Orang Asli land rights by UNDRIP standards in Peninsular Malaysia: an evaluation and possible reform

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ORANG ASLI LAND RIGHTS BY *UNDRIP* STANDARDS IN PENINSULAR MALAYSIA: AN EVALUATION AND POSSIBLE REFORM

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This thesis makes an original contribution to knowledge by evaluating Malaysian laws on Orang Asli ('OA') land and resource rights and suggesting an alternative legal framework for better recognition and protection of these rights: (1) by reference to standards derived from the *2007 United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'); and (2) having regard to the *Malaysian Constitution*.

Malaysia's vote supporting the *UNDRIP* and its courts' recognition of common law Indigenous customary land rights have not induced state action that effectively recognises the customary lands of its Indigenous minority, the OA people. Instead, state land policies focus on the advancement of OA, a marginalised community, through development of OA lands for productive economic use. Such policies may have some positive features but they also continue to erode OA customary lands. Existing protectionist laws affecting OA facilitate these policies and provide limited protection for OA customary lands. Resulting objections from the OA community have prompted calls to honour the *UNDRIP*. These tensions and concerns raise legal questions regarding the adequacy of the existing legal framework governing OA customary lands and the extent to which constitutional arrangements can accommodate *UNDRIP* standards.

The special constitutional position of OA that has enabled extensive state control of OA land and lives equally permits legal recognition of OA customary lands compatible with the *UNDRIP*. However, existing statutory laws affecting OA and placing ultimate power in the state are at odds with *UNDRIP* standards. These laws have worked to the detriment of OA. Despite the potential of common law Indigenous title, domestic experiences and experiences drawn from Australia and Canada suggest that ordinary common law development of OA customary land rights without state intervention may also fall short of *UNDRIP* standards. This thesis concludes that statutory recognition of autonomous OA communal ownership of land and resources with necessary legal safeguards provides a viable alternative for reform. However, a formidable challenge to effective reform remains the lack of political will to recognise OA as a distinct community deserving of *UNDRIP* rights.

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ABSTRACT

This thesis makes an original contribution to knowledge by evaluating Malaysian laws on Orang Asli ('OA') land and resource rights and suggesting an alternative legal framework for better recognition and protection of these rights: (1) by reference to standards derived from the *2007 United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'); and (2) having regard to the *Malaysian Constitution*.

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for reform. However, a formidable challenge to effective reform remains the lack of political will to recognise OA as a distinct community deserving of *UNDRIP* rights.

ORIGINALITY STATEMENT

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Portions of this thesis have been presented at conferences and/or published:

Conference papers:

'Common Law Native Title in Malaysia: Selected Issues for Forestry Stakeholders' (Malaysian Forest Dialogue Forum, Hotel Istana, Kuala Lumpur, 14-15 October 2009)

'The UNDRIP and the Malaysian Constitution: Is Special Recognition and Protection of Orang Asli Customary Lands Permissible?' (Conference on the United Nations Declaration on the Rights of Indigenous Peoples: Implementation and Challenges, University of Malaya, Kuala Lumpur, Malaysia, 9-10 November 2010)

'Implementation of UNDRIP Standards; Communal Title as an Alternative for Recognition and Protection of Orang Asli Customary Land and Resource Rights' (The Law on Customary Lands, Territories and Resource Rights - Bridging the Implementation Gap, Faculty of Law, University of Malaya, Kuala Lumpur, 25-26 January 2011)

'Rights Denied: Orang Asli and Rights to Participate in Decision-making in Peninsular Malaysia' (Justice in the Round Conference, Te Piringa Faculty of Law, University of Waikato, Hamilton, New Zealand, 18-20 April 2011)

Publications:

International Indigenous Rights: Evolution, Progress and Regress (Subang Jaya, 2007)

'Beyond Sagong bin Tasi: The Use of Traditional Knowledge to Prove Aboriginal Customary Rights over Land in Peninsular Malaysia and its Challenges' [2007] 2 *Malayan Law Journal* xxx

'A Review of 'The Orang Asli Cases and Property Rights': An Aboriginal Perspective' [2007] 7 *Malayan Law Journal* i

'The United Nations Declaration on the Rights of Indigenous Peoples: Additional Enforceable Rights for the Orang Asli?' [2008] 2 *Malayan Law Journal* lxxv

'Common Law Native Title in Malaysia: Selected Issues for Forestry Stakeholders' [2010] 1 *Malayan Law Journal* xv.

'The UNDRIP and the Malaysian Constitution: Is Special Recognition and Protection of Orang Asli Customary Lands Permissible?' [2011] 2 *Malayan Law Journal* cxxvi

'Rights Denied: Orang Asli and Rights to Participate in Decision-making in Peninsular Malaysia' (2011) 19(2) *Waikato Law Review* 44

'The Orang Asli and the UNDRIP: from rhetoric to recognition' (2011) 7(24) *Indigenous Law Bulletin* 30

'Bato Bagi v Kerajaan Negeri Sarawak: Extinguishment of native customary rights in Malaysia' (2011) 7(27) *Indigenous Law Bulletin* 30

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TABLE OF ABBREVIATIONS

1961 Policy	*Statement of Policy regarding the Long Term Administration of the Aborigine Peoples in the Federation of Malaya*, Minister of Interior, Federation of Malaya, 20 November 1961
Adong 1	*Adong bin Kuwau v Kerajaan Negeri Johor* (High Court, Malaysia)
Adong 2	*Kerajaan Negeri Johor v Adong bin Kuwau* (Court of Appeal, Malaysia)
Alexkor	*Alexkor v Richtersveld Community* (Constitutional Court, South Africa)
ALRA 1976 (NT)	*Aboriginal Land Rights Act (Northern Territory) 1976* (Cth)
Amodu	*Amodu Tijani v The Secretary, Southern Nigeria* (Privy Council)
APA	*Aboriginal Peoples Act 1954* (Malaysia)
APO	*Aboriginal Peoples Ordinance 1954* (Federation of Malaya) (Repealed)
Bato Bagi	*Bato Bagi v Kerajaan Negeri Sarawak* (Federal Court, Malaysia)
Calder	*Calder v A-G of British Columbia* (Supreme Court, Canada)
CDE	United States Community Development Entities
CERD	UN Committee on the Elimination of Racial Discrimination
CLA	*Civil Law Act 1956* (Malaysia)
COAC	Center for Orang Asli Concerns, a Malaysian non-governmental organisation
COAR	Malaysian Bar Council Committee on Orang Asli Rights
COB	Communal Ownership Body as proposed in Chapter 8

