RIGHTS DENIED: ORANG ASLI AND RIGHTS TO PARTICIPATE IN DECISION-MAKING IN PENINSULAR MALAYSIA

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I. INTRODUCTION[1]

Despite Malaysia's vote in favour of the 2007 United Nations Declaration on the Rights of Indigenous People ("UNDRIP"),[2] this paper contends that Orang Asli, the Indigenous minority in Peninsular Malaysia,[3] continue to possess, at best, nominal rights to participate in domestic decision-making processes and institutions, particularly in matters affecting them as a distinct Indigenous group. This paper examines existing domestic laws and policies affecting Orang Asli, contending that the position of Orang Asli as wards of the State coupled with the lack of State recognition of Orang Asli legal systems and institutions and lands, territories and resources contribute to this state of affairs.

By way of background, this paper introduces Orang Asli as an Indigenous minority in the context of Malaysia before examining the UNDRIP and its relevance to Malaysia. It then examines the various statutory laws affecting Orang Asli legal systems, institutions and lands and resources with reference to the relevant provisions of the UNDRIP. As the nascent development of the doctrine of common law Orang Asli customary land rights now forms part of the recourse available to Orang Asli for customary land claims, this paper introduces the doctrine but focuses on the challenges faced by Orang Asli in instituting and succeeding in the civil courts. Before making its concluding remarks relating to the challenges faced by Orang Asli in the effective recognition of their rights to self-determination and over their customary lands and resources, this paper includes the recent proposed Orang Asli land titles policy ("the Proposed Policy") as an illustration of the problematic nature of implementing free, prior and informed consent ("FPIC") and consultation without Orang Asli possessing such rights.

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1 The contents of this paper are drawn from various chapters of his draft thesis. Accordingly, the author would like to thank his supervisors, Janice Gray and Sean Brennan for their comments on these chapters. This paper is also a revised version of the paper entitled "Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia" presented by the author at the Justice in Round: Perspectives from Custom and Culture, Rights and Dispute Resolution at Te Piringa-Faculty of Law, University of Waikato, Hamilton, New Zealand from 18-20 April 2011. The author has attempted to state the law as at 15 May 2011. Any views and errors in this paper are solely attributable to the author.

2 GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/Res/61/295 (2007).

3 For a brief account of who are the Orang Asli, see section II below.

II. Orang Asli as an Indigenous Minority in Malaysia

The Federation of Malaysia comprises Peninsular Malaysia,[4] located between the Straits of Malacca and the South China Sea, and the states of Sabah and Sarawak and the federal territory of Labuan, located on the northern quarter of the island of Borneo across the South China Sea. In 2010, the population of Malaysia stood at 28.3 million.[5] 2004 estimates indicate that the population is divided into Malays (50.4 per cent), Chinese (23.7 per cent), other Indigenous groups (11 per cent), Indians (7.1 per cent) and other races (7.8 per cent).[6]

Malays, explicitly mentioned in the *Malaysian Constitution*,[7] are the numerically and politically dominant Indigenous[8] ethnic group in Peninsular Malaysia. "Orang Asli" (the English version of the *Malaysian Constitution* refers to them as "Aborigines") refer to 18 ethnic aboriginal sub-groups in Peninsular Malaysia officially categorised as *Negrito*, *Senoi* and Aboriginal Malay and are said to be "first peoples" of Peninsular Malaysia.[9] Orang Asli groups identify themselves by their specific ecological niche, which they call their customary land (*tanah* or *wilayah adat*), and have a close affinity with it.[10] At the end of 2008, Orang Asli numbered only approximately 141,230, around 0.5 per cent of the population of Malaysia.[11] The two "other" Indigenous minority groups mentioned in the *Malaysian Constitution* are natives of Sabah and Sarawak.[12] Both these groups are Indigenous to the island of Borneo, thus having no "traditional connection" with the lands of Peninsular Malaysia.

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4 Peninsular Malaysia consists of eleven states (Perlis, Kedah, Penang, Perak, Selangor, Negeri Sembilan, Melaka (Malacca), Kelantan, Terengganu, Pahang and Johor) and two federal territories (Kuala Lumpur and Putrajaya).

5 Department of Statistics, Malaysia, *Malaysia @ a Glance*, 23 June 2011 <www.statistics.gov.my/portal/index.php?option=com_content&view=article&id=472&Itemid=156&lang=en>.

6 Central Intelligence Agency, *The World Factbook: Malaysia*, 23 June 2011 <www.cia.gov/library/publications/the-world-factbook/print/my.html>.

7 See eg definition of "Malay" art 160(2) repeated below n 14.

8 Whether Malays are indeed "Indigenous" by definitions contained in various international fora has been a subject of contention among commentatators due to a number of reasons, including the cultural and particularly, *religious* constitutional criteria to qualify as a "Malay", their lack of a special attachment to a particular ecological niche and non-self-identification as being "Indigenous" at international fora (See eg Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: from Rhetoric to Recognition* (COAC and JOAS, Subang Jaya (Malaysia), 2010)). Notwithstanding these arguments, the special position of Malays as a privileged ethnic group under the *Malaysian Constitution* remains clear. For a definition of a Malay under the *Malaysian Constitution*, see below n 14.

9 See Colin Nicholas, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia* (IWGIA, Copenhagen, 2000), at 4-6; Robert Knox Dentan et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn & bacon, Needham Heights (MA), 1997), at 10-12.

10 See eg Nicholas, above n 9, at 12; Colin Nicholas, "Background on the Orang Asli and their Customs on Native Land" (Paper presented for In-Depth Discussion on Native Customary Land Rights of the Orang Asli in Peninsular Malaysia, SUHAKAM, Kuala Lumpur, 13 June 2009), at 5.

11 Department of Orang Asli Affairs ("*DOA*"), *Data Maklumat Asas* [*Basic Information Data*] (2008) (translated from *Bahasa Malaysia* by the author), at 8.

12 For constitutional definitions of these four groups, see below nn 13-16.

Constitutionally, Orang Asli,[13] ethnic Malays,[14] natives of Sabah,[15] and natives of Sarawak[16] are afforded distinctive rights and privileges by virtue of their constitutionally-defined ethnicity. Politically, these groups are categorised as *bumiputera*[17] when it comes to policies for the realisation of affirmative action privileges but enjoy a varying level of privileges depending on the group. For instance, Malays and natives of Sabah and Sarawak possess special constitutional rights in respect of reservation of quotas in the public service, education and for the operation of regulated trade or business (art 153). Malays also possess explicit constitutional provisions for the protection of their reservation lands (art 89). On the other hand, the minority Orang Asli, whose history in the Malay Peninsula goes back well before the establishment of the Malay sultanates in the early 15th century, do not enjoy equivalent constitutional rights.

Instead, Orang Asli possess a special status under art 8(5)(c) of the *Malaysian Constitution* that enables laws "for the protection, well-being or advancement" of Orang Asli (including the reservation of land) or the reservation to Orang Asli of "a reasonable proportion of suitable positions in the public service" without offending the constitutional equal protection clause enshrined in art 8(1). In addition, the *Malaysian Constitution* empowers the Federal Government to legislate for the "welfare of Orang Asli".[18] The preamble to the *Aboriginal Peoples Act 1954* (Malaysia)

13 The definition of an Orang Asli under Art 160(2) of the *Malaysian Constitution* does not shed light on who is an Orang Asli as it is merely stated to mean an "aborigine of the Malay Peninsula". Section 3 of *Aboriginal People Act 1954* (Malaysia) ("*APA*") provides for the definition of an Orang Asli. It defines an aborigine (in Bahasa Malaysia, Orang Asli) to mean (a) 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 descendent through males of such persons; (b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or (c) the child of any union between an aboriginal female and a male of another race, provided 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. Under s 2, an "aboriginal ethnic group" means a distinct tribal division of aborigines as characterised by culture, language or social organisation and includes any group that the State Authority may, by order, declare to be an aboriginal ethnic group. Section 3(3) empowers the Minister having charge of Orang Asli affairs to determine any question whether a person is an Orang Asli. The issue of a member of the Executive having unilateral power over who is an Orang Asli is revisited in section IIIA1.

14 A "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and (a) was before *Merdeka* Day (Independence day, 31 August 1957) born in Malaya or Singapore, or is on that day domiciled in the Peninsular Malaysia or in Singapore; or (b) is the issue of that person (see art 160(2) *Malaysian Constitution*).

15 Article 161A(6)(b) of the *Malaysian Constitution* provides that a native in relation to Sabah is a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day (16 September 1963) or not) either in Sabah or to a father domiciled in Sabah at the time of birth. For further reading on who is Indigenous in Sabah, see eg Bulan, Ramy, "Indigenous Identity and the Law: Who is a Native?" (1998) 25 *Journal of Malaysian and Comparative Law* 127.

