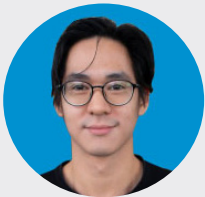


# Orang Asli and the Right to Self-Determination: Are we there yet?

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## Introduction

The Orang Asli communities are believed to have been living in Peninsular Malaysia for some 5,000 – 25,000 years<sup>1</sup>, carrying with them a wealth of culture that deserves to be protected and promoted. This includes their language, traditions, practices, history, knowledge and most importantly, their relationship with nature, which truly embodies the concept of sustainability. However, Orang Asli cultures are often regarded as incompatible with modern society and they are often being framed as being ‘anti-development’.<sup>2</sup> It is perceived by some that because of their backward mentality and their refusal to accept modernity, they are solely responsible for their poor socioeconomic status.<sup>3</sup>

On 9th August 2020, to mark the International Day of the World’s Indigenous Peoples, the UN High Commissioner for Human Rights, Michele Bachelet, highlighted “the importance of ensuring that indigenous peoples can exercise their rights to self-government and self-determination”<sup>4</sup>, as stated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). She stressed that “this is about saving lives and protecting a precious web of culture, language and traditional knowledge that connects us to the deep roots of humanity.”<sup>5</sup>

The UNDRIP represents a universal framework of “the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world”<sup>6</sup>. It covers a wide range of individual and collective rights, including cultural rights, the right to participate in decision making, rights to education, health, employment, and language. The UN General Assembly adopted the Declaration on the 13th September 2007. 144 states, including Malaysia, voted in favour of it. Only four states voted against (Australia, Canada, New Zealand, and the United States). All four of them have since then reversed their position and now support the Declaration.<sup>7</sup> Thus, this signifies an international consensus on the ideals and aspirations of the UNDRIP.

Although the UNDRIP is ‘non-binding’<sup>8</sup>, Malaysia’s explicit endorsement of it at both the UN Human Rights Council and the General Assembly,<sup>9</sup> has created a genuine expectation that the Malaysian government will uphold the rights contained in the UNDRIP. Hence, this paper aims to analyse and assess Malaysia’s efforts in achieving the goals of the UNDRIP. The focus of this paper is on the Orang Asli of Peninsular Malaysia.

<sup>1</sup> Carol Yong, ‘Forest governance in Malaysia: An NGO perspective’ JOANGO Hutan (September 2006, Report).

<sup>2</sup> Rusaslina Idrus, ‘The Discourse of Protection and the Orang Asli in Malaysia’ (2011) Vol. 29 (Supp. 1) *Kajian Malaysia* 53 – 74, 67 – 68.

<sup>3</sup> *Ibid.* See also, Vinodh Pillai, ‘Perak MB chided for telling Orang Asli to stop asking for help’ FMT News (24th November 2019) <<https://www.freemalaysiatoday.com/category/nation/2018/11/24/perak-mb-chided-for-telling-orang-asli-to-stop-asking-for-help/>>.

<sup>4</sup> United Nations Human Rights, Office of the High Commissioner, ‘International Day of the World’s Indigenous Peoples Message from Michelle Bachelet, UN High Commissioner for Human Rights’ (9th August 2020, Press Release) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26156&LangID=e>>.

<sup>5</sup> *Ibid.*

<sup>6</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 43.

<sup>7</sup> Department of Economic and Social Affairs: Indigenous Peoples, ‘United Nations Declaration on the Rights of Indigenous Peoples’ <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

<sup>8</sup> Subramaniam has noted that without political will to discard protectionist policies affecting Orang Asli and their lands, law reform in line with the UNDRIP is impossible. However, he noted that the UNDRIP has found local support, especially regarding the protection of Orang Asli customary land rights. Support has been expressed by SUHAKAM, the Malaysian Bar and indigenous non-governmental organisation networks.

See, Yogeswaran Subramaniam, ‘Orang Asli Land Rights by UNDRIP Standards in Peninsular Malaysia: An Evaluation and Possible Reform’ (August 2012) University of New South Wales, Faculty of Law (PhD Thesis), 76 – 79.

<sup>9</sup> Department of Public Information, News and Media Division, UN General Assembly, ‘General Assembly adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Towards Human Rights for All, says President’ (13th December 2007, Press Release) <<https://www.un.org/press/en/2007/ga10612.doc.htm>>.

The first part of the paper is dedicated to explaining the founding principle of the UNDRIP – the right to self-determination. The concept of Free, Prior and Informed Consent (FPIC) will also be defined as it forms an essential component of the right to self-determination. The second part of the paper is dedicated to exploring some key challenges facing the Orang Asli communities in achieving their right to self-determination espoused in the UNDRIP. The three identified challenges are classified into three categories: citizen and Constitutional special privileges, the Aboriginal Peoples Act 1954, and the utilisation of the courts to enforce customary land rights. The identified challenges will be contextualised.

## The Right to Self-Determination under the UNDRIP<sup>10</sup>

Article 3 of the UNDRIP states that indigenous people have the right to determine their political status freely and freely pursue their economic, social, and cultural development. According to James Anaya, former Special Rapporteur on the rights of indigenous people, the essential idea behind this right is that indigenous people are entitled “to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly”<sup>11</sup>. The aim of UNDRIP is not to grant any ‘extra’ human rights to the indigenous communities instead it recognises that indigenous peoples have the same right of self-determination enjoyed by others.<sup>12</sup> For the purposes of this paper, self-determination is based on two pillars: 1) the right to autonomy in internal affairs<sup>13</sup>; and 2) the right to participate in decision-making processes<sup>14</sup>.

Article 4 of the UNDRIP describes the right to autonomy in internal affairs as the right of indigenous people to self-govern in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.<sup>15</sup> While there is no international consensus on the scope of ‘internal and local

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<sup>10</sup> It must also be noted that this paper’s definition of indigenous peoples’ right to self-determination under the UNDRIP has substantial influence from scholars’ perspectives. Hassan has highlighted that although the UNDRIP has improved the recognition and protection of indigenous peoples’ right to self-determination, the definition of indigenous peoples’ right to self-determination is still vague and needs further refinement. He highlighted the varying definitions of indigenous peoples’ right to self-determination from three perspectives: the State, indigenous peoples and scholars. For instance, from the perspective of States like New Zealand, the definition of indigenous peoples’ right to self-determination should include indigenous peoples’ right to participate in matters relating to politics, economics, cultural affairs, which would then guarantee their right to determine the direction of their own fate. From the perspective of scholars like Erica Daes, indigenous peoples’ right to self-determination is defined as the freedom to live according to their customs and beliefs while being respected by the society. From the perspective of indigenous groups like the National Aboriginal and Islanders Legal Services in Australia, indigenous peoples’ right to self-determination should accept the original definition of the right to self-determination and it should be based on the principle of equality. Other indigenous groups such as the Sami Council described the concept of self-determination as dynamic and not still. See, Muhamad Sayuti bin Hassan @Yahya, ‘Hak Penentuan Kendiri Orang Asal di Bawah Undang-Undang Antarabangsa: Kajian Kes Orang Asli’ (February 2015) University Kebangsaan Malaysia, Faculty of Law (PhD Thesis), 105 – 115.

<sup>11</sup> James Anaya, ‘The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era’ in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples (IWGIA, 2019)*, 187.

