognised in UNDRIP, commonly have strong sentimental attachments to the land on which they and their ancestors have lived. Generally, the land and resources within the control of a community are regarded as a form of communal land. This typically refers to a definite territory consisting of a large tract of land occupied by a community that have lived in the area for a very long time and is governed by specific traditional laws.

Similar to many indigenous peoples around the world, the main issues faced by Malaysian indigenous peoples, majority of whom are interconnected to their customary land, are the security of land and access to resources. With inadequate legal protection, indigenous peoples have suffered from and are threatened with land loss, trespass on their land, and even displacement.

It is well documented that the relocation of indigenous peoples on government initiative to a new area as a result of development or conversion of land into large scale plantation does not only further marginalise the socioeconomic position of the communities, but also affects the cultural integrity of the peoples. The indigenous communities often changed from a self-reliant community to dependent on government to survive. Among the problems identified in these schemes are: there is no formal recognition of ownership of lands allocated to the Orang Asli; the delivery of the development plan is unsatisfactory; lack of opportunity of the Orang Asli to participate directly in the plantation schemes which are managed by appointed corporations; no job opportunity within the scheme areas; and very low income received compared to the scale of lands involved. For communities whose lands are surrounded with large scale plantations, or located near mining activities, access to resources customarily accessed is disrupted, soil fertility is affected, and water sources are contaminated.<sup>74</sup>

These issues reflect the need for the review of the existing law in Malaysia to accord better legal protection consistent with the principles promoted by the UNDRIP. This

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<sup>74</sup> See, e.g., Omar Mustaffa, 'Rancangan Pengumpulan Semula (RPS) Masyarakat Orang Asli: Pencapaian dan Cabaran (Resettlement Scheme for the Orang Asli Communities: Achievement and Challenges' in Ma'rof Redzuan and Sarjit S. Gill (eds), *Orang Asli: Isu, Transformasi dan Cabaran (Orang Asli: Issues, Transformation and Challenges)* (Putra University of Malaysia, 2008) 190, 191-2 (a study on various resettlement schemes throughout the Peninsula); Ma'rof Redzuan and Zahid Emby, 'Orang Asli: Pembangunan dan Ekologi Hutan (Orang Asli: Development and Forest Ecology)' in Ma'rof Redzuan and Sarjit S. Gill (eds), *Orang Asli: Isu, Transformasi dan Cabaran (Orang Asli: Issues, Transformation and Challenges)* (Putra University of Malaysia, 2008) 204 (a study on the resettlement schemes in Banun and Kemar, Perak).

section examines the protection of land and resources under the UNDRIP and considers how the existing relevant legal positions in Malaysia may incorporate the UNDRIP provisions.

### a. UNDRIP on the indigenous peoples' land and resources

The UNDRIP provides for strong protection of land and resource rights of the indigenous peoples. It is comprised of the following cluster of articles relating to land rights: Art 10, 11, 12, 20 and 25-31 read together with Art 3.<sup>75</sup>

#### i. Right to ownership and possession of the land and resources

In particular, the indigenous peoples are recognised to have the right to own and possess the lands and resources that they traditionally occupy or use. Their special relationship is acknowledged as the principal source of livelihood, social and cultural cohesion fundamental to their identity and spiritual welfare. To this, Art 25 states:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

The UNDRIP similarly treats the land, territories and resources traditionally occupied or used by indigenous peoples. This may include the land accessed for subsistence or swidden agriculture.

Land rights are not limited to the traditional land claimed through long and continuous occupation. They include the land that the communities currently occupy or use and the lands that they have acquired or used in the past.<sup>76</sup> Land right affirmations are extensive and include ownership, use, development and control.

#### ii. States' obligations in relation to the land rights

With respect to the land and resource rights of the indigenous peoples, the UNDRIP affirms that States have the obligation to protect these rights and to facilitate their realization. Such obligations include legally recognizing and protecting the lands, territories and resources.<sup>77</sup>

To this, processes must be established and implemented to recognize and adjudicate on land rights. The process must be 'fair, independent, impartial, open and transparent' and give due consideration to the laws, traditions, customs and land tenure systems of the

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<sup>75</sup> For the discussion, see e.g., S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re Empowerment' (2007) 11 (3 October 2007) *Jurist Legal News and Research* [3]. On the scope and extent of land rights under the instrument see, eg, Xanthaki (n 18) 27, 31. Jeremie Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207, 223-9; Charters, (n 18) 168.

<sup>76</sup> UNDRIP, UN Doc A/RES/61/295(n 10) art 26(2).

<sup>77</sup> Ibid art 26(3).

groups concerned. Simultaneously, the indigenous peoples have right to participate in the process.<sup>78</sup>

In other words, the UNDRIP requires fair and mutually acceptable procedures to resolve conflicts between indigenous peoples and states. This may include procedures such as negotiations, mediation, arbitration and national courts as well as international and regional mechanisms as platforms for dispute resolution or as avenues of complaint.

### iii. Right to resources

In addition to land protection, there are also specific provisions addressing access to resources. Some key aspects in relation to resource protection are:

- security in the enjoyment of the means of subsistence and development;<sup>79</sup>
- free engagement in traditional economic activities;<sup>80</sup>
- conservation of 'vital medicinal plants, animals and minerals<sup>81</sup> and of the local environment and of the productive capacity of the lands or territories and resources;<sup>82</sup> and
- determination and development of their own 'priorities and strategies for the development or use of their lands or territories and other resources'.<sup>83</sup>

On whether the word 'resources' in the UNDRIP includes subsoil resources, one national court, the Supreme Court of the Philippines, in relation to its Indigenous Peoples' Right Act 1997 (Philippines),<sup>84</sup> held that the resources should be interpreted as only encompassing the right to surface resources. This is based on a domestic constitutional norm which affirms state ownership to natural resources.<sup>85</sup>

However, this view contradicts a report of a UN Expert Mechanism on the right to participate in decision making on extractive industries operating in or near indigenous territories.<sup>86</sup> The committee suggested that international law has developed a clear principle on the right of indigenous peoples to permanent sovereignty over natural resources. This is based on the right to self-determination, to which the principle of permanent sovereignty over natural resources is integral. Para 11 of the report, citing the Special Rapporteur on indigenous peoples, who noted that:

nowadays the right to self-determination includes a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy

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<sup>78</sup> Ibid art 27.

<sup>79</sup> Ibid.

<sup>80</sup> See Ibid

<sup>81</sup> Ibid art 24.

<sup>82</sup> Ibid art 29.

<sup>83</sup> Ibid art 32.

<sup>84</sup> *Indigenous Peoples' Right Act 1997* Republic Act No. 8371.

<sup>85</sup> Asian Development Bank, *Indigenous Peoples or Ethnic Minorities and Poverty Reduction; Philippines* (Manila, 2002) 16.

<sup>86</sup> Expert Mechanism on the Rights of Indigenous Peoples, UN Human Rights Council, *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, GE.12-13320, 5<sup>th</sup> sess, Item 4 of the provisional agenda, UN Doc A/HCR/EMRIP/2012/2 (9-13 July 2012).

and self-governance. In order to be meaningful, this modern concept of self-determination must logically and legally carry with it the essential right of permanent sovereignty over natural resources.

It has been observed that the recognition of indigenous peoples' permanent sovereignty over lands, territories and resources is a prerequisite for 'meaningful political and economic self-determination of indigenous peoples.

For any extractive activities to be conducted, the committee suggested that, the provision on self-determination read together with other relevant provisions on the protection of land, territories and resources in the UNDRIP,<sup>87</sup> mandates 'free, prior and informed consent (FPIC) of indigenous peoples prior to approval of the use by private industries of indigenous peoples' lands, territories and resources'.<sup>88</sup> This is out of concern that extractive activities often affect indigenous communities, their environment, and the resources which they have traditionally accessed, including those areas with cultural significance, such as sacred sites.

Furthermore, specific guiding principles were also endorsed by the UN Human Rights Council outlining the duties of states and corporations in relation to exploration and exploitation of natural resources in or near indigenous areas.<sup>89</sup> It is considered as an authoritative global standard addressing various issues of human rights involving extractive activities in indigenous territories.<sup>90</sup> The Framework rests on three main pillars:

- a. the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication;
- b. the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and
- c. the need for greater access to remedy, both judicial and non-judicial, for victims of business-related human rights abuse.

#### iv. Prohibition against forcible relocation

Article 10 of UNDRIP states that indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed

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<sup>87</sup> In particular: *UNDRIP*, UN Doc A/RES/61/295 (n 10) art 26, 28 and 32.

<sup>88</sup> *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, UN Doc A/HCR/EMRIP/2012/2 (n 84)[11].

<sup>89</sup> Resolution 17/4, the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework' (A/HRC/17/31).

<sup>90</sup> *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, UN Doc A/HCR/EMRIP/2012/2(n 84) [21].

consent from indigenous peoples concerned and after agreement on just and fair compensation and, where possible, the option of return.

### v. Right to redress for deprivation of land and resource rights

The UNDRIP also provides for right to redress for deprivation of land rights.<sup>91</sup> Art 28 states:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, equal in quality, size and legal status or of monetary compensation or other appropriate redress.

In other words, the article provides guidance on remedies for governments to create a functional process for recognizing indigenous communities and remedying land disputes. It affirms that indigenous peoples have the right to redress for wrongs related to lands, territories and resources, and requires the restitution of land or resources equal in quality, monetary compensation or other appropriate redress. Restitution refers to reestablishment, to the extent possible, the situation that existed for the victims prior to the violations of human rights.<sup>92</sup>

Redress other than restitution must be freely agreed to by the indigenous peoples concerned.<sup>93</sup> This may include the traditional lands that have been taken or used without their free, prior and informed consent. It may also include land that they unwillingly left or of which they lost possession. If it has been transferred legitimately and in good faith to innocent third parties, the indigenous peoples may have the right to recover it or, alternatively, to obtain other lands of equivalent to size and quality.<sup>94</sup>

### vi. Environmental and resource conservation

The UNDRIP also affirms the right to environmental and resource conservation which imposes on states a duty to establish and implement relevant programs.<sup>95</sup> Indigenous peoples are also protected from the siting of hazardous materials and use of their territories for military activities without their free, prior and informed consent.<sup>96</sup> States

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<sup>91</sup> UNDRIP, UN Doc A/RES/61/295 (n 10) Preamble para 4.

<sup>92</sup> Jeremie Gilbert *Indigenous People 's Land Rights Under International Law: From Victims to Actors* (Transnational Publisher,2006); at 145.

<sup>93</sup> UNDRIP, UN Doc A/RES/61/295 (n 10) art 28.

<sup>94</sup> *Sawhoyamaxa Indigenous Cmty v Paraguay (Judgment)* (Inter-American Court of Human Rights, Series C No 146, Mar 29 2006) 128, cited in Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27(1) *Wisconsin International Law Journal* 51, 70.

<sup>95</sup> UNDRIP, UN Doc A/RES/61/295 (n 10) art 29(1).

<sup>96</sup> *Ibid* art 29(2), (3), 30.

also have duties to take effective measures to address health issues for those affected by hazardous materials.

### vii. Right to Consultation and Free, Prior and Informed Consent

At a minimum, international standards call for consultation of the affected peoples before any projects, such as extractive activities, are carried out within the land or territories of the indigenous peoples, along with other projects capable of affecting the resources that they traditionally used.<sup>97</sup> The UNDRIP specifically requires 'free, prior and informed consent' (FPIC), the scope of which is described above.

### b. Malaysian position in relation to protection of land and resources of the indigenous peoples

Generally, in Peninsular Malaysia, there is no clear provision in the statutory law providing for the land rights of the Orang Asli. In contrast, in Sabah and Sarawak, there are statutory provisions recognizing customary land rights of the indigenous peoples in these states and the customary laws of the communities remain in force. However, there are issues in implementation of the law which have affected the land rights of the natives in Sabah and Sarawak.

As Malaysia has a common law system, statutory laws are complemented with the principles derived from judicial decisions which form the common law. The common law in Malaysia through a series of cases have recognised customary land and resources of the indigenous peoples in all three regions.

This section briefly describes the laws in relation to land and access to resources affecting the indigenous peoples in Malaysia.

### i. Orang Asli in Peninsular Malaysia

#### i. Governance of land and forest

The legal framework governing land and forest comprises several pieces of legislation. In Peninsular Malaysia, the land and forests are governed by numerous statutes, including:

- the Federal Constitution
- the National Forestry Act 1984 (Malaysia) (Revised 1993) (NFA)
- the National Land Code 1965 (Malaysia) (NLC) and
- the National Parks Act 1980 (Malaysia) (NPA).

Briefly, under the Art 74 of the *Federal Constitution*, land and forests are subject matters within state legislative power.<sup>98</sup> Under the NLC, ownership and other kinds of interests in land are granted by the states except that as expressly stipulated in the Code its

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<sup>97</sup> Tara Ward, 'The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 54, 66.

<sup>98</sup> *Federal Constitution* (Malaysia) Ninth Schedule State List Item 3(b).

provisions do not override the rights and interests in land acquired under customary law.<sup>99</sup>

The NFA, providing for forest management, is a federal statute enacted to achieve national uniformity but it must be adopted by a state to have legal force.<sup>100</sup> Unalienated land, including forests and forest products on the land, are the property of state authorities.<sup>101</sup> Removal of forest produce on land alienated by a state requires a removal licence.<sup>102</sup> As more than 95% of forest lands in Malaysia are owned by the respective state authorities, these entities effectively have virtual monopoly rights over their forest land, with extensive power of disposal over land and natural resources.<sup>103</sup>

In addition to this legislation, lands and forests are also governed by a complex web of policies established to achieve certain national goals. In Peninsular Malaysia, the formulation of policies relating to land and resources is made by various government agencies including the National Land Council, the National Forestry Council and others related to environment, conservation and economic development. Most of these policies, specifically on land and forestry, are confidential and there is no known assessment of their effectiveness.<sup>104</sup> In addition, the governance of land is also subject to customary laws. Some of them are codified, such as provided in the Negeri Sembilan Customary Tenure Enactment 1909 and provisions on *harta sepencarian* (jointly acquired property) in various Islamic family law legislations.

### ii. The laws on forestry, wildlife and protected areas and the rights of the Orang Asli

In Peninsular Malaysia, areas of land, forestry, wildlife and protected areas are governed by various statutes including the National Forestry Act 1984 (NFA), the National Land Code 1965 (NLC), the National Parks Act 1980 (NPA) and Malay reservation legislation for each of the states.<sup>105</sup> Many of these statutes provide for reservation of land for different purposes including environmental conservation and for the protection of the Malays. In relation to reservations provided for in these laws, the APA expressly provides that the Orang Asli may continue to live within the reservation regardless of contrary provisions in the relevant legislation.<sup>106</sup>

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<sup>99</sup> *National Land Code* (Malaysia) s 4.

<sup>100</sup> *Federal Constitution* (Malaysia) art 76(1)(b), (2). All states in the peninsula have adopted the federal legislation and the amendment in 1993 through their respective adoption enactments, *National Forestry Act (Adoption) Enactments* (1985–1987) and enactments adopting the 1993 amendment.

<sup>101</sup> *National Land Code* (Malaysia) ss 40, 44, 45; *National Forestry Act 1984* (Malaysia) s 14.

<sup>102</sup> *National Forestry Act 1984* (Malaysia) s 40(1).

<sup>103</sup> *Federal Constitution* (Malaysia) Ninth Schedule List 2, Forestry and land is a subject matter under the respective states' jurisdiction.

<sup>104</sup> IM Shukri, 'Land Administration in Peninsular Malaysia – A General Overview' (Department of the Director General of Lands and Mines Federal Malaysia (Unpublished), 2010) 3.

<sup>105</sup> *Malay Reservation Enactment 1933* (Malaysia) (applicable to Perak, Selangor, Negeri Sembilan and Pahang); *Malay Reservation Enactment Kelantan 1930* (Malaysia); *Malay Reservation Enactment Kedah 1931* (Malaysia); *Malay Reservation Enactment Perlis 1935* (Malaysia); *Malay Reservation Enactment Johor 1936* (Malaysia); *Malay Reservation Enactment Terengganu 1941* (Malaysia). There is no Malay Reservation legislation enacted in Malacca and Penang.

<sup>106</sup> *Aboriginal Peoples Act 1954* (Malaysia) s 10(1).

## The Rights of Indigenous Peoples in Malaysia

In relation to land governance, although the ownership of the unalienated land lies with the state authorities, it is expressly provided in the National Land Code that its provisions do not override the rights and interests in land acquired under customary law.<sup>107</sup>

In territories established as National Parks and protected areas, there is no restriction of the rights of the Orang Asli to access land under the relevant legislation.<sup>108</sup> However, some have suggested that the legislation restricts their rights to own and control their traditional lands within the territories.<sup>109</sup> A report by Suhakam also revealed the problems that the Orang Asli have experienced in areas variously declared as reserves.<sup>110</sup> The establishment of protected areas was commonly made without knowledge and participation of the communities living in the areas further restricting their activities and access to their customary land.<sup>111</sup>

Specifically, the interests of the Orang Asli in forest resources are recognized in two statutes: the National Forestry Act 1984 (NFA) and the Wildlife Conservation Act 2010 (WLCA).<sup>112</sup> Forest produce other than wildlife is subject to the NFA and the forestry legislation of the individual states.

In the NFA, a specific provision gives power to the state authorities to exempt the Orang Asli from licencing requirements or payment of royalties for taking forest produce from state land or alienated land for specified purposes, mainly for their personal use.

S 62(2)(b) National Forestry Act 1984 provides:

Subject to any contrary direction by the State Authority, the Director may reduce, commute or waive any royalty in respect of, or exempt from royalty, any forest produce or class of forest produce taken from any State land or alienated land by any aborigine for:

- (i) the construction and repair of temporary huts on any land lawfully occupied by such aborigine;
- (ii) the maintenance of his fishing stakes and landing places;
- (iii) fuel wood or other domestic purposes; or

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<sup>107</sup> *National Land Code* (Malaysia) s 4.

<sup>108</sup> E.g. of the legislation: *National Parks Act 1980* (Malaysia); *Protection of Wildlife Act 1974* (Malaysia); *Wildlife Conservation Act 2010* (Malaysia).

<sup>109</sup> Nicholas, *The Orang Asli and the Contest for Resources* (n 8).

<sup>110</sup> Human Rights Commission of Malaysia (Suhakam), 'National Inquiry into the Land Rights of Indigenous Peoples' (Report, 2013) <<http://www.suhakam.org.my/documents/10124/1326477/SUHAKAM+BI+FINAL.CD.pdf> ('National Inquiry into the Land Rights of Indigenous People').

<sup>111</sup> *Ibid.*

<sup>112</sup> The Act came into force on 26 December 2010.

## The Rights of Indigenous Peoples in Malaysia

- (iv) the construction or maintenance of any work for the common benefit of the aborigines.

The *WLCA* allows the Orang Asli to hunt ten specified animals otherwise protected for sustenance only, such that they may not be sold. Sale of the animals is specifically prohibited as an offence punishable under the Act.

### S 51(1) WLCA:

Notwithstanding anything in this Act, an aborigine may hunt any protected wildlife as specified in the Sixth Schedule<sup>113</sup> for his sustenance or the sustenance of his family members.

### s 51(2)-(3) WLCA:

(2) Any protected wildlife hunted under subsection (1) shall not be sold or exchanged for food, monetary gains or any other thing.

(3) Any aborigine who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding six months or to both.

The WLCA which was enacted to replace *Protection of Wildlife Act 1974*, reducing the rights accorded in the former legislation. The former legislation allowed the Orang Asli to kill or take any wild animals and birds for food.<sup>114</sup> This is another subject of resentment among the Orang Asli. Some suggest that the provision is 'too prescriptive' and 'restrictive'.<sup>115</sup> It does not take into account the situations of various Orang Asli communities on the ground.<sup>116</sup>

## **The Aboriginal Peoples Act 1954 (Act 134)**

The Act 134 provides for the creation of reserves to protect the land of the Orang Asli including:

- Aboriginal Areas (s 6) and
- Aboriginal Reserve (s 7).

Aboriginal Areas refer to areas exclusively or predominantly inhabited by aborigines who are unlikely to remain permanently in the area (s 6(1), s 7(1)(i)). Aboriginal Reserves are meant for areas exclusively inhabited by the aborigines ((s 7(1)). Aboriginal Areas were

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<sup>113</sup> In the Sixth Schedule: the list of animals allowed to be hunted by the Orang Asli are: wild pig, sambar deer, lesser mouse deer, pig-tailed macaque, silvered leaf monkey, dusky leaf monkey, Malayan porcupine, brushtailed porcupine, white breasted waterhen and emerald dove.

<sup>114</sup> *Protection of Wildlife Act 1974* (Malaysia) s 52.

<sup>115</sup> Wook, "The Rights of the Orang Asli in Forests" (n 64) – referring to an interview conducted in 2012: a lawyer representing the Orang Asli and the Director of the Center for Orang Asli Concerns.

<sup>116</sup> Some suggest that some items listed did not even used to be taken by the people. See *ibid* – referring to an interview conducted in 2012: Orang Asli representatives, a lawyer and a researcher.

## The Rights of Indigenous Peoples in Malaysia

created to accommodate mobile aborigines, whereas the Reserves were created for settled aborigines.<sup>117</sup>

Both aboriginal reserves and areas are protected from the creation of Malay Reservations and sanctuaries for wildlife.<sup>118</sup> The Aboriginal Areas were intended to accommodate nomadic aborigines, whereas the Reserves were created for settled aborigines.<sup>119</sup>

Within aboriginal reserves, forest reserves may not be created.<sup>120</sup> Any disposal of land by the state could only be made to the aborigines of the aboriginal communities normally resident within the reserve.<sup>121</sup> No temporary occupation within the reserve is allowed to non-aborigines.<sup>122</sup> The High Court in *Koperasi Kijang Mas v Kerajaan Negeri Perak*<sup>123</sup> held that the aborigines have exclusive rights to forest produce in declared aboriginal reserves even when it is still awaiting gazettal after state approval. The state has no power to issue logging permits in that area to any person who is not Orang Asli.<sup>124</sup> A general provision in s 62 of the NLC permitting the creation of reserves, also allows for the creation of Orang Asli reserves.<sup>125</sup>

The court in *Sagong Tasi v Kerajaan Negeri Selangor*<sup>126</sup> held that the creation of reserves is the duty of the state authority as a fiduciary having legal powers and responsibilities to protect the people.<sup>127</sup> The intention of the creation of reserves under the law is to prohibit the alienation of land in aboriginal areas to a non-aborigine or dealings by the state with land for the benefit of non-aborigines. This merely reflects the permanent nature of the title vested in the aboriginal peoples.

In this case, the courts have held that both state and federal governments were in breach of their fiduciary duties upon failure to gazette the Orang Asli land. This is also partly based on the fact that the government had knowledge that the land was occupied by the communities. The government was also aware that failure to gazette the land would affect the communities seriously, exposing them to serious losses.

The court rejected the argument that in the event the state authority does not exercise the power, the aborigines would have nothing in the manner of any title to or interest in the land. Such an argument would frustrate the purpose of the Act to protect the welfare of aboriginal peoples. The court considers land to be a very valuable socio-economic

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<sup>117</sup> The purpose for the differentiation was explained in British Archives, *The Aboriginal Tribes Enactment, Protection of Aborigine*, Colonial Records CO 717/144/12 (1939).

<sup>118</sup> *Aboriginal Peoples Act 1954* (Malaysia) s 6(2) – for aboriginal areas; s 7(2) for aboriginal reserve.

<sup>119</sup> British Archives, *The Aboriginal Tribes Enactment, Protection of Aborigine*, Colonial Records CO 717/144/12 (1939) cited in Idrus (n 69) 53, 64.

<sup>120</sup> *Aboriginal Peoples Act 1954* (Malaysia) s 7(2)(iii).

<sup>121</sup> *Ibid* s 7(2)(iv).

<sup>122</sup> *Ibid* s 7(2)(v).

<sup>123</sup> [1991] CLJ 486.

<sup>124</sup> *Ibid*, 653.

<sup>125</sup> S 62 provides for the power of the state authority to reserve any state land for any public purpose.

<sup>126</sup> *Kerajaan Negeri Selangor v Sagong Tasi (No 1)* [2002] 2 MLJ 591 (*'Sagong (No 1)'*).

<sup>127</sup> *Sagong (No 1)* (n 124); *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289 (*'Sagong (No 2)'*).

commodity, such that it would not be the intention of the legislature to deprive people of their customary title under common law.<sup>128</sup>

However in practice, most of the Orang Asli's traditional lands are not protected as such.<sup>129</sup> There are substantial areas inhabited by the communities which are not gazetted.<sup>130</sup> Some areas approved but yet to be formally gazetted are also reported to have been reclassified as state land or alienated to individuals or companies without the consent of the Orang Asli concerned. The total area reserved has also declined. In Selangor for instance, within 10 years from 1990, almost 80% of the areas gazetted either as aboriginal areas or reserves, were revoked.<sup>131</sup>

### **The right of occupancy**

Apart from the provisions for aboriginal reserves and areas, the Act also provides for the power of state authorities to grant to the aborigines 'rights of occupancy of any land not being alienated or land leased for any purpose within any aboriginal area or aboriginal reserve'. This kind of right of occupancy is a kind of tenancy at will. S 8 states:

(1) The State Authority may grant rights of occupancy of any land not being alienated land or land leased for any purpose within any aboriginal area or aboriginal reserve.

(2) Rights of occupancy may be granted (a) to (i) any individual aborigine; (ii) members of any family of aborigines; or (iii) members of any aboriginal community; (b) free of rent or subject to such rents as may be imposed in the grant; and (c) subject to such conditions as may be imposed by the grant, and shall be deemed not to confer on any person any better title than that of a tenant at will.

(3) Nothing in this section shall preclude the alienation or grant or lease of any land to any aborigine.

### **Restriction of dealing by the aborigines**

The Act also aims to protect the land of the aborigines by requiring any land dealings by the aborigines to receive the approval of the Director General. Within aboriginal areas, the disposal of land and grants of licences to a non-aboriginal person by the state for

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<sup>128</sup> *Sagong (No 2)* (n 125) 306, 313.

<sup>129</sup> Nicholas, *The Orang Asli and the Contest for Resources* (n 8) 32-4; Suhakam, 'Discussion on Native Customary Land Rights of the Orang Asli in Peninsular Malaysia' (Report, 13 June 2009) 3; H S Lim, 'The Land Rights of the Orang Asli' in *Land Issues in Malaysia* (Consumers' Association of Penang, 2000) 179 cited Azmi Sharom, 'A Critical Study of the Laws Relating to the Indigenous Peoples of Malaysia in the Context of Article 8(j) of the Biodiversity Convention' (2006) 13 *International Journal on Minority and Group Rights* 53, 57.

<sup>130</sup> In 2015, Department of Orang Asli Affairs (JHEOA) identified the gazetted land as representing only 15% (JHEOA, 2015).

<sup>131</sup> Nicholas, *The Orang Asli and the Contest for Resources* (n 8) 33-4.

collection of forest produce must only be made in consultation with the Director General of the Orang Asli.<sup>132</sup>

### Priority of aboriginal rights

The aborigines are also entitled to live within areas declared as Malay Reservations, forest and game reserves subject to conditions prescribed by the state authority. This provision prevails over the other legislation providing for reservations. However, the state authority may require them to leave the area with the payment of compensation.<sup>133</sup>

### Compensation

Compensation is an indication of recognition by the states of the entitlement of the people to their land and resources. Under the Act, compensation for land is payable:

on the state's ordering the aborigines to leave the land declared as a Malay Reservation, forest reserve or game reserve (S 10(1));

on revocation of aboriginal areas or reserves (s 12(1)).

In these situations, the manner of the payment of the compensation for the land is according to s 12 — that is, to the aboriginal persons entitled or to the Director General to be held in trust for the persons or communities.<sup>134</sup>

S 12 uses the word 'may' for requiring payment of compensation, indicating the discretion of the state authority on such payments. However, it was held in *Sagong (No 2)* that the word 'may' is to be read as 'shall' to avoid any inconsistency with the constitutional provision protecting property rights.<sup>135</sup>

Another provision requires compensation for fruit or rubber trees planted by the aborigines on disposal of the land by a state authority (s 11(1)). Section 11(1) provides

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<sup>132</sup> *Aboriginal Peoples Act 1954* (Malaysia) s 6(2)(iii),(iv).

<sup>133</sup> *Ibid* s 10 (3).

The State Authority may be [*sic*] order require any aboriginal community to leave and remain out of any such area and may in the order make such consequential provisions, including the payment of compensation, as may be necessary. (4) Any compensation payable under subsection (3) may be paid in accordance with section 12.

<sup>134</sup> *Ibid* s 12:

If any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefor and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Director General to be held by him as a common fund for such persons or for such aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the Minister.

<sup>135</sup> *Sagong (No 2)* (n 125) [41].

for compensation for fruit or rubber trees found on state land which is alienated or granted to others.