16 Article 161A(6)(a) of the *Malaysian Constitution* provides that a native in relation to Sarawak is a person who is a citizen, is the grandchild of a person of the Bukitan, Bisayah, Dusun, Sea Dayak, Land Dayak, Kadayan, Kalabit, Kayan, Kenyah (including Subup and Sipeng), Kajang (including Sekapan, Kejaman, Lahanan, Punan, Tanjong and Kanowit), Lugat, Lisum, Malay, Melano, Murut, Penan, Sian, Tagal, Tabun and Ubit race or is of mixed flood deriving exclusively from these races. For further reading, see eg Bulan, above n 15.

17 Literally translated from Bahasa Malaysia, sons of the soil.

18 See ninth sch List I - Federal List Item 16.

("APA"), the principle statute governing the administration of Orang Asli, states that it is an act for the "protection, well-being and welfare" of Orang Asli.[19]

A. Wards or Stepchildren of the State?

Despite their status as wards of the State, Orang Asli continue to be politically, economically, culturally and socially marginalised.[20] After more than 50 years of government stewardship and various policy prescriptions, 50 per cent of Orang Asli remained below the poverty level in 2009 when the corresponding national level stood at 3.8 per cent.[21]

It is contended that the legal stranglehold that the government has over Orang Asli by virtue of being their guardians has, in many ways, stifled the voice of the Orang Asli in determining their own priorities in terms of political, cultural, social and economic development. Paternalistic government policies, justified by the need to "mainstream" and "integrate" Orang Asli society and fuelled by the national development agenda, have contributed to the gradual weakening of the inextricable link between Orang Asli and their customary lands through regroupment schemes, expropriation and State acquiescence to encroachment. These lands, like for many other Indigenous communities worldwide, are crucial for the continued vitality of Orang Asli culture, identity and well-being.[22]

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19 A common law fiduciary duty owed by the Federal and state governments to the Orang Asli has been gleaned by the Malaysian Courts from, amongst others, these provisions (see *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 Mal LJ 591, at 619). However, the true potential and extent of this fiduciary duty is yet to be explored in the Malaysian courts. For commentary, see eg Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Rights in Sarawak* (SUHAKAM, Kuala Lumpur, 2007), at 155-160.

20 These issues have been discussed and analysed extensively. For further reading, see generally eg Anthony Williams-Hunt, "Land Conflicts: Orang Asli Ancestral Laws and State Policies" in Razha Rashid (ed), *Indigenous Minorities of Peninsular Malaysia: Selected Issues and Ethnographies* (Intersocietal and Scientific Sdn Bhd (INAS), Kuala Lumpur, 1995); Wazir Jahan Karim, "Malaysia's Indigenous Minorities: Discrepancies between Nation-Building and Ethnic Consciousness" in Razha Rashid (ed), *Indigenous Minorities of Peninsular Malaysia: Selected Issues and Ethnographies* (Intersocietal and Scientific Sdn Bhd (INAS), Kuala Lumpur, 1995); Lim Heng Seng, "The Land Rights of the Orang Asli" in Consumers' Association of Penang (ed), *Tanah Air Ku: Land Issues in Malaysia* (Consumers' Association of Penang, Penang, 1998); Colin Nicholas, above n 9; Dentan and others, above n 9; Alberto Gomes, *Looking for Money: Capitalism and Modernity in an Orang Asli Village* (COAC and Trans-Pacific Press, Melbourne, 2004); Kirk Endicott and Robert Knox Dentan, "Into the Mainstream or Into the Backwater: Malaysian Assimilation of Orang Asli" in Christopher R Duncan, *Southeast Asian Government Policies for the Development of Minorities* (Cornell University Press, NY, 2004); Alice M Nah, "Negotiating Orang Asli Identity in Postcolonial Malaysia" (MSocSc Thesis, National University of Singapore, 2004); Mustaffa Omar, "Penilaian Impak Sosial Rancangan Pengumpulan Semula (RPS) Orang Asli" [An Evaluation of the Social Impact of Orang Asli RPS] (Paper presented at National Conference "Orang Asli After 50 years of Independence of Malaysia: Contribution and Achievement of the Orang Asli in National Development", Muzium Seni Malaysia, University of Malaya, 18-19 November 2008) [translated by the author]; Nicholas, Engi and Teh, above n 8; Rusaslina Idrus, "From Wards to Citizens: Indigenous Rights and Citizenship in Malaysia" (2010) 33(1) *Political and Legal Anthropology Review* 89.

21 The Economic Planning Unit, Prime Minister's Department, *Tenth Malaysia Plan 2011-2015* (Prime Minister's Department, Putrajaya (Malaysia), 2010).

22 See eg Williams-Hunt, above n 20, at 35-36.

1. National development agenda

The Malaysian government's goal is to make Malaysia a fully industrialised country with a standard of living similar to other developed countries by the year 2020. This goal is known as *Wawasan 2020*.[23] Towards achieving this goal, there has been rapid development in the form of large infrastructure and commercial projects in Malaysia. These projects have many a time involved the dispossession of the Orang Asli, regarded by the State as having an interest in their lands no better than that of a tenant-at-will.[24] In fact, landmark cases recognising common law Orang Asli customary land rights involved lands taken for large government infrastructure projects. The case of *Adong bin Kuwau v Kerajaan Negeri Johor*,[25] involved around 53,000 acres of *Jakun*[26] customary land taken for the construction of the Linggiu hydroelectric dam in Johor. *Sagong bin Tasi v Kerajaan Negeri Selangor*[27] concerned land occupied by a *Temuan*[28] settlement acquired for the construction of what is presently the highway to the Kuala Lumpur International Airport.

The Department of Orang Asli Affairs (since January 2011, the Department of Orang Asli Development) ("DOA"), the Malay-dominated government agency charged with the responsibility of Orang Asli welfare, frequently appears to be in a position of conflict of interest where the State wishes to appropriate Orang Asli customary lands. On the one hand, they purportedly represent the Orang Asli interests,[29] usually without meaningful Orang Asli participation, and on the other hand, their status as a government agency may necessarily involve advancing State interests.[30] The competing tensions between these two interests puts the DOA in a difficult position whenever it may need to question government action in order to carry out its assumed function of representing Orang Asli interests.

Private deforestation and development has also contributed to Orang Asli land woes with many cases of encroachment over the years.[31] One such example is Kampong Sebir in the state

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23 Translated literally from Bahasa Malaysia, "Vision 2020". For further reading on Vision 2020, see Mahathir Mohamad, "The Way Forward – Vision 2020" (Copy of speech by the Prime Minister on 28 February 1991), (2008) Wawasan2020 <www.wawasan2020.com/vision>. Vision 2020 has been recallibrated by the more recent *1Malaysia* concept but still remains a national aspiration. See 1Malaysia The Personal Website of Dato' Sri Najib Razak, *1Malaysia Booklet* (2010) <www.1malaysia.com.my/about/about-1malaysia/1malaysia-booklet/>.

24 This is by virtue of the statutory rights of occupancy conferred by the *APA*, that are no better than a tenant-at-will (s 8). Further s 7(3) of the *APA* allows lands decalared by the state as Orang Asli reserves to be revoked wholly or in part or varied unilaterally (see See Lim Heng Seng, "The Land Rights of the Orang Asli" (Paper Presented at the CAP National Conference on Land: Emerging Issues and Challenges, Penang, Malaysia, 12-15 December 1997), at 11; Yogeswaran Subramaniam, "Beyond Sagong bin Tasi: The Use of Traditional Knowledge to Prove Aboriginal Customary Rights Over Land in Peninsular Malaysia and its Challenges", [2007] 2 Mal LJ xxx, at xxxiii; Cheah Wui Ling, "Sagong Tasi: Reconciling State Development and Orang Asli Rights in Malaysian Courts" (Working Paper No 25, Asia Research Institute, National University of Singapore, 2004), at 1; Nicholas, above n 9, at 33).

25 [1997] 1 Mal LJ 418.

26 *Jakun* are an Orang Asli ethnic sub-group.

27 Above n 19.

28 *Temuan* are an Orang Asli ethnic sub-group.

29 The role of *DOA* is critically examined in other parts of this paper. See below Sections IIA3, IIIA1 and V.

30 Nicholas, above n 9, at 110.'State' refers to the Malaysian government and/or individual governments within the nation-state unless defined to the contrary or the context requires otherwise. On the other hand, 'state' refers to individual states of the Federation of Malaysia unless the context requires otherwise.