common law doctrine	The doctrine of common law Orang Asli customary land rights unless the context requires otherwise
CRC	*United Nations Convention on the Rights of Child (1989)*
Delgamuukw	*Delgamuukw v British Columbia* (Supreme Court, Canada)
DOA	Department of Orang Asli Affairs [*Jabatan Hal Ehwal Orang Asli*], known from January 2011 as the Department of Orang Asli Development [*Jabatan Kemajuan Orang Asli*] ('*DOAD*') (translated from the Malay language by the candidate)
DOAD	Department of Orang Asli Development [*Jabatan Kemajuan Orang Asli*], formerly known as the *DOA* (translated from the Malay language by the candidate)
DOAD Plan	Department of Orang Asli Development Strategic Plan 2011-2015 (*DOAD*, 2011)
Draft OARA	Draft Orang Asli Reservation Act proposed by Orang Asli on 30 April 2000
ECOSOC	UN Economic and Social Council
EMRIP	UN Expert Mechanism on the Rights of Indigenous Peoples
FNLMA	*First Nations Land Management Act* SC 1999 (Canada)
FPIC	Free, prior and informed consent as envisaged in this thesis
GDP	Gross Domestic Product
Haida	*Haida Nation v British Columbia (Minister of Forests)* (Supreme Court, Canada)
ICCPR	*International Covenant on Civil and Political Rights (1966)*
ICEFRD	*International Convention on the Elimination of all Forms of Racial Discrimination (1965)*
ILO	International Labour Organisation
ILO Convention 107	*Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent* Countries, ILO C 107 (1957)

ILO Convention 169	*Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, ILO C 169 (1989)
JKOASM	*Jaringan Kampung Orang Asli Semenanjung Malaysia* [Peninsular Malaysia Orang Asli Village network] (translated from the Malay language by the candidate)
JOAS	*Jaringan Orang Asal SeMalaysia*, a network of Malaysian Indigenous minority non-governmental organisations
Johnson	*Johnson v M'intosh* (Supreme Court, United States)
Kajing 1	*Kajing bin Tubek v Ekran Bhd* (High Court, Malaysia)
Kajing 2	*Ketua Pengarah Jabatan Alam Sekitar v Kajing bin Tubek* (Court of Appeal, Malaysia)
Kulasingam	*S Kulasingam v Commissioner of Lands, Federal Territory* (Federal Court, Malaysia)
LAA	*Land Acquisition Act 1960* (Malaysia)
LGIA	*Land Groups Incorporation Act 1974* (Papua New Guinea)
Loh Wai Kong	*Government of Malaysia v Loh Wai Kong* (Federal Court, Malaysia)
Mabo No 2	*Mabo v Queensland (No 2)* (High Court, Australia)
Madeli 1	*Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) v Superintendent of Land & Surveys Miri Division* (Court of Appeal, Malaysia)
Madeli 2	*Superintendent of Land & Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* (Federal Court, Malaysia)
Malaysian Constitution	*Federal Constitution* (Malaysia)
Maxwell Memorandum	Memorandum prepared by W E Maxwell for the purposes of introducing a land registration system in the Malay Peninsula
Mikisew Cree	*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (Supreme Court, Canada)
MPAJA	Malayan Peoples Anti-Japanese Army

'Native' or 'native'	Native of Sabah and Sarawak under art 161 of the *Malaysian Constitution* unless the context requires otherwise
NCR	Native Customary Rights in Sabah and Sarawak
NEM	Malaysian New Economic Model
NFA	*National Forestry Act 1984* (Malaysia)
NLC	*National Land Code 1965* (Malaysia)
NLTB	Native Land Trust Board in Fiji
Nor Nyawai 1	*Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* (High Court, Malaysia)
Nor Nyawai 2	*Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai* (Court of Appeal, Malaysia)
NTA	*Native Title Act 1993* (Australia)
OALT	Orang Asli Land Tribunal as proposed in Chapter 8
OARC	Orang Asli Rights Commission as proposed in Chapter 8
Orang Asli	Aborigines of the Malay peninsula, the Indigenous minority peoples of Peninsular Malaysia
Oyekan	*Oyekan v Adele* (Privy Council)
Pedik	*Yg Dipertua Majlis Daerah Gua Musang v Pedik Bin Busu* (High Court, Malaysia)
Pendor	*Pendor Banger v Ketua Pengarah Jabatan Alam Sekitar* (High Court, Malaysia)
POASM	*Persatuan Orang Asli Semenanjung Malaysia* [Peninsular Malaysia Orang Asli Association] (translated from the Malay language by the candidate)
Proposed Policy	Orang Asli land title grant policy approved by the Malaysian National Land Council on 4 December 2009
PWA	*Protection of Wildlife Act 1972* (Malaysia) (Repealed)
R v Sappier	*R v Sappier; R v Gray* (Supreme Court, Canada)
RPS	*Rancangan Pengumpulan Semula* referring to Orang Asli Regroupment programmes and the like involving group or