However, in practice, payment of compensation has been not for the land itself, especially before *Sagong (No 2)*,<sup>136</sup> but for dwellings and trees only. It is often stated that the compensation is not for the land, as the land was erroneously believed to belong to the states, but for the consequential damages – the buildings and trees which were lost.<sup>137</sup> Conversely, the texts of ss 10 and 12 clearly require compensation for the land. Only s 11 requires compensation upon alienation for fruit and rubber trees planted by the aborigines on state land.

The exercise of the powers of the Federal Government and state as the protectors of the interests of the Orang Asli, and the protection that the law extended to these interests, require that any actions that affect these interests, that is, the excision of the reservations and orders to leave the reserved lands, must be taken with consideration of these interests as the first priority. In many situations, the interests of the Orang Asli to access resources can co-exist with the other interests in reservations, such as with forest and wildlife reserves as well as other environmental conservation-related reservations. However, the interests of the Orang Asli have frequently not received adequate consideration.

### **Analysis of the laws protecting the land of the Orang Asli – compared to the provisions in the UNDRIP**

Based on the above discussion on the provisions of the UNDRIP, the Malaysian laws relevant to the land of the Orang Asli, the following conclusions have been reached on current legal positions relating to the Orang Asli:

- (i) The legal protection of the land of the Orang Asli in the Aboriginal Peoples Act 1954 is inadequate.
  - There is no express statutory provision recognising the rights of the Orang Asli to their customary land.
  - In relation to land reserved under the Act 134 for their protection, state authorities may revoke the reservation unilaterally (ss 6, 7) without legal requirement of consultation or consent.
  - Upon revocation of the reservation, compensation may be paid under s 12(1). S 12 contains the word ‘may’ for requiring payment of compensation, indicating the discretion of the state authority on such payments. However, it was held in *Sagong (No 2)* that the word ‘may’ is to be read as ‘shall’ to avoid inconsistency with the constitutional provision protecting property rights.<sup>138</sup>

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<sup>136</sup> *Sagong (No 2)* (n 125) [2005] 6 MLJ 289.

<sup>137</sup> See e.g., Nicholas, *The Orang Asli and the Contest for Resources* (n 8).

<sup>138</sup> *Sagong (No 2)* (n 125) [41].

- Although the Orang Asli are allowed to live on land declared as a Malay Reservation, forest reserve or game reserve, states may order them to leave with payment of compensation (S 10(1)).
  - In general, the whole legal provision is premised on protection and welfare regime open to the discretion of state authorities and therefore far from right based approach as promoted by the UNDRIP.
- (ii) Although there are no statutory restrictions, the general system of the land registration system, which may provide for legal protection, does not in practice extend to the Orang Asli.
- The following data shows that only a small amount of the Orang Asli land is registered as individual land title. There are reports that applications for land grants made by the Orang Asli have not been heeded.<sup>139</sup>
  - The following data are from JAKOA showing the status of land occupied by the Orang Asli:

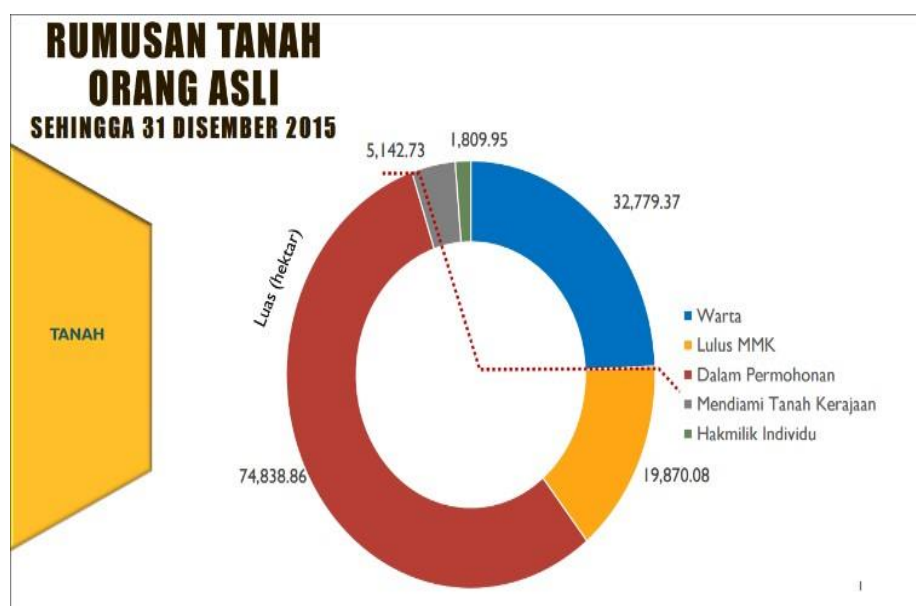


FIGURE 4: DATA ON ORANG ASLI LAND STATUS - JAKOA 2018

On the basis of established common law principles on the customary land of the indigenous peoples in the country, this system of land grant and registration, even where implemented, does not recognise the nature of existing ownership of the land of the Orang Asli on which they have lived for a long time. On jurisprudential basis, states' right over land is subject to

<sup>139</sup> Personal communications of first author with several Orang Asli.

existing right and therefore have no authority to grant the land to the owner of the land.

There has been a move by the government approved by National Land Council to implement land grant scheme to the land of the Orang Asli.<sup>140</sup> The scheme has been strongly opposed by Orang Asli representatives, but implementation is already under way in some states.<sup>141</sup>

- (iii) Lack of implementation of the existing laws in particular the Aboriginal Peoples Act 1954 for the protection of the land of the Orang Asli.

As shown in Figure 3, less than 25% of the land of the Orang Asli are under reservations, as provided by the Aboriginal Peoples Act 1954. Most Orang Asli lands are under application for the reservation which have been pending for years.

- (iv) Although there is recourse for the Orang Asli to go to court of law for a declaration to affirm the ownership over their customary land, court process is procedurally and evidentiary complex; as well as financially burdensome.
- (v) As per the discussion on the laws on forestry and wildlife, access to resources by the Orang Asli is provided by laws as privilege, rather than as a right.

### ii. Natives in Sabah<sup>142</sup>

In contrast to the position of the Orang Asli, Sabah law recognizes the customary rights of natives to their customary land and defines its scope. In Sabah Land Ordinance (Cap. 68), native customary rights (NCR) are defined as (s 15):

- (a) land possessed by customary tenure;
- (b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
- (c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;

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<sup>140</sup> Idrus (n 69); Wook, "The Rights of the Orang Asli in Forests" (n 64)– referring to an interview conducted in 2012: legal advisor of a land and resource development office at federal level and senior officer of the Orang Asli Affairs Department.

<sup>141</sup> Wook, "The Rights of the Orang Asli in Forests" (n 64)– referring to an interview conducted in 2012; and interviews with some Orang Asli headmen in 2019.

<sup>142</sup> Apart from relevant statutes, references for this part include unpublished research report by Izawati Wook, Arif Fahmi Md Yusof, Kamilah Wati Mohd, 'A study on the land provisions of the Orang Asli communities in the Aboriginal Peoples Act 1954: The perspective of justice and welfare principles' (Legal Affairs Division (Unpublished Report), 2014); Rooshida Merican Abdul Rahim Merican et al, *An Introduction to Sabah Native Land Law* (UKM, 2016).

## The Rights of Indigenous Peoples in Malaysia

(d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;

(e) land that has been cultivated or built on within three years;

(f) burial grounds or shrines;

(g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.”

The Ordinance also provides a legal duty to the Collector to enquire whether any NCR exist upon application for unalienated land by publishing a notice.<sup>143</sup> A procedure when the NCR is established is also provided i.e. either by providing money compensation or grant of the land by way of title.<sup>144</sup>

Safeguards to the native land are also provided by the Code. Among others, all dealings in land between non-native and natives are prohibited, except with the written permission of the relevant Minister.<sup>145</sup> Any land purchase involving the native land by non-native is subject to approval of the state authority (Secretary of Natural Resources) with the consent of the native people.<sup>146</sup> Sublease of native title to a non-native is allowed for up to 30 years.<sup>147</sup>

As explained above, native customary rights are defined to include land possessed by customary tenure.<sup>148</sup> Customary tenure is defined as the lawful possession of land by natives by manners including by continuous occupation or cultivation for three or more consecutive years or by title under Part IV of the Ordinance.<sup>149</sup>

With that respect, the holder of the customary tenure has 'a permanent heritable and transferable right of use and occupancy in his land' with certain conditions prescribed by the Code.<sup>150</sup> A Register of Native Title is kept to register the native title.

The Code also accommodates the provision for 'communal land', which is defined as land which is 'held for the common use and benefit of natives and is not assigned to any individual as his private property'.<sup>151</sup> For these purposes, the relevant Minister is allowed to sanction a 'communal native title' in the name of the Collector as trustee for the natives concerned, but has no power of sale.<sup>152</sup>

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<sup>143</sup> *Sabah Land (Cap. 68) Ordinance* (Malaysia) s 13.

<sup>144</sup> *Sabah Land (Cap. 68) Ordinance* (Malaysia) s16(1).

<sup>145</sup> *Sabah Land (Cap. 68) Ordinance* (Malaysia) s 17(1).

<sup>146</sup> See *Ibid*.

<sup>147</sup> *Ibid* s 17(3).

<sup>148</sup> *Ibid* s 15(a).

<sup>149</sup> *Ibid* s 65.

<sup>150</sup> *Ibid* s 66.

<sup>151</sup> *Ibid* .

<sup>152</sup> *Ibid* .

## The Rights of Indigenous Peoples in Malaysia

A provision for native reserve is also provided with the express objective that is 'to protect the present and future interests and well-being of the natives of Sabah or any community thereof' (s 78(1)). Within the Native Reserve, no document of title could be registered.<sup>153</sup>

There are also other legislations in Sabah which incorporate the traditional system of the indigenous peoples. These include:

- a. Sabah Inland Fisheries and Aquaculture Enactment 2003: This allows for community collaborative management of natural resources in river for the sustainability of the resources. The area involved is known as Community Fisheries Management Zone which adopts the community traditional practice of Tagal system.
- b. Sabah Conservation Enactment 1997: This provides for integrated coastal management plan. Coastal communities and some inland communities continue to manage specific areas as these represent important food sources and settlement areas. It also recognises community hunting areas (section 32) and honorary wildlife wardens (section 7) from the community
- c. Sabah Forestry Enactment 1968: section 41 allows communities to harvest forest produce for its use.
- d. Sabah Biodiversity Enactment 2000: This provides for protection of traditional knowledge associated with conservation of biological resources (section 9(1)(j), with clear provisions for protection of resources in NCR land in section 16(b).

### iii. Natives in Sarawak<sup>154</sup>

Similar to Sabah, the land code in Sarawak, ie the Land Code 1958 (Cap 81) (SLC 1958) provides for recognition of native customary land and rights to the land. It provides for the recognition of NCRs created before 1 January 1958 under the laws in force before that date. As to the NCR created after 1957, the SLC establishes the process for the creation of NCR over Interior Area Land (IAL) after 1957. Additionally, the SLC sets out the procedures for the extinguishment of the NCRs.

Specifically as to the NCR created prior to the 1958 Code, the law recognised that the NCRs may be exercised over land that falls within certain categories.

Under the Land (Classification) Ordinance 1948 ('Land Ordinance 1948'), there are six categories of land:

No	Land Category	Description
1	Mixed Zone Land (MZL)	Land which may be held by any citizen
2	Native Area Land (NAL)	Land held by a native under registered title

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<sup>153</sup> Ibid s 79(1).

<sup>154</sup> The legal position of native land in Sarawak is largely based on: Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak* (Suhakam, 2009).

3	Native Communal Reserve (NR)	State land declared by the Minister for use by a native community under a native system of personal law under s 6 of the SLC 1958
4	Reserved Land	Land that i) the Government reserves under s 38 of the Land Code 1958 or prior law ii) located within a National Park, Forest Reserve, Protected Forest, or Communal Forest iii) occupied by the Federal or State Government without a document of title, or iv) otherwise lawfully constituted or declared to be reserved land'.
5	Native Customary Land (NCL)	Land on which native customary rights have been exercised
6	Interior Area Land	Land that does not fall under any of the other land categories

In particular, Native Customary Land, i.e. the most important category with respect to NCR, includes land:

- a. over which NCR 'have lawfully been created prior to the 1st day of January, 1958, and still subsist as such'.
- b. within a reserve under s 6 of the *Land Code 1958*.
- c. Interior Area Land (IAL) over which NCR 'have lawfully been created pursuant to a permit under section 10' of the Land Code 1958.

The creation of an NCR after 1957 can only be made in Interior Area Land according to the requirements of the SLC, which requires a permit from the Superintendent, without which occupation is unlawful. Specifically, under s 5(1) of the SLC, NCR can be created in IAL if occupation is established based on the clearing and occupation of virgin jungle, planting fruit trees on land, occupying the cultivated land, using land for burial grounds or shrines, using lands for rights of way.

*Therefore, for natives in Sarawak, IAL is significant because it is the only category of land over which natives can create new NCR pursuant to s 5 of the SLC. The Minister is authorised to convert one category of land to another. An IAL for instance can be declared NAL which prevents the creation of NCR.*

Under s 8 of the SLC, non-natives may not deal or acquire rights over NAL, NCL, or IAL. However the SLC authorizes the incorporation of a non-native company as native, which allows the company to hold native property, particularly in areas designated as 'development areas'.

Apart from the recognition based on the statutory law, NCR based in native law and custom and in existence prior to 16 April 1955 are recognised under the common law through various cases involving native land claims in Sarawak.

Rights created under ss 5 and 6(1) of the *Land Code 1958* may be registered and the person registering the rights is deemed the lawful owner of the land until the High Court issues a contrary order (s 7A(1) SLC 1958). In contrast, s 132(1) of the SLC 1958 provides that a person who registers an interest in land in the Register required by s 112, holds the interest subject to other interests registered on the Register, but free of all other interests save certain categories delineated in the statute.

On this basis, the registration on the Register of Native Rights is simply to state a claim to rights, which can subsequently be challenged in court. In contrast, registration with the Register as required by s 112 has the legal effect of protecting the registered interest against all but a narrow category of competing interests.

### iii. Native Territorial Domain – the recent amendment to Sarawak Land Code

An amendment to Sarawak Land Code through Land Code (Amendment) Ordinance, 2018 (Cap A179) recognises the custom of creating “native territorial domain”, known by Sarawak natives as “*pemakai menoa*”.

The amendment sought to address a ruling by the Federal Court in *Director of Forests, Sarawak v TR Sandah ak Tabau*<sup>155</sup> which rejected the enforceability of the Iban land customs of *pemakai menoa* (native territorial domain) and *pulau galau* (communal virgin forest).

Specifically, s 6A of the Sarawak Land Code provides:

“Native territorial domain

(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

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<sup>155</sup> [2017] 2 MLJ 281.

## The Rights of Indigenous Peoples in Malaysia

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.”.

Briefly, the newly introduced s 6A allows the native community to claim usufructuary rights exercised and enjoyed by members of that community may, within a native territorial domain. It also creates mechanism for communities to claim the rights upon which a native communal title is issued if the claim is approved.

## The Rights of Indigenous Peoples in Malaysia

However, the provision limits such claim up to 500 and 1,000 hectares (upon appeal). This may be substantially less than the actual area customarily and historically occupied, inhabited, used or enjoyed by the native claimant community.<sup>156</sup>

Usufructuary rights are “the rights or privileges exercised or enjoyed by a native community over a native territorial domain to:

- (a) forage for food, including fishing and hunting;
- (b) enjoy such rights or privileges exercisable by a native community in a communal forest constituted under Part III of the Forests Ordinance, 2015 [Cap. 71]; or
- (c) carry out such activities which are expressly authorized in the native communal title issued under section 6A(3) or a permit issued under section 10(3) but subject to the terms and conditions specified therein.

The nature of usufructuary rights are ‘exclusively ... for agricultural purpose’ (s 6A(3)). Any other purposes are subject to the approval of the *Majlis Mesyuarat Kerajaan Negeri*.

**Native territorial domain** is defined under s 2 of the SLC to mean:

an area or territory

(a) within or conjoining or immediately adjacent to an area where native customary rights have been created by that community in accordance with section 5; and

(b) wherein members of a native community have from a date prior to 1st day of January, 1958, exercised usufructuary rights or preserved by them for such purposes:

Provided that such area or territory have not already been constituted a communal forest under Part III of the Forests Ordinance, 2015 [Cap. 71];

A title issued upon approval of the claim under s 6A known as “native communal title” is limited. Under s 2 of the SLC, the title is issued “over a native territorial domain in the name of a person or body of persons as trustee for the native community concerned but without the right of sale or disposal”.

Furthermore, the amendment also provides for protection to the native customary rights and native territorial domain from execution of any provisional lease when immediate survey of land under s 28 is impracticable. S 28(2) provides that any provisional lease

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<sup>156</sup> Interview with Mr Simon Siah, an Advocate and Solicitor practicing in Sarawak, online conversation, 21 August 2020).

executed under s 28(1) shall exclude “**any land held under native customary rights created under section 5 or native territorial domain under section 6A**” - s 28(2).

#### iv. Challenges to the native customary rights in Sabah and Sarawak

With the statutory provisions recognizing customary land rights in place, challenges remain for natives in Sabah and Sarawak seeking to secure their rights over their traditional lands. This is in part reflected by the numerous numbers of cases in courts contending for their rights.

Focus group discussions conducted in Kuching on 26 January 2020, and Kota Kinabalu in 30 January 2020, attended by representatives of communities, highlighted that land security remains the most significant issue concerning these communities.

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***land security is the most significant issue that the communities are concerned of***

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Participants in Sabah reported that in many situations the laws are not implemented properly to the benefit of the customary landowners. There were many incidents that applications for land grant were made by outsiders, but the inhabitants were unaware of them until land grant was made by the authority. To this, the participants of the Sabah FGD suggested that notice for the land application must be proper and effected to reach the knowledge of the people who are affected by a government decision.

Additionally, the process of land right claims by the state government under the relevant statute often takes a long time. In many cases, indigenous communities must wait for more than five years to get their claims processed. In contrast, large companies are reported to have much shorter wait times.<sup>157</sup>

The FGD participants have also pointed out that there were many incidents involving politicians and government officers in the process of land grant, often in favor of private companies, to the detriment of the local inhabitants.

Further, the statutory provisions in both states do not adequately recognize traditional forms of occupation according to native customary laws. For example, in Sabah, under Section 15 of the Sabah Land Ordinance, NCR applies only to land in active use or owned by native people and being cultivated or lived. On the other hand, the *adat* which are practised by the natives commonly recognises land lying fallow or set aside, which is part of the traditional farming method of rotational cultivation.<sup>158</sup> Hill rice cultivation for instance involves a cycle of one cultivation year followed by a fallow period of 3–10 years to restore soil fertility.<sup>159</sup>

S 15 of Sabah Land Ordinance also prescribes the number of fruit trees per hectare of land (section 15 (b)) and isolated fruit trees, and sago, rattan, or other plants of economic value (section 15 (c)) to ascertain the NCR. On the other hand, traditional native agriculture usually involves planting a diversified number of crops and useful plants

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<sup>157</sup> Abdul Rahim Merican et al (n 141) 49.

<sup>158</sup> Ibid 47.

<sup>159</sup> 'National Inquiry into the Land Rights of Indigenous People' (n 108) 22-23.

using inter-cropping techniques in a particular area. This is to ensure a steady supply of food for the family and for other purposes. Fruit trees may be interspersed with trees for firewood, medicines, crafts, or as building materials.<sup>160</sup> Communal hunting areas, which offer important economic and social activities for natives, are also not recognised.

The SLO also does not take into account the community's water catchment areas including river and coastal areas within the NCR which are important for water supply for domestic use, irrigation and recreation. Rivers and coastal areas are customarily demarcated and managed as they represent a source of food and mode of transportation. Usually rights over rivers and coastal areas are shared with other communities, and also involve shared management responsibilities.<sup>161</sup>

In addition, in many instances, communities are not consulted before the government makes decision involving land alienation and reservation for various purposes, such as forest reserves and parks.<sup>162</sup>

With respect to areas reserve as protected areas such as national park, similar to the relevant legislation in Malaysian Peninsula, legislation in Sabah is silent on the rights of the indigenous peoples. Thus, practices surrounding park management in Sabah have been inconsistent. There have been villages within gazetted national parks which were relocated outside the park boundaries. On the other hand, in the Cocker Range National Park, communities are allowed to remain in their traditional areas. They are also allowed to continuously work within designated Community Use Zones within the park management plan.<sup>163</sup>

As to Sarawak, Bulan and Locklear (2009) identify issues that affect the rights of the natives in Sarawak.<sup>164</sup>

- a. The Sarawak Land Code defines occupation for the purpose of creating NCR in a limited manner by setting out a narrow category of occupation, primarily by settlement or cultivation. This fails to account for the actual practices regarding land ie the traditional forms of occupation according to native customary laws. For instance, it does not recognize a central feature of the customary laws of the Kelabit, Iban, and Penan to maintain the uncultivated jungle within their territories, which they use for hunting, gathering to record their history and to commemorate significant events and people.
- b. The statutory means through which natives are able to obtain documentary proof of ownership of land over which they exercise NCR are inadequate. Issuance of s 10 permits and the establishment of the Register of Native Title have been slow, and a lack of government funding for surveys precludes the possibility of title under s 18. At the same time, the state has issued provisional leases to non-natives

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Abdul Rahim Merican et al (n 141) 47.

<sup>163</sup> Ibid 50.

<sup>164</sup> Bulan and Locklear (n 153) 50.

## The Rights of Indigenous Peoples in Malaysia

over lands on which natives claim to exercise NCR or in areas they consider as their ancestral lands.

- c. The Sarawak Land Code imposes on natives an onerous burden in establishing ownership of lands over which they exercise NCR.
- d. Non issuance of documentary titles to lands over which natives exercise NCR.
- e. State government has broad authority to extinguish NCR which has a significant impact on native communities.

Concerning a recent amendment to the Sarawak Land Code, which recognises the native territorial domain, a lawyer, Mr Simon Siah, and Mr Peter Kallang, an activist from Save River, believe that the provisions are not sufficient to protect the native land in Sarawak, and even may create additional problems.

Simon explained that the problems are in the interpretation of the provision and its practicality. First, it is uncertain as to whether the limit of the size of the land claimed is for a longhouse or individual communities living within a particular domain as within a *pemakai menoa*, there can be more than a single village.

Second, an application must be supported with a land survey, which must be prepared by the applicant. The cost of such a survey is very high, and the natives commonly have inadequate funding. This restricts the ability of the natives to make the application. Native communities which have access to certain non-governmental organisation may have support for a land survey.

Third, the relevant application form requires support from a *penghulu* (community leader) and a district officer. It thus may be expected that in the event that the *penghulu* comes from another village, which also put up such a claim, the *penghulu* may not agree to give support.

Last, s 18 of the Sarawak Land Code may be effectively used to achieve better protection of the native land. S 18 provides for a grant of land title to natives. It states:

- (1) Where the Director, subject to any direction from the Minister, is satisfied that a native has occupied and used any area of unalienated State land in accordance with rights acquired by customary tenure amounting to ownership of the land for residential or agricultural purposes, he may, subject to section 18A, issue to the native a grant in perpetuity of that area of land free of premium rent and other charges.
- (2) A grant in perpetuity under this section shall be made for residential or agricultural purposes, as the case may be, subject to such conditions, obligations and restrictions, as the Director on the direction of the Minister, may impose.

Summary: Land related issues faced by the indigenous peoples in Sabah and Sarawak

- Laws not being implemented properly to the benefit of the customary landowners.
- The long-term process of land right claims.
- Inadequate statutory recognition of traditional forms of occupation according to native customary laws.
- Broad authority of State Authorities to extinguish NCR
- Lack of consultation in decision making involving land alienation and reservation

As such, although there are statutory recognition and mechanism to protect the land of natives in Sabah, the provisions are inadequate allowing states to exercise broad power to the detriment of the native customary rights.

### c. The scope of the customary land rights of the indigenous peoples under the common law

The courts in Malaysia, through common law, have developed principles for the recognition of the indigenous peoples' land rights. There has been a series of court cases which affirm this position, and which have developed to become an established common law principles.<sup>165</sup>

The principles are applicable for both the Orang Asli and natives in Sabah and Sarawak. Under the principles, generally the customary land occupied by the indigenous peoples for a long time is recognised as legally owned by the communities.

In other words, the common law recognizes and protect the existing rights of people, including rights relating to land ownership which arose from customs. The legal rights continue to exist until or unless they are extinguished by legislative provision or an act of executive government authorised by legislation. These rights neither depend on statutory provision nor declaration by executive government. It exists on its own and protected by the common law, subject to extinguishment through means authorised by law. On this basis, the state land ownership is not absolute but subject to existing legal rights.

Specific to the Orang Asli communities, the rights recognised under the common law exist in tandem with, or complement, the rights protected by the Aboriginal Peoples Act 1954, which is a special statute providing for protection of the minority communities.

The basis of these customary rights are customs, known as 'adat' in Malay. Conceptually, *adat* or customs is used interchangeably with the term customary law or native law.<sup>166</sup> In

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<sup>165</sup> This part is largely based on Izawati Wook, 'Customary Land of the Indigenous Peoples in Peninsular Malaysia: An Analysis on the Orang Asli Land Claim Cases' (Conference Paper, Proceeding of the Third International Conference on Law and Justice (ICLJ), 2019).

<sup>166</sup> Bulan and Locklear (n 153) 17.

Malaysian law, customs are one of sources of law recognized by the Federal Constitution and enforceable by the common law.<sup>167</sup> This is similar to the position of English law in which custom is also a source of law.<sup>168</sup>

In relation to the indigenous peoples' land rights, custom practiced by the communities gives rise to the legal rights, recognized and enforceable by the court of law. The customary legal rights continue to exist unless extinguished by clear and plain legislation or by an executive act authorized by such legislation, but compensation must be paid.<sup>169</sup>

An important evidence essential to prove the existence of the customary land right is continuous occupation and control of particular area of land since a long time or several generations.<sup>170</sup> Occupation forms the connection of the communities to the land. This can be in the form of settlement or use of land for agriculture. The test of occupation to meet the evidentiary burden is the existence of 'sufficient measure of control to prevent strangers from interfering'.<sup>171</sup> Continuation of a long established practice of their custom and exercise of the customary right on the land is important to prove the connection.<sup>172</sup> Actual physical presence, however, is not a pre-requisite to establish continuous use and occupation.

Besides, forest areas used by indigenous communities to access for forest produces, hunting and fishing have also been recognised as the customary land rights if the activities continue to be in practice by the communities.<sup>173</sup>

As custom is the basis of the rights, the contents are determined by custom of the particular communities. In other words, the types and extent of the rights are defined by practice, usage and traditions of the communities. Nonetheless, it has also been held by courts that changes in the communities' traditional law and custom do not affect the connection of the communities to the land.<sup>174</sup>

### i. Customary right to land

Courts have recognized that certain communities have customary right to live on land that they have occupied for generations and that these rights are proprietary in nature.<sup>175</sup> In the case of *Sagong Tasi v Kerajaan Negeri Selangor*,<sup>176</sup> the Court of Appeal held that the Plaintiffs in the case, who were also Temuan people, had ownership of the lands in question under customary community title of a permanent nature. The Plaintiffs sought compensation for the loss of areas acquired for construction of a highway. Part of the land

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<sup>167</sup> *Federal Constitution* (Malaysia) art 160(1).

<sup>168</sup> E K Braybrooke, 'Custom as a Source of English Law' (1951) 50(1) *Michigan Law Review* 71, 72.

<sup>169</sup> *Sagong (No 2)* (n 125); *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677 ('*Superintendent of Lands & Surveys Miri Division*').

<sup>170</sup> *Superintendent of Lands & Surveys Miri Division* (n 168).

<sup>171</sup> *Ibid.*

<sup>172</sup> *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241; *Sagong (No 2)* (n 125); *Kerajaan Negeri Johor v Adong bin Kuwau* [1997] 1 MLJ 418; *Superintendent of Lands & Surveys Miri Division* (n 168).

<sup>173</sup> *Sangka bin Chuka dan satu lagi v Pentadbir Tanah Daerah Mersing, Johor* [2016] 8 MLJ 289 ('*Sangka bin Chuka*').

<sup>174</sup> *Sagong (No 2)* (n 125).

<sup>175</sup> *Ibid.*; *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] 5 MLJ 268.

<sup>176</sup> *Sagong (No 2)* (n 125) [35].

was under gazette according to the Aboriginal Peoples Act 1954. The other part not under gazette was claimed by the community as customary land. The courts affirmed that the customary land of the Temuan tribal group is a proprietary right with full beneficial interest in, and to the land. The lands are inheritable; that is, capable of being passed down from generation to generation.

The land right may not only include the right to live on the land for settlement and agriculture, but also to the areas of land that they access for resources such as hunting and fishing, provided it is evident to be integral to the custom of the communities and continue in practice. In the case of *Adong bin Kuwau v Kerajaan Negeri Johor*,<sup>177</sup> which is the first land claim case by the Orang Asli, both High Court and the Court of Appeal recognizes the aborigines' rights in the areas on which they traditionally foraged.