<sup>12</sup> *Ibid*, 185. The right of all peoples to self-determination is one of the core principles of international law. Article 1(2) of the UN Charter calls for the respect for self-determination of peoples. Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also guarantee all peoples’ right to self-determination. For more information on the definition and scope of the right of all peoples to self-determination, see, Muhamad Sayuti bin Hassan @Yahya, ‘Hak Penentuan Kendiri Orang Asal di Bawah Undang-Undang Antarabangsa: Kajian Kes Orang Asli’ (February 2015) University Kebangsaan Malaysia, Faculty of Law (PhD Thesis), 93 – 101.

<sup>13</sup> UNDRIP, Article 4.

<sup>14</sup> UNDRIP, Article 5.

<sup>15</sup> Article 46 of the UNDRIP requires the exercise of rights guaranteed by the UNDRIP to adhere to the principle of sovereignty and the territorial integrity of the State in question.

affairs', it is generally accepted that the scope is broad.<sup>16</sup> The drafting history (travaux préparatoires) of the UNDRIP suggested that the right to autonomy included issues such as "culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions"<sup>17</sup>. While this definition of autonomy was not adopted, it nonetheless demonstrates that the drafters intended its scope to be broad. According to Wheatley, the scope should encompass their organisation of social, economic, and political life, as well as "the exercise of government function by state institutions under the control of indigenous peoples"<sup>18</sup>.

Article 5 of the UNDRIP guarantees the indigenous peoples the right to participate fully "as a collective unit in the decision-making process affecting them"<sup>19</sup>. This acknowledges that "while indigenous peoples have complete autonomy in some instances, in other cases they also have the right to full participation"<sup>20</sup>. This right should be understood as the "ability to influence the law and decision-making processes of the State"<sup>21</sup>. Thus, representatives of indigenous peoples that are "chosen by indigenous peoples in accordance with their own procedures"<sup>22</sup>, should be represented in governmental institutions and be engaged in any decision-making processes.<sup>23</sup> Wheatley also highlighted the increasing state practice of reserving parliamentary seats for indigenous people, as a way to guarantee indigenous peoples' right to influence in decision-making processes in countries such as New Zealand and Colombia.<sup>24</sup>

While the UNDRIP does not provide a strict procedure on how to fulfil the right to self-determination, it can largely be understood in three contexts:<sup>25</sup> 1) the devolvement of the State's legislative and administrative functions concerning their internal affairs; 2) the ability to influence State's decision-making processes; and 3) the recognition and acceptance of indigenous political and legal institutions, including their laws, traditions and customs. As the former Rapporteur, Erica Daes underlined:

*"the true test of self-determination is not whether indigenous peoples have their own institutions, legislative authorities, laws, police and judges. The true test of self-determination is whether Indigenous peoples themselves actually feel that they have choices about their way of life"<sup>26</sup>.*

<sup>16</sup>. Dorothee Cambou, 'The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multidimensional perspective' (27 February 2019) *The International Journal of Human Rights* 1, 6.

<sup>17</sup>. UN Economic and Social Council, Commission on Human Rights, 'Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session', UN Doc. E/CN.4/2005/WG.15/2 (1st September 2005), Article 31.

<sup>18</sup>. Steven Wheatley, 'Autonomy or Self Government' in *The Hague Conference (2010): Rights of Indigenous Peoples, Interim Report* (International Law Association, 2010), 13

<sup>19</sup>. Cambou (n16), 6.

<sup>20</sup>. *Ibid*, 6.

<sup>21</sup>. Wheatley (n18), 12.

<sup>22</sup>. *Ibid*, 12.

<sup>23</sup>. *Ibid*, 12 – 13.

<sup>24</sup>. *Ibid*, 12.

<sup>25</sup>. *Ibid*, 12.

<sup>26</sup>. Erica Daes, 'Striving for self-determination for indigenous peoples' in Y. N. Kly and D. Kly (eds), *In pursuit of the right to self-determination* (Clarity Press, 2000), 58.

## Free, Prior and Informed Consent (FPIC)

Free, prior, and informed consent (FPIC) is a manifestation of the right to self-determination. It acknowledges that indigenous peoples have the power to make agreements between themselves and other polities based on mutual negotiation and consensual agreement.<sup>27</sup> Thus, FPIC aims to achieve three things:<sup>28</sup> 1) to restore control over their lands and resources; 2) to restore their cultural integrity; and 3) to redress the power imbalance to forge new partnerships grounded on rights and mutual respect.

FPIC constitutes three interrelated and indivisible rights<sup>29</sup>: the right to consultation; the right to participation; and the right to their lands and resources. Consultation is often the starting point of FPIC. The UN Expert Mechanism on the Rights of Indigenous Peoples views it as a state obligation to carry out “qualitative process of dialogue and negotiation, with consent as the objective... over the course of a project, from planning to implementation and follow up”<sup>30</sup>. It envisions that the participation of indigenous peoples in the decision-making process would enable them to influence the outcome of the decision, rather than merely having their views heard.<sup>31</sup>

Participation goes beyond the formality of being merely informed. Rather, it includes “the development of initiatives by indigenous peoples”<sup>32</sup>. It regards indigenous peoples as having the “freedom to guide and direct the process of consultation... to share and use or develop their own protocols on consultation... and to contribute to defining methods, timelines, locations and evaluations”<sup>33</sup>. Effective participation also aims to address the factors that may undermine their ‘free will’, such as “intimidation, coercion, manipulation and harassment”<sup>34</sup>. Lastly, by acknowledging that indigenous peoples have the right to “own, use, develop and control” their lands and resources, FPIC safeguards their cultural identity, “which is inextricably linked to their lands, resources and territories”<sup>35</sup>. Thus, the cornerstone of FPIC is as per its’ name – free, prior, and well-informed consent, where indigenous peoples have the right to say ‘no’.

While the Declaration has clearly established the necessity of FPIC, there is a lack of consensus as to when FPIC is applicable. As Peter Vaughan, the Australian delegation to the Permanent Forum on Indigenous Issues stated in 2006, “there can be no absolute right of free, prior, informed consent... that would apply regardless of circumstances”, claiming that “democratic government is about reconciling competing rights and interests”<sup>36</sup>. In short, the divergence of opinion can be categorised into two categories:<sup>37</sup> 1) FPIC is required for any

<sup>27</sup> UN General Assembly, Human Rights Council, ‘Free, prior and informed consent: a human rights-based approach’, Study of the Expert Mechanism on the Rights of Indigenous Peoples (2018) A/HRC/39/62, para 4.22. *Ibid*, para 11.

<sup>28</sup> *Ibid*, para 11.

<sup>29</sup> *Ibid*, para 14.

<sup>30</sup> *Ibid*, para 15.

<sup>31</sup> *Ibid*, para 15.

<sup>32</sup> *Ibid*, para 18.

<sup>33</sup> *Ibid*, para 20.

<sup>34</sup> *Ibid*, para 20.

<sup>35</sup> *Ibid*, para 19

<sup>36</sup> Peter Vaughan, ‘Statement by Mr Peter Vaughan, Head of the Australian delegation to the Permanent Forum on Indigenous Issues, on behalf of Australia, New Zealand and the United States of America, on free, prior informed consent’, Permanent Mission of Australia to the United Nations (22 May 2006) <[https://unmy.mission.gov.au/unmy/soc\\_220506.html](https://unmy.mission.gov.au/unmy/soc_220506.html)>.