31 The Center for Orang Asli Concerns (COAC) has extensively documented cases of encroachment involving Orang Asli lands. This information can be accessed from COAC's web site at <www.coac.org.my>.

of Negri Sembilan. In early 2009, the *Temuan*[32] settlement in Kampong Sebir complained to the local press of encroachment over their customary land by land developers. The state (presumably on behalf of the developers) contended that it had legally leased the land to the developers. In response, the state assemblyman (a member of the state legislature) commented that "Orang Asli cannot claim ownership of land they claim as customary" while another state official said that the customary land in question belonged to the state and was accordingly leased to developers.[33] In spite of the DOA being party to both earlier mentioned landmark customary land cases,[34] its state director was quick to respond that Orang Asli customary land "does not belong to them".[35] The lack of interest in inquiring into the possible existence of common law customary land rights in Kampong Sebir epitomises the continued apathy of the State to Orang Asli customary land rights in the face of development.

2. Orang Asli policies: Integration and assimilation

The 1961 *Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia* ("1961 Policy"),[36] still in force,[37] states, amongst others, that the "[g]overnment should adopt suitable measures designed for their protection and advancement with a view to their ultimate integration with the Malay section of the community". While providing a measure of protection for Orang Asli,[38] the 1961 Policy reflects the then prevailing attitude towards Indigenous populations as peoples in need of protection pending their eventual integration into mainstream society through paternalistic policies for their "advancement".

In the 1980s, the integrationist approach was stretched to what may be seen as an assimilationist approach, namely, the *dakwah*[39] (Islamic missionary activity) or the process of Islamisation of Orang Asli. Conversion to Islam would arguably facilitate Orang Asli "becoming" Malay as defined under the art 160(2) of the Malaysian Constitution.[40] Theoretically, a Muslim Orang Asli need only habitually speak Malay and practice "Malay customs" to fulfil this definition. The *dakwah* programme involves the implementation of a "positive discrimination" policy towards Orang Asli who converted, with material benefits given both individually and via development projects.[41] Despite being pursued more or less covertly, there is an abundance of literature to demonstrate that the Islamisation policy is not a closely guarded secret.[42]

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32 *Temuan* are an Orang Asli ethnic sub-group.

33 See Dharshini Balan and Heidi Foo, "Show consideration and respect to us, pleads Tok Batin" *New Straits Times*, (Malaysia, 16 February 2009); Dharshini Balan and Heidi Foo, "Ungazetted customary land belonged to state government" *New Straits Times*, (Malaysia, 16 February 2009).

34 See above nn 25 and 27 and accompanying text.

35 Sarban Singh and CS Nathan, "Orang Asli land dispute" *The Star Metro*, (Malaysia, 3 January 2009).

36 Ministry of the Interior, Federation of Malaya (1961).

37 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 619.

38 The *1961 Policy* is examined below at Section IIIA2.

39 Translated from Bahasa Malaysia, Islamic missionary activity.

40 See definition of "Malay" above at n 14.

41 See Endicott and Dentan, above n 20, at 34; Nicholas, above n 9, at 98-102. Nicholas refers, amongst others, to a 1983 *DOA* Strategy paper in support of this argument (at 98).

42 There is a plethora of literature on the Islamisation policy and its existence, see eg Geoffrey Benjamin, "On Being Tribal in the Malay World", in in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (ISEAS, Singapore, 2002), at 50-54; Nicholas, above n 9, at 98-103; Endicott and Dentan, above n 20, at 29-30; 44-47; Dentan and others, above n 20, at 79-83; 142-150.

Commentators have argued that absorption of the Orang Asli into the Malay population would increase the number of Malay votes and would eliminate a category of people arguably "more Indigenous" than the Malays.[43] This conclusion has been a point of contention. Statements by Malaysian leaders as to Orang Asli Indigeneity have not clarified matters. Post retirement, the first Prime Minister of Malaysia, Tunku Abdul Rahman stated: [44]

> there was no doubt that the Malays were the indigenous peoples of this land because the original inhabitants did not have any form of civilization compared with the Malays…and instead lived like primitives in mountains and thick jungle.

Another ex-Prime Minister, Dr Mahathir Mohamad has contended that the Malays are the original or Indigenous peoples of Peninsular Malaysia as they formed the "first effective governments" and outnumbered the Orang Asli.[45] In addition to being outmoded and discriminatory against Orang Asli social organisation, these arguments erroneously relate to an exclusive notion of Indigeneity in Peninsular Malaysia and avoid a more pertinent "rights" question, namely, the denial of the special rights of Orang Asli as a distinct Indigenous minority under the *Malaysian Constitution* and now, the UNDRIP.

Benjamin has contended that assimilation is seen as acceptable in some quarters of the Malay community where Orang Asli are seen as "incomplete" Malays, requiring only Islam and an acceptance of social hierarchy to make them complete.[46] Many devout Muslim Malays believe that conversion to Islam would uplift the Orang Asli and provide them "spiritual development".[47] Nicholas goes further by contending that the Islamisation policy coupled with other relocation and development policies have a unifying ideological objective.[48] They enable the control of a people and control their traditional territories. However, official statistics show that only around 20 per cent of Orang Asli households are Muslim after more than 20 years of Islamisation,[49] in spite of allegations of inaccuracy and bias against these figures.[50]

3. Regroupment policies

The main policies for economically mainstreaming Orang Asli largely centre on "regroupment" plans ("RPS").[51] The RPS functions to transform participants into settled, self-sufficient farmers after the five years required for their cash crops (usually palm oil or rubber) to become productive.[52] However, a recent study in relation to the 11 RPS involving 1,905 of the 4,322 participating Orang Asli families revealed that 53.5 per cent of the households lived below poverty level.[53] It is no surprise that Orang Asli facing such a predicament end up reverting to their traditional economic activities to supplement their income.[54] Lack of work opportunities in the RPS have also

43 Endicott and Dentan, above n 20, at 30.

44 "Tunku: No reason to doubt the position Malays", *The Star*, (Malaysia, 6 November 1986).

45 Mahathir Mohamad, *The Malay Dilemma* (Asia Pacific Press, Singapore, 1970), at 126-127.

46 Benjamin, above n 42, at 51.

47 Dentan and others, above n 9, at 81.

48 Nicholas, above n 9, at 102-103.

49 *DOA*, above n 11, at 18.

50 See Endicott and Dentan, above n 20, at 46.

51 Translated from the Bahasa Malaysia term, *Rancangan Pengumpulan Semula*.

52 Endicott and Dentan, above n 20, at 40.

53 Mustaffa Omar, above n 20, at 9.

54 Ibid, at 10.

driven Orang Asli youths to find low wage-earning jobs in urban areas.[55] The development of the RPS infrastructure, the responsibility of the DOA, has also been said to be poor.[56] Perhaps more importantly for current purposes, RPS has resulted in the loss of Orang Asli traditional lands. When Orang Asli are regrouped, their lands are substantially diminished in size. In RPS Betau, for instance, a group of east *Semai*[57] was allotted 95.1 hectares, which represented barely 1.4 per cent of their claim to 7000 hectares of communal land.[58] RPS also does not provide any security of tenure to the Orang Asli as titles are not automatically issued in respect of land subject to the scheme. Worse still, many RPS are not gazetted as aboriginal reserves or areas under the APA rendering participating Orang Asli worse off as far as security of tenure is concerned.[59]

These land policies, including their variants and the Proposed Policy discussed below at Section V, serve to homogenise many Orang Asli into cash crop smallholders, dependent on Government-aided schemes for individual security of tenure and economic well-being. Continued observance of these policies would adversely impact Orang Asli culture and identity within the nation state yet may not necessarily alleviate their deprived socio-economic status to that of other non-Indigenous communities in Malaysia. More pertinently for the purposes of this paper, seldom are Orang Asli engaged or consulted in a meaningful way when any of these policies are formulated. In other words, they have little or no control over life-changing decisions affecting them.

B. Malaysia and the UNDRIP

While there are strong arguments that certain provisions in the UNDRIP already form part of customary international law and binding international treaties,[60] it must also be appreciated the Malaysia inherited a dualist theory of law where international laws have no direct application domestically.[61] Unlike some other jurisdictions where international law is incorporated as part of domestic law,[62] the *Malaysian Constitution* does not contain any provision that deems international law as part of domestic law. Article 74(1) of the *Malaysian Constitution* states that the Federal

55 Ibid, 10-11.

56 For a more recent study on the implementation of RPS, see Mustaffa Omar, above n 20, at 16. For further reading, see Nicholas, above n 9, at 113-119; Dentan et al, above n 9, at 130-136.

57 *Semai* are an Orang Asli ethnic sub-group.

58 See Colin Nicholas, "In the Name of the Semai? The State and Semai Society in Peninsular Malaysia" in LT Ghee and Alberto Gomes (eds), *Tribal Peoples and Development in Southeast Asia* (Department of Anthropology and Sociology, University of Malaya, Kuala Lumpur, 1990), at 71.

59 See Lim, above n 20, at 183.

60 See eg Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Analysis* (1999) 12 Harv Hum Rts J 57; S James Anaya and Siegfried Wiessner, "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment" (2007) Jurist Legal News and Research <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>; S James Anaya and RA Williams, Jr, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System" (2001) 14 Harv Hum Rts J 33; S James Anaya, *Indigenous Peoples in International Law*, (2nd Ed, Oxford University Press (NY), 2004).