In a judicial review application, *Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor*,<sup>178</sup> Jakun communities in the area were required through a general notice, among others, to vacate the area of land which is part of Endau-Rompin National Park, Johor. The application was made by the communities against the state land authority to quash the notice and, among others, also for a declaration that the Jakun communities have native customary land rights over a particular area of land in the national park, their village, and the surrounding areas which they have occupied. They have maintained traditional connection with the lands in accordance with their custom and practices. Summarily, based on evidence tendered by the communities, the High Court found that the community had established that they have common law customary land rights not only to the settlement areas but also encompass 'hunting and foraging areas'.

In other words, the customary land rights of the indigenous communities include the right to access to resources through activities such as hunting, fishing and foraging, on the condition that these activities can be shown to be integral element to the custom and traditional activities of the community, 'which had long been the primary source and essence of their very existence and will continue to be essential to their future livelihood'.<sup>179</sup> Therefore, the matter of actual practice by the communities is important to determine the extent of the rights of communities.

In a recent case of *Mesara Long Chik v Pengarah Tanah Dan Galian Pahang*, Semoq Beri communities, a sub group of Orang Asli Sen'oi communities claimed in a declaration that they have rights and interest over an area of land of about 12 acres in Maran. They claimed that although they have moved from the area, they inherited the land from their ancestors and continue to frequent the land which were planted with a variety of fruit trees. They were accustomed to collecting fruit from the area during fruit season and selling it cash income. In fact, they had in 1985 and 1989 made applications to the state authority for land grant, but there were no positive responses. Subsequently a grant of a temporary license was issued in 2004 by the state authority to an individual following which their fruit trees were destroyed.

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<sup>177</sup> [1997] 1 MLJ 418.

<sup>178</sup> [2016] 8 MLJ 289

<sup>179</sup> [2016] 8 MLJ 289.

## The Rights of Indigenous Peoples in Malaysia

The High Court in Kuantan found that the Plaintiffs had proved their rights over the land on the test of occupation and control over the land; and that these rights were recognized and enforceable by the common law. However, even though the court recognized that they have legal right over the land that the court termed as 'geran adat' under the common law,<sup>180</sup> the court only allowed for compensation for trees on the land according to s 11 Aboriginal Peoples Act 1954, which was an alternative prayer by the Plaintiffs.

Thus far, cases on land right claim have been confined to customary land of the indigenous communities. These principles, therefore, may not extend to land occupied by the Orang Asli upon resettlement often by government initiatives. In relation to this however, it has been suggested by Azman J, in obiter, in the case of *Pedik bin Busu v Yang Dipertua Majlis Daerah Gua Musang*,<sup>181</sup> that the Orang Asli own the land that is given to them by the government through Resettlement Scheme although they were yet to be given title.

### ii. Rights to resources or foraging

In view of the cases decided thus far, among Orang Asli communities in Peninsular Malaysia, the customary land rights of the indigenous communities may extend to the area of land used for collection of forest produce, hunting and foraging commonly located surrounding the village of the communities, provided that such activities can be shown to be continuously in practice integral to the communities' customs, and vital to their livelihood.<sup>182</sup>

The High Court in the case of *Eddy bin Salim v Iskandar Regional Development Authority*<sup>183</sup> held that that the recognition of the customary right, which is non-exclusive, over land at common law

includes the surrounding waters in which their customary activities are being carried out. Hence a claim for native customary rights over lands covering rivers, streams within the boundaries of the land used by them for fishing and gathering of produce of such waters should be claimable but subject to proof.

Therefore, matter of actual practice by the communities is important to determine the extent of the rights of the communities.

Nevertheless, there is a tendency in some judicial decisions to restrict the extent of the Orang Asli rights to areas that they have direct control i.e. settlement and plantation areas. For instant, in the case of *Kerajaan Negeri Selangor v Sagong bin Tasi*,<sup>184</sup> the Court of Appeal, affirming the High Court position, restricted the rights of the Orang Asli to areas actually settled and not to the land on which they customarily foraged.<sup>185</sup>

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<sup>180</sup> *Mesara Long Chik v Pengarah Tanah Dan Galian Pahang* [2018] 1 LNS 1009 [22].

<sup>181</sup> [2010] 5 MLJ 849 [13].

<sup>182</sup> *Sangka bin Chuka* (n 172).

<sup>183</sup> [2017] MLJU 2308; 2017 1 LNS 822.

<sup>184</sup> [2005] 6 MLJ 289.

<sup>185</sup> *Sagong (No 1)* (n 124) [40].

Similarly, in Sarawak, the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai*,<sup>186</sup> reversed the High Court ruling that the natives had a right to the disputed areas used for hunting, fishing and collection of forest produce within the community area [*pemakai menoa*].<sup>187</sup> *Pemakai menoa* (also spelt as *Menua*) is an area of land held by a district longhouse or village community, including farms, garden, fruit groves, cemetery, water and forest within a defined boundary [*garis menua*]. The *pemakai menoa* also includes *temuda* [cultivated land that left fallow], *tembawai* [old longhouse sites] and *pulau* [patches of virgin forest that have left uncultivated to provide the community with forest resources for domestic use]. In other words, *pemakai menoa* is the geographical extent of the territory of each longhouse which is significance for the well-being of the community.

Access to *pemakai menoa* for resources was recognized by the court as part of the customary system of the natives. However, in determining whether the community has rights over the *pemakai menoa*, the court ruled that there was insufficient evidence to establish continuous occupation. The court also referred to High Court decision in *Sagong Tasi* which restricted the land rights of the aborigines to occupation by settlement and by cultivation.

However, as to the position in Sarawak, the Federal Court in *Director of Forest, Sarawak & Anor v. TR Sandah Tabau*<sup>188</sup> has held that native customary rights claim over land founded upon the concept of continuous occupation does not extend to areas where the natives used to roam to forage for their livelihood.<sup>189</sup>

This view has been criticized as failing to fully appreciate the customary land system. The courts have accepted the principles that the customary rights are dependent on the custom and practice of the natives. but refuse to give full credit to them.<sup>190</sup> This goes against the common law basic principle of the recognition of the land rights of the indigenous peoples in which the content of rights are determined by their custom.

### d. Practice in other jurisdictions

In relation to land rights of indigenous peoples, this report considers legal developments in the following jurisdictions:

- a. India
- b. The Philippines
- c. Canada
- d. Australia
- e. New Zealand

All these jurisdictions have express legal provisions that recognize the rights of the indigenous peoples in the jurisdictions to their lands. The approaches taken by the

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<sup>186</sup> [2006] 1 MLJ 256 [28].

<sup>187</sup> *Agi ak Bungkong v Ladang Sawit Bintulu Sdn Bhd* [2010] 4 MLJ 204 [11].

<sup>188</sup> [2017] 3 CLJ 1 FC.

<sup>189</sup> *Director of Forest, Sarawak & Anor v. TR Sandah Tabau* [2017] 3 CLJ 1 FC followed by *Government of Sarawak & Anor v. Busing Anak Jali* [2019] 4 CLJ.

<sup>190</sup> Bulan and Locklear (n 153).

## The Rights of Indigenous Peoples in Malaysia

selected jurisdictions are also useful as examples or models that may be considered for law reform in Malaysia.<sup>191</sup>

### i. Constitutional protection

In Canada and the Philippines, indigenous peoples' rights are protected by constitutional provisions apart from the statutory provisions or the common law. Constitutional provisions provide greater status than other legal rights and protect them against unilateral extinguishment as states are under constitutional obligations to protect them.

The First Nations in Canada have been given constitutional safeguards that affirm their existing common law and treaty rights, including the right to land, although the rights are restricted to what judicial precedents determine to be 'Aboriginal rights'.<sup>192</sup>

The Philippines' 1987 Constitution likewise contains some provisions regarding the recognition and promotion of 'the rights of indigenous cultural communities within the framework of national unity and development' (Art. II, § 22) and the creation of autonomous regions in Muslim Mindanao and in the Cordilleras (Art. X, §§ 15-19).<sup>193</sup>

### ii. Statutory provisions

In the Philippines, India, Taiwan and New Zealand, the rights of indigenous peoples to their land are expressly recognized, provided for or elaborated by specific legislations. Legislation in the Philippines, India and Taiwan provide for active duty on governments to protect the indigenous peoples' rights.

For example, the 20<sup>th</sup> section of the *Taiwan Indigenous Peoples Basic Law* states:

The government recognizes indigenous peoples' rights to land and natural resources. The government shall establish an indigenous peoples' land investigation and management committee to investigate and manage indigenous peoples' land. The organization and other related matters of the committee shall be stipulated by law. The restoration, acquisition, disposal, plan, management and utilization of the land and sea area owned or occupied by indigenous peoples or indigenous persons shall be regulated by laws."

Similar provisions for positive duty of the government are also found in the common law in the US, Canada and New Zealand based on relevant treaties in each jurisdiction. In New Zealand, the Treaty of Waitangi, which governs the relationship between the Māori and the Crown, is statutorily recognized, and has developed into a jurisprudence of Treaty

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<sup>191</sup> This part is largely based on Wook, "The Rights of the Orang Asli in Forests" (n 64).

<sup>192</sup> E.g. *R v Pamajewon* [1996] 2 SCR 821 cited in Mark D Walters, 'The Emergence of Indigenous Rights Law in Canada' in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 21, 47.

<sup>193</sup> See also, Jose Mencio Molintas, 'The Philippine Indigenous Peoples' Struggle For Land And Life: Challenging Legal Texts' (2004) 21(1) *Arizona Journal of International & Comparative Law* .

principles. One of the principles requires the active protection of Māori interests by the Crown.

### iii. The scope of the rights to land: the use of the indigenous peoples' land and the resources

Apart from providing an express legal recognition by way of a constitutional or statutory provision, it is also noteworthy to consider the scope or the content of the right to land and the resources found in these lands.

The contents of indigenous rights in the selected jurisdictions studied are varied. In most jurisdictions, they are extensive. As the Philippines' legislation was directly influenced by the then draft UNDRIP, the contents are wide-ranging. The land rights of the indigenous peoples extend to lands that they occupy, possess and utilize which can be individual or communal. The resource rights are also extensive and include any natural resources useful for the indigenous peoples' livelihood.

Similarly, the indigenous peoples in Canada and New Zealand have extensive rights to resources on the lands they exclusively occupied. In Canada, rights to these lands are collectively known as aboriginal title. They have rights to use and occupy the land, as well as to access and exploit the resources found on the surface and subsurface of the land both for subsistence and for commercial purposes. However, in reality, most of indigenous peoples' lands in all of these jurisdictions have been lost through systematic dispossession. This restricts the real benefit of the common law rights.

Additionally, the indigenous peoples in Canada and New Zealand also have rights to their traditional lands which are not exclusively occupied. These rights are subject to their traditional practices and usage prior to contact and the Crown's acquisition of sovereignty. These rights, referred to as aboriginal rights in Canada, and similar to the position in New Zealand, are practices, traditions and customs which are central and significant to the Aboriginal societies' distinctive culture prior to contact with European powers. They may harvest resources including fish, game and timber for domestic use. Canadian courts have held that domestic use is not limited to traditional practice, but also contemporary practices, such as constructing modern houses.

In New Zealand, rights extend to rivers, lakes, seabed and foreshores. However, in Canada, rights are site-specific; that is, particular to certain identified territories to which they customarily have access.

Similar to Australian common law, these customary rights in Canada and New Zealand prevail over legislation regulating access to resources unless the legislation expressly provides for extinguishment of the indigenous rights.

On the other hand, in other jurisdictions, the indigenous peoples' rights to land and the resources are restrictive in scope. Australian Aboriginal peoples' rights, due to a restrictive view of indigenous customs under the common law, are limited to those exercised by them at the time of the Crown's acquisition of sovereignty. Their right to exclude others depends on their traditional law as it is treated as another kind of right. This is subjected to strict proof of custom. The positive side of this is that it allows for the Aboriginal peoples' rights, such as those related to culture and religion, to co-exist with

other non-exclusive rights. These other rights, however, often prevail in the event of conflict with the indigenous rights.

However, although direct access to natural resources by the Australian Aboriginal Peoples is limited to those customarily accessed, various statutory schemes and provision for consent of the traditional owners to use land subject to land right or native title, for instance, has given rise to a wide range of benefits for the Aboriginal peoples, economically, socially and culturally.

India in its forest rights reform legislation has also merely affirmed and protected existing customary rights. The resource rights recognized by the legislation are restricted to non-timber forest produce traditionally accessed. Some specified wild animals are also excluded for conservation and environmental reasons.<sup>194</sup> Although restrictive, the government is legally obliged to take effective measures to prevent these rights from infringement.

The same restriction in the use of indigenous peoples' land and resources is also found in Taiwan. Article 19 of the Indigenous Peoples Basic Law 2005 provides:

Indigenous Persons have rights to perform the following non-profit activities within Indigenous Peoples' Regions:

1. Hunting wild animals.
2. Collecting wild plants and fungus.
3. Extracting minerals, rocks and soils.
4. Utilizing water resources.

The activities listed above can only be performed for traditional, cultural, ritual, ceremonial and/or self-consumption purposes.

The term "Indigenous Peoples' Regions" refers to 'areas recognized and approved by the Executive Yuan based on the official representation and application made by the Central Indigenous Authority who identifies "Indigenous Peoples' Regions" as all areas within which Indigenous Peoples traditionally live and are duly recognized and officially defined by the Central Competent Authorities as Indigenous Peoples' geographically distinct Traditional Territories, Ancestral Domains, and/or Ancestral Lands which remain traditionally, culturally and historically distinct, and are thus characteristically and intrinsically connected to the Indigenous ways of being, living, and relating'.<sup>195</sup>

Laws in Taiwan provide for ways for the indigenous peoples to acquire ownership rights to land developed and cultivated. Article 37 of the Mountain Slope Conservation & Utilization Law states,

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<sup>194</sup> S 3(1)(l). S 2(q) explains that the wild animals prohibited for hunting are the animals which are found wild in nature as specified under Schedules I to IV of the *Wildlife Protection Act 1971*.

<sup>195</sup> *Taiwan Indigenous Peoples Basic Law 2005* art 1.3.

## The Rights of Indigenous Peoples in Malaysia

Aborigines of reservation lands located within the mountain region should be taught to develop land and obtain cultivation rights, land surface rights, and lease rights. Individuals continuing to operate their cultivation and land surface rights for a period of five years are entitled to acquire gratis ownership of said land, except for land designated for special purposes.

Land ownership transfer is limited to aborigines. Land development management procedure is as provided by the "Executive Yuan".

These laws specifically guarantee that indigenous peoples can acquire such rights as the cultivation rights, land surface rights, ownership and lease rights related to the reserved lands that they have traditionally used.

Examples of express statutory provisions in other jurisdictions providing for recognition of land rights of the indigenous peoples are as follows:

a. Australia - S 10 Native Title Act 1993:

**Recognition and protection of native title.** Native title is recognised, and protected, in accordance with this Act.

b. Philippines: Indigenous Peoples Rights Act 1997

**Section 7. Rights to Ancestral Domains.** - The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected. Such rights shall include: ...

The section also defines the content of the rights which include the rights of ownership, right to develop lands and natural resources and right to safe and clean air and water.

**Section 8. Rights to Ancestral Lands.** - The right of ownership and possession of the ICCs/IPs, to their ancestral lands shall be recognized and protected.

The right to ancestral land include the 'Right to transfer land/property to /among members of the same ICCs/IPs, subject to customary laws and traditions of the community concerned'.

c. Taiwan: Taiwan Indigenous Peoples Basic Law (2005)

Article 20:

The Government recognizes Indigenous Peoples' rights to lands and natural resources. The Government shall establish an Indigenous Peoples' Land Surveys and Management Committee to conduct surveys, inspection, and investigation as well as management of Indigenous Peoples' lands.

### iv. Consultation with the indigenous peoples

Similar to the discussion above, consultation with the indigenous peoples which are affected in any decision-making process including the development and management of their land is an important aspect.

From the perspective of international law, at a minimum, the standards call for consultation of the affected peoples before any projects, such as the use of the land for any activities, are conducted within the land or territories of the indigenous peoples and other projects capable of affecting the resources that they have traditionally used.

On the pattern of relevant international instruments and interpretation by the relevant committees and the regional court on the rights to free, prior and informed consent, the UN Treaty's supervisory bodies have increasingly interpreted existing conventions as requiring this minimum duty to consult indigenous peoples when decisions are being made regarding their lands and resources. More specifically, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on Social, Economic and Cultural Rights (CESCR) have increasingly recognized full FPIC by requiring States Parties to ensure that the consultation of indigenous peoples has the goal of reaching consent. These conclusions have largely been based around the right to culture and the right to non-discrimination, rather than the right of indigenous peoples to self-determination. The UNDRIP specifically requires 'free, prior and informed consent' (FPIC).

Many jurisdictions also emphasize on consultation with the communities to be made condition before any policy or activities being undertaken affecting the indigenous peoples' land. Australia for instance gives emphasis to negotiations in policy making, and determination of native title and future acts on land subject to native title. Legislation enacted in Australia has seen comprehensive processes of inquiry or consultation, and regular scrutiny,<sup>196</sup> involving various parties in the development of policy on both land rights and native title.<sup>197</sup>

Consultation with the indigenous peoples is also statutorily required by the Taiwan Indigenous Peoples Basic Law. Article 21 provides:

In consultation with Indigenous Peoples, the Government or any private entity shall obtain their free and prior informed consent (FPIC) and/or maximum participation, as well as share with the concerned Indigenous Peoples benefits generated from exploration, development, exploitation and utilization of natural resources and lands within Indigenous people's Regions, as well as ecological and academic research thereon.

Taking into account of the approaches taken by several jurisdictions, and the standard required at the international law, consultation process with the indigenous peoples is

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<sup>196</sup> The NTA has undergone regular scrutiny since its inception through the Parliamentary Joint Committee on Native Title statutorily established under the NTA (s 204) – Graeme Neate, 'Land Rights, Native Title and the 'Limits' of Recognition: Getting the Balance Right?' (2009) 11 *Flinders Journal of Law Reform* 1, 132.

<sup>197</sup> Ibid.

essential prior to decision making affecting the indigenous peoples including their land and the development of the communities' land.

### v. Determination of the land of the indigenous peoples

In most jurisdictions studied, mechanisms and processes for the determination, recognition and protection of the land of the indigenous peoples are provided for by specific legislations.

For example, in Australia, New Zealand and Canada, negotiated agreements have acted as a mechanism to settle disputes over land rights and access to resources.<sup>198</sup> Studies have shown that agreement making has the capacity to recognize past and continuing injustices which are not limited by pre-existing strict provisions of the law.<sup>199</sup> It also has the capacity to identify possible restitution that accommodates the needs of particular communities.<sup>200</sup>

Whilst Canada provides for direct negotiation between the government and the particular aboriginal groups, Australia and New Zealand established specific processes. In New Zealand, The *Treaty of Waitangi Act 1975* (NZ) establishes a process for investigation and settlement of claims by the indigenous peoples. In Australia, a special tribunal, known as Native Title Tribunal, was established mainly for the determination of native title of the Australian Aboriginal Peoples. Both systems in these jurisdictions provide for negotiation and mediation process as important aspects in the determination mechanism.

Suhakam in its 2013 Report recommends establishing a tribunal or commission to address issues related to land claims by the indigenous peoples in Malaysia.<sup>201</sup>

The mechanisms established in the jurisdictions studied generally give a role to indigenous perspectives, including their customs and customary law, in defining the scope and content of their rights. Common in many indigenous communities is an integral connection between customary lands, group membership and spiritual values.<sup>202</sup>

This is also seen in the approaches taken in all of these jurisdictions. In the Philippines and New Zealand, for instance, the concept of responsibilities towards the environment for future generations is incorporated into legislative schemes. The concept of communal

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<sup>198</sup> Marcia Langton and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 34.

<sup>199</sup> Sue Jackson, 'Maritime Agreements and the Recognition of Customary Marine Tenure in the Northern Territory' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 220; Bruce Harvey, 'Rio Tinto's Agreement Making in Australia in a Context of Globalisation' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 237.

<sup>200</sup> Marcia Langton, Maureen Tehan and Lisa Palmer, 'Introduction' in Marcia Langton et al (eds), *Honour Among Nations?* (Melbourne University Press, 2004) 1, 20.

<sup>201</sup> 'National Inquiry into the Land Rights of Indigenous People' (n 108)166 [10.19].

<sup>202</sup> Marcia Langton, 'The estate as duration: "Being in place" and Aboriginal property relations in areas of Cape York Peninsula in north Australia' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 75.

land and its inalienability is also recognized. This is also observed in Australia in both land rights schemes and native title systems, although there have been tendencies to narrowly interpret what is Aboriginal property.<sup>203</sup> In New Zealand, the *Treaty of Waitangi Act 1975* (NZ) makes reference to the principles of the Treaty of Waitangi and certain components of tikanga Māori [Māori custom].<sup>204</sup> In the US, the Native American nations' self-determination policy, which emphasizes the Native American nations' cultural perspectives, has seen major improvement in the social and economic aspects of these nations.<sup>205</sup>

To conclude, mechanism for determination, recognition and protection of these lands requires consultation and participation of the particular communities to which the land belong to. There is also a need to take into account their custom, perspectives and relationship of the communities towards the land.

### vi. Compensation upon deprivation of the land rights of the indigenous peoples

In most jurisdictions studied, compensation must be made if land rights or resources rights are extinguished either in whole or part. In some jurisdictions such as the Philippines and Australia, the sources of funds for payment of compensation are clearly defined. The provision of funding on a regular basis has also given communities an income source for the communities' benefits.

For example, in the Native Title Act 1993 of Australia, the monetary compensation is the main form of compensation unless the affected aboriginal peoples request for other forms of remedies such as transfer of property or provisions for goods or services. The basis for the payment of the compensation is on 'just term' to be compensated for any loss, diminution, impairment or other effect on the native title rights and interests.<sup>206</sup>

In Canada, there are numerous settlement agreements made by the governments with the First Nation peoples. The purposes of the settlement agreement vary which for the most part is restorative in nature ie remedying historical wrong. Generally, settlement agreements include:

- Extinguishment of native title in exchange for the grant of title and various other compensatory measures; or,
- Recognition of title to land in the form of freehold land.

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<sup>203</sup> Wook "The Rights of the Orang Asli in Forests" (n 64) chap 8.I.A.2.

<sup>204</sup> Jacinta Ruru, 'The Māori Encounter with Aotearoa: New Zealand's Legal System' in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 111, 121.

<sup>205</sup> S Cornell, "The Importance and Power of Indigenous Self-Governance: Evidence from the United States" paper presented at the *Indigenous Governance Conference*, Canberra 2002, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2003' (2004) *Human Rights and Equal Opportunity Commission* 1-214, 201.

<sup>206</sup> Robyn Glindemann and David Bursey, 'Compensation and Native Title Rights in Australia and Aboriginal Rights in Canada: An Overview' (2001) 20 *Australian Mining & Petroleum Law Journal* 288.

- Many grants of title include minerals in some portion of the land. <sup>207</sup> Where entitlements to minerals were excluded, payment of compensation is made.
- Right to exercise customary rights. Some provide for exclusive access within the granted land and give priority to the First Nation to access the other traditional land which was surrendered to the government. Some others provide for annual allocation (quota) of resources.
- Social and economic funding: e.g., assistance in the development of training, employment and business.<sup>208</sup>
- Existing third-party interests are protected and given effect.<sup>209</sup>

In Taiwan, redress mechanism for extinguishment of native titles comes in the form of fixed proportion of revenue generated from the project shall be allotted to indigenous' people development fund to serve as returns or compensation.<sup>210</sup>

The reform and experience by the jurisdictions studied provide examples of how the principles in the UNDRIP may be applied to better protect the land rights of the indigenous peoples.

### e. Recommendations

#### **Orang Asli communities**

1. Specific to the Orang Asli communities, based on the existing laws, specifically the Act 134 and the National Land Code, the state governments have to take action in order to determine and gazette the land occupied by the Orang Asli for immediate protection of the land rights of the Orang Asli.

This should be taken based on the spirit of respecting human rights of all citizens and fulfilling the obligation of the government consistent with the duties provided by the Federal Constitution and the UNDRIP. The Federal Government, having duty for the welfare of the Orang Asli must play important role initiating necessary negotiation with the State governments.

2. As the existing legislation is inadequate to protect the land of the Orang Asli, it is essential to enact a specific legislation to safeguard the land of the Orang Asli. Specifically, the proposed legislation is to provide for:

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<sup>207</sup> E.g. in *Nunavut Land Claim Agreement 1993*, whilst 2% (14 000 square miles) of traditional land was granted including minerals, another 15% (122 000 square miles) granted exclude entitlement to minerals. The status of grant is freehold title.

<sup>208</sup> E.g.: A land claim settlement agreement in involving the Inuit in the Nunavut settlement area (1993) laid down the basis for the creation of new territory, Nunavut in 1999. Under the terms of the agreement, jurisdiction over some territorial matters was transferred to a new public government. It includes wildlife management, natural resource management, land use planning and development and property taxation. Normally, payment is made in the form of payment over a period of time to community governments or corporations.

<sup>209</sup> Richard Bartlett, 'Canada: Indigenous Land Claims and Settlements' in Bryan Keon-Cohen (ed), *Native Title in the Millenium* (Aboriginal Studies Press, 2001) 355, 361.

<sup>210</sup> The *Indigenous People Basic Law of Taiwan* was promulgated on 5th February 2005. See Articles 20-21.

- a. recognition that the Orang Asli have legal rights over their customary land and the land that they live;
- b. recognition that the rights of the Orang Asli in protected areas co-exist with the interests of states; and regulation on the use and management of the area must be made with consultation and participation of the communities involved;
- c. a system in which the land of the Orang Asli is to be registered according to the system and practice of the communities. To this, a consultation must be made with the communities;
- d. mechanism to determine the land, width and nature of the land rights of the communities. The mechanism may be in the form of a tribunal or a process initiated by state governments for negotiation towards agreement making. The mechanism established must give a role to indigenous perspectives, including their customs and customary law in dispute settlement practice.
- e. acquisition of the land of the Orang Asli and their relocation by the state governments could only be made based on the principle of FPIC with provision on just and fair compensation including priority to restitution of land of similar quality.

As part of the process in drafting the new legislation, review of existing legislations affecting the Orang Asli must also be made to reconcile conflicting provisions against the interests of the Orang Asli.

### **Natives in Sabah and Sarawak**

1. Specific to the indigenous peoples in Sabah and Sarawak, the governments must be proactive in determining the land of the natives by conducting appropriate survey according to the relevant law for the purpose of protecting the natives' land. An appropriate mechanism may be established, including in the form of a tribunal, or negotiation for determination of the natives' land.
2. It is also recommended that the land legislations in Sabah and Sarawak be amended as follows:
  - a. to provide for FPIC as a statutory prerequisite for use or extinguishment of the customary land rights failing which any land alienation will be null and void.
  - b. to provide for better notice and information system to the local communities of any action taken by the government involving the communities' interest in land.

Notes: drafting legislation; negotiation and public awareness

1. In the process for the drafting of the legislation, or amendment to the existing legislations, and any efforts taken, it is necessary for states to conduct **consultation** based on **free, prior and informed consent** with all stakeholders especially the indigenous communities according to proper process consistent with the UNDRIP. The process must also take into account the **diversity** of practice and customary system of the indigenous communities.

2. In addition to the law-making process, the government may also resort to **negotiation** with the indigenous communities with a view towards agreement making in relation to the use and management of land. This mechanism has been taken in many jurisdictions especially Canada, US, New Zealand and Australia. This effort may be more practical and feasible in view of the diverse cultures and background of the indigenous communities.

Consent judgments involving the government of Kelantan and the Orang Asli in Pos Balar and Pos Belatim concluded in the year of 2018 are unprecedented move in the country which prove that such initiative is possible.

3. It is also necessary to enhance public awareness on the indigenous communities and their rights.

## f. Challenges to the recommendations

Challenges to the change of law include:

### a. Federal-state divide of jurisdiction

Particular to the Orang Asli in Peninsular Malaysia, the matter of welfare of the Orang Asli is under the jurisdiction of the federal government in term of administration and Parliament in respect of law making. On the other hand, land is under jurisdiction of state both for administration and law making.

In the meantime, it is not irrelevant to state here that government leaders in some states have been known to issue statements indicating resistance against the land rights of the Orang Asli. In view of this, to change the law requires awareness and strong political reconciliation to move and effect the change. Some have also proposed that the current federal government, as this matter has been part of manifesto of the ruling parties promise, may move forward the discussion using the mechanism of the National Land Council.<sup>211</sup>

On the context of human rights institutions, other relevant institutions and NGOs, promotion of awareness and pressure may in a way lead towards changes in law and its implementation.

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<sup>211</sup> First author's communication with some experts in Orang Asli land laws.

**b. Malay Reservation Enactments**

In many states in which many Orang Asli reside, lands are reserved under the Malay Reservation Enactments. There are lands occupied or customarily lived by the Orang Asli which are under the Malay Reserve. In Kelantan for example, the Malay Reserve lands are up to 85% of the total land cover.