<sup>37</sup> Jeremie Gilbert and Cathal Doyle, ‘A new dawn over the land: shedding light on collective ownership and consent’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the rights of indigenous peoples* (Hart Publishing, 2011), 44.

projects affecting indigenous peoples' lands, territories, resources, and well-being; and 2) FPIC is only necessary when the projects could potentially have a significant impact<sup>38</sup> on indigenous peoples' property rights or their physical or cultural survival. Nonetheless, the UN Expert Mechanism has highlighted:

*“A State or stakeholder that decides to proceed after consent is withheld by indigenous peoples moves into a legal grey area and exposes itself to judicial review and other types of recourse mechanisms”.*<sup>39</sup>

While this difference in opinion may look like inconsistencies within the human rights regime, it is part of the evolution process of FPIC under international law,<sup>40</sup> and it represents an opportunity for states to contribute to the development of FPIC that is consistent with the indigenous peoples right to self-determination.

## The Road to Self-Determination

This section of the article is dedicated to the legal challenges faced by the Orang Asli in achieving self-determination. The identified legal challenges are categorised into three categories: 1) Citizenry and Constitutional Special Privileges; 2) the Aboriginal Peoples Act 1954; and 3) The Utilisation of the Courts to Enforce Customary Land Rights. It is important to note that many of the identified challenges are interrelated and should not be analysed standalone. For instance, the many manifestations of poverty within Orang Asli communities are partly attributed to more complex issues such as the situation of Orang Asli ancestral lands. Furthermore, all the identified challenges are not new too. The government has spent millions of ringgits every year to alleviate their situation, especially on socioeconomics. Nonetheless, these governmental policies affecting the Orang Asli has made little reference to UNDRIP's right to self-determination.

### Citizenry and Constitutional Special Privileges

The Orang Asli are one of the most vulnerable groups in Malaysia, scoring poorly on many socioeconomic indicators, from poverty to educational attainment. The incidence of poverty among Orang Asli communities is disproportionately high. Many of the Orang Asli settlements still lack basic necessities such as electricity and running water. In 2009 the official poverty figure among Orang Asli stood at 50%,<sup>41</sup> vastly exceeding the national average. With the recent revision of the national poverty line income from RM 980 to RM 2,208 a month,<sup>42</sup> the incidence of poverty among Orang Asli communities is undoubtedly expected to rise dramatically. In terms of education, the Orang Asli communities also lag far behind other communities. According to the Malaysian Education Blueprint 2013 - 2025, Orang Asli students suffer from high drop-out rates and low educational outcomes, where “only 30% of Orang Asli students complete secondary school, less than half the national average of 72%”.<sup>43</sup> Thus, it is hard to imagine how a population can be self-determined if they lack the necessary wealth, education, skills and resources.

<sup>38</sup> FPIC is mentioned in five articles of the UNDRIP: Art 10 – no relocation shall happen without FPIC; Art 11 – redress for cultural, intellectual, religious and spiritual property taken without FPIC; Art 19 – States shall obtain FPIC on legislative and administrative measures affecting them; Art 28 – redress for lands, territories and resources taken without FPIC; and Art 29 – no storage or disposal of hazardous materials in their lands without FPIC.

<sup>39</sup> UN General Assembly, 'Free, prior and informed consent: a human rights-based approach' (n27), para 28.

<sup>40</sup> Gilbert and Doyle (n37), 58.

<sup>41</sup> Prime Minister's Department, 'Tenth Malaysia Plan 2011 – 2015' The Economic Planning Unit Prime Minister's Department Putrajaya (2010), 162.

<sup>42</sup> Department of Statistics Malaysia, 'Household Income and Basic Amenities Survey Report' Department of Statistics, Malaysia (July 2020), 296.

<sup>43</sup> Ministry of Education Malaysia, 'Malaysia Education Blueprint 2013 – 2025' (2013), 4-21.



## Birth Registration and Birth Certificate

For many, the issue of birth registration still poses a significant problem. Birth registration is generally a prerequisite for the issuance of a birth certificate. Without a birth certificate, the person is at risk of being excluded from the protection and enjoyment of rights guaranteed to all Malaysians, such as the right to education<sup>44</sup>, healthcare, work, social security and to own property. Hence, the birth certificate is the gateway to have rights.

Former Home Minister, Ahmad Zahid Hamidi revealed in 2017 that “there were 290, 437 stateless children in Malaysia”<sup>45</sup> and “between 2012 and January 2017, 15,394 children born in Malaysia were denied citizenship even though their fathers are Malaysian citizens”<sup>46</sup>. While the exact number of undocumented Orang Asli children are difficult to ascertain, the Orang Asli communities are at a higher risk of being undocumented as they face significant barriers in registering births. These barriers include the remoteness and distance of their areas from Registration Departments, low literacy rates and the lack of understanding of the importance of registration of births.<sup>47</sup>

SUHAKAM’s 2010 report revealed that in 2007, among the 16,715 Orang Asli students registered in 100% Orang Asli schools, 1,858 of them do not possess a birth certificate.<sup>48</sup> According to SUHAKAM, the lack of birth certificates and identity cards was one of the main challenges in realising Orang Asli’s right to education as they were unable to sit for examinations, receive government financial aid and welfare services.<sup>49</sup>

The UN Committee on the Rights of the Child in 2007 had also expressed its concerns that children born in remote areas in Malaysia were not being registered at birth.<sup>50</sup> It recommended Malaysia “to implement an efficient and at all stages free-of-charge birth registration system, which covers its territory fully, and undertake awareness-raising campaigns to reach the most remote areas of its territory”.<sup>51</sup> SUHAKAM also recommended the JHEOA (now JAKOA) to carry out more registration programmes to reduce the incidence of undocumented Orang Asli children.<sup>52</sup>

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<sup>44</sup> Prior to 2019, children are required to present their birth certificate or identity card to be admitted into mainstream government schools. As of 2019, the government has modified this admission criteria to allow undocumented children to be admitted at schools if one of their parents is a Malaysian citizen. The Ministry of Education has noted that this would benefit 2,635 students in primary and secondary school. See, for example, ‘Undocumented children allowed to study – Maszlee’ Borneo Post Online (28th November 2018) <<https://www.theborneopost.com/2018/11/28/undocumented-children-allowed-to-study-maszlee/>>.

<sup>45</sup> Teo Nie Ching, ‘Simplify process of granting citizenship to stateless children’ *Malaysiakini* (8th June 2017) <<https://www.malaysiakini.com/news/385006#0S5iS1aSiLHik5k7.99>>.

<sup>46</sup> *Ibid*.

<sup>47</sup> Yahya Awang, ‘Kajian Mengenai Masalah Ketiadaan Dokumen Pengenalan Diri di Kalangan Masyarakat Orang Asli Semenanjung Malaysia’ (2010) University Malaya.

<sup>48</sup> SUHAKAM, ‘Laporan Status Hak Pendidikan Kanak-Kanak Orang Asli’ *Human Rights Commission of Malaysia (2010, Report)*, 47.

<sup>49</sup> *Ibid*, 46.

<sup>50</sup> UN Convention on the Rights of the Child, ‘Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Malaysia’ *Committee on the Rights of the Child CRC/C/MYS/CO/1* (25 June 2007), para 44.

<sup>51</sup> *ibid*, para 45.

<sup>52</sup> SUHAKAM, ‘Laporan Status Hak Pendidikan Kanak-Kanak Orang Asli’ (n48), p59.



If throughout the years, the Malays in Peninsular Malaysia have been able to progress socioeconomically, why haven't the Orang Asli been able to do the same? In the words of Nicholas:

*"In Malaysian realpolitik, the bumiputera policy is... about giving recognition to a category of Malaysians who are perceived to be endowed with special rights and status on account of their primal presence on this land. Thus, apart from economic 'rights', other rights or privileges extended to bumiputeras are the greater protection and recognition of their religion, culture, language, education, representation in government, leadership in key government positions and institutions and political dominance, just to name a few."<sup>53</sup>*

The Orang Asli are recognised as indigenous to Peninsular Malaysia. Thus, how could their socioeconomic progress and advancement differ so significantly from other communities?