	individual agricultural development of lands for Orang Asli
Sagong 1	*Sagong bin Tasi v Kerajaan Negeri Selangor* (High Court, Malaysia)
Sagong 2	*Kerajaan Negeri Selangor v Sagong bin Tasi* (Court of Appeal, Malaysia)
SDBA	*Street, Drainage and Building Act 1974* (Malaysia)
St Catherine	*St Catherine Milling and Lumber Company v The Queen* (Privy Council)
State	Individual states of the Federation of Malaysia, particularly Peninsular Malaysia unless defined to the contrary or the context requires otherwise
state	Malaysian Government and/or or collective individual States of the Federation of Malaysia unless defined to the contrary or the context requires otherwise
State Authority	Ruler or Governor of the individual State of the Federation of Malaysia, as the case may be (*NLC*, s 5). In executive matters relating to land, the Ruler or Governor of the State is generally obliged to act in accordance with the advice of the relevant State Executive Council. The State Executive Council is appointed by the Ruler or Governor and consists of members of the State Legislative Assembly.
SUHAKAM	Malaysian Human Rights Commission
the Special Rapporteur	UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people unless the context requires otherwise
UN	United Nations
UN Charter	Charter of the United Nations
UNDRIP	*United Nations Declaration on the Rights of Indigenous Peoples* as reproduced in Appendix 1
UNDRIP Standards	*UNDRIP* standards as contained in Appendix 2
UNPFII	*United Nations Permanent Forum on Indigenous Issues*
VC	Village Council as proposed in Chapter 8

Ward	*Ward v Western Australia* (High Court, Australia)
Wet Ket	*Wet Ket v Pejabat Tanah Daerah Temerloh* (High Court, Malaysia)
Wik	*Wik Peoples v Queensland* (High Court, Australia)
Yorta Yorta	*Members of the Yorta Yorta Aboriginal Community v Victoria* (High Court, Australia)

Chapter 1

SCOPE, METHODOLOGY, LITERATURE REVIEW AND THESIS STRUCTURE

I INTRODUCTION

The 2007 *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*')[1] contains extensive provisions for the recognition and protection of Indigenous peoples, and their lands and resources. It garnered considerable support at the United Nations ('UN') General Assembly with 143 nations in favour, four against and 11 abstentions. Since its adoption, all four nations that voted against the *UNDRIP* and two abstainer nations have reversed their positions and indicated support for the Declaration, suggesting further consensus that the *UNDRIP* is an international aspiration.

Malaysia voted in favour of the *UNDRIP* both at UN Human Rights Council and General Assembly levels. In doing so, it has internationally proclaimed that the *UNDRIP* is 'a standard of achievement to be pursued in the spirit of partnership and mutual respect'.[2] Despite the *UNDRIP*'s categorisation as 'non-binding',[3] Malaysia's votes create a moral obligation to uphold the spirit of the Declaration. The full text of the *UNDRIP* has been included in Appendix 1.

Domestically, the Malaysian Courts have also recognised the common law customary land rights[4] of Peninsular Malaysia's Indigenous minority, the Orang Asli.[5] Despite these developments, the state[6] has not taken any formal measures

[1] GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2007).
[2] See preambular para 24.
[3] For a discussion on the legal enforceability of the *UNDRIP*, see below Chapter 3, 76-7.
[4] See *Adong 1* [1997] 1 MLJ 418; *Adong 2* [1998] 2 MLJ 158 (Court of Appeal, Malaysia); *Sagong 1* [2002] 2 MLJ 591; *Sagong 2* [2005] 6 MLJ 289 (Court of Appeal, Malaysia).
[5] The Orang Asli community refers to the 18 officially classified ethnic Aboriginal sub-groups in Peninsular Malaysia (see below Chapter 2, 20-3).

towards better recognition and protection of Orang Asli customary lands and resources. The existing Orang Asli land reservation system under the *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*') is inadequate, affording limited recognition of Orang Asli land and resource rights. For example, Orang Asli lands protected under the *APA* can be terminated by the State[7] executive at will, and without adequate compensation.[8] Federal policies towards Orang Asli customary lands have also not been very encouraging. The Federal Government, responsible for the welfare of Orang Asli,[9] has shifted Orang Asli land policies from that of protection towards development involving the grant of individual titles to Orang Asli, planned economic activities and orderly resettlement.[10] Despite being intended to improve the socio-economic position of Orang Asli, these laws and policies have contributed to the continued erosion of Orang Asli customary lands through encroachment, alienation, state appropriation and the creation of land and resource interests.

Faced with a predicament common to many Indigenous communities worldwide, Orang Asli have resorted to the courts and public advocacy to assert their rights, including making repeated calls to implement the *UNDRIP*. In the event the Orang Asli succeed in their struggle and the state finds the will to review its position on Orang Asli customary lands, and implement the *UNDRIP*, two significant legal questions arise:

- do existing laws on Orang Asli lands and resources reflect the standards of recognition and protection contained in the *UNDRIP*?; and
- if they do not, is there an alternative legal framework for the better recognition and protection of Orang Asli customary land and resource rights

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[6] The word 'state' in this context means the Malaysian Government and/or collective individual States of the Federation of Malaysia.
[7] The word 'State' in this context means individual States of the Federation of Malaysia, particularly Peninsular Malaysia.
[8] See *APA*, ss 6(3), 7(3), and s 12 respectively.
[9] See *Malaysian Constitution*, Ninth sch List I - Federal List Item 16.
[10] Recent evidence supporting current state policies can be found in the five year Federal Government plan for the development of Orang Asli (see *DOAD*, *Pelan Strategik Jabatan Kemajuan Orang Asli 2011-2015* [*Department of Orang Asli Development Strategic Plan 2011-2015*] (Planning and Research Section, Department of Orang Asli Development, 2011) (translated from the Malay language by the candidate), 68-9).

that is: (1) consistent with the *UNDRIP*; and (2) within the confines of the *Federal Constitution* (Malaysia) ('*Malaysian Constitution*')?

These two legal questions form the research question of this thesis. This thesis evaluates existing laws on Orang Asli customary land and resource rights against standards drawn from the *UNDRIP*. It then explores an alternative framework for better recognition and protection of Orang Asli rights having regard to the constraints of the Malaysian legal system. Answering this question would be of utility to land reform efforts consistent with the *UNDRIP*, particularly in the context of Orang Asli.

Accordingly, the hypothesis is that:

- the present system of law relating to the recognition and protection of Orang Asli land and resource rights is inadequate when compared to *UNDRIP* standards and therefore is in need of change; and
- *UNDRIP* standards can be usefully applied to assist in developing a legal framework for the better recognition and protection of Orang Asli customary land and resource rights.