In view of the provision of the Malay Reserve Enactments, in order to recognise the land of the Orang Asli, it is necessary for the Malay Reserve land to be degazetted, but it must be replaced.

This aspect must be addressed at the state level.

**c. Implications for other legislations**

Legislation involving land, forestry, wildlife, environment, national park must be reviewed in the drafting process to consider its implications.

**d. Political will**

Leaders of the governments must exercise greater integrity observing the basic principles underlying the protection of land rights. This includes the principles of consultation, free and prior informed consent, as well as respect to the rights of the indigenous peoples.

Protection of land rights have been recognised to be important for indigenous communities to be resilient and self-sufficient. Smallholding farmers must also be protected to achieve equal distribution of the countries' wealth.

## 6. RIGHTS IN RELATION TO CULTURAL INTEGRITY

Culture encompasses the social behaviours and norms practised by human societies. It comprises knowledge, experience, beliefs and religion, values and attitudes. It also involves arts, spatial relations, material objects and possessions acquired by a group of people in the course of generations. Humans acquire culture through the learning process of enculturation and socialization as manifested by diversity of culture across societies around the world. In other words, culture is essentially a way of life of a group of people including the behaviours, beliefs and values that they accept and pass along by communication and imitation from one generation to another.

The right to culture and right to take part in culture are recognised at the international law especially in:

- a. the International Covenant on Economic Social and Cultural Rights (ICESCR),<sup>212</sup>
- b. the International Covenant on Civil and Political Rights (ICCPR)<sup>213</sup> and
- c. the Elimination for All Forms of Racial Discrimination (CERD).

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<sup>212</sup> Article 15.

<sup>213</sup> Article 27.

The right to take part in culture has been expanded through a wider interpretation of the ICCPR which affirms the right to culture for members of minorities and indigenous peoples. Article 27 of the ICCPR specifically affirms that persons belonging to ethnic, religious or linguistic minorities 'shall not be denied the right, in community with other members of their group, to enjoy their own culture'. This protection is thereby individual in nature.

As to the scope of culture under the international law, the United Nations (UN) Human Rights Committee (HRC) has observed that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.'<sup>214</sup>

In addition, the UN Committee for the Elimination of All Forms of Racial Discrimination (CERD) provides a broad scope of the concept which includes 'distinct culture, history, language and way of life as an enrichment of the State's cultural identity'.<sup>215</sup>

Whilst the right to culture as protected under the general international human rights instruments is individual in nature, the UNDRIP incorporates a collective element in its provisions, under which states are under an obligation to protect indigenous peoples' full enjoyment of their human rights, either as individuals or as a collective.<sup>216</sup>

### a. Right to culture in UNDRIP

The UNDRIP also seeks the effective protection of indigenous culture. Such rights are made positive by the declaration and impose upon states positive duties to safeguard the rights to culture by the indigenous peoples.

It must be emphasized that the cultural rights are interconnected with the protection of the land of indigenous peoples. As Wiessner pointed out, equally crucial to the effective protection of indigenous peoples' cultures is the safeguarding of their land. Being 'indigenous' means to live within one's roots.<sup>217</sup> For indigenous peoples, land is central to their culture. Land is thereby not only an issue of property but also the sources of spiritual, cultural and social identity.<sup>218</sup> As land protection has been discussed earlier, this part focuses on other aspect of culture related rights.

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<sup>214</sup> UN HRC, *General Comment No. 23, Art. 27 (Rights of Minorities)*, UN doc CCPR/C/21/Rev.1/ Add.5 (1994) para. 7.

<sup>215</sup> CERD, *General Recommendation XXIII on the Rights of Indigenous People*, UN doc A/52/18 (1997).

<sup>216</sup> See also Lucy Claridge and Alexandra Xanthaki, 'Protecting the right to culture for minorities and indigenous peoples: an overview of international case law' in Peter Grant (ed.), *State of the World's Minorities and Indigenous Peoples 2016* (Minority Rights Group International, 2016).

<sup>217</sup> Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22(1) *European Journal of International Law* 121-140.

<sup>218</sup> Gilbert Jeremie, *Land Rights as Cultural Rights in Indigenous Peoples' Land Rights under International Law* (Brill Nijhoff, 2016) 171-209.

Aspects of culture related rights
<ul style="list-style-type: none"><li>• Prohibition of ethnocide</li><li>• Spiritual and religious traditions and customs</li><li>• Language, knowledge and traditions</li><li>• Education and culture</li></ul>



- i. **Prohibition of ethnocide** against indigenous peoples - Article 8(1). In particular, the indigenous peoples have right to not be subjected to forced assimilation and destruction of their culture. This provision goes beyond the prohibition of genocide against them as specified in Article 7(2). Cultural genocide broadly refers to ‘the extermination of a culture that does not involve physical extermination of its people’.<sup>219</sup>

The destruction of indigenous peoples’ cultures can take many forms, including forced relocation, removal of children from their communities, invasion of their lands, aggressive assimilationist policies, or restrictions of access to their traditional means of livelihoods.<sup>220</sup>

To protect against these harms, the UNDRIP provides that States have duties to provide effective mechanism for prevention of, and redress for:

“(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.”

- ii. **Spiritual and religious traditions and customs:** UNDRIP also affirms that the indigenous peoples have the right to practise and revitalize their cultural traditions and customs, including the right to maintain, protect, and develop past,

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<sup>219</sup> K Jonassohn and Frank Chalk, ‘A Typology of Genocide and some Implications for the Human Rights Agenda’ in Isidor Wallimann, M N Dobkowski, R L Rubenstein (eds), *Genocide and the Modern Age: Etiology and case studies of Mass Death* (Syracuse University Press, 1987) p. 11.

<sup>220</sup> ‘Indigenous Peoples, Human Rights, and Cultural Heritage: Towards a Right to Cultural Integrity’, in Alexandra Xanthaki, Sanna Valkonen, Leena Heinämäki and Piia Kristiina Nuorgam (eds), *Indigenous Peoples and Cultural Heritage: Rights, Debates, Challenges* (Brill, 2017).

present, and future manifestations of such cultures (Article 11), including the right to manifest, practise, develop, and teach their spiritual and religious traditions, customs, and ceremonies, as well as the restitution and repatriation of ceremonial objects and human remains - Article 12.

- iii. **Language, knowledge and traditions:** Indigenous peoples have the right to 'revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies', etc. and obligates states to 'take effective measures to ensure that this right is protected' - Article 13.

Language is an essential part of minority and indigenous cultures. It differentiates them from the rest of the population and guarantees 'the expression, diffusion, and transmission of their culture'. The loss of minority and indigenous languages contributes to the erosion of their identity and traditional knowledge. Language has also been recognised as a means of participation in community life. Thus, to deprive a man of such participation amounts to depriving him of his identity.

The rights of indigenous peoples to language are twofold:

- They have the right to learn the national language on the same basis as the rest of the population, without any discrimination. To this end, States must take positive measures to ensure equal access to the teaching of the language.
  - They also have the right to learn their own languages.<sup>221</sup>
- iv. **Education:** Article 14 states that 'individual and collective rights to education', including the right of indigenous peoples to 'develop and control educational systems that are consistent with their linguistic and cultural methods of teaching and learning' as well as the right of 'indigenous pupils' to be placed on an 'equal footing with non-indigenous pupils' regarding 'access to all levels and forms of education within the State'.

Related to education, Article 15 guarantees indigenous peoples the right to have 'their cultures, traditions, histories and aspirations ... appropriately reflected in education and public information'. This includes the state's duty to combat prejudice and discrimination and to develop tools which 'promote tolerance, understanding and good relations among indigenous peoples and all other segments of society'.

Indigenous peoples also have the right to 'establish their own media in their own languages', an important aspect of self-determination, and to have non-discriminatory access to non-indigenous media; also states have a 'duty to ensure that indigenous cultural diversity is duly reflected in non-indigenous media' - Article 16.

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<sup>221</sup> Claridge and Xanthaki (n 214).

These provisions on cultural rights are considered as significant to redress wrongs experienced by many indigenous peoples around the world including forced assimilation or discrimination in education, media, and public life.<sup>222</sup>

### b. Right to culture under Malaysian law and policy

As culture encompasses belief and religion, Art 11 of the Federal Constitution is to certain extent relevant. Art 11 guarantees the right of every person in Malaysia to profess and practice his religion. The scope of the constitutional provision extends to the indigenous peoples as well.

As Malaysia practice legal pluralism, custom or *adat* is also one of the sources of law - Art 160(2) of the Federal Constitution. Custom which is enforceable is considered as part of the law, also known as personal law, in Malaysia.

Relevant to the indigenous peoples, the primary function of custom is to maintain harmonious relationship between individual members of a village or a longhouse, for instance, and visitors. *Adat* is also important to ensure a balance between the community and the physical and spiritual environment. For them, a breach of *adat* not only upsets the order of things in the community, but may also threaten individual relationship, spiritual well-being and health of the people, and material prosperity of the entire community.<sup>223</sup>

The customary laws govern aspect of personal matters including family, marriage and divorce as well as distribution of property. The *Law Reform (Marriage and Divorce) Act 1976*, s 3(4) excludes the application of the Act to native of Sabah and Sarawak; and the Orang Asli in Peninsular Malaysia. In particular, the provision states that the marriage and divorce of these communities are 'governed by native customary law or aboriginal custom' except in certain situations including personal option. This means, they may choose to marry under the LRA or according to customary law. If they are Muslims, their marriage is governed by the relevant Islamic family law legislations.

However, conflict may arise in respect of converts to Islam and the status of their marriage. Under s 51(1) of the LRA, where one party to a marriage has converted to Islam, the other party who does not so converted may petition for divorce.

In Sabah and Sarawak, customary laws of various indigenous communities are part of the state laws. The custom encompasses a broad area of personal matters including betrothal, marriage, divorce, sexual offences, death, graves and property. Certain customary laws of certain communities are codified in statutory form. Examples for this are Woolley's Code in Sabah which compiled basic principles of *adat* of certain communities in Sabah in 1930's; *Sabah Native Courts (Native Customary Laws) Rules 1995*; and *Sarawak Native Customary Law Ordinance (Cap 51)* orders made under the Ordinance which compiled customary laws of certain communities in Sarawak. In

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<sup>222</sup> Wiessner (n 215).

<sup>223</sup> Wu Min Aun, *The Malaysian Legal System* (Pearson Malaysia, 2005) 234.

addition, there are dispute settlement mechanisms in both states in the form of Native Courts which function mainly to administer the customs of the communities.

With respect to the Orang Asli, the *Aboriginal Peoples Act 1954* appears to provide some protection to the customs and beliefs of the Orang Asli communities. Under the proviso to S 4 of the Act, the power of the Director General appointed under the Act does not 'preclude any aboriginal headman from exercising his authority in matters of aboriginal custom and belief'. This reflects the aim of the Act to protect the culture of the indigenous communities.

Further, under S 17(1) of the Act, an Orang Asli school children must not be required to attend any religious instruction unless upon prior consent of his father or of his mother. In addition, under S 17(2), an Orang Asli child must not be adopted by a person who is not himself an Orang Asli from the same ethnic group unless the consent of the Director General of the Orang Affairs is obtained. Commonly, in the customs of the Orang Asli, if both parents of a child have died, the obligation to look after the child should fall under the immediate family members/next kin. If no one can decide, the community's council (*Lembaga Adat*) may need to decide based on their customary law.

Apart from the above, courts have also enforced *adat* of the communities to recognise the rights of the indigenous communities to their customary land and resources which are also crucial Malaysian position in relation to protection of land and resources of the indigenous peoples to the exercise of cultural rights by the indigenous communities.

Cultural matters have also been addressed by a recent Dasar Pembangunan Luar Bandar 2020-2030 (Rural Development Policy) which was published by the Ministry of Rural Development (Kementerian Pembangunan Luar Bandar).<sup>224</sup> The policy paper outlines the following as the basis in the 10 years plan regarding the matter:

- a. More activities promoting the culture of the Orang Asli and native communities in Sabah and Sarawak among the public in the country; and
- b. Empowering *adat* institutions in rural development.

The Native Court (*Mahkamah Anak Negeri*) in Sabah and Sarawak and Custom Hall (*Balai Adat*) have been acknowledged as important institutions to the rural area development and sustainability of the relevant communities. The government in the policy paper acknowledges that the institution must be recognised as part of efforts to strengthen the social system and identity of the communities. The initiatives outlined are intended to empower the status and role of the institutions, taking into account the views and decisions of the communities subject to the scope and jurisdiction of the institutions. This is a positive direction to the benefit of the indigenous communities.

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<sup>224</sup> Dasar Pembangunan Luar Bandar, 2019, Kementerian Pembangunan Luar Bandar.

### c. Issues faced by the indigenous groups in relation to cultural rights

Although the laws are cognizant, to a certain extent, of the customs and customary laws of the Orang Asli and natives in Sabah and Sarawak, there are issues which affect the exercise of cultural rights of the communities.

#### i. Community leadership:

Related closely to the protection of cultural integrity of a community is a strong leadership of the communities. In both East and West Malaysia, similar issue raised is interference of the states in the appointment of the leaders of the communities and are not made in accordance with the custom of the communities.

Often persons appointed as the headman in this situation do not receive adequate support from the communities. This situation has been suggested as a factor that affects the unity of the communities which is important to keep minority communities together.<sup>225</sup>

#### ii. Religious proselytizing activities and conversion

Embong stated that:

Being animists, one of the main issues the Orang Asli have to contend with is religious conversion, since they have been the target of proselytizing activities from both Muslim and Christian missionaries.

This is said to be 'not so much because of Islam, but more so because of the practice of the *pendakwah* people (Muslim missionaries) whom he regards as being mainly interested in getting converts, and not in Orang Asli welfare'.<sup>226</sup> A few Orang Asli have also hinted the same to the first author of this study in some informal conversations. As such, it is important for missionaries and activists to reconsider approaches taken to be more acceptable to the people and respecting their culture.

#### iii. Minority languages

Many of the indigenous individuals raise issues of sustainability of the community language, which is important to the identify of a community. Although there are efforts by the government to highlight the languages of minority communities in educational system and broadcasting, more could be done to ensure that the communities are able to sustain their cultural heritage.

#### iv. Marriage registration of the Orang Asli and natives in Sabah and Sarawak

As mentioned above, under the *Law Reform (Marriage and Divorce) Act 1976*, the marriage and divorce of the Orang Asli are governed by their customs. However,

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<sup>225</sup> Data from FGD Sabah, FGD Sarawak, a number of FGDs conducted in the Peninsular Malaysia.

<sup>226</sup> Abdul Rahman Embong, 'The Culture and Practice of Pluralism in Postcolonial Malaysia' in RW, Hefner (ed), *The Politics of Multiculturalism: Pluralism and Citizenship in Malaysia, Singapore and Indonesia* (University of Hawaii Press, 2001).

there is no specific regulation to formally register the marriage and divorce, which may lead to problems in school registration and issues if divorce occurs.<sup>227</sup> Therefore, it is necessary for a specific regulation to allow for a formal registration of marriage and divorce involving the Orang Asli communities.

### v. Child marriage

Child marriage refers to marriage involving a person of under a minimum age provided under the *Law Reform (Marriage and Divorce) Act 1976 (LRA)* which is 16 for female and 18 for male. However, as the marriage of the Orang Asli and natives in Sabah and Sarawak is not subjected to the LRA, such legal requirement does not apply to these communities.

Nevertheless, the practice of child marriage is prevalent among the communities. Factors include poverty and lack of access to education which are common among the indigenous communities.<sup>228</sup> In view of negative impacts of child marriage on physical and emotional health of children, it is important that this issue is addressed by the relevant authorities with engagement and consultation with the communities.

## d. Other jurisdictions

There are growing commitments in many countries to provide for greater legal protection for the cultural rights of their indigenous peoples. Taiwan and the Philippines, for instance, have enacted for express legal provisions in specific legislations providing for respect, recognition and protection of the rights of the indigenous peoples to practice and revitalize their culture, traditions and institutions.<sup>229</sup>

Measures designed also primarily involve education system and mass media to reflect cultures, traditions and histories of the local indigenous peoples. The matters related are also provided specifically, including language, traditional knowledge and intellectual property, access to biological and genetic resources, archaeological and historical sites.

To promote ethnic relations, states are also legally required to take effective measures to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among the indigenous peoples and all segments of society.<sup>230</sup>

## e. Recommendations

Based on the provisions of UNDRIP, and the position of the laws and policies in Malaysia, in order to protect the cultural rights of the indigenous peoples in Malaysia, it is recommended that:

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<sup>227</sup> Interview with Amani William Hunt, Faculty of Social Sciences and Humanities, UKM, 28 February 2020).

<sup>228</sup> Noor Aziah Mohd Awal & Mohd Al Adib Samuri, *Child Marriage in Malaysia* (2018). Unpublished Working Paper accessed in <https://www.unicef.org/malaysia/media/711/file/Child%20marriage%20in%20Malaysia.pdf>.

<sup>229</sup> *Philippines Indigenous Peoples' Rights Act* s 29, 32; *Taiwan Basic Laws* art 10.

<sup>230</sup> *Philippines Indigenous Peoples' Rights Act* s 31; *Taiwan Basic Laws* art 33.

### Short term plan

1. The government must ensure that appointment of leaders in indigenous communities are made according to the communities' practice and traditions.
2. The government must prevent any direct acts that may result in force assimilation and destruction of culture of the indigenous peoples.
3. The government must develop and maintain effective mechanism for the prevention of actions with negative effects on their distinct identity; forced assimilation and inciting racial and ethical discrimination.
4. The government must acknowledge and protect the cultural and sacred sites of indigenous peoples.

### Long term plan:

1. The governments must enact special law or policy that recognizes indigenous cultural and linguistic rights.
2. The government must allow indigenous peoples to establish and run their own media according to existing law, without any prejudice and discrimination.
3. The government must ensure indigenous peoples' access to mainstream media; and that the indigenous cultural diversity is duly reflected in non-indigenous media.
4. Government must provide a specific regulation for the registration of marriage and divorces among the Orang Asli.

## 7. RIGHTS IN RELATION TO EDUCATION

### a. Challenges in education involving the Orang Asli and natives in Sabah and Sarawak

Education is an important tool to empower human communities. It is recognized as a human right and is an indispensable means of realising other human rights and fundamental freedoms. Education is the gateway by which economically and socially marginalized peoples can lift themselves out of poverty and obtain the means to participate fully in their communities.<sup>231</sup>

However, there are many challenges and issues in relation to education involving the children of the Orang Asli and natives in Sabah and Sarawak. These include low attendance rates among children due to factors such as distance, transportation and inadequate facilities and infrastructure, poverty or low social economic status as well as

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<sup>231</sup> Gina Cosentino, 'Indigenous Peoples have the right to education: but so far we failed them' *World Economic Forum* (Web page, 9 August 2016) <https://www.weforum.org/agenda/2016/08/indigenous-people-have-a-right-to-quality-education-but-so-far-we-ve-failed-them/>

lack of interest or low motivation level among the marginalized minority indigenous students in all regions.<sup>232</sup> Since the beginning of the pandemic, Ministry of Education and their partners have launched multiple initiatives to ensure continuity of learning and access to education mainly in the form of online learning platforms, improving connectivity conditions for teachers and students and distributing home learning kits. However, despite the great efforts, one of the biggest challenges on the part of the Government and school administrators is to ensure access to education for indigenous children who commonly live in no-internet coverage area and with limited resources to acquire required devices.<sup>233</sup> These problems have hampered effective teaching and learning.

There are many studies which show that school dropout is common among the Orang Asli communities.<sup>234</sup> A study reported that only 30% of the Orang Asli students completed secondary school, which is less than half the national average of 72%.<sup>235</sup> Meanwhile, according to an analysis carried out by an Orang Asli government department, out of a total of 3,200 Orang Asli students who enrolled in Form One in 2014 throughout the peninsula, only 2,062 remained in school until Form Five. This means that 1,138 (42.12 per cent) of those students who enrolled in 2014 had dropped out of secondary school.<sup>236</sup> Other problems reported are language barrier; and existing training programs that do not adequately prepare the teachers to deal with the complexities of this community. School leaders and teachers face difficulties in helping these students, such as integrating with peers who are not of theirs and assuring them of the importance of pursuing basic and advanced education.<sup>237</sup>

One of the key gaps identified in the discourse is that the government initiatives have not effectively addressed the real issues faced by the indigenous peoples in the education system. Evidence of these problems can be seen in terms of the opportunities provided to indigenous peoples to participate in decision-making, curriculum design, teachers' selection, and teaching methods that respect indigenous cultures and traditions. Some groups feel marginalized by the existing education system as in many situations it does not reflect the diverse culture and languages of the minority indigenous peoples. This

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<sup>232</sup> Interview with Puan Hasmah Abdul Manaf, formerly a Penolong Setiausaha Bahagian Pendidikan & Latihan SUHAKAM. (Rohaida Nordin, 18 Mei 2019).

<sup>233</sup> 52% Students in Sabah have no Internet Access, Gadgets for Online Learning. Borneo Post 10 May 2020 <https://www.theborneopost.com/2020/05/10/52-pct-students-in-sabah-have-no-internet-access-gadgets-for-online-learning/>; 50% of Students in Sarawak Unable to Follow Online Learning, Dayak Daily, 11 June 2020: <https://dayakdaily.com/50-per-cent-of-student-in-sarawak-unable-to-follow-online-learning/>.

<sup>234</sup> Renganathan S, 'Educating the Orang Asli children: Exploring indigenous children's practices and experiences in schools' (2016) *The Journal of Educational Research*; Zairil Khir Johari and Nicholas Chab, 'The need for decentralization: A historical analysis of Malaysia's education system' in C. Joseph, *Policies and Politics in Malaysian Education* (Taylor & Francis, 2017) 17..

<sup>235</sup> Zulkefli Aini, Abdul Ghafar Don & Nurul Islam Mohd Isa, 'Education Development Program to Orang Asli by the Ministry of Education Malaysia (MOE)' (2019) 4(1) *Jurnal Hal Ehwal Islam dan Warisan Selangor* 1.

<sup>236</sup> Kurniawati Kamaruddin, 'Orang Asli school dropout rate still serious' *Malaysiakini* (3 September 2018) <https://www.malaysiakini.com/news/441468>.

<sup>237</sup> Zulkefli Aini, Abdul Ghafar Don & Nurul Islam Mohd Isa, 'Education Development Program to Orang Asli by the Ministry of Education Malaysia (MOE)' 2019 4(1) *Jurnal Hal Ehwal Islam dan Warisan Selangor* 1.

may result in the education system becoming alienated from the real lives of indigenous peoples.<sup>238</sup>

In addition to the high school dropout number among the Orang Asli students and ineffective teaching and learning within existing national education system, there were also allegations of abuse and mismanagement of teachers at Orang Asli school. This issue came to fore upon a 2015 incident when seven Orang Asli children went missing from their remote school, Sekolah Kebangsaan Tohoi in Gua Musang, Kelantan. They were believed to have run into the forest surrounding their school after being warned of punishment by school teachers for swimming in a nearby river without permission. After almost 50 days of extensive search and rescue by the authorities, the Department of Orang Asli Development (JAKOA) and the villagers, only two children were found alive.<sup>239</sup> There was allegation that the school imposed corporal punishment when they were often hit and caned. An Education Ministry official who visited the school refused to comment on the case. However, in a statement, the Ministry said that schools for Orang Asli children were regularly monitored to ensure its growth and success.<sup>240</sup> In 2018, the families of the Orang Asli children filed negligence suits against the government. The defendants include public officers from the Education Department, the Orang Asli Development Department, and officers involved in the search and rescue mission. The causes of action of the suit were negligence as well as breach of statutory, fiduciary and constitutional duties, and the legitimate expectation of the plaintiffs.<sup>241</sup>

### Undocumented children in Peninsular Malaysia, Sabah and Sarawak

For some indigenous children, their predicament in the enjoyment of the right to education is due to the fact that they have no legal status or also known as undocumented children.<sup>242</sup> Most of the undocumented children do not possess birth certificates or other legal identity documents and as such they are at risk of becoming stateless.

The issue is faced not only among the natives in Sabah and Sarawak<sup>243</sup> but also Orang Asli children<sup>244</sup> and Indians of Tamil descent in Peninsular Malaysia.<sup>245</sup> However, for purpose of this report, focus is made on the undocumented children in Sabah and Sarawak who

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<sup>238</sup> Desmond Daniel Anak Copta, 'Isu Pendidikan di Malaysia (Pendidikan Orang Asli)' *Universiti Kebangsaan Malaysia*. See also, Ya Shin Wan, *Educational Policies in Overcoming Barriers Faced by Orang Asli Children: Education for all? Policy Paper No 66* (Ideas Policy Research, 2020).

<sup>239</sup> Ramli Ibrahim, 'Orang Asli Kids Who Went Missing in Kelantan Jungle Shy Away from School', *New Straits Time*, 23 August 2016. <https://www.nst.com.my/news/2016/08/167666/orang-asli-kids-who-went-missing-kelantan-jungle-shy-away-school>.

<sup>240</sup> Stephanie Scawen, 'Malaysia: Outrage after 5 Indigenous Children die', *Al Jazeera*, 15 Oct 2015. <https://www.aljazeera.com/features/2015/10/15/malaysia-outrage-after-5-indigenous-children-die>.

<sup>241</sup> Ida Nadirah Ibrahim, 'Pos Tohoi Orang Asli Sue Government for Negligence over Dead Children', *the Malay Mail*, 24 Aug 2018. <https://www.malaymail.com/news/malaysia/2018/08/24/pos-tohoi-orang-asli-sue-government-for-negligence-over-dead-children/1665639>.

<sup>242</sup> Kanageswary Selvakumaran, Tie Fatt Hee and Jal Zabdi Mohd. Yusoff, 'A Legal Perspective on the Right to Education for Stateless Children in Selected ASEAN Countries', (2020) 28 (1) *Pertanika Journal of Social Science & Humanities* 361 - 377.

<sup>243</sup> Rodziana Mohamed Razali, et.al, Migration and Statelessness, Turning the Spotlight on Malaysia (2015) 23 (S) *Pertanika Journal of Social Science & Humanities* 19 - 36.

<sup>244</sup> Tamara Joan Duraisingam, Stateless Persons of Malaysia: The Causes and Consequences, *International Journal of Public Law and Policy*, 2016 Vol.5 No.4, pp.291-304.

<sup>245</sup> UNHCR Statistics – only capture the mapped stateless Indians in the Peninsular – from 40k to over 12k in 2017.

are among the natives. For Sabah and Sarawak, undocumented children are commonly found among different populations of migratory and non-migratory backgrounds such as the semi-nomadic community of Bajau Laut/ Samaa Dilaut. This also occurs among children born to refugee and migrant communities; children born overseas to a non-citizen father; children born out of wedlock to a non-citizen, undocumented or stateless mother. The children may have been born in Malaysia or may have come from other countries at some point of their life.

Many researches have been conducted to identify the causes and consequences of the undocumented status of these children. Most of these undocumented children do not possess birth certificates and at risk of becoming stateless. General factors impeding birth registration include lack of supporting document such as marriage certificate of parents<sup>246</sup> and identity card of parents; fear of legal implications among undocumented parents; and lack of awareness or capacity.<sup>247</sup> Specifically for vulnerable migrant, births out of hospital, inability to obtain birth records from the relevant hospital authority due to outstanding medical bills, lack of awareness on the importance of birth registration and its procedures, undocumented status of parent, and desertion by one's spouse, usually the husband, are among the reasons that singularly or in combination, lead to late birth registration. <sup>248</sup> For communities in remote locations in Sabah, long distance and burdening costs to travel to the nearest NRD (National Registration Department) are the usual challenges. However, the baseline figures and demographic profiles of people 'at risk' of statelessness in Sabah and Sarawak continue to be unavailable to date.

Legal solutions to ensure undocumented status and statelessness is prevented and reduced among others entail accession to pertinent treaties<sup>249</sup> and acceptance of key provisions upholding legal identity for all and the harmonization of Malaysia's internal legislation and practice on nationality with international standards.<sup>250</sup> Lack of identity document has been one of the most significant barriers to schooling especially in Sabah and Sarawak. Enrolment in Malaysian government schools is only available to children possessing valid documents. Although all children born in Malaysia are eligible to register for birth certificates, this documentation is not enough to admit certain children to public schools. As of January 2019, the process for admission to government primary schools was simplified, allowing undocumented children with at least one Malaysian

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<sup>246</sup> Lack of marriage certificate is commonly due to illegal or undocumented status of the parent(s), or inter-faith marriages of parents that are not registered with the authority especially marriages between non-Muslim indigenous people with a Muslim spouse.

<sup>247</sup> Catherine Allerton, *The Malaysian Insider*, 'Statelessness and child rights in Sabah', 5 December 2014. <http://www.themalaysianinsider.com/sideviews/article/statelessness-and-child-rights-in-sabah-catherine-allerton>; Tenaganita, *Acting today for Tomorrow's Generation: Regional Conference on Stateless/ Undocumented Children in Sabah*, 15-18 Nov 2005, Kota Kinabalu, p.30.