### **Special Privileges under Article 153 of the Constitution**

Article 153 of the Federal Constitution requires the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of Sabah and Sarawak. This special position includes reservations of positions in the public service, scholarships, exhibitions and other educational and training privileges and licences and permits for trade and business required by the federal law.<sup>54</sup> As the Orang Asli are not included in Article 153, they are not guaranteed the same constitutional right enjoyed by the Malays and the natives of Sabah and Sarawak.

Nonetheless, Article 8(5)(c) of the Constitution permits the enactment of any laws "for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land)" and reservations of suitable positions in public service. While Article 8(5)(c) permits the promotion of affirmative action laws in favour of Orang Asli, it does not "expressly oblige the federal government to safeguard the position of the Orang Asli".<sup>55</sup> It merely suggests that any positive discrimination for the welfare of Orang Asli would not violate the principle of equality guaranteed by Article 8 of the Federal Constitution.

This distinction in status of the Orang Asli from the Malays and natives of Sabah and Sarawak under the Federal Constitution means that the Orang Asli population have no mandatory constitutional provisions that protects them.<sup>56</sup> In fact, the word 'aborigine' (in the Malay language, 'Orang Asli') only appears four times in the Federal Constitution: Article 8(5)(c); Article 45(2)<sup>57</sup>; Ninth schedule, List I Federal list, Item 16<sup>58</sup>; and Article 160(2)<sup>59</sup>. According to Nicholas, the language of these articles are also phrased "in a rather unclear way that it has also become increasingly difficult to argue for the same rights and privileges that are accorded to, for example, the Malays (on account of their claim to indigeneity)".<sup>60</sup>

<sup>53</sup> Colin Nicholas, 'Orang Asli and the Bumiputera Policy' Center for Orang Asli Concerns (20th July 2004) <[https://www.coac.org.my/main.php?section=articles&article\\_id=19](https://www.coac.org.my/main.php?section=articles&article_id=19)>.

<sup>54</sup> Federal Constitution, Article 153(2).

<sup>55</sup> Yogeswaran Subramaniam, 'Ethnicity, Indigeneity and Indigenous Rights: The 'Orang Asli' Experience' (2015) Vol. 15 (Issue 1) QUT Law Review 71-91, 78

<sup>56</sup> Ibid, 79.

<sup>57</sup> Article 45(2) gives the Yang di-Pertuan Agong the authority to appoint representatives to represent the interests of aborigines.

<sup>58</sup> Item 16 provides that the 'welfare of the aborigines' is within the constitutional jurisdiction of the federal government. However, this does not extend to cover matters concerning their land. Matters regarding aboriginal lands remains the responsibility of the state government. This is in contrast with Malay reservations, which is explicitly governed by Article 89 of the Federal Constitution.

<sup>59</sup> Article 160(2) simply defines an 'aborigine' as an aborigine of the Malay Peninsula. The Federal Constitution does not provide a useful definition of an 'aborigine'. For the definition of an 'aborigine', refer to Section 3 of the Aboriginal People Act 1954.

<sup>60</sup> Nicholas, 'Orang Asli and the Bumiputera Policy' (n53).

It is not the intention of this article to advocate for the inclusion of the Orang Asli within Article 153 where they can receive the same special privileges accorded to Malays and the natives of Sabah and Sarawak. This article also does not suggest that the non-inclusion of Orang Asli in Article 153 is the sole reason holding back Orang Asli's socioeconomic advancement. Rather, this section of the article aims to contextualise the socioeconomic challenges facing Orang Asli through a constitutional lens. As Nicholas puts it:

*"So why are the Orang Asli still on the periphery? Simply because fairness and justice had not prevailed in the distribution of rights, resources, and opportunities".<sup>61</sup>*

## The Aboriginal Peoples Act 1954 (APA)

The APA was initially enacted during the Malayan Emergency to prevent the communists from infiltrating into the Orang Asli communities. It is the primary statute that governs the rights of Orang Asli. Its preamble states that it aims to "provide for the protection, well-being and advancement"<sup>62</sup> of Orang Asli. The APA grants extraordinary governmental powers that affect many aspects of the Orang Asli lives to the federal and state governments. These powers include:

### Federal Government

**Section 3(3)** - The Minister in charge of Orang Asli Affairs (Minister) has the ultimate decision to decide who legally qualifies as an Orang Asli;

**Section 4** – The Director-General of JAKOA is solely responsible for the general administration, welfare and advancement of the Orang Asli;

**Section 16** – The Minister has the power to appoint or remove Orang Asli headmen (Tok Batin);

### State Government

**Section 6 and 7** – The State Authority has the power to declare and revoke Aboriginal reserves and areas;

**Section 8** – The State Authority has the power to declare the rights of occupancy within Aboriginal reserves and areas.

**Section 12** – The State Authority has the power to decide whether compensation is to be paid to the Orang Asli for the loss of their lands.<sup>63</sup>

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<sup>61</sup> Ibid.

<sup>62</sup> Aboriginal Peoples Act 1954 (Revised 1974) [APA], Preamble.

<sup>63</sup> The Court of Appeal held in *Kerajaan Negeri Selangor & Sagong Tasi & Ors* that Section 12 of the APA as unconstitutional as it violates Article 13(2) of the Federal Constitution which prohibits the compulsory acquisition or use of property without adequate compensation. See *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, 190.

Thus, under the APA, the Orang Asli possess little decision-making powers, far from the ideals of self-determination espoused in the UNDRIP. The Bar Council Malaysia and Pusat Komnas have described the APA as 'outdated' as it confers "extraordinary governmental power to control most, if not all, material aspects of Orang Asli lives"<sup>64</sup>.

### Orang Asli Identity

As Article 160(2) of the Federal Constitution only provides a vague definition of an aborigine ("an aborigine of the Malay Peninsula"), the APA is referred to for a more substantive definition of an aborigine. Section 3(1) of the APA states:

"... an aborigine is:

- 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 descendant 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 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
- 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."<sup>65</sup>

As seen above, the statutory definition of an aborigine emphasises on three aspects: 1) aboriginal practices (language, customs, beliefs and 'way of life'); 2) membership within the aboriginal community; and 3) lineage (blood or adoption). Based on this statutory definition, an Orang Asli may lose his/ her 'aborigine' status if they failed to practice the 'aboriginal way of life'. As Nah has highlighted, the Orang Asli would lose their legal identity as 'aborigines' and would arguably be considered as a 'Malay'<sup>66</sup> under the eyes of the law "if they convert to Islam, speak Malay, and replace the practice of aboriginal customs with the practice of Malay customs"<sup>67</sup>.

Indeed, the issue of whether an aboriginal ethnic group could lose their identity as an 'aborigine' within the meaning of the APA was brought up in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* (*Sagong Tasi*). In this case, the defendants (Selangor State Government) argued that because the plaintiffs' (Temuans) cultural life had been so modernised that they no longer qualify to be an 'aborigine' under the APA.<sup>68</sup> The High Court rejected the defendants' cultural dilution arguments:

<sup>64</sup> Bar Council Malaysia and Pusat Komnas, 'Joint Memorandum on the Reform of the Aboriginal Peoples Act 1954 and Orang Asli Policy and Administration – Towards Better Orang Asli Self-Determination' (18th May 2019, Press Release) <<https://komnas.org/wp-content/uploads/sites/16/2019/07/joint-memorandum.reform-of-Aboriginal-Peoples-Act.Bar-Council-and-Pusat-Komnas-English.18-May-2019-1.pdf>>.