II METHODOLOGY, SCOPE AND LITERATURE REVIEW

This section outlines the methodology used in this thesis before providing an overview of the legal literature on Orang Asli rights.

A *Methodology and Scope*

In summary, the methodology employed is evaluative and exploratory doctrinal legal research on domestic laws (Orang Asli customary land and resource rights in Malaysia) based on a normative international human rights framework (the *UNDRIP* Standards). In the context of this thesis, 'doctrinal legal research' refers to answering

the research question based on primary and secondary *legal* (meaning from the legal discipline) sources, secondary *non-legal* (from other disciplines) sources and official Government documents. Materials are also drawn from the candidate's participation in conferences, workshops, forums and discussions, and relevant experience gained as legal counsel in Orang Asli land claims and as a serving member of the Malaysian Bar Council Committee on Orang Asli Rights ('COAR').

Chapter 2 provides the necessary context and backdrop to the thesis by tracing the historical position of Orang Asli within Malay, colonial and subsequently, Malaysian society. Chapter 3 sets out the 'normative framework' of this thesis, namely, the standards against which the evaluative and exploratory questions regarding Orang Asli land and resource rights[11] are to be answered. Generally, the use of a normative framework, drawn from desirable moral, political and legal aspirations, for the evaluation and the possible improvement of existing rights is not an uncommon legal research methodology.[12] The source of the normative framework in this thesis, namely, the *UNDRIP*, contains explicit provisions envisioning its role as a possible benchmark for the reform of laws relating to Indigenous rights. For example, preambular paragraph 24 of the *UNDRIP* proclaims the *UNDRIP* as a standard of achievement to be pursued by supporting states in a spirit of partnership and mutual respect. Art 38 provides that '[s]tates in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration'.

Further, the *UNDRIP* is argued to be the most progressive source for a normative framework by contrasting it with other international human rights treaties and comparing it with two other *International Labour Organisation* ('ILO') conventions on Indigenous rights, namely, *ILO Convention 107* and *ILO Convention 169*. State and domestic support for the *UNDRIP* are also utilised to justify the use of the *UNDRIP* as the basis for the normative framework. Drawing from relevant provisions of the *UNDRIP* and the concepts of self-determination and collective

[11] For the research question of this thesis, see above, 2-3.
[12] See eg. Roger Brownswood, 'Maps, Methodologies, and Critiques: Confessions of a Contract Lawyer' in Mark Van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline* (Hart Publishing, 2011), 133.

rights contained in the *UNDRIP*, and their respective interpretation by various UN Indigenous institutions,[13] the normative framework for the effective recognition and protection of Indigenous land and resource rights, namely, the *UNDRIP* Standards, is justified and explained.

As a preliminary issue to the evaluation process in Chapters 5 to 7, Chapter 4 examines the relevant provisions of the *Malaysian Constitution* relating to *fundamental liberties* and the *Federal-State power divide* to determine whether the idea of recognition and protection of Orang Asli customary lands in line with the *UNDRIP* is constitutionally permissible. If such recognition is unconstitutional, domestic implementation of the *UNDRIP* in respect of Orang Asli lands would require amendments to the *Malaysian Constitution*.

Chapter 5 uses the standards derived from the *UNDRIP* in Chapter 3 as a benchmark for evaluating Orang Asli statutory land and resource rights. An articulation of the statutory protection afforded to Orang Asli land and resource rights is conducted before it is compared with *UNDRIP* standards. The evaluation of statutory land and resource rights is aided by considering relevant state policies and practice. Evidence of state practice is derived from secondary sources.

As a precursor to the evaluation of the doctrine of common law Orang Asli customary land rights, Chapter 6 uses domestic case law to explain the doctrine by interrogating its rationale and three key features, namely its content, method of proof and vulnerability. As the Malaysian common law doctrine is at an embryonic stage, Chapter 6 argues for the use of comparative case law from Australia and Canada in Chapter 7 to assist the evaluation of the domestic doctrine. Although not binding on the Malaysian courts, Australian and Canadian case law are considered persuasive and relevant to the analysis due to the extensive reliance on these cases by the Malaysian courts in developing the doctrine of Orang Asli customary land rights at common law. Notwithstanding statutory intervention to common law native title in Australia through the *Native Title Act 1993* (Cth) ('*NT*A'), relevant post-*NTA* cases

[13] These institutions include the UN Permanent Forum on Indigenous Issues ('*UNPFII*'), UN Expert Mechanism on the Rights of Indigenous Peoples ('*EMRIP*') and the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

are also applied in the comparative analysis. In particular, post-*NTA* cases are applied where residual aspects of the Australian common law doctrine remain under the *NTA* or where these cases are otherwise considered illustrative of issues relating to the civil litigation-based approach to the recognition and protection of Orang Asli customary land rights. Both general and contextual justifications for the use of post-*NTA* cases are provided and the qualifications for employing such a methodology are acknowledged where necessary. The key features of the common law doctrine explained in Chapter 6, and as supplemented by comparative cases and secondary sources from Australia and Canada, are compared against *UNDRIP* Standards in Chapter 7.

After establishing a positive link between the *UNDRIP* and land rights-based reform for Orang Asli, Chapter 8 crafts an alternative legal framework for the recognition of Orang Asli customary land and resource rights based on:

- the *UNDRIP* Standards;
- the need to achieve an optimum balance between: (1) the rigidity that accompanies the certainty and security of 'titled' ownership; and (2) flexibility that caters for Orang Asli laws, traditions, customs and institutions and self-determination; and
- constitutional limitations.

The 'legal framework' elaborates on key land tenure systems, institutions, processes and protection that may inform future reform endeavours towards formalised communal ownership of lands and resources. Inspiration for the legal framework is drawn from North and South American, Australasian and African experiences. A qualification to the proposed legal framework is the fact that it has not been devised in consultation with Orang Asli. Nonetheless, secondary sources are used to support the contention that a legal framework consistent with the *UNDRIP* may well find favour with Orang Asli. Despite not being intended as a prescriptive and detailed legal framework for Orang Asli customary land rights, the alternative legal framework functions as a possible path towards the realisation of *UNDRIP* rights.