<sup>248</sup> Rodziana Mohamed Razali, et.al, 'Migration and Statelessness, Turning the Spotlight on Malaysia' (2015) 23 (S), *Pertanika Journal of Social Science & Humanities*, 19 – 36.

<sup>249</sup> *The Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness 1954*. adopted by the General Assembly of the United Nations on 4 December 1954,

<sup>250</sup> Rodziana Mohamed Razali, et.al, *Migration and Statelessness, Turning the Spotlight on Malaysia* (2015) *Pertanika Journal of Social Science & Humanities*.

parent/guardian to be enrolled. However, this provision has not been extended towards undocumented children with foreign parents.<sup>251</sup>

However, although the parents of the undocumented children may originate from Sabah or Sarawak, allowing them to register for public school, other issues keep the children out of school. Being poor, they are unable to pay certain fees although the fees are minimal, unable to afford school related expenses and many of these children help their parents to work for income.<sup>252</sup> Other issues include social stigma as they are often perceived as non-citizens and lack of information and awareness of the importance of education.<sup>253</sup>

For those who cannot attend public schools, an alternative is private schools, which tend to be more expensive. Therefore, an only option for these undocumented children who cannot attend mainstream schools or expensive private schools is Alternative Learning Centres (ALCs). These ALCs are offered by NGOs, community and faith-based groups, and concerned individuals.

For example, the NGO *Borneo Komrad*, provides an alternative education for 150 undocumented native children at their learning centres in Kota Kinabalu, Tawau and Semporna. The alternative school allows and provides for syllabus to be prepared and taught based on needs and situations of the marginalised children who require special consideration.<sup>254</sup>

Nevertheless, ALCs are regarded as not an ideal alternative to mainstream schooling due to a lack of certification, accreditation, and commercial value. It is also reported that the ALCs are often poorly resourced and having issue in relation to access to secondary level.<sup>255</sup> The ALCs can also be subjected to crackdowns by some government departments because the non-citizen students do not possess valid papers for their stay in Malaysia.<sup>256</sup>

However, there is no law or policy laid formally for undocumented or stateless children and Malaysia has yet to formally recognize ALCs and their programmes as an option to existing formal education.<sup>257</sup> In view of the importance of the ALCs in providing alternative for undocumented children who are often left behind the mainstream public school, it is high time for the government to recognise and support the role of these institutions to ensure sustainability and quality of the education provided. These

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<sup>251</sup> Ministry of Education Malaysia & UNICEF Malaysia (2019) *Children out of school, United Nations Children's Fund, Malaysia*

[https://www.unicef.org/malaysia/media/921/file/Out%20of%20School%20children%20%20\(OOSCI\)%20Accessible%20version.pdf](https://www.unicef.org/malaysia/media/921/file/Out%20of%20School%20children%20%20(OOSCI)%20Accessible%20version.pdf)

<sup>252</sup> *Ibid.*

<sup>253</sup> Interview with Cik Wan Shakila (Izawati Wook, Borneo Komrad, 7 August 2020)

<sup>254</sup> *Ibid.*

<sup>255</sup> Ministry of Education Malaysia & UNICEF Malaysia (2019) *Children out of school, United Nations Children's Fund, Malaysia.*

<sup>256</sup> *Ibid.*

<sup>257</sup> UNICEF, *Reaching the unreached: An assessment of the alternative education programme for refugee and undocumented children in Kampung Numbak, Kota Kinabalu, Sabah.* [https://www.unicef.org/malaysia/Unicef\\_Reaching\\_the\\_Unreached\\_R4\\_v2.pdf](https://www.unicef.org/malaysia/Unicef_Reaching_the_Unreached_R4_v2.pdf).

institutions could serve as a bridge for the undocumented children into the mainstream public school.

### b. The position of education in Malaysian law and policy

In Malaysia, the laws specifically protect the rights of education to all citizens, including the minority indigenous peoples equally without discrimination based on religion, race and place of birth. Article 12 (1) of the Federal Constitution (FC) states

12. (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth— (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

The education system in Malaysia is provided by the *Education Act 1996* (Act 550) (EA 1996). It aims at strengthening the national education system in line with national aspirations and the ambition to become a centre of excellence in quality and world-class education. EA 1996 provides for a legal obligation for parents to ensure that children who have attained age of six is enrolled and remains as a pupil in a primary school for the duration of the compulsory education.<sup>258</sup> This is to ensure all children receive a basic education.

Specific to the Orang Asli, the *Aboriginal Peoples Act 1954* provides that no Orang Asli children are prevented from studying in any school due to indigenous status.<sup>259</sup>

The Malaysian government places education as one of the main priorities in the country's development. The education sector receives the largest allocation of public expenditure in Malaysia. In 2019, 20% of the entire budget was allocated to education.<sup>260</sup> Education is provided free of charge from primary to secondary level. Fees are payable only at tertiary level and are heavily subsidised at almost 90%.

Specific to the Orang Asli in Peninsular Malaysia and natives in Sabah and Sarawak, there are various programs that have been planned and implemented by the Malaysian government on the Orang Asli community to develop their education primarily through the Orang Asli Education Transformation Plan 2013-2017 and recently, the Malaysia Education Blueprint 2013-2025. The main programs include:

Programs	Description
Orang Asli and Indigenous Adult	<ul style="list-style-type: none"><li>introduced in 2008 in Orang Asli and Penan schools</li></ul>

<sup>258</sup> *Education Act 1966* (Malaysia) s 29A (2).

<sup>259</sup> *Aboriginal Peoples Act* (Malaysia) s 17(1).

<sup>260</sup> Ministry of Finance, 2018. Budget 2019. Putrajaya: Ministry of Finance.

Classes (Kelas Dewasa Orang Asli dan Peribumi - KEDAP)	<ul style="list-style-type: none"> <li>• aims to eradicate the rate of illiteracy and increase the level of basic skills of reading, writing and counting</li> <li>• participants are adults who have school children and are given an allowance for attending the class</li> </ul>
Integrated Curriculum Program of Orang Asli and Penan (KAP)	<ul style="list-style-type: none"> <li>• introduced in 2007 in selected schools</li> <li>• aims at overcoming drop-out among Orang Asli and Penan pupils</li> <li>• prioritises the concept of 'learning is fun'</li> <li>• modifications made in terms of content, skills and assessments as well as the teaching and learning approach based on the experience, environment, and socio-economy of the relevant communities.</li> </ul>
Comprehensive Special Model School Program (K9)  (Sekolah Model Khas Komprehensif - K9)	<ul style="list-style-type: none"> <li>• introduced in 2008 in schools with indigenous children in all three regions</li> <li>• aims to overcome school drop-out among the Orang Asli and natives</li> <li>• provides education from Year 1 to Form 3 in schools equipped with dormitory facilities</li> <li>• some offer vocational basic education</li> </ul>

Other initiatives include establishment of a special unit in the MOE to cater issues involving the Orang Asli and natives<sup>261</sup> and the establishment of a special unit at the Institute of Teachers Education in Pahang and Kelantan for the specialized recruitment and training of indigenous teachers.<sup>262</sup> Additionally, indigenous culture and language are also introduced at the schools with indigenous pupils through teaching activities (singing, dancing, poem and drawing), although it is challenging to cater to all indigenous students using their local dialects.<sup>263</sup>

Studies revealed that these programmes have been successful to certain extent in increasing students' academic achievement.<sup>264</sup> As at 2020, there are 94 primary schools and 1 secondary school with 100% indigenous students. For the Penan in Sarawak, there are 9 schools with 100% Penan students. In Sabah, data shows that there are 10 schools with 100% Kadazandusun Bonggi students<sup>265</sup> These efforts indicate the government's

<sup>261</sup> Bahagian Pengurusan Sekolah Harian (Unit Sekolah Orang Asli), Kementerian Pendidikan Malaysia.

<sup>262</sup> E.g. Interview with Dr Aminuddin b Mohamed AMP, Senior Lecturer (Rohaida Nordin), Institut Perguruan Guru, Kuala Lipis Pahang, 18 April and 18 June 2020).

<sup>263</sup> Interview with En Rozaimie bin Mohamad, Penolong Pengarah Bahagian Pengurusan Sekolah Harian Kementerian Pendidikan Malaysia (Rohaida Nordin, 22 June 2020).

<sup>264</sup> Zulkefli Aini, Abdul Ghafar Don & Nurul Islam Mohd Isa, "Education Development Program to Orang Asli by the Ministry of Education Malaysia (MOE), *Jurnal Hal Ehwal Islam dan Warisan Selangor 2019 4(1)*, 1.

<sup>265</sup> Interview with En Rozaimie Bin Mohamad, Penolong Pengarah Bahagian Pengurusan Sekolah Harian Kementerian Pendidikan Malaysia (Rohaida Nordin, 22 June 2020).

concern for minority groups in Malaysia without any difference with other mainstream communities in providing education to all Malaysians.<sup>266</sup>

In the pipeline is the Indigenous Students Education Plan 2018-2025 (Pelan Pendidikan Murid Orang Asli). This Plan consists some of most important plan of actions to address the challenges to Orang Asli education discussed above.<sup>267</sup>

In regards to the right of the Orang Asli to establish their own educational system in their own language and appropriate to their culture as recognised by Article 14 of the UNDRIP, a thorough survey was not able to be conducted on Orang Asli community to inquire as whether they wish and ready to exercise this right, due to the COVID 19 related movement restrictions. However, interviews with Orang Asli professional was conducted to inquire on this issue. Purposive interview was conducted instead of a survey. An interview was conducted with Mr Bah Tony, one of the professional icon of the Orang Asli as to whether the Orang Asli community prefer to establish and control their own educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning, which are similar to the one that is operating in some developed countries (Sweden and Norway). He responded that based on his own experience and his knowledge, the national education system accompanied with the Integrated Curriculum Program of Orang Asli and Penan (KAP); and Comprehensive Special Model School Program (K9) are sufficient for the Orang Asli. Additionally, he views that the Orang Asli may not be ready to administer their own educational systems and institution, separate from the government. But this may be a long-termed target.

According to Mr Bah Tony, what is more practical and realistic for the Orang Asli at present is for the government to ensure better access to the national education system by the Orang Asli children. This requires government to continue addressing all challenges and issues in relation to education involving the children of the Orang Asli and natives in Sabah and Sarawak. Additionally, the Orang Asli prefer that their right under Article 15 of the UNDRIP to be materialised by the government, namely for the diversity of their culture, traditions, history and aspirations to be reflected in the existing national education curriculum and public information.<sup>268</sup>

### c. The provisions in UNDRIP

Associated to the right to culture discussed above, the UNDRIP also provides for the rights of indigenous peoples in relation to education and the duties of the states in relation to the rights.

Article 14 states:

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<sup>266</sup> Zulkefli Aini, Abdul Ghafar Don & Nurul Islam Mohd Isa, "Education Development Program to Orang Asli by the Ministry of Education Malaysia (MOE);", *Jurnal Hal Ehwal Islam dan Warisan Selangor* 2019 4(1), 1.

<sup>267</sup> Pelan Pendidikan Murid Orang Asli 2018-2025. Interview with Dr Mohd Roslan Rosnon, Senior Lecturer, Universiti Putra Malaysia, (Rohaida Nordin, 6 April 2020).

<sup>268</sup> Interview with Amani William Hunt, Faculty of Social Sciences and Humanities, UKM, 28 February 2020).

## The Rights of Indigenous Peoples in Malaysia

(1) Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

(2) Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

(3) States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15 states:

(1) Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

(2) States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

In summary, Article 14 recognises the right of the indigenous peoples not only to establish their own educational system in their own language and appropriate to their culture but also access to the state's education system. Under Article 15, diversity of their culture, traditions, history and aspirations must be reflected in the education and public information.

These UNDRIP provisions are important for policy makers to consider in order to be implemented in the system of indigenous education at the grassroots level. Education is vital for continuous improvement of the social and economic conditions of the indigenous communities and should be provided without discrimination and with the consideration of cultural and lifestyle factors of the communities and use of language itself.

### d. Approaches by other jurisdictions

Indigenous peoples' potential in education is closely linked to their ability to learn in a language-friendly environment with their own language and culture free from discrimination. For this purpose, there are several best practices on rights to indigenous education implemented in countries such as the United States, Canada, New Zealand, Bolivia and others. The selection of these countries is based on the implementation of practices that are consistent with UNDRIP standards (Articles 14 and 15) as follows:

## The Rights of Indigenous Peoples in Malaysia

- a. Ongoing dialogue and consultation with indigenous peoples in the process of law and education reform;
- b. Laws that recognize and strengthen indigenous cultural and linguistic rights;
- c. Comprehensive educational strategies supported by the history and needs of different indigenous peoples in a country; and
- d. Promotion of indigenous peoples regulated educational programs and initiatives.

These aspects are closely related to each other and can often occur simultaneously.

### i. Dialogue and negotiations with indigenous peoples

The process of negotiating and obtaining consent is an important aspect of Article 14 UNDRIP. Consultation is also a prerequisite for exercising educational rights in line with the right to self-determination. Ongoing consultation is essential to ensure community involvement in all educational processes, including implementing policy changes and educational curricula to meet the language needs and uniqueness of Indigenous culture. Some countries such as the United States and Canada already have laws and policies that require the cooperation of Indigenous peoples in the development of education. In the United States, for example, all projects funded under the *Indian Education Act 1972* must be developed and managed in collaboration with Indian tribes, parents, and students so that their future in education can be holistically determined in accordance with their own wishes and decisions.

In 2007 in Colombia, the Constitutional Court held that the government could not make any decision governing Indigenous education, including the methods used to recruit and elect teachers, without first referring to the communities involved (Application of Convention No. 169 by Domestic and International Courts in Latin America). In addition, the United States also held consultations with the head of the Indigenous Peoples in a "listening" and "learning" session, designed to develop strategies related to the education needs of indigenous students. Among the other countries that also carry out negotiations on indigenous education is New Zealand. The government through the Ministry holding the New Zealand education portfolio has implemented extensive consultation with the Maori community to develop the "Maori Education Strategy" (Ka Hikitia: Managing for Success-Maori Education Strategy (2008-2012)). Such practices should be noted by governments in other countries, as they are in line with the spirit advocated by UNDRIP.

### ii. Laws that recognize and enforce indigenous cultural and linguistic rights

Another important factor in the process of recognition of Indigenous education rights is through legal reforms to recognise linguistic and cultural rights as provided for in Articles 14 and 15 of the UNDRIP. The structure of domestic legislation, as well as various political factors, will determine whether this reform is feasible through constitutional amendment or court order. Such measures must be in line with the government's obligation to consult and cooperate directly with indigenous peoples.

In this regard, the practice in Bolivia is one of the examples that can be cited as it is the first country to incorporate all the provisions of the UNDRIP into domestic law as enshrined in Bolivia's Law 3760. In addition, some countries such as Ecuador (Article 84, *Republica Del Ecuador Constitucion De 1998*), Guatemala (Article 76, *Republica De*

*Guatemala Constitucion De 1985 Con Las Reformas De 1993*), Mexico (Article 2 of the Mexican Constitution), Nepal (Part III, *Interim Constitution of Nepal 2063* (2007)) and Panama (Article 88 *Constitucion Politica Dela Republica De Panama*) have introduced provisions that promote the use of bilingualism in indigenous education and languages in their constitutions. There are also some countries that have taken additional steps to protect the rights contained in Articles 14 and 15 of UNDRIP by granting the status of "official" or "national" language to indigenous languages. Among the countries that have done so are Bolivia through Article 5, *Republica Del Bolivia Constitucion De 2009*; Mexico through Article 4, the General Law on Linguistic Rights of Indigenous Peoples and New Zealand through Article 3, the *Maori Language Act of 1987*. These legislations promote indigenous language alongside other mainstream languages. Recognition through the legal mechanism of indigenous languages is seen as an effort to preserve, honour and diversify all cultures in a nation's society.

In New Zealand, the United States, and Canada, indigenous education is also provided for under certain agreements. For example, in New Zealand, the Maori language ("*te reo Maori*") is protected under the Treaty of Waitangi as "*taonga*" (valued Maori property). In the United States and Canada, there are various agreements that recognize indigenous rights to education, language, and cultural practices within their territories. Indigenous treaty rights and indigenous rights are given further protection in the process of reforming the Canadian constitution.<sup>269</sup> In the United States, linguistic and cultural rights are also promoted through legal initiatives under the Native American Languages Act 1990.

### iii. Comprehensive education strategy supported by indigenous history and needs

It is important for each country to make plans to implement indigenous education in a comprehensive manner that meets the needs of its indigenous peoples. This means that the comprehensive plan will identify and address various issues in education that have implications for indigenous peoples.

In this regard, New Zealand is among the countries that have proactively partnered with indigenous peoples to develop action plans to address various educational issues in line with the requirements of Articles 14 and 15 of UNDRIP. This collaboration has increased international awareness of indigenous rights, including the participation of Maori in the UNDRIP drafting process. In the 1970s and 1980s, the Maori began their efforts to improve and strengthen the Maori language (*te reo Maori*).<sup>270</sup> These efforts led to the establishment of the first Maori language school, a language school focused on teaching Maori language and culture. It also led to the passing of the Maori Language Act in 1987, making *te reo Maori* one of the three official languages of New Zealand. In 1998, the New Zealand Ministry of Education began extensive consultation with the Maori community to develop a "Maori Education Strategy." New Zealand's new education strategy was

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<sup>269</sup> Jerry Paquette and Gerald Fallon, 'First-Nations Education and the Law: Issues and Challenges' (2008) 17 (3) *Education Law Journal* 366-375.

<sup>270</sup> 'Education for Māori: Context for our proposed audit work until 2017. Part 3: Historical and current context for Maori education' *Controller and Auditor-General of New Zealand* (Web page, 2012) <https://www.oag.govt.nz/2012/education-for-maori/part3.htm>.

launched in 1999, the 'Managing for Success-Maori Education Strategy' with a focus on improving the quality of education for Maori including both Maori and non-Maori schools.

In 2005 this strategy was updated to ensure the continued commitment to Maori education. In 2006, New Zealand received feedback from leading Maori academic scholars on the next steps they could take. In 2007, the year UNDRIP was adopted, a draft revision of the "Ka Hikitia-Managing for Success" strategy was published, in which the government began consulting extensively through meetings, presentations to teachers and written reports.<sup>271</sup>

As part of its comprehensive strategy, integrated efforts have been made to recognize, preserve and strengthen the Maori language as a national asset as provided in Article 3 of the *Maori Language Act of 1987*. Efforts have also been made to support and strengthen Maori schools where Maori language and culture are taught in line with ILO No. 169, to increase student achievement, increase student access to Maori teaching, increase community involvement in education and increase the number of Maori language teachers and teaching materials. New Zealand has also sought to increase the number of Maori students in institutions of higher learning<sup>272</sup> and to raise awareness of Maori culture, language and issues among the public. Finally, New Zealand has developed a "measurable profit framework" to measure the success of the Maori education program through the 'Accelerating Success-Maori Education Strategy'.

Nonetheless, the government needs to be prepared for some of the challenges it will face in implementing such a comprehensive plan. Among the challenges that may occur are the lack of qualified teachers and inadequate teaching materials, lack of access to schools and discrimination in the classroom. In addressing such challenges, practices in other countries can be considered. For example, the United States has offered special posts to bilingual teachers in public schools to increase the number of bilingual teachers trained. In Mexico, in addition to addressing the social stigma attached to bilingual education, the government offer higher salaries to bilingual teachers compared to teachers who speak only one language.<sup>273</sup> Therefore, governments need to be aware of these challenges by implementing efforts similar to those in the United States and Mexico.

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<sup>271</sup> Ministry of Education, 'Ka Hikitia: Managing for Success-Maori Education Strategy (2008-2012) (rev. ed.2009)' Education.gov.nz (Web page) <http://www.education.govt.nz/assets/Documents/Ministry/Strategies-and-policies/Ka-Hikitia/KaHikitia2009PartOne.pdf> (pt. 1)and<http://www.education.govt.nz/assets/Documents/Ministry/Strategies-and-policies/KaHikitia/KaHikitia2009PartTwo.pdf> (pt. 2).

<sup>272</sup> Mason Durie, 'Indigenous Higher Education: Maori Experience in New Zealand' (Webpage, 2005) <http://www.mass-ey.ac.nz/massey/home.cfm> 7.

<sup>273</sup> Carla Paciotto, 'The Tarahumara of Mexico, in Stabilizing Indigenous Languages' *Assembly of First Nations* (Web page, 1996) [http://www.afn.ca/uploads/files/education2/Stabilizingindigenous\\_languages\\_center\\_for\\_excellence\\_in\\_education\\_2007.pdf](http://www.afn.ca/uploads/files/education2/Stabilizingindigenous_languages_center_for_excellence_in_education_2007.pdf).

iv. Promoting indigenous education programs and initiatives administered by indigenous peoples

Indigenous peoples' right to self-determination can be achieved through Article 14 of UNDRIP, which is the recognition of right to education through systems and initiatives administered by indigenous peoples themselves. The rights set out in Article 14 of the UNDRIP are not just about administrative control, as they include other aspects.

In Sweden, for example, indigenous has set up six state / public schools run by the Sami school board, from pre-school to middle school and offers curriculum that includes Sami language and Sami culture. In addition, Sami school boards not only administered Sami schools and educational programs, they are also active in providing guidance on how to integrate Sami perspectives on a wide range of subjects, such as science, art, mathematics, social and sports <sup>274</sup>. In Norway, there is a Sami University (Sami Allaskuvla) which attracts students from all over Norway, Finland, Sweden, and Russia.<sup>275</sup> The university offers courses such as teaching, journalism, Sami language and literature as well as Sami tradition and applied arts; all taught from a Sami or indigenous perspective.

In addition, one of the most well-known references is the practice in Australia, where an aboriginal language group has developed an aboriginal language centre that strives to preserve and promote the local language. In Uganda, indigenous peoples have developed a program for Karamajong people who encourage community participation in creating a curriculum that adapts to their nomadic lifestyle, taught by their own community members, and includes areas of research directly related to Karamajong's lifestyle such as crop production, livestock, health and peace and safety.

This is part of the effort to empower indigenous peoples' educational rights. Government support is crucial to creating awareness in the community about the value and importance of indigenous knowledge and information.

e. Recommendations

Based on the discussion above, considering the approaches taken by other jurisdictions, and consistent with the principles and provisions of the UNDRIP in relation to education, it is recommended that laws and policy in Malaysia relevant to indigenous education must take into account the following short- and long-term plan.

**Short term plan:**

1. The government must strengthen and ensure effective and continuous dialogue and consultation with indigenous peoples in the process of development of educational law / policies / program / project / initiatives.

<sup>274</sup> Alie van der Schaaf, 'Sami: The Sami Language in Sweden' (2001) *Mercator-Education* 1-35,8-9..

<sup>275</sup> Economic Planning Unit, Tenth Malaysia Plan (2011-2015) *Samer* (Web page, 2010)<http://www.samer.se/4581>

2. The government must ensure all educational strategies enforce indigenous cultural and linguistic rights.
3. All educational strategies for indigenous education must be supported by the history and needs of different indigenous peoples in Malaysia.
4. The government must promote and support educational programs and initiatives, including financial and teachers' training, such as the alternative schools, and other benefits for the indigenous peoples maintained by them or civil society organisations.

**Long term plan:**

1. The government must enact law / policy that make dialogue and negotiation compulsory as part of self-determination rights of indigenous peoples.
2. The government must enact laws / policy that recognize indigenous cultural and linguistic rights
3. The government must develop policy that culture, tradition, history and aspiration of indigenous peoples are sufficiently included in the education curriculum e.g. in history textbooks.
4. The government must regulate and support educational programs and initiatives, such as the alternative school, beneficial for the indigenous peoples maintained by them or civil society organisations.

## 8. RIGHTS IN RELATION TO ECONOMIC AND SOCIAL CONDITIONS

### a. Economic and social development involving indigenous peoples in Malaysia

The main issues faced by the Orang Asli and natives in Sabah and Sarawak with respect to economic and social conditions include:

- a. High poverty rate
- b. Health issues (including contagious disease and malnutrition)
- c. Educational achievement levels being relatively low with elevated high school drop-out rates
- d. Lack of sufficient basic infrastructure
- e. Lack of employment and other economic opportunities
- f. Land ownership and recognition issue especially with respect to land reservation and ownership of land which has been occupied by the communities for long time.

Provision of infrastructure is generally unsatisfactory in many settlements of the indigenous communities, even in areas not too remote from urban areas. These include basic facilities or services such as road transportation, electricity supply, clean water supply, housing and sanitation as well as communication facility that contribute to the quality of life and wellbeing.

Besides, discrimination in term of wages, benefits and opportunities is also reportedly experienced by the minority communities.<sup>276</sup> An example is restricted opportunity to obtain relevant license or permit to sell forest products or other resources. This has allowed exploitation of the communities by others to profit from their skills on access to the resources.<sup>277</sup>

Another criticism often raised is related to development program under the government initiative involving the indigenous peoples' land such as agricultural projects and community resettlement program. Criticisms include a lack of due consultation with the communities and lack of direct participation of the communities in the projects. Some interviewees highlighted that policies were often introduced using top-down approach without proper consultation with the communities and does not involve the communities directly.<sup>278</sup> In many situations, the communities participate only in receiving 'dividends' from the project. The dividends are alleged as low compared to the scale of the projects that they are not able to sustain themselves, whilst other economic opportunities are restrictive.

Nevertheless, one academic believes that such a top-down approach is not in every case a negative approach because in many situations these projects highly benefit the communities involved. On positive note, he added that the government has now begun to move towards a potential-based approach particularly in empowering Orang Asli through capacity building.<sup>279</sup>

The issues faced by the indigenous communities have also been acknowledged by the Federal Government in a Rural Development Policy Paper published by the Ministry of Rural Development. In the policy paper, the government identifies that the main challenge in developing the Orang Asli communities and the natives in Sabah and Sarawak is the location of their settlements, which is far from centers of economic growth. Efforts to develop these groups are becoming more complicated due to limited communication systems, high costs and low levels of delivery. However, it also states that the development efforts involving these communities especially those living in rural areas should continue to be given attention by enhancing knowledge and skills through human capital development. The policy also acknowledges the need to maintain and document the traditional knowledge of the indigenous communities.<sup>280</sup>

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<sup>276</sup> Interview with Amani William Hunt and Faridah Goh , Faculty of Social Sciences and Humanities, UKM, 28 February 2020); Interview with Simon Siah and Peter Kallang, Save River, FGD Sabah. See also, Cholin Nicholas, 'The Law on Natural Resource Management as It Affects the Orang Asli' (Conference Paper, UNDP-RIPP/PACOS workshop on Indigenous Peoples and Natural Resource Management Laws, 10 November 2005)

<sup>277</sup> Suruhanjaya Hak Asasi Manusia Malaysia, *Laporan Inkuiri Nasional Mengenai Hak Tanah Orang Asal / Asli* (Report, 5 August 2013) 66 [4.122].

<sup>278</sup> Interview with Amani William Hunt and Faridah Goh (Faculty of Social Sciences and Humanities, UKM, 28 February 2020); Bah Tony; Interview with Associate Professor Dr Wan Amir Zal bin Wan Ismail (Google Meet, 5 May 2020).

<sup>279</sup> Interview with Associate Professor Dr Wan Amir Zal bin Wan Ismail (Google Meet, 5 May 2020).

<sup>280</sup> Dasar Pembangunan Luar Bandar, 2019, Kementerian Pembangunan Luar Bandar, 13-14.

i. The government policy in addressing economic and social issues of the indigenous peoples

In view of the peculiar challenges in the development of the indigenous communities, *Dasar Pembangunan Luar Bandar 2020-2030* (The Rural Development Policy) of the Ministry of Rural Development outlines plan specific to the Orang Asli, natives in Sabah and natives in Sarawak. The policy is the basis for the development efforts implemented by the government. Examining the content of the policy paper, the special needs of the indigenous communities are recognized, although the approach is more on welfare basis rather than right based.

The policy paper outlines the following specific strategies:

(i) Resettlement program (*Program Penempatan Semula Skim Pembesaran Desa*)

The rural development ministry seeks to implement a placement program based on the Integrated Development Project Village. This integrated development program involves the relocation of the houses scattered in strategic existing rural locations in terms of basic facilities and economic opportunities. The scheme also takes into account the interests of the second generation

The development planning of this scheme involves three main components: physical development, economy and human capital. Physical development covering the construction of houses, basic infrastructure and social amenity. Economic development also includes agricultural, livestock, fisheries and SME activities. Human capital development covers efforts to improve education, skills and entrepreneurship.

(ii) Recognition of land ownership

This strategy seeks to getting recognition and expediting the ownership process of the customary land and gazetting the Orang Asli land under the relevant legislation. It is reported that the implementation is undertaken by the state governments to expedite, gazette and provide a valid map. The process involves measurement and border verification and ownership. It has also been reported that the state governments of Sabah and Sarawak in collaboration with the Federal Government have successfully resolved the process of grading the NCR land in stages and that these efforts will continue.