<sup>65</sup> APA, Section 3(1).

<sup>66</sup> According to Article 160 of the Federal Constitution, a Malaysian is to be considered a 'Malay' if he/ she: 1) professes the religion of Islam; 2) habitually speaks the Malay language; and 3) conforms to Malay customs.

<sup>67</sup> Alice M. Nah, 'Recognizing indigenous identity in postcolonial Malaysian law: Rights and realities for the Orang Asli (aborigines) of Peninsular Malaysia' (2008) Vol. 164 (Issue 2) *Journal of the Humanities and Social Sciences of Southeast Asia* 212, 219.

<sup>68</sup> *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591, 604.

- a) "they no longer depended on foraging for their livelihood in accordance with their tradition;
- b) they cultivate the lands with non-traditional crops such as palm oil;
- c) they also speak other languages in addition to Temuan language;
- d) some members of the family embrace other religions, and/or marry outsiders;
- e) some family members work elsewhere either before or after the acquisition; and
- f) the *Jawatankuasa Kemajuan dan Keselamatan Kampung* ('JKKK') was set up by the JHEOA to manage their affairs."<sup>69</sup>

The High Court held that the plaintiffs (Temuans) belong to an aboriginal society within the meaning of the APA.<sup>70</sup> In supporting its decision, it cited evidence of the Temuans' ongoing practice of culture, such as the existence of a tribal council (*Lembaga Adat*) that represents an organised society with a specific political system, their culture relating to the land (*adat tanah*) and burial (*adat kebumian*), their religion and belief system, their community weapon – the blowpipe (*sumpitan*), their tradition of 'sekor-menakor', their personal and place names, customs on inheritance, traditional activities and language.<sup>71</sup> While the Temuan claimants were considered to be 'aborigines' in the *Sagong Tasi* case, it equally suggests a possible scenario where an aboriginal ethnic group could lose their 'aborigine' status under the APA due to cultural dilution. This is especially true when one considers the government's economic policies for the *Orang Asli* that revolve around "regroupment schemes", which Subramaniam has described as an attempt "to homogenise many *Orang Asli* into cash crop smallholders, dependent on Government-aided schemes for individual security of tenure and economic well-being"<sup>72</sup>, and far from the ideals espoused in the UNDRIP.

As Crook noted:

*"With the accelerating pace of modernisation, meeting this standard may become increasingly more difficult, particularly for the *Orang Asli* of the Peninsula... *Orang Asli* groups have been subjected to a series of schemes designed to integrate, or as some have argued, assimilate them into the modern Malaysian society. While these schemes may provide a modicum of housing, educational opportunities, access to medical services and employment, they also serve to discourage the traditional way of life."<sup>73</sup>*

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<sup>69</sup> *Ibid*, 607.

<sup>70</sup> *Ibid*, 605.

<sup>71</sup> *Ibid*, 605.

<sup>72</sup> Yogeswaran Subramaniam, 'Rights Denied: *Orang Asli* and Rights to Participate in Decision-Making in Peninsular Malaysia' (2011) Vol. 19 (Issue 2) *Waikato Law Review* 45, 51.

<sup>73</sup> Peter Crook, 'After Adong: The Emerging Doctrine of Native Title in Malaysia' (2005) 32 *Journal of Malaysian and Comparative Law* 71, 77.



## Orang Asli Lands

The APA grants the state authority the power to declare any area inhabited by the Orang Asli as an aboriginal area<sup>74</sup> or aboriginal reserve<sup>75</sup> by gazette notification, which the Minister has the authority to exclude any person from entering.<sup>76</sup> Both aboriginal areas and reserves are afforded some protections such as the prohibition to declare them a Malay Reservation or a wildlife sanctuary, and the prohibition to alienate, grant, lease or dispose of these lands except to Orang Asli normally residing there.<sup>77</sup> The state authority also has the power to grant rights of occupancy to any Orang Asli or their family members within any aboriginal area or reserves.<sup>78</sup>

Nonetheless, all these protections and rights can be revoked unilaterally by the state authority.<sup>79</sup> The APA contains no references to FPIC and the Orang Asli has "no explicit statutory rights of appeal or review against any decision to degazette Orang Asli reserves"<sup>80</sup>. Between 1990 and 1999, 76.2% of the Orang Asli reserves in Selangor alone were degazetted.<sup>81</sup> Hence, land gazettelement provides limited security, especially with our development pace, where "Orang Asli traditional territories are becoming increasingly much sought-after assets"<sup>82</sup>. Furthermore, in an event where these protections are revoked, and displacement occurs, the State authority is not obliged to grant any compensation.<sup>83</sup> The State authorities are only obliged to compensate for the fruit or rubber trees on the land under the APA.<sup>84</sup> As Nicholas puts it:

*"In effect, the perception is that the best security that an Orang Asli can get is one of 'tenant-at-will'. That is to say, an Orang Asli is allowed to remain in a particular area only at the pleasure of the state authority. If at any such time the state wishes to re-acquire the land, it can revoke its status and the Orang Asli are left with no other legal recourse but to move elsewhere."*

Land is constitutionally a state matter. Thus, when the APA confers immense power over the state authority to safeguard Orang Asli lands and resources, it ultimately "underscores the importance of the state's performance in protecting these interests".<sup>85</sup> The High Court in the *Sagong Tasi* case held that the state government has "a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights...", and further held that the state government had breached its fiduciary duty towards the Orang Asli claimants<sup>86</sup>. The Court of Appeal in the same case further highlighted the role of the APA as a 'human rights statute'; therefore, its interpretation must be constructed "liberally in favour of the aborigines as enhancing their rights rather than curtailing them"<sup>87</sup>.

<sup>74</sup> APA, Section 6.

<sup>75</sup> APA, Section 7.

<sup>76</sup> APA, Section 14.

<sup>77</sup> APA, Section 6 and 7.

<sup>78</sup> APA, Section 8.

<sup>79</sup> APA, Section 6(3) and 7(3).

<sup>80</sup> Subramaniam, 'Rights Denied: Orang Asli and the Rights to Participate in Decision-Making in Peninsular Malaysia' (n72), 56.

<sup>81</sup> Colin Nicholas, 'The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia' (IWGIA Document No. 95, Copenhagen 2000), 36.

<sup>82</sup> Ibid.

<sup>83</sup> APA, Section 12.

<sup>84</sup> APA, Section 11.

<sup>85</sup> Yogeswaran Subramaniam, 'Affirmative Action and the Legal Recognition of Customary Land Rights in Peninsular Malaysia: The Orang Asli Experience' (2013) Vol 17 (Issue 1) Australian Indigenous Law Review 103, 110.

<sup>86</sup> *Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors* (n68), 618.

<sup>87</sup> *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, 185 - 186.

Nonetheless, according to Nicholas, the state government has consistently disregarded the concept of FPIC, where "many orang asli... find out that their lands are under threat only when the surveyors are on their land, or when the bulldozers come in".<sup>88</sup> Subramaniam has also highlighted JAKOA's competing interests as they have to balance the interest of the Orang Asli (as the guardian of Orang Asli conferred by the APA) and the interest of the federal government (as a government agency).<sup>89</sup> This puts JAKOA "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"<sup>90</sup>.