61 For further reading on the dualist theory of law as applied in Malaysia, see eg Gurdial Singh Nijar, "The Application of International Norms in the National Adjudication of Fundamental Human Rights" (Paper presented at the 12th Malaysian law Conference, 10-12 December 2003); Abdul Ghafur Hamid @ Khin Maung Sein, "Judicial Application of International Law in Malaysia: A Critical Analysis)" (Paper presented at the Second Asian Law Institute (ASLI) Conference, Bangkok, Thailand, 26-27 May 2005).

62 See for example, art 25 of the *German Constitution 1949* that provides "The general rules of international law are an integral part of federal law".

"…Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List". Item 1 of the Federal List[63] empowers the Federal Government to legislate on "External Affairs, including (a) Treaties, agreements and conventions with other countries… (b) Implementation of treaties, agreements and conventions with other countries". The treaty making power is vested in the executive authority of the Federal government.[64] Thus, the Federal parliament holds exclusive power to implement international treaties made by the Executive and render them operative domestically through enabling legislation. The Malaysian courts have also given priority to local enabling laws when construing international treaties to which Malaysia is a party.[65]

Notwithstanding this, Malaysian courts have on occasion applied customary international law and international treaties through the medium of the common law.[66] Malaysian courts appear to have thus far also taken a relatively liberal approach to the assimilation of international standards into the common law in respect of Indigenous customary land rights claims.[67] While the potential for common law development of international human rights norms in Malaysia may well open up avenues for Orang Asli, the focus of this paper is different, namely, the extent to which the State grants Orang Asli rights to participate in decisions affecting them and their lands and resources with reference to the provisions of the UNDRIP.

It is nonetheless contended that Malaysia's unreserved votes in favour of the UNDRIP, both at Human Right Council and General Assembly levels,[68] create, at the very least, a genuine expectation and moral obligation that it would work towards achieving the aspirations of the UNDRIP in the "spirit of partnership and mutual respect".[69] As pointed out by the Supreme Court of Belize:[70]

> Also, importantly in this regard is the recent Declaration on the Rights of Indigenous Peoples adopted by the General Assembly of the United Nations on 13 September 2007. Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, *states are not expected to disregard them*.

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63 *Malaysian Constitution*, Ninth Schedule.

64 See *Malaysian Constitution* arts 39 and 80(1); *The Government of the State of Kelantan v The Government of the Federation of Malaya* [1963] Mal LJ 355.

65 See eg *Dato' Param Cumaraswamy v MBf Capital Bhd* [1997] 3 Mal LJ 824, at 849.

66 See eg *PP v Oie Hee Koi* [1968] 1 Mal LJ 148 (Privy Council); *Olofson v Government of Malaysia* [1966] 2 Mal LJ 300; *Village Holdings Sdn Bhd v Her Majesty the Queen in Right of Canada* [1988] 2 Mal LJ 656. Compare *PP v Narogne Sookpavit* [1987] 2 Mal LJ 100.

67 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 615; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, [2008] 2 Mal LJ 677, at 692 (Federal Court, Malaysia); *Kerajaan Negeri Johor v Adong bin Kuwau* [1998] 2 Mal LJ 158 (Court of Appeal, Malaysia) [1998] 2 Mal LJ 158, at 164 (Gopal Sri Ram JCA). In Malaysia, the Federal Court is the apex court of the land while the Court of Appeal is the other superior appelate court.

68 See *Working Group of the Commission of Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, UN HRC Res 2/2006, 1st sess, 21st mtg, UN Doc A/HRC/1/L.3 (2006); Department of Public Information, News and Media Division, United Nations General Assembly, *General Assembly Adopts Declaration on Rights of Indigenous Peoples: Major Step Towards Human Rights for All, Says President*, 13 September 2007, UNGA 10612, 61st sess, 107 & 108th mtgs (2007), 10 October 2010 <www.un.org/News/Press/docs/2007/ga10612.doc.htm> (General Assembly).

69 The quotation is extracted from preambular para 24 of the *UNDRIP*.

70 *Aurelio Cal In His Own Behalf And On Behalf Of The Maya Village Of Santa Cruz & Anor v The Attorney General Of Belize & Anor* (Claims 171 and 172 of 2007 (Consolidated)), at [131].

As a member of the Human Rights Council, Malaysia is also obligated to "uphold the highest standards in the promotion and protection of human rights".[71] If Malaysia were to honour its commitment to the UNDRIP, article 38 of the UNDRIP provides "States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration".

Consultation and FPIC are key aspects of the concept of self-determination, allowing Indigenous communities to be included in any decision-making process affecting them and, accordingly, conferring upon them control over their own priorities. A summary of the *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent endorsed by the United Nations Permanent Forum on Indigenous Issues* at its third session in 2005[72] can be paraphrased as follows.

Free implies no coercion, intimidation and manipulation. *Prior* implies that consent has been sought sufficiently in advance of any authorisation or commencement of activities and respects time requirements of Indigenous consultation/consensus processes. *Informed* implies all information regarding the activity including but not limited to the nature, size, reversibility and scope of the project or activity, its duration and locality, and full assessment of its impact, potential risk and fair and equitable benefit sharing, personnel involved and procedures. All this information should be presented in a manner and language that is accessible and understandable having regard to oral traditions of the affected Indigenous community.

Consultation in good faith and participation are crucial components of a *consent* process. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. This process may include the option of withholding consent. Consent to any agreement should be interpreted as Indigenous peoples have reasonably understood it. Finally, the Indigenous community must specify the representative institutions entitled to express consent on behalf of the affected community.[73]

In line with the UNDRIP, consultations should include the provision of full and comprehensible information on the likely impact of the proposed action to all affected Orang Asli. In *Haida Nation v British Columbia (Minister of Forests)*, the Supreme Court of Canada held that meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained and amongst others, not be conducted for the purpose of convincing the Indigenous community of the State's point of view.[74]

In the UNDRIP, the requirement of FPIC and consultation ranges from macro-level policy measures for the realisation of the aspirations contained in the UNDRIP[75] to individual development projects affecting a particular Indigenous territory.[76] This concept allows Orang Asli communities to play an important role in the type of land ownership, use and management model prof-

71 *Human Rights Council*, GA Res, UN GAOR at [9], UN Doc A/RES/60/251 (2006).

72 UN ECOSOC, UN Doc E/C. 19/2005/3 (2005).

73 For further guidance on engagements with Indigenous communities, see eg "Guidelines for Engagement with Indigenous Peoples" (United Nations International Workshop on Engaging Communities, Brisbane, 15 August 2005).

74 [2004] SCR 511, at [46]. For a recent example of domestic consultation practices, see below Section V.

75 See eg art 38.

76 See eg art 32 para 2.

fered to the Orang Asli community by way of State recognition and the extent to which an Orang Asli community wishes to practice its customs, traditions and land tenure systems. This concept also finds its way into any move to relocate an Orang Asli community or excise their lands by empowering the Indigenous community to participate effectively before any such move is decided.

III. Orang Asli Statutory Rights

The following examination of the main pieces of legislation affecting Orang Asli lands and resources fortifies the contention that the protectionist mindset of existing laws stemming from Orang Asli being perceived as wards of the State functions to vest the decision-making power of Orang Asli solely in the State and, in some circumstances, particularly relating to exploitation of lands and resources, neglects the very existence of Orang Asli. UNDRIP standards of self-determination and, FPIC and consultation in matters relating to decisions affecting Orang Asli customary lands and resources have very little place in such a legislative and policy environment.

A. Aboriginal Peoples Act 1954 (Malaysia) ("APA")

The APA reflects the protectionist approach of lawmakers towards Indigenous peoples prevalent during that period. The ongoing Malayan communist insurgency during the 1950s strengthened "protection" provisions due to concerns over the threat and influence of insurgents on Orang Asli living in the fringes and interior of then Malaya. Possibly suitable for its time, the APA confers excessive power on the State over Orang Asli in the name of the "protection, well being and welfare" of Orang Asli. The *APA* has seen minimal amendment since 1954 and remains in force as the principle statute governing Orang Asli administration.

1. Identity and customary institutions

Inconsistent with notions of Indigenous self-identification contained in the UNDRIP,[77] s 3(3) of the APA empowers the Minister having charge of Orang Asli affairs ("the Minister"), a position never held by an Orang Asli, to decide on "any question whether any person is or is not" an Orang Asli. While possibly understandable during the communist insurgency when there were concerns over the infiltration of communist insurgents and ideologies into remote Orang Asli communities through assimilation and integration,[78] the continued existence of this provision grants the State excessive powers. Subject only to the court's common law power of judicial review, s 3(3) empowers the executive to unilaterally regulate and control the composition of the Orang Asli community.