With respect to the Orang Asli in Peninsular Malaysia, the policy paper suggests that collaboration with the state governments in land gazetting efforts of the Orang Asli land needs to be improved. JAKOA and the state governments need to work together and achieve understanding in ensuring the gazetting of communal land of the Orang Asli to ensure that the land rights of the indigenous communities are protected.

(iii) Management of land development using “win-win approach” (*Mengurus pembangunan tanah menggunakan “pendekatan menang-menang”*)

The Policy paper also acknowledges that land development for Orang Asli and natives in Sabah and Sarawak is important to create economic activity and generate income for the local community. It seeks for more effective cooperation between State Governments, related agencies, landowners and investors. It suggests for a “win-win approach” in

managing the indigenous lands more efficiently so that the community concerned will benefit from the program.

Among the initiatives that are planned in the 2020-2030 policy is land development project involving the land of the Orang Asli and natives in Sabah and Sarawak including agricultural activities. It is outlined that the initiative will require joint efforts with private investors, leases, plantations contracts and private plantations. Additionally, it seeks to provide opportunities to the local community local to optimize the development for economic purposes.

Other specific strategies involving the development of the Orang Asli and native in Sabah and Sarawak include:

- a. Enhancing capacity building by creating high skilled human resources based on local needs
- b. Improving infrastructure including full access to electricity, clean and treated water supply, as well as better communication network including access road and telecommunication.
- c. Access to better quality housing

Besides, the Malaysian federal and state governments have various policies in place to enhance economic and social conditions of the indigenous peoples. For example, the Strategic Plan 2016-2020 of JAKOA gives emphasis on economic aspect. To increase Orang Asli's income through affordable economic activities, the Strategic Plan by the department outlined programs including assistance in plantation project; agricultural related training; empowering existing Orang Asli entrepreneurs; and aid to encourage more Orang Asli involvement in entrepreneurship. In providing facilities and infrastructure to the settlements of the Orang Asli, initiatives taken are often in the form of integrated development of Orang Asli villages, resettlement and treated water supply.

In addition, eco-tourism has also been given significant attention by JAKOA as it may provide alternative source of income to the Orang Asli who live near to areas of tourist interest. For examples, Orang Asli from Jakun tribe in Lake Chini, Pahang and Jahai from Royal Belum State Park are actively involved in the eco-tourism industry.<sup>281</sup> However, to strengthen the tourism industry, the communities need proper capacity building and training to operate the business activities successfully.<sup>282</sup> However, there are several aspects to consider including infrastructure issues, environmental sustainability and pollution.<sup>283</sup>

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<sup>281</sup> Zanisah Man and Yeoh En Ne, 'Penyertaan orang Asli dalam aktiviti eko-pelancongan di Tasik Chini, Pahang, Malaysia' (2019) 15(4) *Malaysian Journal of Society and Space* 50; Siti Nor Awang et al, 'Indigineous tourism - Satu tinjauan awal penglibatan masyarakat Orang Asli dalam industri pelancongan' (2015) 11 (9) *Malaysian Journal of Society and Space*, 125.

<sup>282</sup> Interview with Amani William Hunt, Faculty of Social Sciences and Humanities, UKM, 28 February 2020).

<sup>283</sup> Wan Suzita Wan Ibrahim et al, 'Pelancongan dan pembangunan setempat di Malaysia: Satu analisis SWOT Royal Belum sebagai produk ekopelancongan' (2015) 11(13) *Malaysian Journal of Society and Space* 115.

Therefore, the direction of the recent policy in Malaysia with respect to the economic and social empowerment has been extensive and inclusive recognizing the needs of the minority groups in addressing the issues faced by them. However, looking from the perspective of UNDRIP, the voice and perspectives of the communities must be taken into account in formulating and implementing policy and law especially on aspects of land and economic development of the communities. More importantly, in any development initiative involving land of the communities, the government must recognize the communities as landowners and ensure direct participation in all stages including the decision making and implementation.

### ii. Health and healthcare issues

Health care in Malaysia is mainly provided by public service apart from the private sectors and non-governmental organisations (NGOs). The main provider of health care services is the Ministry of Health (MOH). Basic health care is accessible to more than 95% of the population in Peninsular Malaysia and approximately 70 percent of the population in Sabah and Sarawak. For instance, in relation to the Orang Asli, the Malaysian government, through the Ministry of Health provides special privilege for the communities to access health care services. Among the initiatives provided are dental services, mobile medical service (land), air medical service and a special hospital for the Orang Asli ie Hospital Gombak.

However, disparities in access to health care by the indigenous communities as compared to that enjoyed by the mainstream society, remain high. In term of infectious diseases, cases of Orang Asli women and children infected with tuberculosis, leprosy, nutritional deficits and attendant intestinal parasitism are worrying.<sup>284</sup> The longstanding illness such as scabies, worm infestation, yaws, diarrhoea, malaria (plus other fevers), wounds neuralgia and goitre are still unsettled health issues among them. Additionally, the new disease of HIV/AIDS, and non-communicated diseases (NCDs) which are normally found in middle class main-stream society have also been found among the Orang Asli, especially those living in city centres or nearby cities.

The same situation of health inequities is also reported among natives in Sabah and Sarawak especially among children in rural and coastal areas. For instance, it is reported that 'other *bumiputra*' recorded the highest prevalence of stunting among children in 2016. Sabah and Sarawak have the highest rate compared to other states in the country. The prevalence of stunting was recorded higher in rural localities (23.3%) than urban areas (19.2%).<sup>285</sup> Besides, the children of Penan people in Sarawak and communities

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<sup>284</sup> See, eg, Hasni, N. H., Halim, S. A., Omar, M., & Ghazali, N. (2017). Food Security among Orang Kintak in Pengkalan Hulu, Perak. *International Journal of Academic Research in Business and Social Sciences*, 7(3); Ching, G. S., Kiong, W. S., Abdillah, K. K., Zamhari, S. K., Masri, M. S., Perumal, C., Leong, J. P. C. (2016). Applying territorial approach to rural agribusiness development in Malaysia's aboriginal (Orang Asli) settlements: A comparative study of Pos Balar, Kelantan and Pos Sinderut, Pahang. *Malaysian Journal of Society and Space* 12(4), 12(4), 109 – 115.

<sup>285</sup> Ibid; Bong MW, Norimah A Karim and Ismail Mohd Noor, 'Nutritional status and complementary feeding among Penan infants and young children in rural Sarawak, Malaysia' (2018) 24(4) *Malaysian Journal of Nutrition*, 539-550; Chee How, Eric et al, 'Risk factors for undernutrition in children under five years of age in Tenom, Sabah, Malaysia. (2020) *Malaysian Journal of Public Health Medicine*. 71-81.

living in coastal areas in Sabah have high rates of undernutrition.<sup>286</sup> Undernutrition is a complex interplay of factors including inadequate feeding, sanitation and poor access to healthcare. These instances reflect a dire situation of health among the indigenous communities.

Issues, factors and challenges that hamper efforts to enhance the health status of the indigenous communities include:

- a. Socioeconomic condition including poverty and low educational level; low family net income, shared crowded households and unsupportive environmental conditions
- b. Accessibility to a quality healthcare service due to geographical locations and lack of transportation services
- c. Lower quality of environment
- d. Lack of initiative in aspect of healthy practice and lifestyle.

Therefore, although public healthcare facilities are commonly available, the facilities provided are limited and might not reach those who are in need due to reasons such as poverty, poor health awareness, and insufficient infrastructures used to access the healthcare services.

In a national convention on Orang Asli held in April 2019 by the Prime Minister's Department and a workshop to draft the national strategic plan on the Orang Asli development, in relation to health, the following was proposed:

- a. Increased funding for the healthcare service to the Orang Asli
- b. More effective delivery of healthcare services
- c. Support for nutrition needs among children of the Orang Asli Promotion for awareness among the Orang Asli communities on health-related practices
- d. Increase healthcare support staff from among Orang Asli communities.

### b. The provisions in UNDRIP

As part of the right to self-determination, the UNDRIP recognizes that the indigenous peoples have right to freely determine their economic, social and cultural development - (Article 3). Indigenous peoples also have the right to manage their economic activities and assert the right to full participation in economic and other matters such as political, social and cultural (Article 5).

In relation to economic and social conditions of indigenous peoples, the UNDRIP provides for a comprehensive provision covering all aspects, including:

- a. economic empowerment by having right to enjoy their own subsistence; and
- b. strong social capacity including matters of housing and sanitation; health and social security.

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<sup>286</sup> Harris, H.; Ooi, Y.B.H.; Lee, J.; Matanjun, P., 'Non-communicable diseases among low income adults in rural coastal communities in Eastern Sabah, Malaysia' (2019) 19 (Suppl. 4), 1-13.

## The Rights of Indigenous Peoples in Malaysia

As provided under Article 20:

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

To safeguard indigenous economics, Article 21 emphasizes on various areas such as education, employment, vocational training, housing, hygiene, health and even social security to ensure the social and economic stability of indigenous peoples.

In terms of economic and social empowerment, the UNDRIP also affirms that the Indigenous peoples have right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions. Indigenous peoples also have the right to be actively involved in the operation of development programs (Article 23).

Furthermore, with regard to certain vulnerable groups, the UNDRIP provides for the positive duty of states to take measures to protect these groups against violence and discrimination. Under Article 22:

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

### i. Economic empowerment and self-sustenance

Specific to the economic context, the UNDRIP emphasizes the right to obtain sustenance, development and freedom of economic and traditional activities (Article 20). Indigenous people also have the right to claim damages fairly if their income is disrupted. This is based on principle of equality and governments are required to provide special measures to ensure the economic development of indigenous peoples by giving special attention to senior citizens, women, youth, children and people with disabilities.

Closely related as part of protecting economic right is protection of the rights to land and resources as discussed earlier. In particular, as enshrined in Article 32, indigenous peoples have the right to set priorities and strategies for the development or use of land, territories and natural resources. To achieve this, governments need to consult the indigenous peoples to obtain Free Prior and Informed Consent (FPIC) for projects that

## The Rights of Indigenous Peoples in Malaysia

have implications for indigenous lands and territories especially for development purposes.

The right to traditional economic activities is also part of right to exercise the right to culture by the indigenous peoples. In the case of *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada, Communication*,<sup>287</sup> the claim submitted to the Human Rights Committee (HRC) was related to the right of the Lubicon Lake Band community to deal freely with natural resources. The community claimed that they had the right to continue their traditional economic activities such as hunting. However, the claim under item 1, ICCPR (self-determination) did not favour the Lubicon native community. HRC recognized the rights of the Lubicon community under article 27 (minority rights) to recognize their rights to economic and social activities as part of the traditional customs and culture of the community.<sup>288</sup> HRC criticised the court's interpretation on "irreparable injury". According to HRC, the Lubicon community meets the standard (irreparable injury) criteria in which their source of income, economy and traditional way of life are affected as a result of the project.<sup>289</sup>

### ii. Health and health care services

The provisions as to health and healthcare under the UNDRIP have been two prongs:

- a. the right to exercise their own traditional practice and maintenance of the communities' knowledge relating to health, and
- b. equal right to the same standard of health similarly enjoyed by the other sections of the society.

Under Article 24:

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and

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<sup>287</sup> Bernard Ominayak and the Lubicon Lake Band V. Canada, *Communication No. 167/1984*, U.N. Doc. Ccpr/C/38/D/167/1984 (1990).

<sup>288</sup> Communication No. 167/1984, Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Chief Bernard Ominayak and the Lubicon Lake Band V. Canada, Ccpr/C/38/D/167/1984., para 32.2. Before the case was referred to HRC, the Court of Appeal of Canada rejected the application of the Lubicon community on the grounds that "the Lubicon Lake Band would suffer no irreparable harm if resource development continued fully and that the balance of convenience, therefore, favoured denial of the injunction." See Chief Bernard Ominayak and the Lubicon Lake Band V. Canada, *Communication No. 167/1984*, U.N. Doc. CCPR/C/38/D/167/1984 (1990) [3.7].

<sup>289</sup> Communication No. 167/1984, Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Chief Bernard Ominayak and the Lubicon Lake Band V. Canada, CCPR/C/38/D/167/1984., para 3.8. *This test was: injury that is of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice. The author submits that the Lubicon Lake Band clearly met this test by demonstrating, with uncontested evidence, injury to their livelihood, to their subsistence economy, to their culture and to their way of life as a social and political entity. Yet, the Court found that the Band had not demonstrated irreparable harm.*

minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right. – Art 24.

As health is closely related to the environment, the UNDRIP also affirms that the indigenous peoples must be protected, to be protected against the disposal of hazardous materials in their lands against their consent. Under Article 29(1):

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented – Art 29(2).

With regards to rights to health of indigenous peoples, the discourse on human rights and the health of indigenous peoples opens opportunities for the refinement of ideas as well as revisions of relevant laws and cultures.<sup>290</sup> Such opportunities are important for the protection and health of indigenous people. In fact, the recognition of the right to self-determination is a cornerstone in implementing the recognition of the rights to health of the indigenous peoples.<sup>291</sup>

### c. Approaches in other jurisdictions in matter of economic and social conditions: The Philippines and New Zealand

Compared to the legal position in Malaysia which is silent in relation to economic and social rights, express legal protection and recognition of indigenous peoples or known as Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) in the Philippines may reflect the spirit of the UNDRIP.

The specific law applicable to ICCs/IPs is *Republic Act No. 8371, The Indigenous Peoples' Rights Act of 1997* (IPRA 1997). The law contained in the IPRA 1997 is in line with the spirit of the right to self-determination and recognizes the rights of indigenous peoples as required by the UNDRIP. Specifically, section 13 of IPRA 1997 recognizes the right of

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<sup>290</sup> Odette Mazel, 'Self-Determination and the Right to Health: Australian Aboriginal Community Controlled Health Services' (2016) *Human Rights Law Review* 0, 1–33.

<sup>291</sup> Larissa Behrendt *et al*, 'Self-Determination: Background Concepts' *Health.vic* (Web page, 15 Dec 2017) <https://www2.health.vic.gov.au/about/publications/ResearchAndReports/self-determination-background-concepts..>

ICCs/IPs to freely pursue economic activities in line with the recognition of self-determination under UNDRIP.

There are comprehensive provisions in the legislation that recognize the rights of indigenous peoples comprising matters relating to economic and social conditions. These range from the recognition to land rights, provisions of basic facilities to the provisions on rights and special needs of women, children, elderly, youth and differently abled persons. The following table provides instances of provisions in the IPRA relevant to empowering the economic and social conditions of the indigenous peoples in the Philippines:

**Section 13. *Self-Governance***

The State recognizes the inherent right of ICCs/IPs to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development.

**Section 16. *Right to Participate in Decision -Making***

ICCs/IPs have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through procedures determined by them as well as to maintain and develop their own indigenous political structures. Consequently, the State shall ensure that the ICCs/IPs shall be given mandatory representation in policy-making bodies and other local legislative councils.

**Section 17. *Right to Determine and Decide Priorities for Development.***

The ICCs/IPs shall have the right to determine and decide their own priorities for development affecting their lives, beliefs, institutions, spiritual well-being, and the lands they own, occupy or use. They shall participate in the formulation, implementation and evaluation of policies, plans and programs for national, regional and local development which may directly affect them.

**Section 24. *Unlawful Acts Pertaining to Employment.*** - It shall be unlawful for any person:

- a. To discriminate against any ICC/IP with respect to the terms and conditions of employment on account of their descent. Equal remuneration shall be paid to ICC/IP and non-ICC/IP for work of equal value; and
- b. To deny any ICC/IP employee any right or benefit herein provided for or to discharge them for the purpose of preventing them from enjoying any of the rights or benefits provided under this Act.

**Section 25. *Basic Services.***

The ICC/IP have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. Particular attention shall be paid to the rights and special needs of indigenous women, elderly, youth, children and differently-abled persons. Accordingly, the State shall guarantee the right of ICCs/IPs to government 's basic services which shall include, but not limited to water and electrical facilities, education, health and infrastructure.

**Section 26. Women.**

ICC/IP women shall enjoy equal rights and opportunities with men, as regards the social, economic, political and cultural spheres of life. The participation of indigenous women in the decision-making process in all levels, as well as in the development of society, shall be given due respect and recognition.

The State shall provide full access to education, maternal and child care, health and nutrition, and housing services to indigenous women. Vocational, technical, professional and other forms of training shall be provided to enable these women to fully participate in all aspects of social life. As far as possible, the State shall ensure that indigenous women have access to all services in their own languages.

**Section 27. Children and Youth.**

The State shall recognize the vital role of the children and youth of ICCs/IPs in nation-building and shall promote and protect their physical, moral, spiritual, moral, spiritual, intellectual and social well-being. Towards this end, the State shall support all government programs intended for the development and rearing of the children and youth of ICCs/IPs for civic efficiency and establish such mechanisms as may be necessary for the protection of the rights of the indigenous children and youth.

Furthermore, section 44 (c) of IPRA 1997 has also mandated a National Commission on Indigenous Peoples (NCIP) to formulate and implement policies, plans, programs and projects for the economic, social and cultural development of the ICCs / IPs and to monitor its implementation thereof. A clear provision that gives mandate to agency is very important in ensuring that NCIP has a legal obligation to comply with such provision.

In New Zealand, protection and health care for the Maori people are considered as a good practice. The Maori health and health care can be used as examples of health protection of indigenous peoples. To address the issue of health, New Zealand introduced the Public Health and Disability Act 2000. Section 4 of Public Health and Disability Act 2000 states:

In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Maori, Part 3 provides for mechanisms

## The Rights of Indigenous Peoples in Malaysia

to enable Maori to contribute to decision-making on, and to participate in the delivery of, health and disability services.

Additionally, the New Zealand Government developed a Strategic Plan to address the Maori health issue, *He Korowai Oranga: Māori Health Strategy*. This strategic plan defines the direction of Maori health development and provides a framework for the public sector to take responsibility for supporting the health of the Maori people.

The approaches taken in these jurisdictions reflect the recognition of the rights of the indigenous peoples in line with the UNDRIP principles.

### d. Recommendations

Considering the provisions in the UNDRIP, the local situation and comparative perspectives, this study proposes several recommendations with respect to the rights in relation to economic and social conditions:

#### **Plan - Rights in relation to economic and social conditions**

1. The government must recognise and protect the right of the indigenous peoples to freely determine their economic and social development.
2. In designing strategies to enhance the economic status of the indigenous peoples, the government must recognise and protect that the following rights of the indigenous peoples:
  - a. to manage their economic activities
  - b. to fully participate in economic matters involving them
  - c. to engage their own means of subsistence and development
  - d. to engage freely in all their traditional and other economic activities
  - e. are entitled to just and fair redress whenever they are deprived their own means of subsistence and development.
3. The government must obtain free, prior and informed consent of the indigenous peoples in any project development involving or affecting their land.
4. The government must ensure provision for and equal access for training necessary for capacity building of the communities suitable to their needs.
5. The government must ensure that the environment surrounding the settlement of the indigenous peoples is safe and protect them from disposal of hazardous materials in their land against their consent.
6. Towards ensuring strong social capacity of the indigenous peoples, the government must provide and maintain safe and clean water; increase the electricity supply; increase accessibility to major roads by quality access roads; provides quality housing; and expand the telecommunications system to the settlements of the Orang Asli and natives.

Provision of these matters must be subject to needs, culture and custom of the communities involved. The needs and priority often vary according to locality, economic activities and acceptance of the communities. Therefore, consultation with the communities is necessary in the plan development.

7. In protecting health of the indigenous peoples, the government must recognise and protect their right:
  - a. to exercise their own traditional practice and maintenance of the communities' knowledge relating to health, and
  - b. to the same standard of health similarly enjoyed by the other sections of society
8. The government must also ensure that special attention is given to senior citizens, women, youth, children and the disabled in both economic and social development.

## 9. CHALLENGES TO THE RECOMMENDATIONS

Based on the interviews and focus group discussions conducted in this study, several challenges are suggested:

- a. Lack of understanding of the UNDRIP principles and their significance

There are different interpretations by different sections of society in terms of the scope, application and meaning of the provisions. This may affect the prospect of achieving the objective. It is important for those involved to know and understand the key principles of the UNDRIP, especially the officers in the administration as well as the indigenous communities and those who advocate for these, including the NGOs.

There is also a kind of resistance or rejection against the UNDRIP principles, especially among the administrative circle. Whereas political will is important to initiate and sustain the desired change.

- b. Lack of understanding of indigenous perspectives and issues.

In many situations, many do not appreciate the special relationship of the communities to their land as the principal source of livelihood, social and cultural cohesion fundamental to their identity and spiritual welfare. Whilst, public knowledge about the ways these communities use their land and its significance to them will allow for better understanding and may assist in effort for policy changes, especially in terms of the manner in which state authorities deal with them for greater protection of their land.

- c. The current position of the law

Especially on land related issues, the laws are inadequate in providing recognition and protection to the land of the indigenous peoples. Further, the implementation of the laws are often not in favour of the indigenous peoples.

### d. The number

The small number of the indigenous peoples, especially the Orang Asli in Peninsular Malaysia may not attract enough attention for policy changes relative to much higher competing interests.

### e. Changing culture, challenges and unity of the communities

Protecting culture and custom of communities is important as these elements signify identity of the communities. However, some communities may not want to continue or even safeguard the traditional culture. Some no longer believe in custom and tradition of their communities. On the other hand, some groups seek to safeguard or continue certain practices whilst the practices may no longer in practice by the communities. Changes, nevertheless, must be acknowledged as a natural process in a community.

This may be influenced by many factors including modernisation, propagation of other religions and other values foreign to the communities as well as commercial interests. This situation to certain extent may affect unity of the communities which is a strength for a nation to safeguard its identity.

These challenges may hinder effective implementation of the recommendations.

## 10. CONCLUSION

In conclusion, this report summarily analyses the compatibility of the relevant federal and state laws in Malaysia, including the Federal Constitution, as well as the policies against the principles and provisions of the UNDRIP. It also identifies the possibility of the UNDRIP principles being integrated into the Malaysian law. For this, it considers whether any provision in the Malaysian law contradicts or opposes the UNDRIP principles. Specifically, this report outlines issues and challenges as well as factors relating to the goal of incorporating UNDRIP into Malaysian laws and policies, including challenges or barriers that may hinder the recommended amendments and remedial strategies to address it.

In principle, the UNDRIP provides a strong affirmation of the rights of indigenous peoples with respect for human rights as its central element based on principles of equality and non-discrimination. Other important principles are affirmed as the basis for its wide-ranging provisions including the right to self-determination; free, prior and informed consent; the right to cultural integrity and the protection of livelihood; and the right to access to quality basic services. The bottom lines of the UNDRIP principles are as follows:

### 1. Respect for Human Rights

Respecting human rights, individual and collective, of all human beings including the indigenous peoples and upholding principle of equality and non-discrimination.

2. Right to Self-determination	Recognizing that the indigenous peoples are free to determine their political status and free to pursue their economy, social and cultural development.
3. Free, Prior and Informed Consent	Upholding that any decision by States authority affecting the legal rights of indigenous peoples will only be taken upon participation and free, prior and informed consent of the indigenous peoples.
4. Cultural Integrity	Recognizing that distinct culture, history, institution, language and way of life of the indigenous peoples enrich State's cultural identity, that they have right to practice and to be protected.
5. Protection of Livelihood	Safeguarding rights to land and resources, as well as economic and social rights of the indigenous peoples protects their livelihood and empowers them as self-reliant people.
6. Access to quality basic services	Effective measures must be taken to ensure continuing improvement of economic and social conditions of the indigenous peoples by providing access to quality education, employment, vocational training and re-training, healthcare, water and sanitation, communication and other infrastructures.

Analysing the basic principles underlying the Malaysian law, especially outlined in the Federal Constitution, this report suggests that:

1. The fundamental rights affirmed in the Malaysian constitutional document; the Federal Constitution are in line with the principles upheld by the UNDRIP. The Federal Constitution affirms fundamental rights of human being and citizen in Malaysia and acknowledges the need of special protection for indigenous peoples, including the Orang Asli.
2. Although the provisions on fundamental liberties are minimal, the scope that it provides allow for expansion of these rights to cater to the internalisation of the UNDRIP provisions through legislation or at least through public policy.
3. The Malaysian laws also recognise the need to protect the indigenous peoples in the country, and some basic rights of the indigenous peoples, with equality and non-discrimination as its core principles. These are the founding principles of the UNDRIP suggesting that the principles underlying the Malaysian laws are coherent or consistent with the UNDRIP.
4. The UNDRIP recognises extensive standards to be adopted by States with regard to, among others, the right to self-determination, the principle of free, prior and informed consent, land rights, cultural integrity and socio-economic related rights. These principles are also recognised to certain extent, although limited, in the Malaysian laws.

## The Rights of Indigenous Peoples in Malaysia

5. Some other principles, including the right to self-determination and the principle of free, prior and informed consent, are not specifically provided for in Malaysian laws. In order to protect the rights of the indigenous peoples in Malaysia, it is important for the States to consider for immediate adoption of such standards through legal and policy reform.

This report also considers several important aspects relevant to the indigenous peoples in Malaysia:

1. Protection of land and resources
2. Protection of cultural rights
3. Rights in relation to education
4. Rights in relation to economic and social conditions

In each aspect, the relevant provisions of the UNDRIP are examined and the Malaysian laws affecting these are specifically analysed, with recommendation for changes are outlined consistent with the relevant provisions in the UNDRIP. Based on these findings, this report recommends for specific actions (as tabulated in the table below) to be undertaken by states to ensure immediate adoption of the UNDRP standards.

This is legally possible to be implemented under the construct of the present Malaysian Constitution without the need for amendment. However, the recognition of Orang Asli customary land rights consistent with the UNDRIP may necessarily require the states to reduce or relinquish the excessive control they currently possess over Orang Asli and their lands.<sup>292</sup>

In conclusion, to protect the rights of the indigenous peoples in Malaysia, it is important for federal and state governments to consider for immediate adoption of the standards promoted in the UNDRIP through legal and policy reform within their jurisdictions.

However, there are several challenges in implementing these recommendations. The challenges in implementing the recommendations include

1. Lack of understanding of the UNDRIP principles and its significance
2. Lack of understanding on the indigenous perspective and issues
3. The current position of the law especially on land related issues
4. The small number of the indigenous population
5. Changing culture, challenges and unity of the communities

Change of the laws requires political willingness and strong political reconciliation to move and effect the change. The government and policy makers must take serious steps in implementing the recommendations. Another crucial factor is public awareness on the significance of protecting the rights the indigenous peoples. To allow enjoyment of rights, public need to be aware of them and understand how to exercise them. This can foster community-wide attitudinal change, which in turn can positively influence decision-making and law reform.

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<sup>292</sup> Yogeswaran Subramaniam, 'Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia' (2011) 19 *Waikato Law Review* 44.

## THE UNDRIP PRINCIPLES, THE MALAYSIAN LAWS AND POLICIES AND THE RECOMMENDATIONS

The United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP) and Malaysian laws:

Towards respect and recognition of the rights of the indigenous peoples in Malaysia

### Empowering the indigenous peoples in Malaysia: the UNDRIP perspectives



#### LAND

Land and resources as community foundation



#### CULTURE

Towards cultural integrity of the indigenous peoples



#### EDUCATION

Tool of social and economic empowerment for community dignity, cultural diversity, traditions, history and future aspirations



#### SOCIO-ECONOMY

Economic empowerment for community and self-sustenance

### LAND - Land and resources as community foundation

UNDRIP	MALAYSIAN LAWS
<p>1. Right to own and possess the lands and resources that they traditionally occupy or use – Art 25.</p> <p>States have obligations to legally recognize and protects the lands, territories and resources – Art 26(3); to establish and implement process to recognize and adjudicate on land rights with participation of the IP – Art 27</p> <p>2. Right in relation to resources:</p> <ol style="list-style-type: none"> <li>a. security in the enjoyment of the means of subsistence and development – Art 20.</li> <li>b. free engagement in traditional economic activities – Art 20</li> <li>c. conservation of ‘vital medicinal plants, animals and minerals (Art 24) and of the local environment and of the productive capacity of the lands or territories and resources (Art 29); and</li> <li>d. determination and development of their own ‘priorities and strategies for the</li> </ol>	<p style="text-align: center;"><b>Orang Asli in Peninsular Malaysia</b></p> <p>There is no clear provision in the statutory law providing for the land rights of the Orang Asli.</p> <p>The laws which are generally applicable to matter of land and other natural resources have some recognition of interests of the Orang Asli (including National Land Code, National Forestry Act 1984, <i>Wildlife Conservation Act 2010</i>). However, the general land code is not implemented to protect the Orang Asli land.</p> <p>The Aboriginal Peoples Act 1954 provides for land reservation for the Orang Asli; and protection for their interests in land and resources.</p> <p>However, the laws are inadequate as they do not expressly recognise the communities’ interest in land as of legal rights.</p> <p style="text-align: center;"><b>Natives in Sabah and Sarawak</b></p>

<p>development or use of their lands or territories and other resources' (Art 32).</p> <p>3. Prohibition against forcible relocation – Art 10.</p> <p>4. Right to redress for deprivation of land rights – priority for restitution, and whenever not possible - just, fair and equitable compensation subject to free consent of the IP – Art 28.</p> <p>5. Right to be protected from the siting of hazardous materials and use of their territories for military activities without their free, prior and informed consent – Art 29.</p>	<p>There are statutory provisions recognizing customary land rights of the indigenous peoples in these states and the customary laws of the communities remain in force.</p> <ol style="list-style-type: none"> <li>a. Sabah Land Ordinance (Cap. 68)</li> <li>b. <i>Sabah Inland Fisheries and Aquaculture Enactment 2003</i></li> <li>c. Sabah Conservation Enactment 1997</li> <li>d. Sabah Forestry Enactment 1968</li> <li>e. Sabah Biodiversity Enactment 2000</li> <li>f. Sarawak Land Code 1958 (Cap 81)</li> <li>g. Land (Classification) Ordinance 1948</li> <li>h. Cases from all the 3 jurisdictions</li> </ol>
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### RECOMMENDATIONS FOR THE PROTECTION OF LAND OF INDIGENOUS PEOPLES

#### Orang Asli in Peninsular Malaysia

1. The state governments must take action in order to determine and gazette the land occupied by the Orang Asli. This should be taken based on the spirit of respecting human rights of all citizens and fulfilling the obligation of the government consistent with the duties provided by the Federal Constitution and the UNDRIP. The Federal Government, having duty for the welfare of the Orang Asli must play important role initiating necessary negotiation with the State governments.
2. As the existing legislation is inadequate to protect the land of the Orang Asli, it is essential to enact a specific legislation to safeguard the land of the Orang Asli. Specifically, the proposed legislation is to provide for:
  - a. recognition that the Orang Asli have legal rights over their customary land and the land that they live;
  - b. recognition that the rights of the Orang Asli in protected areas co-exist with the interests of states; and regulation on the use and management of the area, with consultation and participation of the communities involved;
  - c. a system in which the land of the Orang Asli is to be registered according to the system and practice of the communities. To this, a consultation must be made with the particular communities;
  - d. mechanism to determine the land, width and nature of the land rights of the communities. The mechanism may be in the form of a tribunal or a process initiated by state governments for negotiation towards agreement making. The mechanism established must give a role to indigenous perspectives, including their customs and customary law is dispute settlement practice.
  - e. provision relating to acquisition of the land of the Orang Asli and their relocation by the state governments. This must be based on the principle of FPIC. The compensation provided for the acquisition and relocation must give priority to land of similar quality.