In 2013, SUHAKAM released its Report of the National Inquiry into the Land Rights of Indigenous Peoples and outlined 18 recommendations including the adoption of a human rights-based approach to development and FPIC law and the establishment of an Independent National Commission on Indigenous Peoples.<sup>91</sup> Following the Roundtable Discussion held by the Bar Council Malaysia and Pusat Komnas in 2019, the Bar Council has also advocated for the implementation of 136 resolutions of a 2019 Orang Asli Convention organised by the Federal government targeted towards restoring the dignity of the Orang Asli (136 OA Convention Resolutions).<sup>92</sup> The Bar Council highlighted the importance of "any law, policy, institutional and practice reforms that concern the Orang Asli community to take into account all previous consultations held with all sections of the community and in the future, be preceded by prior and effective consultation with all sections of the community and at every stage of the reform process."<sup>93</sup>

## The Utilisation of the Courts to Enforce Customary Land Rights

Customary land rights under the common law cannot be traced to any statute, rather it "reflects the entitlement of the aboriginal people, in accordance with their laws and customs, to their traditional lands"<sup>94</sup>. These native laws and customs pre-existed statute and as such, continue to exist unless extinguished by plain and obvious words in a statute. The case of *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor and Anor* officially established the recognition of Orang Asli customary land rights under common law by the Malaysian courts. The plaintiffs, 52 heads of aboriginal families, claimed that the Sungai Linggiu's catchment area was their traditional and ancestral land, where the Johor Government had entered into an agreement with the Singapore Government to build a dam.

In the judgment, the High Court acknowledged that the aboriginal people are among the two groups of people that have traditionally occupied Peninsular Malaysia. Since "they have been in continuous and unbroken occupation... of the land from time immemorial", they have "the right to live on their land as their forefathers had lived and... the future generations of the aboriginal people would be entitled to this right of their forefathers"<sup>95</sup>.

<sup>88</sup> Colin Nicholas, Jenita Engi and Teh Yen Ping, 'The Orang Asli and the UNDRIP: from Rhetoric to Recognition' (Center for Orang Asli Concerns, 2010), 98.

<sup>89</sup> Subramaniam, 'Rights Denied: Orang Asli and the Rights to Participate in Decision-Making in Peninsular Malaysia' (n72), 48.

<sup>90</sup> Ibid.

<sup>91</sup> SUHAKAM, 'Report of the National Inquiry into the Land Rights of Indigenous Peoples' Human Rights Commission of Malaysia (2013, Report), 164 – 174.

<sup>92</sup> Bar Council Malaysia and Pusat Komnas, 'Joint Memorandum on the Reform of the Aboriginal Peoples Act 1954 and Orang Asli Policy and Administration – Towards Better Orang Asli Self-Determination' (n64).

<sup>93</sup> Ibid, para 10.

<sup>94</sup> *Sagong Tasi v. Kerajaan Selangor* (n68), 611.

<sup>95</sup> *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor and Anor* [1997] 6(4) AILR 82, 84.

In *Adong*, customary land rights under common law were limited in the sense that the aboriginal people have “the right to move freely about their land... and also to live from the produce of the land itself, but not... in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein”<sup>96</sup> (usufructuary rights).

Subsequently, *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* expanded the scope customary land rights to include proprietary rights in and over the land (ownership). However, ‘ownership’ rights were “limited only to the area that forms their settlement... not to the jungles at large where they used to roam to forage for their livelihood”<sup>97</sup>. Justice Mohd Noor highlighted his intention to align with “the worldwide recognition now being given to aboriginal rights” and cited the *Delgamuukw* case, where the Canadian Supreme Court held:

*“Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights”*.<sup>98</sup>

Justice Mohd Noor further added:

*“... if the aboriginal people are now to be denied the recognition of their proprietary interest in their customary and ancestral lands, it would tantamount to taking a step backward to the situation prevailing in Australia before the last quarter of the 20th century where the laws, practices, customs and rules of the indigenous peoples were not given recognition, especially with regard to their strong social and spiritual connection with their traditional lands and waters.”*<sup>99</sup>

Thus, the High Court held that the Orang Asli (Temuans) plaintiffs, in this case, must be compensated in accordance with the Land Acquisition Act 1960 for the loss of their customary land.<sup>100</sup>

While there has been clear establishment of customary land rights under common law by the Malaysian judiciary, it was stressed in *Sagong Tasi* that these rights “can be extinguished by clear and plain legislation or by an executive act authorised by such legislation, but compensation should be paid”<sup>101</sup>.

As Subramaniam and Nicholas noted:

*“Indigenous customary rights under Malaysian law are therefore susceptible to unilateral extinguishment by law, with relatively little jurisprudential development on the principle of free, prior and informed consent of indigenous communities in matters affecting their lands, territories and resources.”*<sup>102</sup>

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Sagong Tasi v. Kerajaan Selangor* (n68), 615.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, 618.

<sup>101</sup> *Ibid.*, 612.

<sup>102</sup> Yogeswaran Subramaniam and Colin Nicholas, ‘The Courts and the Restitution of Indigenous Territories in Malaysia’ (2018) April 2018 (No. 1) *Erasmus Law Review* 67, 71.

Nicholas, Engi and Ping have also noted that the government still proceed on the assumption that these judgments only apply to specific situations in a particular territory so "the whole native title argument must be argued by the Orang Asli each time they file a case for a disputed territory".<sup>103</sup> They highlighted:

*"The onus has always been on the Orang Asli to prove that they own the land, rather than on the government to demonstrate when and how it came to take possession legally of Orang Asli customary lands. This is the situation despite the fact that for most, if not all, Orang Asli territories, no legal extinguishment of their proprietary rights has occurred according to international law or as allowed for in the UNDRIP."<sup>104</sup>*

For instance, on the 29th July 2019, Perak's Menteri Besar (MB), Ahmad Faizal Azumu, declared that Perak has no customary land for Orang Asli, stating that its government had "maintained a view under the state constitution that no land is recognised as customary land either for indigenous peoples, Malays, Chinese, Indians, or any other race."<sup>105</sup> However, on the 1st August 2019, following a meeting with then Minister in Prime Minister Department P. Waytha Moorthy and then Attorney-General Tommy Thomas, the Perak MB announced its decision to halt its logging activities temporarily.<sup>106</sup> Nonetheless, by June 2020, it was reported that the logging activities have since recommenced.<sup>107</sup>

<sup>103</sup>. Nicholas et al, 'The Orang Asli and the UNDRIP: from Rhetoric to Recognition' (n88), 95 – 96.

<sup>104</sup>. Ibid, 96.

<sup>105</sup>. Bernama, 'State constitution does not recognise customary land – Perak MB' Malaysiakini (29th July 2019) <<https://www.malaysiakini.com/news/485908>>.

SUHAKAM has described the Perak Menteri Besar's declaration as "wilfully ignorant, offensive and disrespectful to the Orang Asli". It also stated that the lack of recognition of native customary rights by state governments, public authorities and private companies has resulted in the rise of illegal land-grabbing and encroachment of indigenous peoples' land. See, Hemananthani Sivanandam, 'Perak MB's comments on Orang Asli rights disrespectful, says Suhakam' The Star (1st August 2019) <<https://www.thestar.com.my/news/nation/2019/08/01/perak-mb039s-comments-on-orang-asli-rights-disrespectful-says-suhakam>>.