Article 34 of the UNDRIP calls for rights to promote, develop and maintain Indigenous institutional structures. However, interaction with non-Orang Asli society and the effect of State-imposed Orang Asli decision-making institutions has had profound effects upon traditional Orang Asli institutions. Section 16(1) of the APA states that, Orang Asli communities who do not have a hereditary headman are to select, through its members, a headman commonly known as a *Batin*. However, this appointment is subject to confirmation by the Minister (s 16(1)). The Minister may

77 *UNDRIP*, arts 2, and 33 para 1. See also eg *Working Group on Indigenous Peoples, Working Paper by the Chairperson-Rapporteur, Ms Erica-Irene A Daes on the Concept of Indigenous Peoples*, UNESCOR, UN Doc E/CN.4/sub 2/AC.4/1996/2(1996).

78 The communist insurgency ended in 1989 with the signing of a peace accord between the Communist Party of Malaysia and the Malaysian Government.

also remove any such headman (s 16(2)).[79] This method of appointment, selection and removal fails to respect and recognise other forms of traditional and communal Orang Asli decision-making institutions and processes. Examples of such institutions include the *Mairaknak* (communal consultation and decision-making body) in the case of the *West Semai* sub-group, *Lemaga Adat* (Customary Council) in the case of *Jahut* and *Lembaga Adat* (Customary Council) in the case of the *Temuan*.

The added application of the *DOA Guidelines for the Appointment of Orang Asli Village Heads*[80] is said to reduce *Batin* to employees or servants of the *DOA*.[81] In tandem with these developments, the DOA has also set up Village Development and Safety Committees ("JKKK") in Orang Asli villages to manage, among other matters, development activities. To complicate matters, it is not uncommon for the *Batin* and the Chairman of the JKKK of one village not to be the same person.[82] There is also potential for the abuse of such extensive State powers. Citing three separate incidents involving different Orang Asli villages in the 1990s, Nicholas has argued that the government selectively recognised the *Lembaga Adat* customary institution, JKKK and *Batin* as legal "representatives" of the community in order to extract cooperation, consent and compliance from the affected Orang Asli community.[83]

Notwithstanding this, many Orang Asli villages still practice their laws, customs, traditions and institutions, albeit in a manner that has transformed with the impact of change from outside interaction.[84] However, the continued practice of Orang Asli laws, customs, traditions and customary institutions could prove difficult due to a combination of factors, including the lack of legal recognition and protection of such institutions, excessive State intervention in Orang Asli institutions, pro-State *Batin*, religious conversion, the influence of modern culture and allegations of divide-and- rule against the State.[85]

As for participation in the Malaysian political system, art 45(2) of the *Malaysian Constitution* provides for the appointment by the *Yang Dipertuan Agong*[86] of a Senator "capable of representing the interests" of Orang Asli in the Senate. However, Orang Asli have never appointed this person themselves. Instead, the de facto power of such appointment again lies with the Minister who,

79 The inordinate power that the State has over the headman may compromise Orang Asli interests. For a critique on the selection and removal of Orang Asli headmen, see eg Nicholas, Engi and Teh, above n 8, at 114-115.

80 For a commentary on these Guidelines, see Nicholas, Engi and Teh, above n 8, at 114-115.

81 Ibid, at 115.

82 Dato' Yahya Awang (ex-Director-General of the *DOA*), "West Semai Customary Laws" (Oral response to presentation by Tijah Yok Chopil at SUHAKAM Workshop on Indigenous Legal Systems of the Orang Asli, Kuala Lumpur, 23 March 2011).

83 Colin Nicholas, "Orang Asli Resource Politics: Manipulating Property Regimes through Representivity" (Paper presented at the RSCD Conference on Politics of the Commons: Articulating Development and Strengthening Local Practices, Regional Centre for Social Science and Sustainable Development, Chiang Mai University, Chiangmai, Thailand, 11-14 July 2003).

84 Wazir Jahan Karim, "Constructing Emotions and World of the Orang Asli" in Razha Rashid and Wazir Jahan Karim (eds), *Minority Cultures of Peninsular Malaysia: Survivals of Indigenous Heritage* (Academy of Social Sciences, Penang, 2001) 13, at 14.

85 Tijah Yok Chopil, (Workshop Presentation, SUHAKAM Workshop on Indigenous Legal Systems of the Orang Asli, Kuala Lumpur, 23 March 2011) (translated from Bahasa Malaysia by the author).

86 This is the equivalent of the King of Malaysia who is appointed on a rotational basis every 5 years by the Council of Rulers of the states in Peninsular Malaysia that have Sultans as a head of state, namely, Perlis, Kedah, Kelantan, Perak, Terengganu, Pahang, Selangor, Negeri Sembilan and Johor (see *Malaysian Constitution*, arts 33-8, Third and Fifth schs).

on the advice of the DOA makes the necessary recommendation to the *Yang Dipertuan Agong*.[87] It is pertinent to note that the *DOA* has never been headed by an Orang Asli. Non-Orang Asli also make up a majority of *DOA* employees.[88]

The State also has extensive powers to exclude persons from entering or remaining on Orang Asli areas or reserves or inhabited places if the Minister is satisfied that such exclusion is desirable, having regard to the "proper administration of the welfare" of Orang Asli (s 14(1)). The Director-General of the DOA and any police officer has the power to detain and remove any persons found in these areas whom the Director-General has reason to believe "are detrimental to the welfare" of Orang Asli (s 15). The existence of these powers may serve as a deterrent against Orang Asli exercising their right to freedom of association, a constitutionally guaranteed right under art 10 of the *Malaysian Constitution*.

2. Land and territories

Articles 26 and 32 of the UNDRIP call for, amongst others, the recognition of the rights of Orang Asli to their customary lands, territories and resources and the requirement of FPIC in matters affecting these rights. The APA contains no provisions that recognise Orang Asli customary lands, territories and resources and empowers unilateral acts by the state in respect of these lands.

The State Authority[89] has the power to declare any area exclusively inhabited by Orang Asli to be an aboriginal reserve by gazette notification (s 7(1)). There is limited security of tenure against encroachment while the lands remain declared aboriginal reserves (s 7(2)) but rights of occupancy within such land are no better than that of a tenant at will (s 8(2)). Further, the State Authority has the unilateral power to revoke wholly or in part or vary any declaration of an aboriginal reserve by a similar gazette notification (s 7(3)). Between 1990 and 1999, 76 per cent of Orang Asli reserves were degazetted in the state of Selangor alone.[90] To compound matters, the performance in gazetting these reserves has been poor. Official figures indicate that only around 14.6 per cent of applications for aboriginal reserves have been approved as at December 2008.[91] There are no explicit statutory rights of appeal or review against any decision to degazette Orang Asli reserves. Far from FPIC and consultation, it is clear that there is no statutory right to participate in any decision to degazette Orang Asli reserves.

Compulsory compensation for deprivation of Orang Asli land under the APA is limited to fruit or rubber trees where an Orang Asli is able to establish claims to such rights.[92] Further, there are no statutory provisions for FPIC and consultation pre–acquisition of these lands. Against art 13 of the *Malaysian Constitution* that provides for mandatory adequate compensation for acquisition or use of property, s 12 of the APA leaves compensation for excision of Orang Asli reserves or areas at the discretion of the state. Mandatory and adequate compensation for "acquisition or use" of Orang Asli lands can only be claimed if Orang Asli are able to establish common law Orang Asli customary land rights over a tract of land in the courts.[93] The Malaysian legislation governing the

87 Nicholas, Engi and Teh, above n 8, at 114-115.

88 *DOA*, above n 11, at 2.

89 "State Authority", whenever referred to in this paper, means the Ruler or Governor of the individual state in Peninsular Malaysia (see *National Land Code 1965* (NLC), s 5).

90 Nicholas, above n 9, at 36-37.

91 *DOA*, above n 11, at 18.

92 Section 11(1).

93 For a discussion on this doctrine and the challenges faced by Orang Asli in establishing such claims, see below Section IV.

compulsory acquisition of land, the *Land Acquisition Act 1960* (Malaysia) ("*LAA*") does not provide the right to participation in a decision to compulsorily acquire land. Under the *LAA*, proprietors only have rights to prior notification and adequate compensation in accordance with market value of the land acquired or used. In the first place, "market value" compensation does not factor Orang Asli perspectives of lands, territories and resources, and the right to restitution. Further, the right to mandatory compensation for loss of Orang Asli lands, territories and resources under the *LAA* only crystallises when Orang Asli establish customary land rights under the common law. Even in such circumstances, the Malaysian Courts have limited the payment of market value compensation to settled areas and not other parts of customary lands and territories (for example, foraging areas).[94]

The principle legislation governing titles, dealings and interests in land in Peninsular Malaysia, the *National Land Code 1965* (Malaysia) ("*NLC*") that confers indefeasible title to proprietors does not apply to "any law for the time being in force relating to customary tenure".[95] As such, Orang Asli do not possess the level of security of tenure enjoyed by other proprietors under the *NLC*. In terms of statutory rights to their lands and territories, Orang Asli are left with the APA where, as observed, these rights are vested in the State as guardian of the Orang Asli.