As part of the process in drafting the new legislation, review of existing legislations affecting the Orang Asli must also be made to reconcile conflicting provisions against the interests of the Orang Asli.
3. States have to take necessary action to enhance public awareness on the indigenous communities and their rights.

## The Rights of Indigenous Peoples in Malaysia

### Natives in Sabah and Sarawak

1. The state governments must be proactive in determining the land of the natives by conducting appropriate survey according the relevant law for the purpose of protecting the natives' land. An appropriate mechanism may be established, including in the form of a tribunal, or using negotiation for determination of the natives' land.
2. States are to amend their respective land legislation:
  - a. to provide for free, prior, informed consent (FPIC) as a statutory prerequisite for use or extinguishment of the customary land rights failing which any land alienation will be null and void.
  - b. To provide for better notice and information system to the local communities of any action taken by the government involving the communities' interest in land.
3. In the process for the drafting of the legislation, or amendment to the existing legislations, and any actions taken affecting the natives' land, States must conduct consultation based on free, prior and informed consent with all stakeholders especially the indigenous communities according to proper process consistent with the UNDRIP. The process must take into account the diversity of practice and customary system of the indigenous communities.
4. The government may also resort to negotiation with the indigenous communities with view towards agreement making in relation to the use and management of land.
5. States must take necessary action to enhance public awareness on the indigenous communities and their rights.

### CULTURE: Towards cultural integrity of the indigenous peoples

UNDRIP	MALAYSIAN LAWS & POLICIES
<ol style="list-style-type: none"> <li>1. Right to not be subjected to forced assimilation and destruction of their culture – Art 8(1).</li> <li>2. States have duties to provide effective mechanism for prevention of, and redress for:               <p>“(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;</p> <p>(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;</p> <p>(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;</p> <p>(d) Any form of forced assimilation or integration;</p> <p>(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.”</p> </li> </ol>	<p>Art 11 of Federal Constitution guarantees the right of every person in Malaysia to profess and practice his religion. The scope of the constitutional provision is equally applicable to the indigenous peoples.</p> <p>Custom or <i>adat</i> is one of sources of law - Art 160(2) of the Federal Constitution. Custom which is enforceable is considered as part of law, or also known as personal law, in Malaysia.</p> <p>Legislation recognizing the custom of the IP:</p> <ol style="list-style-type: none"> <li>a. <i>Sabah Native Courts (Native Customary Laws) Rules 1995;</i></li> <li>b. <i>Sarawak Native Customary Law Ordinance (Cap 51)</i></li> <li>c. <i>Aboriginal Peoples Act 1954</i></li> </ol>

3. Spiritual and religious traditions and customs: Right to practise and revitalize their cultural traditions and customs, including the right to maintain, protect, and develop past, present, and future manifestations of such cultures (Article 11), including the right to manifest, practise, develop, and teach their spiritual and religious traditions, customs, and ceremonies, as well as the restitution and repatriation of ceremonial objects and human remains - Article 12.
4. Language, knowledge and traditions: The right to 'revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies', etc. and obligates states to 'take effective measures to ensure that this right is protected' - Article 13.
5. Education: 'individual and collective rights to education', including:
  - a. right to 'develop and control educational systems that are consistent with their linguistic and cultural methods of teaching and learning' - Art 14
  - b. right of 'indigenous pupils' to be placed on an 'equal footing with non-indigenous pupils' regarding 'access to all levels and forms of education within the State' - Art 14.
  - c. Right to have 'their cultures, traditions, histories and aspirations ... appropriately reflected in education and public information' - Art 15. This includes the state's duty to combat prejudice and discrimination and to develop tools which 'promote tolerance, understanding and good relations among indigenous peoples and all other segments of society'.

Media: The indigenous peoples also have the right to 'establish their own media in their own languages', an important aspect of self-determination, and to have non-discriminatory access to non-indigenous media; also states have a 'duty to ensure that indigenous cultural diversity is duly reflected in non-indigenous media' - Article 16.

### RECOMMENDATIONS

#### Short term:

1. The government must ensure that appointment of leaders in indigenous communities are made according to the communities' practice and traditions.

2. The government must prevent any direct acts that may result in forced assimilation and destruction of culture of indigenous peoples.
3. The government must develop and maintain effective mechanism for prevention of actions with negative effect to their distinct identity; force assimilation and inciting racial and ethical discrimination.
4. The government must acknowledge and protect cultural and sacred sites of the indigenous peoples.

**Long term:**

5. The government must enact special law or policy that recognizes indigenous cultural and linguistic rights.
6. The government must allow indigenous peoples to establish and run their own media according to existing law, without any prejudice and discrimination.
7. The government must ensure indigenous peoples' access to mainstream media; and that the indigenous cultural diversity is duly reflected in non-indigenous media.
8. The government must provide a specific regulation for the registration of marriage and divorce of the Orang Asli.

**EDUCATION**

**EDUCATION: Education as a tool of social empowerment**

UNDRIP	MALAYSIAN LAWS AND POLICY
<ol style="list-style-type: none"> <li>1. Right to establish and control their educational systems and institutions and provide education in their own language, in a manner consistent with the methods of teaching and learning indigenous cultures without discrimination – Art 14.</li> <li>2. Right to the dignity and diversity of their culture, traditions, history and aspirations that should be reflected in education and public information – Art 15.</li> </ol> <p>Elements of Art 14 and 15:</p> <ol style="list-style-type: none"> <li>1. Dialogue and negotiations with indigenous peoples</li> <li>2. Recognition of indigenous cultural and linguistic rights</li> <li>3. Comprehensive education strategy supported by indigenous history and needs</li> <li>4. Indigenous education programs and initiatives administered by indigenous peoples</li> </ol>	<p>The laws in Malaysia guarantees the right to education equally for all regardless of race and gender:</p> <ol style="list-style-type: none"> <li>1. Every person in Malaysia has the right to education without discrimination based on religion, race and place of birth - Art 12(1) FC. This applies equally to the IP.</li> <li>2. Section 29 (A) Education Act 1996 requires that primary education is compulsory for all children under age of 12.</li> <li>3. Section 17 (1) Aboriginal Peoples Act 1954 provides that no Orang Asli children are prevented from studying in any school due to his status as an aboriginal people.</li> </ol> <p><b>Policy:</b></p> <p>There are policies specific for the OA to address issues relating to education of the OA including high number of students drop out, low performance). Example of such policy:</p> <ol style="list-style-type: none"> <li>1. Special Model School</li> </ol>

	<p>2. Indigenous Students Education Plan 2018-2025 (Pelan Pendidikan Murid Orang Asli)</p> <p>There is no specific law providing for the traditional knowledge and cultures of the OA to be included in the syllabus.</p> <p>However, there are some policies or practices in place which requiring teachers to incorporate the language and culture of the indigenous peoples at school.</p>
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**RECOMMENDATIONS**

**Short term plan:**

1. The government must strengthen and ensure effective and continuous dialogue and consultation with indigenous peoples in the process of development of educational law / policies / program / project / initiatives.
2. The government should ensure all educational strategies enforce indigenous cultural and linguistic rights.
3. All educational strategies for indigenous education must be supported by the history and needs of different indigenous peoples in Malaysia.
4. The government must promote and support (including financial and teachers' training) for educational programs and initiatives, such as the alternative school, beneficial for the indigenous peoples maintained by them or civil society organisations.

**Long term plan:**

1. The government must enact laws and policies that make dialogue and negotiation compulsory as part of the self-determination rights of indigenous peoples.
2. The government must enact laws / policy that recognize indigenous cultural and linguistic rights.
3. The government to develop policy that culture, tradition, history and aspiration of indigenous peoples are sufficiently included in the education curriculum e.g. in history textbooks.
4. The government must regulate and support educational programs and initiatives, such as the alternative school, beneficial for the indigenous peoples maintained by them or civil society organisations

**SOCIO ECONOMY**

**SOCIO-ECONOMY: Economic, health and social conditions for community empowerment and sustenance**

<b>UNDRIP</b>	<b>MALAYSIAN LAWS AND POLICY</b>
<p>Rights in relation to economic &amp; social conditions:</p> <ol style="list-style-type: none"> <li>1. Right to freely determine their economic, social and cultural development - (Art 3).</li> <li>2. Right to manage their economic activities and assert the right to full participation in</li> </ol>	<p>There is no specific law providing for economic and social conditions of IP in Malaysia.</p> <p>Welfare of OA is under the executive power of the Federal Government.</p>

## The Rights of Indigenous Peoples in Malaysia

<p>economic and other matters such as political, social and cultural (Article 5).</p> <ol style="list-style-type: none"><li>3. Right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities (Art 20(1)).</li><li>4. Deprivation of their means of subsistence and development entitled them to just and fair redress (Art 20(1)).</li><li>5. Art 21: emphasizes on various areas such as education, employment, vocational training, housing, hygiene, health and even social security to ensure the social and economic stability of indigenous peoples.</li><li>6. Right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions. Indigenous peoples also have the right to be actively involved in determining various development programs (Article 23)</li><li>7. Rights and special needs of indigenous elders, women, youth, children and persons with disabilities - States shall take measures to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination (Art 22).</li><li>8. Right to set priorities and strategies for the development or use of land, territories and natural resources. To achieve this, the governments need to consult the indigenous peoples to obtain Free Prior and Informed Consent (FPIC) for projects that have implications for indigenous lands and territories especially for development purposes (Art 32).</li></ol>	<p>There are specific government policies providing for the economic and healthcare of the IP particularly to address issues of poverty, poor health and other socioeconomic conditions.</p> <p>Example: JAKOA Strategic Plan 2016-2020</p> <p>Although situations have to certain extent improved in many places but remain unsatisfactory.</p> <p>Closely related to the economic and social conditions of the communities, the legal position on the IP right to land and resources is inadequate resulting in insecurity and exploitation.</p>
<p><b>Health and healthcare services:</b></p> <ol style="list-style-type: none"><li>1. Right to exercise their own traditional practice and maintenance of the communities' knowledge relating to health - including the conservation of their vital medicinal plants, animals and minerals (Art 24).</li><li>2. Equal right to the same standard of health, physical and mental, similarly enjoyed by the other sections of the society (Art 24).</li></ol>	

Protection by State against disposal or hazardous materials in their land against their consent. (Art 29(1)).

### RECOMMENDATION

1. The government must recognise and protect the right of the indigenous peoples to freely determine their economic and social development.
2. In designing strategies to enhance the economic status of the indigenous peoples, the government must recognise and protect that the following rights of the indigenous peoples:
  - a. to manage their economic activities
  - b. to fully participate in economic matters involving them
  - c. to engage their own means of subsistence and development
  - d. to engage freely in all their traditional and other economic activities
  - e. are entitled to just and fair redress whenever they are deprived their own means of subsistence and development.
3. The government must obtain free, prior and informed consent of the indigenous peoples in any project development involving or affecting their land.
4. The government must ensure provision for and equal access for training necessary for capacity building of the communities suitable to their needs.
5. The government must ensure that the environment surrounding the settlement of the indigenous peoples is safe and protect them from disposal of hazardous materials in their land against their consent.
6. Towards ensuring strong social capacity of the indigenous peoples, the government must provide and maintain safe and clean water; increase the electricity supply; increase accessibility to major roads by quality access roads; provides quality housing; and expand the telecommunications system to the settlements of the Orang Asli and natives. Provision of these matters, however, is subject to the needs, culture and customs of the communities involved. The needs and priority often vary according to locality, economic activities and acceptance of the communities. Therefore, consultation with the communities is necessary in the plan development.
7. In protecting health of the indigenous peoples, the government must recognise and protect their right:
  - a. to exercise their own traditional practice and maintenance of the communities' knowledge relating to health, and
  - b. to the same standard of health similarly enjoyed by the other sections of the society
8. The government must also ensure that special attention is given to senior citizens, women, youth, children and the disabled in both economic and social development.

THE ABORIGINAL PEOPLES ACT 1954 (Act 134) AND THE UNDRIP

No	Parts	Act 134: The Provisions	Compatibility with UNDRIP	Recommendations
1	Introductory	<p><b>S 3 Definition of aborigine</b></p> <p><i>In this Act, an aborigine is</i></p> <p>a) <i>any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;</i></p> <p>b) <i>any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or</i></p> <p>c) <i>the child of any union between an aboriginal female and a male of another race, provided</i></p>	<p>As to the identity of IP, Art 2 of UNDRIP provides:</p> <p><i>Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.</i></p> <p>Therefore, S 3 Act 134 that gives power to the Minister to decide on the identity of the Orang Asli is contrary to the spirit of UNDRIP.</p>	<p>The study recommends for self-identification by the communities themselves according to their practice and traditions, not the Minister.</p> <p>The study recommends that S 3(3) Act 134 is removed.</p>

## The Rights of Indigenous Peoples in Malaysia

		<p><i>that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.</i></p> <p><i>(2) Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising that religion.</i></p> <p><b><i>(3) Any question whether any person is or is not an aborigine shall be decided by the Minister.</i></b></p>		
2	Administration	<p><b>S 4 Administration of aborigines</b></p> <p><i>The Director-General shall be responsible for the general</i></p>		S4 should be amended to recognise the self-determination of Orang Asli.

## The Rights of Indigenous Peoples in Malaysia

	<p><i>administration, welfare and advancement of aborigines:</i></p> <p><i>Provided that nothing in this section shall be deemed to preclude any aboriginal headman from exercising his authority in matters of aboriginal custom and belief in any aboriginal community or any aboriginal ethnic group.</i></p> <p><b>S 5 Appointment of Director General and Deputy Director Generals</b></p> <p><i>(1) The Yang di-Pertuan Agong may appoint a Director General for Orang Asli Affairs, and as many Deputy Director Generals for Orang Asli Affairs and other officers as he may consider necessary for the purposes of this Act.</i></p> <p><i>(2) It shall be lawful for the Director General to do all acts reasonably necessary and incidental to or connected with the performance of his functions under this Act including the conducting of research into any aspects of aboriginal life.</i></p>	<p>S 4 Act 134 provide for extensive power of the Director-General. It is in contradiction with Article 3 UNDRIP on the self-determination of Orang Asli.</p> <p>The provisions provide for the appointment of officials for the administration of the Orang Asli communities, powers and scope of the administration.</p> <p>This shall not interfere with the community headman to exercise his authority.</p>	
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## The Rights of Indigenous Peoples in Malaysia

		<p>(3) <i>All the powers of the Director General under this Act shall be exercisable by the Deputy Director Generals.</i></p> <p>(4) <i>Every person appointed under this section shall be deemed to be a public servant within the meaning of the Penal Code [Act 574].</i></p>		
3	<p>Land related:</p> <p>Creation of aboriginal reserve &amp; areas</p> <p>Right of occupancy</p> <p>Dealings</p> <p>Areas declared as reservation</p> <p>Compensation</p> <p>Compulsory acquisition</p>	<p><b>S 6 Aboriginal areas</b></p> <p>(1) <i>The State Authority may, by notification in the Gazette, declare any area predominantly or exclusively inhabited by aborigines, which has not been declared an aboriginal reserve under section 7, to be an aboriginal area and may declare the area to be divided into one or more aboriginal cantons:</i></p> <p><i>Provided that where there is more than one aboriginal ethnic group there shall be as many cantons as there are aboriginal ethnic groups.</i></p> <p>(2) <i>Within an aboriginal area</i></p> <p><i>i. no land shall be declared a Malay Reservation under</i></p>	<p>The provisions in Act 134 related to land of the Orang Asli are inadequate to recognise and protect the rights of Orang Asli to land that they customarily live and/or presently occupy. This is incompatible with various provisions of UNDRIP including Art 25, 26, 27, 28, 29, 30 and 32.</p>	<p>The Act 134 must be amended to recognise the right to land in line with UNDRIP.</p> <p>The same recommendation is made in the National Inquiry Report on the Land Rights of Indigenous Peoples in Malaysia by SUHAKAM, 2013 and the National Human Right Action Plan (NHRAP) 2018.</p> <p>As the existing legislation is inadequate to protect the land of the Orang Asli, it is essential to enact specific legislation to safeguard the land of the Orang Asli.</p> <p>Specifically, the proposed legislation is to provide for:</p> <ol style="list-style-type: none"> <li>recognition that the Orang Asli have legal rights over their customary land and the land that they live;</li> <li>recognition that the rights of the Orang Asli in protected areas co-exist with the interests of states; and regulation on the use and management of the area, with consultation and participation of the communities involved;</li> </ol>

## The Rights of Indigenous Peoples in Malaysia

	<p><i>any written law relating to Malay Reservations;</i></p> <p>ii. <i>no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;</i></p> <p>iii. <i>no land shall be alienated, granted, leased or otherwise disposed of to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Director-General; and</i></p> <p>iv. <i>no licences for the collection of forest produce under any written law relating to forests shall be issued to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Director-General and in granting any such licence it may be ordered that a specified proportion of aboriginal labour be employed.</i></p> <p>(2) <i>The State Authority may in like manner revoke wholly or in part or vary</i></p>		<p>c. a system in which the land of the Orang Asli is to be registered according to the system and practice of the communities. To this, a consultation must be made with particular communities;</p> <p>d. mechanism to determine the land, width and nature of the land rights of the communities. The mechanism may be in the form of a tribunal or a process initiated by state governments for negotiation towards agreement making. The mechanism established must give a role to indigenous perspectives, including their customs and customary law is dispute settlement practice.</p> <p>e. The provision relating to the acquisition of the land of the Orang Asli and their relocation by the state governments. This must be based on the principle of FPIC. The compensation for must gives priority to the land of similar quality.</p> <p>f. As part of the process in drafting the new legislation, review of existing legislations affecting the Orang Asli must also be made to reconcile conflicting provisions against the interests of the Orang Asli.</p> <p>g. States have to take necessary action to enhance public awareness on the indigenous communities and their rights.</p> <p>The proposed legislation should incorporate the element of Free, Prior and Informed Consent (FPIC) in various aspects affecting land of the Orang Asli as provided under the UNDRIP.</p>
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		<p><i>any declaration of an aboriginal area made under subsection (1).</i></p> <p><b>S 7 Aboriginal Reserve</b></p> <p><i>(1) The State Authority may, by notification in the Gazette, declare any area exclusively inhabited by aborigines to be an aboriginal reserve:</i></p> <p><i>Provided</i></p> <ul style="list-style-type: none"> <li><i>i. when it appears unlikely that the aborigines will remain permanently in that place it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and</i></li> <li><i>ii. an aboriginal reserve may be constituted within an aboriginal area.</i></li> </ul> <p><i>(2) Within an aboriginal reserved"</i></p> <ul style="list-style-type: none"> <li><i>i. no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;</i></li> <li><i>ii. no land shall be declared a sanctuary</i></li> </ul>		
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## The Rights of Indigenous Peoples in Malaysia

		<p>or reserve under any written law relating to the protection of wild animals and birds;</p> <p>iii. no land shall be declared a reserved forest under any written law relating to forests;</p> <p>iv. no land shall be alienated, granted, leased or otherwise disposed of except to aborigines of the aboriginal communities normally resident within the reserve; and</p> <p>v. no temporary occupation of any land shall be permitted under any written law relating to land.</p> <p>(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal reserve made under subsection (1).</p> <p><b>S 8 Right of occupancy</b></p> <p>(1) The State Authority may grant rights of occupancy of any land not being alienated land or land leased for any</p>		
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## The Rights of Indigenous Peoples in Malaysia

	<p><i>purpose within any aboriginal area or aboriginal reserve.</i></p> <p><i>(2) Rights of occupancy may be granted</i></p> <ul style="list-style-type: none"><li><i>a) to</i><ul style="list-style-type: none"><li><i>i. any individual aborigine;</i></li><li><i>ii. members of any family of aborigines; or</i></li><li><i>iii. members of any aboriginal community;</i></li></ul></li><li><i>b) free of rent or subject to such rents as may be imposed in the grant; and</i></li><li><i>c) subject to such conditions as may be imposed by the grant,</i></li></ul> <p><i>and shall be deemed not to confer on any person any better title than that of a tenant at will.</i></p>		
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## The Rights of Indigenous Peoples in Malaysia

		<p><i>(3) Nothing in this section shall preclude the alienation or grant or lease of any land to any aborigine.</i></p> <p><b>Other provisions:</b></p> <p><b>S 9 Dealing in land by aborigines</b></p> <p><b>S 10. Aboriginal communities not obliged to leave areas declared Malay Reservations, etc.</b></p> <p><b>S 11. Compensation on alienation of State land upon which fruit or rubber trees are growing</b></p> <p><b>S 12. Compensation</b></p> <p><b>S 13. Compulsory acquisition of land for aboriginal areas or reserves</b></p>		
4	Exclusion of persons from aboriginal areas & reserve	<p><b>14. Exclusion of persons from aboriginal areas and aboriginal reserves</b></p> <p><i>(1) The Minister may, if he is satisfied that having regard to the proper administration of the welfare of the aborigines in any aboriginal area or aboriginal reserve or</i></p>	<p>The provision was enacted with aim to address situation of communist insurgency which affected the community in the past.</p> <p>It empowers the Director-General of JAKOA and Federal Minister having charge of Orang Asli Affairs to have the</p>	<p>The excessive power of the DG and the Minister pertaining to this matter must be revised to include consultation with the Orang Asli communities.</p>

## The Rights of Indigenous Peoples in Malaysia

		<p><i>aboriginal inhabited place it is desirable that any person or class of person should be prohibited from entering or remaining in the area, reserve or place, make an order to that effect in the form prescribed in the Schedule.</i></p> <p>(2)</p> <p>a) The order when addressed to an individual person, may be served on the person named therein by a police officer or by any person whom the Minister may direct to serve the same.</p> <p>b) The order shall if practicable be served personally on the person named therein by showing him the original order and by tendering or delivering to him a copy thereof signed by the Minister.</p> <p>c) If service cannot conveniently be effected as aforesaid the serving officer shall affix a copy of</p>	<p>ultimate power to exclude any persons from Orang Asli inhabited areas, reserves and areas.<sup>293</sup></p>	
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<sup>293</sup> Joint Memorandum on The Reform of The Aboriginal Peoples Act 1954 And Orang Asli Policy And Administration, Pusat KOMAS and the Bar Council Committee on Orang Asli Rights (“COAR”), 18 April 2019.

## The Rights of Indigenous Peoples in Malaysia

		<p>the order to some conspicuous part of the house or other place where the person named in the order ordinarily resides and thereupon the order shall be deemed to have been duly served.</p> <p>d) A certificate signed by the Minister that an order has been duly served on the person named therein shall be admissible in evidence in any judicial proceeding and on the production of such a certificate the court shall presume until the contrary is proved that the order was duly served.</p> <p><i>(3) The order, when addressed to a class of persons, shall be published in the Gazette.</i></p> <p><i>(4) Any person on whom an order has been served in accordance with this section who is found within any aboriginal area, aboriginal reserve or aboriginal inhabited place mentioned in the order and any person who is a member of any class of persons which has been prohibited from entering or remaining in any</i></p>		
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## The Rights of Indigenous Peoples in Malaysia

	<p><i>aboriginal area, aboriginal reserve or aboriginal inhabited place who is found within the area, reserve or place shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit.</i></p> <p><i>(5) Any person found committing an offence under subsection(4) may be arrested without warrant by the Director-General or any police officer.</i></p> <p><b>S 15 Removal of undesirable persons</b></p> <p><i>(1) The Director-General and any police officer may detain any person found in any aboriginal area, aboriginal reserve or aboriginal inhabited place whose activities he has reason to believe are detrimental to the welfare of any aborigine or any aboriginal community and shall remove any such person from the area, reserve or place within seven days from the date of detaining him.</i></p> <p><i>(2) The Director General or any police officer who detains or removes any person in accordance with subsection (1)</i></p>		
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## The Rights of Indigenous Peoples in Malaysia

		<i>shall as soon as possible report all the circumstances in writing to the Minister.</i>		
5	Community Leadership	<p><b>S 16 Headman</b></p> <p><i>(1) The hereditary headman of an aboriginal community shall be the headman thereof or, in the case of an aboriginal community in which the office of the headman is not hereditary, a person selected to be headman by the members of the community shall be headman thereof, subject in each case to confirmation by the Minister.</i></p> <p><i>(2) The Minister may remove any headman from his office.</i></p>	<p>S16 recognises community leadership.</p> <p>Under S 4, the exercise of the administrative authority shall not interfere with the community headman in matters of custom and belief of the community.</p> <p>2. Power of Minister</p> <p>“subject in each case to confirmation by the Minister.”</p> <p>“The Minister may remove any headman from his office.”</p> <p>These provisions are incompatible with the spirit of self-determination of Orang Asli and against the principles of UNDRIP as a whole.</p>	<p>The current study recommends that the appointment of a headman of the community must be made according to the <i>adat</i> of the community.</p> <p>The excessive power to the Minister provided must be revised.</p>
6	Education	<p><b>S 17 No aboriginal child shall be precluded from attending any school by reason only of his being an aborigine.</b></p> <p><i>(1) No aboriginal child attending any school shall be obliged to attend any religious instruction unless the prior consent of his father or of his mother if his father is dead, or of his guardian should both</i></p>	<p>This provides for:</p> <p>a. Protection against discrimination in education.</p> <p>b. Protection of the communities’ belief.</p> <p>This is in line with Art 14, 15 (1), 17 (2) and 21 (1) of the UNDRIP.</p>	<p>As deliberated in part 7 of this report, that recommends short and long term plan on Orang Asli education.</p> <p>However, in the long term, the government must:</p> <ol style="list-style-type: none"> <li>enact laws and policies that make dialogue and negotiation compulsory as part of the self-determination rights of indigenous peoples.</li> <li>enact laws/policy that recognizes indigenous cultural and linguistic rights.</li> </ol>

## The Rights of Indigenous Peoples in Malaysia

		<p><i>parents be dead, is notified to the Director-General, and is transmitted by the Director-General in writing to the headmaster of the school concerned.</i></p> <p><i>(2) Any person who acts in contravention of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred ringgit.</i></p>	<p>Art 14 (2) provides that indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.</p>	<ol style="list-style-type: none"> <li>3. develop a policy that culture, tradition, history and aspiration of indigenous peoples are sufficiently included in the education curriculum, e.g. in history textbooks.</li> <li>4. regulate and support educational programs and initiatives, such as the alternative school, beneficial for the indigenous peoples maintained by them or civil society organisations</li> </ol>
7	Children	<p><b>S 18 Aboriginal children not to be adopted</b></p> <p>(1) No person who is not himself an aborigine of the same ethnic group shall adopt or assume the care, custody or control of any aboriginal child <b>except with the consent of the Director-General</b> and in giving the consent the Director General may impose such conditions as he thinks fit.</p> <p>(2) Any person who acts in contravention of this section or commits a breach of any condition imposed by the Director-General shall be guilty of</p>	<p>This provision gives protection against the adoption of the aboriginal children by a person outside their community.</p> <p>Art 9 of UNDRIP particularly recognise all indigenous peoples the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.</p> <p>(Art 9 should be read together with Art 11 and 33 of UNDRIP).</p>	<p>Decision on adoption of a child must be made by the parents or, if the child has no parents, by his/her guardian. The Minister's role is to ensure that the best interest of the child in the process is observed.</p>

## The Rights of Indigenous Peoples in Malaysia

		an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.		
8	Power of Minister to make regulations	<p><b>S 19 Regulations</b></p> <p><i>The Minister may make regulations for carrying into effect the purposes of this Act and in particular for the following purposes:</i></p> <ul style="list-style-type: none"> <li><i>a) the creation, nature and regulation of aboriginal settlements within aboriginal areas and aboriginal reserves;</i></li> <li><i>b) prohibiting either absolutely or conditionally and controlling the entry into aboriginal reserves, aboriginal areas, aboriginal inhabited places and aboriginal settlements of any person or any class of persons;</i></li> </ul>	The Minister has broad powers to make regulations affecting the Orang Asli, including redefining their ethnicity. <sup>294</sup>	The excessive power to the Minister about this matter must be revised. It should respect the Orang Asli leadership and their traditional way of life.