In order to facilitate an uninhibited legal inquiry into the adequacy of legal recognition and protection of Orang Asli land rights and possible reform alternatives, this thesis also proceeds on the assumption that the state possesses the will to implement *UNDRIP* standards to the extent possible under the Malaysian legal system. In reality, there exist political, social and economic challenges in applying *UNDRIP* Standards to the Orang Asli situation. While not forming the thrust of the legal inquiry into the evaluation and reform of Orang Asli customary land and resource rights within the Malaysian legal system, these complex issues are nonetheless acknowledged, where deemed appropriate.

B *Review of Literature on Orang Asli Customary Land Rights*

This section provides an overview of existing *legal* scholarly analysis on the recognition and protection of Orang Asli customary land rights in order to expose a gap in the existing body of literature on the subject. The existing body of literature may be divided into those written pre- and post-recognition of common law Orang Asli customary land rights (in 1996).[14] The pre-recognition works of Rachagan,[15] Hooker,[16] Liow[17] and Chua[18] provide background to the examination of the constitutional and statutory position of Orang Asli and their lands conducted in Chapters 2, 4 and 5 of this thesis. However, their pre-common law recognition work has not engaged in the inquiry of this thesis, namely, an analysis of Malaysian laws on Orang Asli with reference to international human rights standards, particularly the *UNDRIP*. Given the age of these works, they neither envisage nor take into

[14] Recognition of common law Orang Asli customary land rights occurred in 1996 (see *Adong 1* [1997] 1 MLJ 418).
[15] Sothi Rachagan, 'Constitutional and Statutory Provisions Governing the Orang Asli' in Lim Teck Ghee and Alberto G Gomes (eds), *Tribal Peoples and Development in Southeast Asia* (Department of Anthropology and Sociology, University of Malaya, 1990), 101.
[16] M B Hooker, 'The Orang Asli and the Laws of Malaysia: With Special Reference to Land' (1996) 48 *Akademika* 21; M B Hooker, *The Personal Laws of Malaysia: An Introduction* (Oxford University Press, 1976).
[17] See eg. Liow Sook Ching, *The Constitutional and Legal Position of the Orang Asli of Peninsular Malaysia* (LLB Hons Graduation Exercise, Faculty of Law, University of Malaya, Kuala Lumpur, 1980).
[18] Michael Chua Kim Wah, *The Orang Asli Problem: A Comparative Analysis of Aboriginal Land Rights in Malaysia, Australia and New Zealand* (LLB Hons Graduation Exercise, Faculty of Law, University of Malaya, Kuala Lumpur, 1991).

account more recent developments affecting Orang Asli customary lands locally and internationally. These developments include the emerging doctrine of common law Orang Asli customary land rights as recognised by the Malaysian courts[19] and the *UNDRIP* itself. As can be gleaned from Section IIA above, an analysis of these developments is necessary for the purposes of this thesis. First, an examination of the doctrine of common law Orang Asli customary land rights facilitates the evaluation process in Chapters 6 and 7. Secondly, the *UNDRIP* forms the basis of the normative framework for the evaluation and reform exercise carried out from Chapters 5 to 8.

In respect of post-recognition literature, Bulan and Locklear,[20] Dennison,[21] Crook,[22] and earlier, Gray[23] all provide valuable legal analyses of common law Orang Asli customary land rights, also employing varying degrees of comparative analysis with Australia and Canada, albeit with different objectives. These works are of utility to the articulation and evaluation of the doctrine of common law Orang Asli customary land rights in Chapters 6 and 7 respectively.

With particular focus on the natives of Sarawak (as opposed to Orang Asli of Peninsular Malaysia), Bulan and Locklear examine, amongst other matters, the basis of recognition, content and proof of common law native title in Malaysia and its protection.[24] They also explore Malaysia's responsibility under international customary law in protecting Indigenous land rights and consider the common law mechanisms in Australia, Canada and the United States for recognition of Indigenous land rights. In comparing the common law native title doctrine in Australia and Malaysia, Dennison contends that the conceptualisation of native title in Malaysian case law differs markedly from Australia due to the fiduciary duty

[19] See eg. *Adong 1* [1997] 1 MLJ 418; *Adong 2* [1998] 2 MLJ 158 (Court of Appeal, Malaysia); *Sagong 1* [2002] 2 MLJ 591; *Sagong 2* [2005] 6 MLJ 289 (Court of Appeal, Malaysia).
[20] See eg. Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Rights in Sarawak* (SUHAKAM, 2007).
[21] Amy Dennison, 'Evolving Conceptions of Native Title in Malaysia and Australia – A Cross Nation Comparison' (2007) 11(1) *Australian Indigenous Law Review* 79.
[22] Peter Crook, 'After *Adong*: The Emerging Doctrine of Native Title in Malaysia' (2005) 32 *Journal of Malaysian and Comparative Law* 81.
[23] Stephen Gray, 'Skeletal Principles in Malaysia's Common Law Cupboard: The Future of Indigenous Native Title in Malaysian Common Law' [2002] *LAWASIA Journal* 99.
[24] See Bulan and Locklear, above n 20.

owed by the state to its Indigenous peoples along with explicit constitutional provisions enabling special treatment of Indigenous peoples.[25] Crook highlights some of the inconsistencies in Malaysian case law on common law customary land rights and the significance that these inconsistencies may have for the future development of the doctrine.[26] In examining the extent to which native title principles in Australia and elsewhere are applicable to Orang Asli customary land claims, Gray considers the philosophical, political and legal differences between the Australian and Malaysian Indigenous peoples.[27]