The oft-cited and much vaunted 1961 Policy,[96] while mindful of Orang Asli welfare and the need to protect of the Orang Asli lands, customs, institutions and languages, charts the course for the "development" and ultimate "integration" of the Orang Asli into mainstream Malay society.[97] In this sense, the 1961 Policy is similar to the outdated[98] ILO Convention 107,[99] that charges the State with the primary responsibility of protecting Indigenous rights and calls for systematic action for the protection of Indigenous populations concerned and their progressive integration into national societies.[100] Consistent with the assimilationist orientation of ILO Convention 107 but inconsistent with the concepts of self-determination and FPIC and consultation, the 1961 Policy fails to meaningfully include Orang Asli in any policy decisions affecting them.

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94 See *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 615; *Superintendent of Land and Surveys, Bintulu v Nor Anak Nyawai* [2006] 1 Mal LJ 256, at 269 (Court of Appeal, Malaysia). Mandatory compensation for areas outside the settlement, if proven to be Orang Asli customary land by common law in the courts, has been assessed based on loss of future income and livelihood but below the market value of the land (See *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 435-6),

95 See *NLC* s 4(2)(a); *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289, at 307-308 (Court of Appeal, Malaysia).

96 See above nn 36-38 and accompanying text

97 Evidence of the integrationist approach of the *1961 Policy* within the document can be found in, amongst other paragraphs, (1) the prescriptive wording of paragraph (b) that calls for the promotion of natural integration of the Aboriginal community; (2) paragraph (f) that mentions that replacement of special training with "the advance of the process of integration"; and (3) the paternalistic paragraph (iii)(b) of the notes of explanation to the *1961 Policy* that encourages the ultimate replacement of shifting cultivation traditionally observed by some aboriginal communities with permanent agriculture.

98 This is implicit in preambular para 4 of the subsequent *Convention concerning Indigenous and Tribal peoples in Independent Countries*, ILO C 169, (adopted 27 June 1989, entered into force 5 September 1991). It states "considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards".

99 *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, ILO C 107 (adopted 26 June 1957, entered into force 2 Jun 1959) ("*ILO Convention 107*").

100 Art 2, para 1.

Drawing from arts 11 and 12 para 1 of ILO Convention 107, principle (d) of the *1961 Policy* nonetheless provides for the recognition of Orang Asli land rights and the protection from removal without full consent. Principle (b) excludes the use of force or coercion as a means of promoting integration. However, DOA strategies and practice seems to have paid little attention to this part of the 1961 Policy.[101] For example, the DOA's 10 point strategy summary of 1993[102] towards improving the wellbeing of Orang Asli and integrating the Orang Asli with national society has notably left out the 1961 Policy requirement of "full consent" before relocation of Orang Asli from their traditional areas. Items 2 and 3 of the DOA's strategy on relocation of Orang Asli again omits any mention of the requirement of "full consent".[103]

B. Resource and Use Rights

Article 26 para 2 of the UNDRIP calls for the recognition of Indigenous rights to resources. The *National Forestry Act 1984* (Malaysia) ("*NFA*"), that provides for the administration and management of forests and forest development in Peninsular Malaysia, does not recognise Orang Asli ownership of forest produce on their customary lands. The *NFA* also does not confer express rights to Orang Asli in respect of the removal or taking of forest produce from Orang Asli customary lands. It merely provides for the State Authority or executive, as the case may be, to grant Orang Asli some allowances and privileges in respect of the removal or taking of forest produce.[104]

There are no provisions in the *NFA* for Orang Asli participation in any decisions made affecting forests. Notwithstanding this, there are exclusive rights for the taking and removing of forest produce by Orang Asli within aboriginal reserves[105] but as seen earlier, an aboriginal reserve can be revoked by a unilateral executive act.[106] Section 62(2)(b) of the *NFA* provides that, subject to any contrary direction by the State Authority, the individual state[107] Director of Forestry may reduce, commute or waive any royalty in respect of, or exempt from royalty any forest produce taken from any State or alienated land by any Orang Asli for:

(i) the construction and repair of temporary huts on any land lawfully occupied by such Orang Asli;

(ii) the maintenance of his fishing stakes and landing places;

(iii) fuelwood or other domestic purposes; or

(iv) the construction or maintenance of any work for the common benefit of Orang Asli.

The provision does not confer rights upon Orang Asli for the removal or taking of forest produce from Orang Asli customary lands. They merely provide for the State Authority or executive to grant at its discretion, some allowance to Orang Asli in respect of the removal or taking of forest produce for the limited purposes set out in that provision.

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101 For examples of such practices, see eg Nicholas, Engi and Teh, above n 8, at 57-70; 111-122; Nicholas, aboven n 9, at chs 5-6; Dentan and others, above n 9, at 73-99; chs 4-5.

102 *DOA*, *Ringkasan Program* (1993) in Nicholas, above n 9, at 96-98.

103 Department of Orang Asli Development, *Strategy* (2011) <www.jakoa.gov.my/web/guest/strategi>.

104 See *NFA*, ss 40(3) and ss 62(2)(b).

105 *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] 1 Current Law Journal 486, at 487-488.

106 See above Section IIIA2.

107 This Act applies throughout Peninsular Malaysia through the adoption of the legislation by the individual states. Despite the uniformity of the laws throughout Peninsular Malaysia, forestry matters nevertheless fall under the state legislative list (see *Malaysian Constitution* Ninth sch List II- State List, Item 3).

As for hunting rights, the recent *Wildlife Conservation Act 2010* unilaterally reduced the number of species that Orang Asli can hunt for subsistence purposes from hundreds to only ten.[108] Against UNDRIP standards of FPIC and consultation, Orang Asli complain that they were never consulted on the repeal of the previous *Protection of Wildlife Act 1972* (Malaysia) and the introduction of the *Wildlife Conservation Bill 2010* (Malaysia). The *Fisheries Act 1960* (Malaysia) does not mention Orang Asli, some of whom rely on fishing for subsistence and livelihood. Despite the presence of Orang Asli in areas that have been declared national or state parks, Federal and state laws relating do not contain any provisions covering Orang Asli.[109] The *Waters Act 1920* (Malaysia) and all other equivalent state enactments in Peninsular Malaysia vests all property and control over rivers in the hands of the state with no provision for Orang Asli.[110] In respect of mineral and resource rights, materials and minerals are the property of the respective individual State Authority within Peninsular Malaysia.[111] Finally, legislation relating to the regulation of use and development of land does not even contemplate the existence of Orang Asli or their customary lands and resources.[112]

These laws reflect popular perceptions of State-Orang Asli relations, namely that they are a community under the stewardship and protection of the State whose rights are consequently dependent on State goodwill rather than by virtue of them being a distinct Indigenous minority group within the Malaysian constitutional framework.

IV. Common Law Orang Asli Customary Rights: Challenges

Applying common law jurisprudence, Malaysian courts have recognized the pre-existing rights of Orang Asli to their ancestral and customary lands at common law.[113] Analyses of this doctrine in an Orang Asli context have been conducted elsewhere and are beyond the scope of this paper.[114] As a backdrop to the contention in this section that Orang Asli face formidable challenges in succeeding in such claims, it is nonetheless pertinent to note the salient features of this form of title:

(1) The common law recognises and protects the pre-existing rights of Orang Asli in respect of their lands and resources.[115]

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108 See s 51(1) and sixth schedule.

109 See eg *National Parks Act 1980* (Malaysia).

110 In respect of the *Waters Act 1920* (Malaysia), see s 3.

111 *NLC*, s 40(b).

112 See for example, *Land (Group Settlement Area) Act 1960* (Malaysia); *Local Government Act 1976* (Malaysia); *Town and Country Planning Act 1972* (Malaysia); *Environmental Quality Act 1974* (Malaysia); *Land Acquisition Act 1960* (Malaysia); *Water Services Industry Act* 2006 (Malaysia); *Land Conservation Act 1960* (Malaysia) and the various individual state Mining and Water Enactments In Peninsular Malaysia.

113 See *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25; *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67, (Court of Appeal, Malaysia); *Sagong bin Tasi v Kerajaan Negeri Selangor* above n 19; *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95.

114 See eg Bulan and Locklear, above n 19; Subramaniam, above n 24; Yogeswaran Subramaniam, "Common Law Native Title in Malaysia: Selected Issues for Forestry Stakeholders" [2010] 1 Mal LJ xv, at xvii-xxvi.