The Malaysian Bar also released a press statement describing Perak Menteri Besar's declaration as legally erroneous and reminded the Perak state government to "exercise due care and diligence when making public statements on the extent of the legal rights afforded to the Orang Asli". See, Abdul Fareed Abdul Gafoor, 'Perak Menteri Besar's Erroneous Assumptions on the Law Regarding Orang Asli Customary Land Rights' Malaysian Bar (31st July 2019, Press Release) <<https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-perak-menteri-besar-s-erroneous-assumptions-on-the-law-regarding-orang-asli-customary-land-rights>>.

The Centre for Orang Asli Concerns (COAC) also reminded the Perak Menteri Besar that there are legal precedents on the recognition of Orang Asli customary land, with one court case specifically in Perak (Kong Chee Wai Iwn Pengarah Tanah Dan Galian Perak [2016] 1 CLJ 605). See, Geraldine Tong, 'There is legal precedent in Perak recognising Orang Asli land, COAC tells MB' Malaysiakini (30th July 2019) <<https://www.malaysiakini.com/news/485974>>.

<sup>106</sup>. In the joint statement between Ahmad Faizal and Waytha Moorthy, both the federal and state governments affirmed their commitment to protect the interests of the Orang Asli in that area. They also stated that the federal and state governments will work together to resolve any issues regarding the Orang Asli in the future. See, John Bunyan, 'Perak MB halts logging activities in Orang Asli village in Gerik' Malay Mail (1st August 2019) <<https://www.malaymail.com/news/malaysia/2019/08/01/perak-mb-halts-logging-activities-in-orang-asli-village-in-gerik/1776766>>.

<sup>107</sup>. 'Loggers return to disputed zones, says Orang Asli watchdog' Malaysiakini (22th June 2020) <<https://www.malaysiakini.com/news/531231>>.



Furthermore, there exist many challenges for the Orang Asli to utilise the courts to enforce their customary land rights. First, many simply cannot afford legal services. Without the provision of legal aid, legal representation is effectively cut off for many from the outset.<sup>108</sup> If legal representation is secured, they then "have to grapple with marshalling community participation, decision-making and unity throughout the litigation process"<sup>109</sup> and adapt to the adversarial style of civil proceedings which is "arguably at odds with indigenous perspectives on dispute resolution".<sup>110</sup> Then, they have to endure the long and arduous litigation process. In the *Sagong Tasi* case, it took the Orang Asli (Temuans) claimants 12 years to conclude the litigation process and receive compensation for the loss of their customary lands.<sup>111</sup> Nevertheless, Subramaniam and Nicholas have noted that "the Malaysian courts remain the last bastion of justice for Malaysia's indigenous minority peoples".<sup>112</sup>

## Conclusion

- The right to self-determination under the UNDRIP can largely be understood in three contexts: 1) the devolvement of the State's legislative and administrative functions concerning their internal affairs; 2) the ability to influence State's decision-making processes; and 3) the recognition and acceptance of indigenous political and legal institutions, including their laws, traditions and customs.
- Free, prior, and informed consent (FPIC) is a manifestation of the right to self-determination. It constitutes three interrelated and indivisible rights: the right to consultation; the right to participation; and the right to their lands and resources. While there is a lack of international consensus as to when FPIC should be applied, this is part of the evolution process of FPIC under international law.
- This paper identified three main challenges in the fulfilment of the Orang Asli's right to self-determination guaranteed by the UNDRIP: 1) Citizenry and Constitutional Special Privileges; 2) the Aboriginal Peoples Act 1954; and 3) The Utilisation of the Courts to Enforce Customary Land Rights.
- In terms of challenges relating to citizenry and Constitutional special privileges, the example of birth registrations and birth certificates was highlighted. The lack of birth certificates among some Orang Asli students have been identified as one of the main challenges in realising Orang Asli's right to education. This paper also noted that the Orang Asli are not accorded the same special privileges guaranteed to the Malays and the natives of Sabah and Sarawak as they are not included in Article 153 of the Federal Constitution.

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<sup>108</sup>. Subramaniam and Nicholas, 'The Courts and the Restitution of Indigenous Territories in Malaysia' (n102), 72.

<sup>109</sup>. *Ibid.*

<sup>110</sup>. *Ibid.*

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

<sup>112</sup>. *Ibid.*, 78.

- The protectionist nature of APA has also been identified as a challenge towards achieving self-determination. The APA confers extraordinary power to the federal government to control virtually every aspect of the Orang Asli's life. The definition of an 'aborigine' under the APA also potentially enables an Orang Asli to "lose" his/ her legal identity as an 'aborigine' through "modernisation" and urbanisation. The APA also grants excessive powers on the State Authority over Orang Asli lands. Although the courts have held that the State Authority has a duty to protect the welfare of the Orang Asli, including their land rights, the State Authorities have consistently disregarded the concept of FPIC. The competing interests of JAKOA as the guardian of the welfare of Orang Asli and a government agency is also problematic.
- Although the Malaysian courts recognises customary land rights under the common law, there appears to be a lack of political will on the government to recognise landmark decisions on the recognition of Orang Asli customary land rights. Furthermore, there exists many challenges for the Orang Asli to utilise the courts to enforce their customary land rights. These challenges include the high cost of legal services, community participation and decision-making process during the litigation process, the adversarial nature of civil proceedings, and the long process of litigation.
- In conclusion, the ideals of self-determination espoused in the UNDRIP remain a distant reality for the Orang Asli in Peninsular Malaysia. This paper has highlighted the various legal challenges which prevent the Orang Asli from being self-determined. For the Orang Asli to fulfil their right to self-determination guaranteed by the UNDRIP, the Aboriginal Peoples Act 1954 will need to be reformed to reflect the goals of the UNDRIP. Law reform must also be accompanied by political will to genuinely empower the Orang Asli to be self-determined. Their socioeconomic status will need to be improved so that they have a fair opportunity to be truly in-charge of their internal affairs and participate in decision-making processes in a meaningful manner. The UNDRIP is an important tool as it acts as the guiding principle for the interpretation, enforcement and implementation of law and policies that affects the Orang Asli.

## References

### Legislation

1. Aboriginal Peoples Act 1954 (Revised 1974) [APA].
2. Federal Constitution.

### Case Law

1. Adong bin Kuwau & Ors v. Kerajaan Negeri Johor and Anor [1997] 6(4) AILR 82.
2. Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169.
3. Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591

### International Documents

1. UN Convention on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Malaysia' Committee on the Rights of the Child CRC/C/MYS/CO/1 (25 June 2007).
2. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
3. UN Economic and Social Council, Commission on Human Rights, 'Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session', UN Doc. E/CN.4/2005/WG.15/2 (1st September 2005), Article 31.
4. UN General Assembly, Human Rights Council, 'Free, prior and informed consent: a human rights-based approach', Study of the Expert Mechanism on the Rights of Indigenous Peoples (2018) A/HRC/39/62.

### Reports

1. Department of Statistics Malaysia, 'Household Income and Basic Amenities Survey Report' Department of Statistics, Malaysia (July 2020).
2. SUHAKAM, 'Laporan Status Hak Pendidikan Kanak-Kanak Orang Asli' Human Rights Commission of Malaysia (2010, Report).
3. SUHAKAM, 'Report of the National Inquiry into the Land Rights of Indigenous Peoples' Human Rights Commission of Malaysia (2013, Report).
4. Prime Minister's Department, 'Tenth Malaysia Plan 2011 – 2015' The Economic Planning Unit Prime Minister's Department Putrajaya (2010).
5. Yong C., 'Forest governance in Malaysia: An NGO perspective' JOANGO Hutan (September 2006, Report).