However, none of these works articulate the common law doctrine in Malaysia for the purposes of evaluation against the *UNDRIP*. Cheah, while incorporating minimum international human rights standards in examining the Malaysian case of *Sagong 1*,[28] theorised on how the Court could have taken its decision a step further by bringing Orang Asli land rights into conformity with minimum international standards.[29] While this work is of some utility, the inquiry in Chapter 7 specifically focuses on evaluating common law Orang Asli customary land rights against land and resource recognition and protection standards contained in the *UNDRIP*. Literature on specific issues arising from the emerging doctrine of Orang Asli customary land rights, namely, its doctrinal basis,[30] nature and characteristics,[31]

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[25] Dennison, above n 21.
[26] Crook, above n 22.
[27] Gray, above n 23.
[28] [2002] 2 MLJ 591.
[29] See eg. Cheah Wui Ling, 'Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestone or False Start' (2004) 2 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/cheah>.
[30] R R Sethu, 'The Orang Asli Cases and Property Cases' in Andrew Harding and H P Lee (eds), *Constitutional Landmarks in Malaysia: The First Fifty Years* (LexisNexis, 2007), ch 17; M B Hooker, ''Native title' in Malaysia: *Adong's* Case' (2001) 3(2) *Australian Journal of Asian Law* 198. Compare Yogeswaran Subramaniam, 'A Review of 'The Orang Asli Cases and Property Rights': An Aboriginal Perspective' [2007] 7 *Malayan Law Journal* i. See further, Jeswynn Yogaratnam, 'Mabo: Whistle blowing the State government on native title in Malaysia' (2008) 33 *Alternative Law Journal* 240.
[31] See eg. Yogeswaran Subramaniam, 'Common Law Native Title in Malaysia: Selected Issues for Forest Stakeholders' [2010] 1 *Malayan Law Journal* xv; Bulan and Locklear, above n 20; Ramy Bulan, 'Native Title in Malaysia: A 'Complementary' Sui Generis Proprietary Right under the Federal Constitution', (2007) 11(1) *Australian Indigenous Law Review* 54; Ramy Bulan, 'Listening to the Indigenous Voice for a Defensible Conception of Property in the Determination of Customary Land Rights in Malaysia' (Paper presented at the Asian Law Institute (ASLI) Conference, University of Indonesia, Jakarta, Indonesia, 23-24 May 2006); Noor Ashikin Hamid, Noraida Harun and Sharifah Nuridah Aishah Syed Nong Mohamad, 'Judicial Recognition of the Orang Asli Land Rights in Malaysia: Triumph and Hope' [2010] 8 *Current Law Journal* i; Crook, above n 22; Gray, above n 23; Dennison, above n 21.

proof,[32] resource rights[33] and matters of compensation[34] are of value to this thesis in articulating the domestic doctrine and supplementing the proposed reforms. Again, none of these works evaluate the potential of the common law doctrine to recognise and protect Orang Asli customary land rights in a manner consistent with *UNDRIP* standards.

Legal literature on the reform of Orang Asli customary land and resource rights has mostly been general, for example, in the form of a list of recommendations.[35] The complexities of incorporating international human rights standards into the Malaysian legal system in an Orang Asli context as performed in Chapters 4 and 8 have not been addressed. While not based on international human rights standards, Lim's work on the 'Land Rights of the Orang Asli' is by far the most comprehensive legal work on Orang Asli land rights, including proposals for reform of existing laws.[36] However, Lim's research was conducted before recent common law developments in Malaysia on Orang Asli customary land rights had taken place[37] and, perhaps more importantly, without due examination and consideration of *UNDRIP* standards.[38] This omission is perhaps understandable given that his research was conducted in 1997, when the Draft *UNDRIP* was still being elaborated by the UN Commission for Human Rights Inter-sessional Working Group. Nonetheless, his proposal for a fortified land reservation system based on the *Malay Reservation Enactments* has found its way into subsequent Orang Asli memoranda

[32] See eg. 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 *Malayan Law Journal* xxx.
[33] In relation to forest produce, see Subramaniam, 'Common Law Native Title in Malaysia: Selected Issues for Forest Stakeholders', above n 31.
[34] See eg. Ramy Bulan, 'Native Title as a Proprietary Right Under the Constitution in Peninsular Malaysia: A Step in the Right Direction?' (2001) 9 *Asia Pacific Law Review* 83; Cheah, above n 29; Bulan, 'Listening to the Indigenous Voice for a Defensible Conception of Property', above n 31; Bulan, 'Native Title in Malaysia: A 'Complementary' Sui Generis Proprietary Right under the Federal Constitution', above n 31; Anuar Alias and Md Nasir Daud, *Saka: Adequate Compensation for Orang Asli Land* (Universiti Tun Hussein Onn Malaysia, 2011); Anuar Alias, *Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands* (PhD Thesis, University of Malaya, 2009).
[35] See eg. Hamid, Harun and Syed Nong Mohamad, above n 31; Alias and Daud, above n 34, 150-2.
[36] Lim Heng Seng, 'The Land Rights of the Orang Asli' (Paper presented at the Consumers' Association of Penang National Conference on Land: Emerging Issues and Challenges, Penang, Malaysia, 12-15 December 1997), 11.
[37] These developments are examined and articulated in Chapter 6 (at 195-261).
[38] Lim, above n 36, 39-43, Appendix I.

to the Government for reform. The resulting Draft Orang Asli Reservation Act is revisited and critically examined in Chapter 8.[39]

A review of the legal literature on Orang Asli land rights reveals a gap in research that evaluates *and* explores the better recognition and protection of Orang Asli land and resource rights with reference to the *UNDRIP* and the constraints of the Malaysian legal system. In this connection, the ongoing National Indigenous Land Inquiry, conducted by the Malaysian Human Rights Commission (SUHAKAM), with a view to highlighting problems and developing recommendations in respect of Indigenous land issues is noteworthy.[40] The report emerging from the inquiry, due to be completed by the end of 2012, may address part of the gap highlighted in this literature review.

III STRUCTURE OF THESIS

This section summarises the contribution of each chapter to the thesis and explains the rationale for its overall structure.