115 See *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 430; *Kerajaan Negeri Johor v Adong bin Kuwau*, n 67, at 162-163; *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612; *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 301-302; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai* [2006], above n 94, at 270; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 692 (Federal Court).

(2) The radical title of the state is subject to any pre-existing rights held by Orang Asli.[116]

(3) Common law customary land rights in Malaysia do not owe their existence to any statute or executive declaration.[117] In Peninsular Malaysia, it has been held that statutory rights under the APA and common law rights of Orang Asli are complementary in that they can exist in tandem.[118]

(4) Proof of these rights is by way of continuous occupation[119] and oral histories of the claimants relating to their customs, traditions and relationship with their lands, subject to the confines of the *Evidence Act 1950* (Malaysia).[120] "Occupation" of land does not require physical presence but evidence of continued exercise of control over the land.[121]

(5) These rights have their source in traditional laws and customs.[122] The particular nature or rights associated with these rights is a question of fact to be determined by the customs, practices and usages of each individual community.[123]

(6) Customary rights under the common law and any derivative title are inalienable.[124]

(7) They can either be held communally or individually.[125]

(8) Extinguishment of these rights can be by way of clear and unambiguous words in legislation[126] or an executive act authorised by such legislation.[127] A reservation or trust of land for a public purpose may not necessarily extinguish these rights unless it is inconsistent with the continued enjoyment of these rights.[128]

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116 See eg *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612; *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 301-302; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 692 (Federal Court).

117 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 94, at 270.

118 *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 431; *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67, at 163; *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 615.

119 See *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 94, at 269.

120 See *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 610: 621-624.

121 *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 694-695 (Federal Court). For example, monthly visits are sufficient, where other evidence supports a finding of occupation (see *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 694).

122 See *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 Mal LJ 241 at 268, 286; *Madeli bin Salleh (Suing as Administrator of the Estate of the Deceased, Salleh bin Kilong v Superintendent of Land & Surveys Miri Division* [2005] 5 Mal LJ 305, at 330.

123 *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 94, at 301-302.

124 *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 430; *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67, at 162.

125 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 613-614; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 692-693 (Federal Court).

126 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 94, at 270; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 690, 696-697 (Federal Court).

127 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612.

128 *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 697-698 (Federal Court).

(9) If these rights are extinguished, adequate compensation is payable in accordance with art 13 of the *Malaysian Constitution*.[129] However, "foraging lands" and "settlement lands" have been treated differently in terms of assessing "adequate compensation". In *Adong bin Kuwau v Kerajaan Negeri Johor*, the Court assessed compensation for loss of foraging lands having regard to deprivations of (1) heritage land; (2) freedom of habitation or movement; (3) produce of the forest; and (4) future living of himself, immediate family and descendants but below the market value of the land.[130] In respect of settlement lands, the Court in *Sagong bin Tasi v Kerajaan Negeri Selangor* awarded "market value" compensation pursuant to the *LAA*.[131]

(10) The Malaysian courts have also limited the proprietary interest in customary lands "to the area that forms their settlement, but not to the jungles at large where they used to roam and forage for their livelihood in accordance with their tradition".[132] The Court of Appeal in Malaysia has held that this view is logical as "otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had foraged in search for food".[133] The limitation, seemingly driven by pragmatism, would appear arbitrary given that the nature of any customary title is to be determined in accordance with the practices of each individual community.[134]

Unfortunately for Orang Asli, their relative success in pursuing civil claims for customary land rights has not elicited any legislative response towards the recognition of Orang Asli customary land and resource rights. Bearing this in mind, this section highlights the significant challenges faced by Orang Asli who bring these claims to the civil courts. First, Orang Asli do not possess or receive funds for making these claims and are largely reliant on *pro bono* legal and technical support from the Malaysian Bar and non-governmental organisations. Second, Orang Asli would need to address any internal conflict before instituting any communal action. This may prove to be particularly problematic where community members under the payroll of the State (for example, *Batin*)[135] may feel obliged not to act against the interests of the State. Third, such claims usually encounter strenuous opposition from the State who inevitably possesses more power and resources at their disposal.

Fourth, establishing these claims for the substantial number of Orang Asli who have been relocated from their lands may be difficult due to the requirement of "continuous occupation" for generations. Fifth, Orang Asli who have submitted to the various land development schemes by the Government may no longer be seen as having a "traditional" connection with the land. A further challenge to proof relates to the evidentiary requirements under the *Evidence Act 1950* (Malaysia). While allowing for admissibility of oral evidence, the Act does not necessary give due weight to

129 *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 434; *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67, at 163-164; *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 617; *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 309-310; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 691-2 (Federal Court).

130 *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 436. Affimed on appeal by the Court of Appeal, see *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67.

131 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 621. Affirmed on appeal by the Court of Appeal (see *Kerajaan Negeri Selangor v Sagong bin Tasi,* above n 95, at 309-311).

132 See *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19 at 615; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 95, at 269.

133 *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai* above n 94, at 269.

134 *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005], above n 95, at 301-302. For a criticism of this limitation, Yogeswaran Subramaniam, see above n 114, at xxv-xxvi.

135 For the possible influence that the State may have over the *Batin,* see above Section IIIA1.

Orang Asli perspectives and oral traditions. As many experts on Orang Asli laws and customs are employed by the State, there may be further potential resource and ethical challenges in securing expert evidence against the State.

Sixth, experiences from other jurisdictions have shown that the judges of the civil courts may be poorly placed to adequately "translate" Orang Asli customs and traditions into justiciable rights.[136] Further, judicial conservatism, depending on the presiding bench, may function to roll-back or stunt the development of this nascent doctrine. Seventh, the highly legalistic, adversarial and non-participative nature of a native title claim also reduces the prospect of negotiated outcomes that generate benefits for both Aboriginal and non-Aboriginal claimants.[137] In this respect, the Canadian Royal Commission on Aboriginal Peoples has pointed out that continued resort to the courts is not only expensive and lengthy in time but risks outcomes (because of the all-or-nothing nature of the process) that may be unacceptable to all sides.[138]

Even if rights to common law Orang Asli customary land rights are established, it is contended that there are other limitations to this form of interest when analysed against the UNDRIP. For example, in Peninsular Malaysia, it is yet to be established whether these rights include rights to *ownership* of resources, provided for in art 26 of the UNDRIP. If Orang Asli customary land rights are limited to uses of the land that are not irreconcilable with a group's particular attachment to the land in future cases,[139] this limitation arguably runs afoul of article 32 which calls for the right of Indigenous peoples to determine their own priorities in respect of the development of their lands. Another limit to the doctrine of common law Orang Asli customary land rights relates to the Malaysian courts' arbitrary spatial containment of these rights to settled lands (as opposed to foraging areas).[140] Against art 26 para 3 of the UNDRIP, this restriction does not provide "due respect" for Orang Asli laws, customs and traditions in relation to, amongst others, customary land boundaries. Further, this form of interest can be extinguished without the FPIC of the Orang Asli, subject only to the payment of monetary compensation, and in the best case, at market value of the land. This method of assessment fails to take into account the cultural, social, economic and spiritual value of the land to Orang Asli and the complex interrelationship and dependence between these values. The Malaysian courts are also yet to grant a remedy for the provision of alternative suitable lands for the deprivation of lands and resources.

Although encouraging, the recognition of common law Orang Asli customary rights to their lands and resources by the Malaysian courts is not a due recognition of Orang Asli legal systems, decision-making processes or institutions. As the doctrine stands in Peninsular Malaysia, custom-

136 See eg Christina Godlewska and Jeremy Webber, The Calder Decision, Aboriginal Title, Treaties and the Nisga'a' in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (UBC Press, Vancouver, 2007), at 12; *Delgamuukw v British Columbia* 1997 CanLII 302 (SCC) 302, at [186] (Lamer CJ, Cory and Major JJ); [207] (LaForest and L'Heaureax Dube JJ); [209] (McLachlin J, concurring). The report of the *Royal Commission on Aboriginal Affairs* also concluded that negotiation is clearly preferable to court-based solutions of Aboriginal land and resource issues (see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996) <www.collectionscanada.gc.ca/webarchives/20071124125812/www.ainc-inac.gc.ca/ch/rcap/sg/shm4_e.html>, at vol 2 ch 4 ss 1 and 6.2).