### Press Releases

1. Gafoor A. F.A., 'Perak Menteri Besar's Erroneous Assumptions on the Law Regarding Orang Asli Customary Land Rights' Malaysian Bar (31st July 2019, Press Release) <<https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-perak-menteri-besar-s-erroneous-assumptions-on-the-law-regarding-orang-asli-customary-land-rights>>.
2. United Nations Human Rights, Office of the High Commissioner, 'International Day of the World's Indigenous Peoples Message from Michelle Bachelet, UN High Commissioner for Human Rights' (9th August 2020, Press Release) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26156&LangID=e>>.
3. Department of Public Information, News and Media Division, UN General Assembly, 'General Assembly

adopts Declaration on Rights of Indigenous Peoples: 'Major Step Towards Human Rights for All, says President' (13th December 2007, Press Release) <<https://www.un.org/press/en/2007/ga10612.doc.htm>>.

4. Bar Council Malaysia and Pusat Komas, 'Joint Memorandum on the Reform of the Aboriginal Peoples Act 1954 and Orang Asli Policy and Administration – Towards Better Orang Asli Self-Determination' (18th May 2019, Press Release) <<https://komas.org/wp-content/uploads/sites/16/2019/07/joint-memorandum-reform-of-Aboriginal-Peoples-Act.Bar-Council-and-Pusat-Komas-English.18-May-2019-1.pdf>>.

### Books

1. Nicholas C., 'The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia' (IWGIA Document No. 95, Copenhagen 2000).
2. Nicholas C., Engi J. and Ping T.Y., 'The Orang Asli and the UNDRIP: from Rhetoric to Recognition' (Center for Orang Asli Concerns, 2010).

### Book Chapters

1. Anaya J., 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Charters C. and Stavenhagen R. (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2019).
2. Daes E., 'Striving for self-determination for indigenous peoples' in Y. N. Kly and D. Kly (eds), *In pursuit of the right to self-determination* (Clarity Press, 2000).
3. Gilbert J. and Doyle C., 'A new dawn over the land: shedding light on collective ownership and consent' in Allen S. and Xanthaki A. (eds), *Reflections on the UN Declaration on the rights of indigenous peoples* (Hart Publishing, 2011), 44.
4. Wheatley S., 'Autonomy or Self Government' in *The Hague Conference (2010): Rights of Indigenous Peoples, Interim Report* (International Law Association, 2010).

### Thesis

1. Subramaniam Y., 'Orang Asli Land Rights by UNDRIP Standards in Peninsular Malaysia: An Evaluation and Possible Reform' (August 2012) University of New South Wales, Faculty of Law (PhD Thesis).
2. Hassan M. S.Y., 'Hak Penentuan Kendiri Orang Asal di Bawah Undang-Undang Antarabangsa: Kajian Kes Orang Asli' (February 2015) University Kebangsaan Malaysia, Faculty of Law (PhD Thesis)

### Journal Articles

1. Awang Y., 'Kajian Mengenai Masalah Ketiadaan Dokumen Pengenalan Diri di Kalangan Masyarakat Orang Asli Semenanjung Malaysia' (2010) University Malaya.
2. Crook P., 'After Adong: The Emerging Doctrine of Native Title in Malaysia' (2005) 32 *Journal of Malaysian and Comparative Law* 71.
3. Cambou D., 'The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multidimensional perspective' (27 February 2019) *The International Journal of Human Rights* 1.
4. Idrus R., 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) Vol. 29 (Supp. 1) *Kajian Malaysia* 53.
5. Nah A. M., 'Recognizing indigenous identity in postcolonial Malaysian law: Rights and realities for the Orang Asli (aborigines) of Peninsular Malaysia' (2008) Vol. 164 (Issue 2) *Journal of the Humanities and Social*



Sciences of Southeast Asia 212.

6. Subramaniam Y., 'Affirmative Action and the Legal Recognition of Customary Land Rights in Peninsular Malaysia: The Orang Asli Experience' (2013) Vol 17 (Issue 1) Australian Indigenous Law Review 103.
7. Subramaniam Y., 'Ethnicity, Indigeneity and Indigenous Rights: The 'Orang Asli' Experience' (2015) Vol. 15 (Issue 1) QUT Law Review 71-91.
8. Subramaniam Y., 'Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia' (2011) Vol. 19 (Issue 2) Waikato Law Review 45.
9. Subramaniam Y. and Nicholas C., 'The Courts and the Restitution of Indigenous Territories in Malaysia' (2018) April 2018 (No. 1) Erasmus Law Review 67.

## Speech

1. Vaughan P., 'Statement by Mr Peter Vaughan, Head of the Australian delegation to the Permanent Forum on Indigenous Issues, on behalf of Australia, New Zealand and the United States of America, on free, prior informed consent', Permanent Mission of Australia to the United Nations (22 May 2006) <[https://unmy.mission.gov.au/unmy/soc\\_220506.html](https://unmy.mission.gov.au/unmy/soc_220506.html)>.
2. Nicholas C., 'Orang Asli and the Bumiputera Policy' Center for Orang Asli Concerns (20th July 2004) <[https://www.coac.org.my/main.php?section=articles&article\\_id=19](https://www.coac.org.my/main.php?section=articles&article_id=19)>.

## Websites

1. Department of Economic and Social Affairs: Indigenous Peoples, 'United Nations Declaration on the Rights of Indigenous Peoples' <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.
2. Nicholas C., 'Orang Asli and the Bumiputera Policy' Center for Orang Asli Concerns (20th July 2004) <[https://www.coac.org.my/main.php?section=articles&article\\_id=19](https://www.coac.org.my/main.php?section=articles&article_id=19)>.

## News Articles

3. -, 'Undocumented children allowed to study – Maszlee' Borneo Post Online (28th November 2018) <<https://www.theborneopost.com/2018/11/28/undocumented-children-allowed-to-study-maszlee/>>.
4. -, 'Loggers return to disputed zones, says Orang Asli watchdog' Malaysiakini (22th June 2020) <<https://www.malaysiakini.com/news/531231>>.
5. Bernama, 'State constitution does not recognise customary land – Perak MB' Malaysiakini (29th July 2019) <<https://www.malaysiakini.com/news/485908>>.
6. Ching T. N., 'Simplify process of granting citizenship to stateless children' Malaysiakini (8th June 2017) <<https://www.malaysiakini.com/news/385006#0S5iS1aSILHlk5k7.99>>.
7. Geraldine Tong, 'There is legal precedent in Perak recognising Orang Asli land, COAC tells MB' Malaysiakini (30th July 2019) <<https://www.malaysiakini.com/news/485974>>.
8. Hemananthani Sivanandam, 'Perak MB's comments on Orang Asli rights disrespectful, says Suhakam' The Star (1st August 2019) <<https://www.thestar.com.my/news/nation/2019/08/01/perak-mb039s-comments-on-orang-asli-rights-disrespectful-says-suhakam>>.
9. John Bunyan, 'Perak MB halts logging activities in Orang Asli village in Gerik' Malay Mail (1st August 2019) <<https://www.malaymail.com/news/malaysia/2019/08/01/perak-mb-halts-logging-activities-in-orang-asli-village-in-gerik/1776766>>.
10. Vinodh Pillai, 'Perak MB chided for telling Orang Asli to stop asking for help' FMT News (24th November 2019) <<https://www.freemalysiatoday.com/category/nation/2018/11/24/perak-mb-chided-for-telling-orang-asli-to-stop-asking-for-help/>>.





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