In addition to providing context for the evaluative and reform questions in this thesis, Chapter 2 argues that it may be opportune for the Malaysian Government to explore alternatives to the current legal framework affecting Orang Asli and their lands. In this chapter, Orang Asli are positioned as a constitutionally-protected Indigenous minority who are socio-economically marginalised and at risk of assimilation with the ethnic Malay section of Malaysian society. The current legal position of Orang Asli, a product of their particular historical circumstances, enables the state to exercise extensive control over Orang Asli and their lands and resources. These legal powers allow the Federal Government, as protector of Orang Asli, to determine policies that chart the course for Orang Asli well-being and their identity as a distinct group. While these powers may not be objectionable in themselves,

[39] See below, 329-31.
[40] 'Land rights to be discussed: SUHAKAM to hold inquiry with natives', *The Star* (Malaysia), 11 May 2011. For further information on the Inquiry, see SUHAKAM, *The Official Website of the National Inquiry into the Land Rights of Indigenous Peoples*, 22 June 2012 <http://www.suhakam.org.my/ni_microsite>.

state land policies have nonetheless contributed to the erosion of the special link between Orang Asli and their customary lands. Chapter 2 also highlights the centrality of Orang Asli customary lands, and the *UNDRIP* itself, in the assertion of Orang Asli rights.

In Chapter 3, the normative framework for the evaluative and exploratory process in this thesis is justified and developed. The *UNDRIP* is argued to be an appropriate source for the normative framework based on:

- Orang Asli aspirations;
- The *UNDRIP*'s acceptance by the UN system and members; and
- A comparison with other international treaties on Indigenous rights.

The normative framework consists of ideal standards for the effective 'recognition' and 'protection' of Indigenous land and resource rights drawn from the *UNDRIP*. The three standards ('*UNDRIP* Standards') are:

- Ownership, management and use of lands and resources with due respect for Indigenous laws, traditions, customs and institutions (recognition);
- Free, prior and informed consent and consultation in matters affecting Indigenous lands and resources (preventive protection); and
- Just redress for dispossession (curative protection).

The *UNDRIP* Standards will be used to: (1) adjudge existing laws on Orang Asli land and resource rights; and (2) propose land rights reform. These Standards are reproduced in Appendix 2.

The constitutionality of the domestic application of the *UNDRIP* is examined in Chapter 4. It argues that recognition and protection for Orang Asli customary lands consistent with the *UNDRIP*, in the light of the fundamental liberties afforded to other Malaysians, particularly those relating to life, equality and property, is not necessarily inconsistent with the *Malaysian Constitution*. Article 8(5)(c) of the

Malaysian Constitution provides an elaboration of the constitutional guarantee of equality and non-discrimination under art 8(1), and accordingly permits positive discrimination legislation for 'the protection, well-being or advancement of the Aboriginal peoples of the Malay peninsula (Orang Asli) (including the reservation of land)'. As for relations between the Federation of Malaysia and the individual States, the power divide between Orang Asli affairs (Federal Government) and lands and resources (State Governments) is not a constitutional impediment to the passing of a uniform law for Orang Asli land rights throughout Peninsular Malaysia.

The evaluation of existing laws affecting Orang Asli land and resources is conducted from Chapters 5 to 7. Chapter 5 evaluates existing Orang Asli statutory land and resource rights compared to the *UNDRIP* Standards. The existing statutory regime affords limited recognition and protection for Orang Asli customary lands and resources. Other legislation affecting lands and resources does not envisage Orang Asli customary land rights. The statutory regime equally suggests that Orang Asli and their lands are under the protection and control of the state. However, it is observed that statutes affecting Orang Asli lands and resources are at odds with the *UNDRIP* Standards because their respective underlying philosophies appear inconsistent. On one hand, the *UNDRIP* emphasises internal autonomy and equal respect for Indigenous groups while on the other hand, existing legislation virtually presumes an Orang Asli community incapable of making its own decisions and in need of state control and protection.

Chapter 6 functions to introduce the nascent doctrine of common law Orang Asli customary land rights as a backdrop to its evaluation against the *UNDRIP* Standards in Chapter 7. After introducing the doctrine of Indigenous title generally, this chapter examines landmark Malaysian cases with a view to investigating the rationale for the common law doctrine and its three key features, namely: (1) content; (2) method of proof; and (3) vulnerability. Given the relative dearth of local cases and the Malaysian courts' extensive reliance on common law jurisprudence on Indigenous title, particularly from Australia and Canada, the case law from these

two jurisdictions is best suited to supplement the evaluation of the Malaysian common law doctrine.

Utilising the *UNDRIP* Standards, Chapter 7 evaluates the adequacy of the doctrine of common law Orang Asli customary land rights in effectively recognising and protecting Orang Asli customary lands. Despite its potential to confer full ownership rights in respect of Orang Asli customary land rights, the common law doctrine has potential limitations in ensuring the effective recognition and protection of Orang Asli lands and resources envisaged by the *UNDRIP* Standards. The emerging and unsettled articulation of the doctrine in Malaysia also allows for the narrowing of the scope of the doctrine. It is contended that placing sole responsibility with the Malaysian judiciary for resolving Orang Asli land issues through ordinary development of the common law without any positive legislative and executive intervention may not achieve outcomes consistent with the *UNDRIP* Standards.

In concluding the thesis, Chapter 8 explores the grant of a nuanced and flexible form of statutory communal title as a possible alternative for reform of Orang Asli land and resource rights. It elaborates key land tenure systems, institutions, processes and protection that may inform future reform endeavours towards formalised communal ownership of lands and resources based on *UNDRIP* Standards. Finally, the chapter highlights the challenges posed in implementing such reforms in Malaysia.

Chapter 2

THE ORANG ASLI: AN INDIGENOUS MINORITY IN MALAYSIA

I INTRODUCTION

'Orang Asli'[1] are said to be the 'first peoples' of Peninsular Malaysia.[2] The term 'Orang Asli' refers to the 18 official ethnic Aboriginal sub-groups in Peninsular Malaysia, classified into three broad categories of *Negrito*, *Senoi* and *Aboriginal Malay*.[3] Similar to other Indigenous communities worldwide, contact with other societies has had a profound influence on Orang Asli as an Indigenous minority within Malaysian society.