137 Sean Brennan and others, *Treaty* (Federation Press, Annandale (NSW), 2005), at 114-116.

138 See Royal Commission on Aboriginal Peoples, above n 136, at vol 2 ch 4 s 1.

139 This is the common law position in Canada. See *Delgamuukw v British Columbia* , above n 136, at [111].

140 See above n 132-134 and accompanying text, and *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 94, at 269.

ary law is only regarded relevant to determine the extent of legal recognition of Orang Asli customary land and resource rights afforded by the courts.[141]

V. The Proposed Policy

The recent Proposed Policy, passed by the National Land Council on 4 December 2009, arguably violates provisions of the UNDRIP. Under the Proposed Policy, each Orang Asli head of household is to be individually granted between two and six acres of plantation lands and up to a quarter of an acre for housing depending on land availability as determined by the individual state.[142] In violation of art 26 para 3 of the UNDRIP that calls for States to recognise their rights to their lands and resources, the Proposed Policy contains no provision for these rights and even prohibits Orang Asli who receive benefits under the Proposed Policy from making any claim for common law customary land rights. Further, it only covers lands gazetted as Orang Asli reserves and those approved as Orang Asli reserves but not gazetted yet. As a result of this limitation, an estimated 88,377.87 hectares[143] or about 64 per cent of land considered by the State as occupied by Orang Asli stands to be excluded from the Proposed Policy without compensation. In addition to contravening art 32 para 2 of the UNDRIP, the Proposed Policy may also offend art 13 para 2 of the *Malaysian Constitution* that requires adequate compensation for compulsory acquisition or use of property. State-appointed external contractors for land development and constraints in the use of Orang Asli land to individual residential plots and plantations lands under the Proposed Policy offend the core UNDRIP concept of self-determination. The restrictions in the use of customary lands to purposes determined by non-community members are also an affront to Orang Asli laws, customs, traditions and decision-making institutions.

On 17 March 2010, 2,500 Orang Asli marched to Putrajaya, the administrative capital of Malaysia, in protest against the Proposed Policy. They delivered a protest memorandum signed by 12,000 Orang Asli to the Prime Minister. The memorandum stated, among other matters, that the Proposed Policy would destroy the communal lifestyle practised by Orang Asli, was in violation of the UNDRIP and the fundamental liberties of Orang Asli under the *Malaysian Constitution* and formulated and passed without prior consultation with the Orang Asli community.[144] The events after the protest are perhaps more illustrative for current purposes. After the protest, a workshop held between the Government and several Orang Asli groups for the purported review of the Proposed Policy was limited to the scope pre-determined by the Government representatives present and did not touch on critical issues raised by the Orang Asli in their memorandum.[145] In the mean-

141 *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 301-302.

142 See *POASM* and *Gabungan NGO-NGO Orang Asli Semenanjung Malaysia* [Peninsular Malaysia *Orang Asli* NGO Network], *Memorandum Bantahan Dasar Pemberimilikan Tanah Orang Asli yang diluluskan oleh Majlis Tanah Negara yang Dipengerusikan oleh YAB Timbalan Perdana Menteri Malaysia pada 4hb Disember 2009* [*Protest memorandum against Orang Asli land title grant policy approved by National Land Council in a meeting chaired by the Right Honourable Deputy Prime Minister of Malaysia on 4 December 2009 in Putrajaya*] (17 March 2010) [translated from Bahasa Malaysia by the author], enc 1.

143 *DOA*, above n 11, at 18.

144 *POASM* and *Gabungan NGO-NGO Orang Asli Semenanjung Malaysia* [Peninsular Malaysia Orang Asli NGO Network], above n 142, at 5.

145 Bah Tony Williams-Hunt, "FPIC and Orang Asli Lands in Peninsular Malaysia" (Paper presented at a Conference on Customary Lands, Territories and Resources: Bridging the Implementation Gap, Kuala Lumpur, 25-26 January 2011).

time, the DOA also embarked on "road shows" that have been criticised as being more for the purpose of convincing the Orang Asli to accept the Proposed Policy.[146] Subsequent discussions for the refinement of the Proposed Policy mainly involved the DOA, other Government agencies and members of the state executive with very few Orang Asli participants. At the time of writing, the Proposed Policy still looms over the Orang Asli but has not been implemented. Without express rights to FPIC and consultation, it would be difficult to envisage the State voluntarily employing any meaningful and effective standards in its engagements with the Orang Asli regarding the Proposed Policy.

VI. Concluding Remarks

The evaluation of the existing legal framework on Orang Asli rights to decision-making in respect of land and resource rights against UNDRIP standards can be likened to comparing apples and oranges. Both "laws" (in a broad sense) possess differing philosophies. On the one hand, the UNDRIP emphasises internal autonomy and equal respect for Indigenous society while on the other hand, existing domestic law almost presumes an Orang Asli society incapable of making its own decisions and in need of State control and protection. As argued in this paper, a possible reason for these differing philosophies is the status of Orang Asli as wards of the State dependent on the Government for their welfare. In such an environment, it is easy for Orang Asli "rights" to be viewed as a matter of discretion and benevolence on the part of the State rather than "rights" in the strict sense of the word, meaning a collection of inherent entitlements.

The guardian-ward relationship that the State possesses with Orang Asli gives the State dominion over Orang Asli customary lands and resources. These lands and resources are crucial to the continued survival and vitality of Orang Asli as a distinct Indigenous group. From a legal perspective, Orang Asli are consequently left in a quandary. They can either keep quiet and lose these lands to encroachment and Government-introduced land-development schemes or face the unenviable task of traversing the legal minefield of a customary land rights claim and possible repercussions from the State if they are unsuccessful in their claim.

Orang Asli have repeatedly demanded that the Government take into account the UNDRIP when devising any policy affecting Orang Asli and their customary lands. Having said that the position of Orang Asli as wards of the State enables laws empowering the State to determine Orang Asli priorities, there is no constitutional impediment to laws for the special recognition and protection for Orang Asli customary land and resource rights.[147] Article 8(5)(c) of the *Malaysian Constitution*, an embodiment of the principle of equality before the law, enables positive discrimination legislation for 'the protection, well being or advancement of the Aboriginal peoples of the Malay peninsula (including the reservation of land)…' If at all there is a legal question on the conferment of these rights, it would be more a question of the extent of the special rights. At its best, the UNDRIP envisions a land and resource model based on internal autonomy, empowerment and Indigenous systems. While legally possible under the *Malaysian Constitution* without the need for any amendment, the recognition of Orang Asli customary land rights consistent with the UNDRIP may necessarily require the State to reduce or relinquish the excessive control they currently possess over Orang Asli and their lands. The legal power possessed by the State enables it to exercise

146 Ibid. This approach clearly goes against of the standards of consultations adumbrated above at Section IIB.

147 See eg Yogeswaran Subramaniam, "The *UNDRIP* and the *Malaysian Constitution*: Is Special Recognition and Protection of Orang Asli Customary Lands Permissible?" (2011) 2 Mal LJ lxxv.

political, religious, social and economic decisions affecting the numerically-inferior Orang Asli with virtual impunity. However, the State sees these powers as a necessary tool to align Orang Asli with the national development agenda and for Orang Asli to partake in the benefits of mainstream Malaysian society. An inevitable effect of this scenario would be strong resistance to the gradual reduction of State protection and stewardship over Orang Asli and their lands in favour of increased internal autonomy.

Unless there is strong public sentiment for the recognition of Orang Asli land rights, it would be over-optimistic to assume that the State would initiate any reform towards gradual Orang Asli self-determination over their customary lands and resources and priorities. Legitimacy and internalisation of Orang Asli rights within Malaysian society are a crucial starting point. Legitimacy of the standards contained in the UNDRIP on the part of the general populace and the State would bring about an environment conducive for the existence and growth of political will. If there is a feeling that the standards contained in the UNDRIP lack legitimacy, there would be no pull towards voluntarily and habitually obeying these norms.[148]

A distinct challenge to legitimacy in this context would be the complex web of competing and differing notions of domestic and international Indigeneity between ethnic Malays, natives of Sabah and Sarawak and Orang Asli, the distinct constitutional privileges afforded to these groups and their unequal political power. The legal recognition of Orang Asli customary land and resource rights and decision-making institutions by virtue of them being seen as "first peoples" may also be viewed as a challenge to the constitutional and political status of the Malays. On the other hand, it must also be appreciated that affording special constitutional status both to Orang Asli and Malays is not a mutually exclusive exercise. There is little legal doubt that the special position that Malays enjoy under the *Malaysian Constitution*, for example, under art 153 (reservation of quotas) and art 89 (Malay reservation lands) can, at least in principle, exist harmoniously with the legal recognition and protection of distinct Orang Asli rights. Notwithstanding this, such recognition and protection solely in favour of Orang Asli may not sit comfortably with Malays and other Malaysian Indigenous minority communities across the South China Sea. On the assumption that the current situation prevails where Malays do not seek "Indigenous" rights but merely preserve their special position under the *Malaysian Constitution*, a possible way forward, provided there is the political will to so, may be holistic reforms in favour of all Indigenous minority groups, namely Natives of Sabah and Sarawak and Orang Asli based on UNDRIP standards while maintaining the special constitutional position of ethnic Malays.

148 See Claire Charters, "The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples", in Claire Charters and Rudolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen, 2009), at 280.