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<sup>294</sup> Joint Memorandum on The Reform Of The Aboriginal Peoples Act 1954 And Orang Asli Policy And Administration, Pusat KOMAS and the Bar Council Committee on Orang Asli Rights (“COAR”), 18 April 2019.

## The Rights of Indigenous Peoples in Malaysia

		<p>c) providing for the appointment of, and prescribing the qualifications of and the method of appointing, any headman;</p> <p>d) providing for the registration of aborigines;</p> <p>e) the manner of evidencing and recording rights of occupancy granted to aborigines under this Act;</p> <p>f) prohibiting the planting of any specified product on lands over which rights of occupancy have been granted;</p> <p>g) permitting and regulating the felling of jungle within aboriginal areas and aboriginal reserves;</p> <p>h) permitting aborigines to take forest produce in aboriginal areas;</p> <p>i) regulating the taking of wild birds and animals by aborigines;</p> <p>j) providing for the establishment of schools in aboriginal areas, aboriginal reserves and</p>		
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## The Rights of Indigenous Peoples in Malaysia

		<p><i>aboriginal inhabited places and prescribing the curricula of the schools and the qualifications of teachers in the schools;</i></p> <p><i>k) prescribing the terms and conditions upon which aborigines may be employed, and the regulations may provide for the recovery by the Director-General on behalf of an aborigine of any wages or salary due to the aborigine in accordance with the regulations;</i></p> <p><i>l) prohibiting either absolutely or conditionally the entry into or the circulation within any aboriginal area, aboriginal reserve or aboriginal inhabited places of any written or printed matter, any cinematograph film and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner</i></p>		
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## The Rights of Indigenous Peoples in Malaysia

	<p><i>capable of suggesting words or ideas and every copy and reproduction or substantial reproduction thereof;</i></p> <p><i>m) prohibiting either absolutely or conditionally the sale or gift of any intoxicating liquor as defined in any written law relating to excise to any specified aborigine or aboriginal community or within any aboriginal area, aboriginal reserve or aboriginal inhabited place; and</i></p> <p><i>n) prescribing the terminology by which aborigines, aboriginal communities and aboriginal ethnic group shall be referred to.</i></p> <p><i>(2) No regulations shall be made for the purposes of paragraph</i></p> <p><i>(1)(a), (e), (f), (g), (h), or (i) unless the Government of the State in which the regulations shall have effect has first been consulted.</i></p>		
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## LEGAL ROADMAP:

### **PROMOTING AND UPHOLDING THE RIGHTS OF INDIGENOUS PEOPLES IN MALAYSIA**

#### **The perspectives of the United Nation Declaration on the Rights of Indigenous Peoples**

Malaysia is rich with great ethnic, linguistic, cultural and religious diversity. While diversity can be a source of strength, it often leads to a divisive social environment. In recognition of this, it must be Malaysia's mission to continue promoting an inclusive society by respecting differences and recognizing that the values of varied cultures may contribute towards societal well-being. Integral to this, the minority indigenous communities including the Orang Asli in Peninsular Malays and minority native groups in Sabah and Sarawak enrich the rich diversity of the population.

The *United Nation Declaration on the Rights of Indigenous Peoples* (UNDRIP) provides an important guideline which requires positive duties of States to take action to respect and fulfil their obligations to protect the rights of indigenous peoples. However, a report by the United Nation 12 years after adoption of UNDRIP acknowledges that major threats to the rights of the world's indigenous peoples remain. It identifies natural resource extraction, large scale agriculture, infrastructural development, and conservation development as major factors behind violation of the rights of Indigenous Peoples.

The Indigenous Peoples of Malaysia are also facing these problems. As the laws and policies protecting the Indigenous Peoples' land are inadequate, land ownership; relocation and access to daily resources are common issues. Other key issues faced by the local indigenous peoples include poverty and difficult lack of access to basic needs including education, health services, sanitation and basic infrastructures.

This document is a legal roadmap for the incorporation of UNDRIP principles into Malaysian laws and policies at all level. It outlines strategies to be taken into action especially by the government, both federal and states, to seek for the law and policy in Malaysia affecting the indigenous peoples in Malaysia to be in line with the principles upheld in the UNDRIP.

Respect, recognition and protection of the rights of the indigenous peoples are important not only for the well-being of the indigenous groups but for the whole society.

Change of the laws requires political willingness and strong political reconciliation to move and effect the change. The government and policy makers must take serious steps in implementing the recommendations. Another crucial factor is public awareness on the significance of protecting the rights the indigenous peoples. In order to enjoy their rights, people need to be aware of them and understand how to exercise them. This can foster community-wide attitudinal change, which in turn can positively influence decision-making and law reform.

## The Guiding Principles

### ***Respect for Human Rights***

Respecting human rights, individual and collective, of all human beings including the indigenous peoples and upholding principle of equality and non-discrimination.

### ***Right to Self-determination***

Recognizing that the indigenous peoples are free to determine their political status and free to pursue their economy, social and cultural development.

### ***Free, Prior and Informed Consent***

Upholding that any decision by States authority affecting the legal rights of indigenous peoples will only be taken upon participation and free, prior and informed consent of the indigenous peoples.

### ***Cultural Integrity***

Recognizing that distinct culture, history, institution, language and way of life of the indigenous peoples enrich State's cultural identity, that they have right to practice and to be protected.

### ***Protection of Livelihood***

Safeguarding rights to land and resources, as well as economic and social rights of the indigenous peoples protects their livelihood and empowers them as self-reliant people.

### ***Access to quality basic services***

Effective measures must be taken to ensure continuing improvement of economic and social conditions of the indigenous peoples by providing access to quality education, employment, vocational training and re-training, healthcare, water and sanitation, communication and other infrastructures.

### ***Good Governance and Shared Responsibility***

Good governance will appropriate mechanisms including accountability and transparency in the implementation of the Roadmap by engaging all relevant stakeholders.

## The United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP) and Malaysian laws:

Towards respect and recognition of the rights of the indigenous peoples in Malaysia

### Empowering the indigenous peoples in Malaysia: the UNDRIP perspectives



#### LAND

Land and resources as community foundation



#### CULTURE

Towards cultural integrity of the indigenous peoples



#### EDUCATION

Tool of social and economic empowerment for community dignity, cultural diversity, traditions, history and future aspirations



#### SOCIO-ECONOMY

Economic empowerment for community and self-sustenance

### Strategy 1: Protecting land and resources of the indigenous peoples

#### Orang Asli in Peninsular Malaysia

1. The state governments must take action in order to determine and gazette the land occupied by the Orang Asli. This should be taken based on the spirit of respecting human rights of all citizens and fulfilling the obligation of the government consistent with the duties provided by the Federal Constitution and the UNDRIP. The Federal Government, having duty for the welfare of the Orang Asli must play important role initiating necessary negotiation with the State governments.
2. As the existing legislation is inadequate to protect the land of the Orang Asli, it is essential to enact a specific legislation to safeguard the land of the Orang Asli. Specifically, the proposed legislation is to provide for:
  - a. recognition that the Orang Asli have legal rights over their customary land and the land that they live;
  - b. recognition that the rights of the Orang Asli in protected areas co-exist with the interests of states; and regulation on the use and management of the area, with consultation and participation of the communities involved;
  - c. a system in which the land of the Orang Asli is to be registered according to the system and practice of the communities. To this, a consultation must be made with the particular communities;
  - d. mechanism to determine the land, width and nature of the land rights of the communities. The mechanism may be in the form of a tribunal or a process initiated by state governments for negotiation towards

agreement making. The mechanism established must give a role to indigenous perspectives, including their customs and customary law in dispute settlement practice.

- e. provision relating to acquisition of the land of the Orang Asli and their relocation by the state governments. This must be based on the principle of FPIC. The compensation provided for the acquisition and relocation must give priority to land of similar quality.

As part of the process in drafting the new legislation, review of existing legislations affecting the Orang Asli must also be made to reconcile conflicting provisions against the interests of the Orang Asli.

3. States have to take necessary action to enhance public awareness on the indigenous communities and their rights.

### **Indigenous peoples in Sabah and Sarawak**

6. The state governments must be proactive in determining the land of the natives by conducting appropriate survey according the law for the purpose of protecting the natives' land. An appropriate mechanism may be established, including in the form of a tribunal, or using negotiation for determination of the natives' land.
7. States are recommended to amend their respective land legislation as follows:
  - a. to provide for free, prior, informed consent (FPIC) as a statutory prerequisite for use or extinguishment of the customary land rights failing which any land alienation will be null and void.
  - b. To provide for better notice and information system to the local communities of any action taken by the government involving the communities' interest in land.
8. In the process for the drafting of the legislation, or amendment to the existing legislations, and any actions taken affecting the natives' land, States must conduct consultation based on free, prior and informed consent with all stakeholders especially the indigenous communities according to proper process consistent with the UNDRIP. The process must take into account the diversity of practice and customary system of the indigenous communities.
9. The government may also resort to negotiation with indigenous communities with a view towards agreement making in relation to the use and management of land.
10. States must take necessary action to enhance public awareness on the indigenous communities and their rights.

## Strategy 2: Promoting cultural integrity of the indigenous peoples

### Short term plan:

1. The governments must ensure that appointment of leaders in indigenous communities are made according to the communities' practice and traditions.
2. The government must prevent any direct acts that may result in force assimilation and destruction of culture of the indigenous peoples.
3. The government must develop and maintain effective mechanisms for the prevention of actions with negative effects on their distinct identity; forced assimilation and inciting racial and ethical discrimination.
4. The government must acknowledge and protect the cultural and sacred sites of indigenous peoples.

### Long term plan:

5. The government must enact special law or policy that recognizes indigenous cultural and linguistic rights.
6. The government must allow indigenous peoples to establish and run their own media according to existing law, without any prejudice and discrimination.
7. The government must ensure indigenous peoples' access to mainstream media; and that the indigenous cultural diversity is duly reflected in non-indigenous media.
8. The government must provide specific regulations for the registration of marriages and divorces among the Orang Asli.

### **Strategy 3: Enhancing access to quality education with participation of the indigenous peoples**

#### **Short term plan:**

1. The government must strengthen and ensure effective and continuous dialogue and consultation with indigenous peoples in the process of development of educational law / policies / program / project / initiatives.
2. The government must ensure all educational strategies enforce indigenous cultural and linguistic rights.
3. All educational strategies for indigenous education must be supported by the history and needs of different indigenous peoples in Malaysia.
4. The government must promote and support educational programs and initiatives, including financial and teachers' training, such as the alternative schools, and other benefits for the indigenous peoples maintained by them or civil society organisations.

#### **Long term plan:**

5. The government must enact law / policy that make dialogue and negotiation compulsory as part of self-determination rights of indigenous peoples.
6. The government must enact laws / policy that recognize indigenous cultural and linguistic rights
7. The government must develop policy that culture, tradition, history and aspiration of indigenous peoples are sufficiently included in the education curriculum e.g. in history textbooks.
8. The government must regulate and support educational programs and initiatives, such as the alternative school, beneficial for the indigenous peoples maintained by them or civil society organisations.

#### Strategy 4: Enhancing economic, health and social conditions for community empowerment and sustenance

1. The government must recognise and protect the right of the indigenous peoples to freely determine their economic and social development.
2. In designing strategies to enhance the economic status of the indigenous peoples, the government must recognise and protect that the following rights of the indigenous peoples:
  - a. to manage their economic activities
  - b. to fully participate in economic matters involving them
  - c. to engage their own means of subsistence and development
  - d. to engage freely in all their traditional and other economic activities
  - e. are entitled to just and fair redress whenever they are deprived their own means of subsistence and development.
3. The government must obtain free, prior and informed consent of the indigenous peoples in any project development involving or affecting their land.
4. The government must ensure provision for and equal access for training necessary for capacity building of the communities suitable to their needs.
5. The government must ensure that the environment surrounding the settlement of the indigenous peoples is safe and protect them from disposal of hazardous materials in their land against their consent.
6. Towards ensuring strong social capacity of the indigenous peoples, the government must provide and maintain safe and clean water; increase the electricity supply; increase accessibility to major roads by quality access roads; provides quality housing; and expand the telecommunications system to the settlements of the Orang Asli and natives. Provision of these matters, however, is subject to the needs, culture and customs of the communities involved. The needs and priority often vary according to locality, economic activities and acceptance of the communities. Therefore, consultation with the communities is necessary in the plan development.
7. In protecting health of the indigenous peoples, the government must recognise and protect their right:
  - a. to exercise their own traditional practice and maintenance of the communities' knowledge relating to health, and
  - b. to the same standard of health similarly enjoyed by the other sections of the society
8. The government must also ensure that special attention is given to senior citizens, women, youth, children and the disabled in both economic and social development.

## Stakeholders

Governmental actors	Non-governmental actors
Kerajaan Persekutuan	Suhakam
Kerajaan-kerajaan Negeri	Persatuan Orang Asli Semenanjung Malaysia
Jabatan Kemajuan Orang Asli	Centre for Orang Asli Concern
Kementerian Pendidikan	Jaringan Orang Asal Se-Malaysia
Kementerian Kesihatan	Sahabat Alam Malaysia (SAM)
Kementerian Komunikasi dan Multimedia	Researchers and academics
Kementerian Pembangunan Luar Bandar	

## APPENDIX 1: UNDRIP

Copy of the United Nations Declaration on the Rights of Indigenous Peoples

**General Assembly**Distr.: General  
2 October 2007**Sixty-first session**

Agenda item 68

**Resolution adopted by the General Assembly on 13 September 2007***[without reference to a Main Committee (A/61/L.67 and Add.1)]***61/295. United Nations Declaration on the Rights of Indigenous Peoples**

The General Assembly,

*Taking note* of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,<sup>1</sup> by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

*Recalling* its resolution 61/178 of 20 December 2006,<sup>295</sup> by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

*Adopts* the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

*107th plenary meeting  
13 September 2007***Annex****United Nations Declaration on the Rights of Indigenous Peoples***The General Assembly,*

*Guided by* the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

*Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

*Affirming also* that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

*Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

*Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

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<sup>295</sup> See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A. A/RES/61/295 2

*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources, Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

*Welcoming* the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

*Emphasizing* the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

*Recognizing* in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

*Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

*Considering* also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights<sup>296</sup> and the International Covenant on Civil and Political Rights,<sup>297</sup> as well as the Vienna Declaration and Programme of Action,<sup>297</sup> affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

*Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

*Emphasizing* that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

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<sup>296</sup> See resolution 2200 A (XXI), annex.

<sup>297</sup> A/CONF.157/24 (Part I), chap. III.

*Believing* that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

*Article 1*

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights<sup>298</sup> and international human rights law.

*Article 2*

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

*Article 3*

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

*Article 4*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

*Article 5*

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

*Article 6*

Every indigenous individual has the right to a nationality.

*Article 7*

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

*Article 8*

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

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<sup>298</sup> Resolution 217 A (III).

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

#### *Article 9*

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

#### *Article 10*

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

#### *Article 11*

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

#### *Article 12*

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

#### *Article 13*

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

#### *Article 14*

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

#### *Article 15*

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

#### *Article 16*

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

#### *Article 17*

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

#### *Article 18*

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

#### *Article 19*

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

#### *Article 20*

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

#### *Article 21*

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

*Article 22*

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

*Article 23*

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

*Article 24*

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right. Article 25 Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

*Article 26*

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

*Article 27*

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

*Article 28*

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which

they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

#### *Article 29*

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

#### *Article 30*

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

#### *Article 31*

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

#### *Article 32*

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

#### *Article 33*

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures. Article 34 Indigenous peoples have the right

to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

*Article 35*

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

*Article 36*

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

*Article 37*

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

*Article 38*

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

*Article 39*

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

*Article 40*

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

*Article 41*

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

*Article 42*

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

*Article 43*

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

*Article 44*

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

*Article 45*

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

*Article 46*

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

## APPENDIX 2: LIST OF ABBREVIATIONS

APA	Aboriginal Peoples Act 1954
CERD	Elimination for All Forms of Racial Discrimination
FGD	Focus Group Discussion
FPIC	Free, Prior and Informed Consent
IAL	Interior Area Land
ICCPR	International Covenant on Civil and Political Rights
IESCR	International Covenant on Economic, Social and Cultural Rights
<i>IPRA</i>	The Indigenous Peoples' Rights Act of 1997 (IPRA 1997) (The Philippines)
JAKOA	Jabatan Kemajuan Orang Asli (Department of Orang Asli Development)
KEDAP	Kelas Dewasa Orang Asli dan Peribumi (Orang Asli and Indigenous Adult Classes)
MOH	Ministry of Health
MZL	Mixed Zone Land
NAL	Native Area Land
NCIP	National Commission on Indigenous Peoples (The Philippines)
NCL	Native Customary Land
NCR	Native Customary Rights
NGO	Non-governmental Organisation
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNHRC	United Nations Human Rights Committee

## APPENDIX 3: LIST OF LOCAL LEGISLATION REFERRED

*Aboriginal Peoples Act 1954*  
*Access to Biological Resources and Benefit Sharing Act 2017*  
*Customary Tenure Enactment Negeri Sembilan 1909*  
*Education Act 1966*  
*Federal Constitution*  
*Land Code (Amendment) Ordinance, 2018 (Cap A179) (Sarawak)*  
*Law Reform (Marriage and Divorce) Act 1976*  
*Malay Reservation Enactment 1933*  
*Malay Reservation Enactment Johor 1936*  
*Malay Reservation Enactment Kedah 1931*  
*Malay Reservation Enactment Kelantan 1930*  
*Malay Reservation Enactment Perlis 1935*  
*Malay Reservation Enactment Terengganu 1941*  
*National Forestry Act 1984*  
*National Land Code 1965*  
*National Parks Act 1980*  
*Protection of Wildlife Act 1974*  
*Sabah Biodiversity Enactment 2000*  
*Sabah Conservation Enactment 1997*  
*Sabah Forestry Enactment 1968*  
*Sabah Inland Fisheries and Aquaculture Enactment 2003*  
*Sabah Land Ordinance (Cap. 68)*  
*Sabah Native Courts (Native Customary Laws) Rules 1995*  
*Sarawak Land (Classification) Ordinance 1948*  
*Sarawak Land Code 1958 (Cap 81)*  
*Sarawak Native Customary Law Ordinance (Cap 51)*  
*Wildlife Conservation Act 2010*

## APPENDIX 4: DATA COLLECTION

The following table provides details on the consultations made throughout the project:

No	Program	Descriptions	Date
1	Focus group discussion	<p>The FGD was conducted in Kuching involving:</p> <ol style="list-style-type: none"> <li>1. Sarawak Dayak Iban Association (SADIA)</li> <li>2. Jaringan Orang Asal SeMalaysia</li> <li>3. Society for Rights of Indigenous People of Sarawak</li> <li>4. Assoc Prof Dr Zaimuariffudin Shukri Nordin UNIMAS</li> <li>5. Dr Sayuti Hassan, UKM</li> </ol>	26 Jan 2020
2	Focus group discussion	<p>The FGD was conducted in Kota Kinabalu, Sabah.</p> <p>The discussion involved participants from Suhakam and Land Claim Committee representatives.</p> <p>List of participants:</p> <ol style="list-style-type: none"> <li>1. Heflin Dino (SUHAKAM Sabah)</li> <li>2. Datuk Jhonny Intang (Jawatankuasa Tuntutan Tanah Adat Daerah Tongod)</li> <li>3. Washington Ramli (Jawatankuasa Tuntutan Tanah Adat Daerah Tongod)</li> <li>4. Moses Koh (Jawatankuasa Tuntutan Tanah Adat Daerah Tongod)</li> <li>5. Lustina Samir (Jawatankuasa Tuntutan Tanah Adat Daerah Tongod)</li> <li>6. Micheal Tamoi (Jawatankuasa Tuntutan Tanah Adat Daerah Tongod)</li> <li>7. Benson Inggam (Jawatankuasa Tuntutan Tanah Adat Daerah Tongod)</li> <li>8. Suzalie Mohamad, UMS</li> <li>9. Profesor Madya Dr. Rohaida Nordin, UKM</li> <li>10. Husna Azman, USIM</li> </ol>	30 Jan 2020
3	Interview	<p>The interview was conducted in COAC office in Subang Jaya. The list of participants:</p> <ol style="list-style-type: none"> <li>1. Dr Colin Nicholas, an expert in Orang Asli issue on 22 January 2020</li> <li>2. Dr Izawati Wook, USIM</li> <li>3. En Al-Hanisham Mohd Khalid, UUM</li> </ol>	22 January 2020

4	Focus group discussion	<p>The FGD was conducted in UKM. The list of participants:</p> <ol style="list-style-type: none"> <li>1. Mr Amani Williams-Hunt - a member of national economic council and an Orang Asli lawyer on 28 February 2020</li> <li>2. Pn Faridah Goh, an Orang Asli from Melaka</li> <li>3. Prof Madya Dr Rohaida Nordin, UKM</li> <li>4. Dr Zanisah Man, UKM</li> <li>5. Dr Sayuti Hassan, UKM</li> <li>6. Dr Izawati Wook, USIM</li> </ol>	28 Feb 2020
5	Focus group discussion	<p>The FGD was conducted online through Zoom platform. The list of participants:</p> <ol style="list-style-type: none"> <li>1. Associate Professor Wan Ahmad Amir Zal Wan Ismail, an academic specialising on socio-economic studies and poverty</li> <li>2. Prof Madya Dr Rohaida Nordin, UKM</li> <li>3. Dr Zanisah Man, UKM</li> <li>4. Dr Sayuti Hassan, UKM</li> <li>5. Dr Izawati Wook, USIM</li> </ol>	30 April 2020
6	Focus group discussion	<p>The FGD was conducted at KP Meeting Room, Jabatan Kemajuan Orang Asli, Kuala Lumpur. The list of participants:</p> <ol style="list-style-type: none"> <li>1. Prof Dr Juli Edo, Ketua Pengarah, Jabatan Kemajuan Orang Asli</li> <li>2. Dr Zanisah Man, UKM</li> <li>3. Assoc Prof Dr Rohaida Nordin, UKM</li> <li>4. Dr Izawati Wook (joined online)</li> </ol>	9 July 2020
7	Focus group discussion	<p>The FGD was conducted at Kolektif Borneo Komrad office, Manjalara, Kuala Lumpur. The list of participants:</p> <ol style="list-style-type: none"> <li>1. Cik Wan Shakila, Manager, Borneo Komrad</li> <li>2. Prof Madya Dr Rohaida Nordin, UKM</li> <li>3. Dr Sayuti Hassan, UKM</li> <li>4. Dr Izawati Wook, USIM</li> </ol>	7 Ogos 2020
8	Focus group discussion	<p>The FGD was conducted online through Zoom platform. The list of participants:</p> <ol style="list-style-type: none"> <li>1. Mr Peter Kallang – Save River</li> <li>2. Mr. Simon Siah, a lawyer having good experience and well informed on matters concerning the NCR and land Sarawak Land Code.</li> </ol>	21 August 2020

		<ol style="list-style-type: none"> <li>3. Mr. Thomas Jalong, the General Secretary of Jaringan Orang Asal SeMalaysia (JOAS)</li> <li>4. Dr Izawati Wook, USIM</li> <li>5. Assoc Prof Dr Zaimuariffudin Shukri Nordin, UNIMAS</li> </ol>	
6	Personal Interviews	<p>List of interviewees:</p> <ol style="list-style-type: none"> <li>1. En Ahmad Razak, Officer, Pejabat Ketua Menteri Sarawak (30 April 2020).</li> <li>2. Dr. Izandis Bin Mohamad Sayed, Kementerian Kesihatan (January 2020 – En Hanisham).</li> <li>3. Dr Aminuddin b Mohamed AMP, pensyarah Institut Pendidikan Guru Tuanku Afzan, Kuala Lipis, Pahang (May 2020).</li> <li>4. Puan Hasmah Abdul Manaf, formerly a Penolong Setiausaha Bahagian Pendidikan dan Latihan SUHAKAM on 18 May 2020.</li> <li>5. En Rozaimie Mohamed, Penolong Pengarah, Bahagian Pengurusan Sekolah Harian, Kementerian Pendidikan Malaysia (June 2020).</li> <li>6. Dr Roslan Rosnon, Pensyarah, Fakulti Ekologi, Universiti Putra Malaysia (May 2020).</li> <li>7. Mr Tay Lin Hiong, Department of Agriculture (phone interview on 28 July 2020)</li> </ol>	

**4.2.3 Programs directly participated by the consultants were also relevant as the information obtained informed this project:**

No	Program	Description
1	National Convention on the Right of Orang Asli 2019	<p>This was held by the Department of Orang Asli Advancement in April 2019. The lead consultant acted as a facilitator for focus group discussion (FGD) conducted and acted as presenter for the resolution obtained from the FGD. The subject matters involved were issues on land, education, health and other socio-economic conditions of the Orang Asli communities.</p> <p>This convention gathered representatives of Orang Asli around the peninsula; government officers; NGOs; and institutions relevant including the Bar Council and Suhakam. The input from the convention contributed to the</p>

		basic plan for the national strategic plan for the Orang Asli.
2	Workshop for Development of National Strategic Plan of Orang Asli	<p>This workshop was organised by the Department of Orang Asli Advancement in 23-25 November 2019.</p> <p>The lead consultant was appointed as a facilitator and panel for focus group on Orang Asli land. Together in the panel were Mr Amani Williams-Hunt and Dr Yogeswaran Subramaniam, who were counsels for land claim cases by the Orang Asli.</p> <p>Two other consultants were involved as FGD participants for economic and cultural rights of the Orang Asli.</p> <p>This workshop gathered experts in the subject matter; representatives from state governments; and a government department related to land, survey, forestry and wildlife to obtain their perspectives in the direction of the policy development relating to Orang Asli. The information obtained from this program informed this project.</p>
3	Land and Indigeneity: Experience from the First Nations of Canada	Discussion on understanding the connection between land and society through the indigenous peoples, conducted in UKM, Bangi on 25 Nov 2019. The panel for discussion were Mr Anthony Williams-Hunt, who is an Orang Asli and Dr Tran Tran from Australia. A co-consultant acted as a moderator in the program.
4	Seminar Orang Asal 2019	The seminar was conducted in Universiti Malaysia Sabah in 20 Dec 2019 participated by co-consultant.
5	<i>Simposium Minda Merdeka: Hala Tuju Orang Asli Era Malaysia Baru</i>	<p>The focus group discussion involving Orang Asli and scholars conducted in Tenera Hotel, Bangi on 18 August 2018 – discussing the aspiration of the Orang Asli from their perspectives on land, culture, leadership, education and economic development. The participants were:</p> <ol style="list-style-type: none"> <li>1. Dr Juli Edo</li> <li>2. Batin Norya Abas (Chairman, Persatuan Orang Asli Semenanjung Malaysia)</li> <li>3. Achom Luji (retiree, OA from Perak)</li> <li>4. Mahat Akiya (OA novelist, from Perak)</li> </ol>

		<ol style="list-style-type: none"> <li>5. Melati Jamil (OA, Selangor)</li> <li>6. Sarimah Jamil (OA, Selangor)</li> <li>7. Norhayati (OA, Pahang)</li> <li>8. Emeritus Prof Dato' Dr Hood Salleh (UKM)</li> <li>9. Dr Aminuddin Mohamed (IPG)</li> <li>10. Dr Noor Sazaai Mat Saad (USIM)</li> <li>11. Dr Fariza Puteh Behak (USIM)</li> <li>12. Dr Izawati Wook (USIM)</li> <li>13. Prof Madya Dr Mahazan Abdul Mutalib (USIM)</li> <li>14. Hj Razak Hussin (UKM)</li> <li>15. Dr Vivien WC Yew (UKM)</li> </ol>
6.	Orang Asli Speaks: Facing Post MCO Challenges	An online forum on issues faced by Orang Asli women, youth, grassroots members, children, entrepreneurs and such. The panelists were Dr Juli Edo Director of JAKOA, Dr Bahari Belaton, YB Bob Manolan.

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