Orang Asli were dispossessed of their customary lands through contact with other societies and have become politically, culturally, socially and economically disadvantaged compared to mainstream Malaysian society. In spite of the Federal Government's responsibility for the welfare and well-being of Orang Asli since Malaya's independence in 1957, the Malaysian legislature and executive have a questionable record in recognising and protecting Orang Asli customary lands, emphasising their own priorities for the development and modernisation of Orang Asli, and generally, national development. However, Orang Asli have begun to vocalise their rights as: (1) citizens; (2) a distinct Indigenous group; and (3) members of the global Indigenous community. Central to this struggle are Orang Asli customary lands that are crucial in protecting and developing their distinctive culture and identity, and uplifting their socio-economic status. In addition to highlighting the need for the state to reconsider its current management of Orang Asli affairs and lands, this chapter also:

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[1] See art 160(2), *Malaysian Constitution*.

[2] Robert Knox Dentan et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, 1997), 10-12.

[3] A brief description of these groups is provided in Section IIB below (see below, 20-3).

- provides the necessary local background, basic information and context for the evaluation of Orang Asli land and resource rights (Chapters 5, 6 and 7) and exploration of an alternative legal framework for the recognition of these rights (Chapter 8); and
- demonstrates, from an Orang Asli perspective, the importance of and need for the protection of Orang Asli customary lands having regard to the *UNDRIP*.

II ORANG ASLI: BACKGROUND, INFORMATION AND CONTEXT

As this is a thesis on Orang Asli land rights, it is important to appreciate Orang Asli, and their land and history. Section IIA contains relevant geographical, demographic and socio-economic information on Malaysia and highlights the disadvantaged socio-economic position of the Orang Asli community when compared to mainstream Malaysian society. Section IIB suggests that the historical interaction between Orang Asli and dominant societies within the Malay peninsula goes some way towards explaining challenges currently faced by Orang Asli in sustaining their well-being, culture, identity and lands. The inadequate recognition of Orang Asli and their lands has left Orang Asli vulnerable socio-economically and their lands and destiny as a community in the hands of the state. Resultant state land policies for the integration and 'mainstreaming' of Orang Asli, compounded by the national development agenda, have contributed to the involuntary loss of Orang Asli customary lands. Cumulatively, these problems suggest that there is a need to explore alternatives to the current legal framework affecting Orang Asli customary lands.

A *Malaysia and Orang Asli: Key data*

The Federation of Malaysia comprises the peninsular land that separates the Straits of Malacca from the South China Sea and the northern quarter of the island of

Borneo except for the small kingdom of Brunei. Peninsular Malaysia consists of eleven States (Perlis, Kedah, Penang, Perak, Selangor, Negeri Sembilan, Melaka on the west coast, Kelantan, Terengganu and Pahang on the east coast and the southern State of Johor) and two federal territories (Kuala Lumpur and Putrajaya). The Borneo territories are made up of the States of Sabah and Sarawak and the federal territory of Labuan. Peninsular Malaysia measures 131,573 square km while the States of Sabah and Sarawak are larger, covering an area of 198,000 square km. The capital of Malaysia is Kuala Lumpur while the government administrative centre is in Putrajaya. A basic political map of Malaysia is contained in Appendix 3.

In April 2012, the population of Malaysia stood at 28.72 million.[4] Ethnically, the population is divided into ethnic 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).[5] Malays, explicitly mentioned in the *Malaysian Constitution*,[6] are the numerically and politically dominant ethnic group[7] in Peninsular Malaysia. Orang Asli (the English version of the *Malaysian Constitution* refers to them as 'Aborigines'),[8] the Indigenous minority in Peninsular Malaysia, are also mentioned in the *Malaysian Constitution*. 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.[9] In 2010, Orang Asli numbered approximately 178,197, around 0.6 per cent of the population of Malaysia.[10] The two 'other' Indigenous minority groups mentioned in the *Malaysian Constitution* are

[4] Department of Statistics, Malaysia, *Official Website*, 22 June 2012 <http://www.statistics.gov.my/portal/>.
[5] Central Intelligence Agency, *The World Factbook: Malaysia*, 22 June 2012 <www.cia.gov/library/publications/the-world-factbook/geos/my.html>.
[6] See eg. definition of 'Malay' (*Malaysian Constitution*, art 160(2), repeated below at n 108).
[7] Whether Malays are 'Indigenous' by definitions contained in various international fora has been a subject of contention. Notwithstanding these arguments, the special position of Malays under the *Malaysian Constitution* remains clear. These issues are canvassed in Section IIB3(c) below (see below, 42-6).
[8] See eg. definition of 'Aborigine' at art 160(2). For an examination of the constitutional position of Orang Asli vis-a-vis other Indigenous groups, see Section IIB3(a) below (see below, 34-8).
[9] For further discussion on the importance of Orang Asli customary lands to the vitality of Orang Asli culture and identity, see Section IIIA below (see below, 65-7).
[10] Department of Orang Asli Development ('*DOAD*'), *Pelan Strategik Jabatan Kemajuan Orang Asli 2011-2015* [*Department of Orang Asli Development Strategic Plan 2011-2015*] (Planning and Research Section, Department of Orang Asli Development, 2011) (translated from the Malay language by the candidate), 20.

natives of Sabah and Sarawak.[11] Both these groups are indigenous to the island of Borneo, thus having no 'traditional connection' with the lands of Peninsular Malaysia.

Malaysia is an upper middle income country. For the year ending 2010, the World Bank ranked Malaysia as the 35th largest economy in the world by Gross Domestic Product (GDP).[12] Malaysia also ranked 61st in the world in terms of GDP per capita for the same period.[13]

Key socio-economic indicators reveal that Orang Asli are arguably the most impoverished and marginalised community in Malaysia. In 2009, 50 per cent of Orang Asli lived below the poverty level compared to the national average of 3.8 per cent.[14] Orang Asli, who mostly reside in rural areas, have a much higher poverty rate than the national rural poverty rate of 11.9 per cent.[15] The dropout rate of Orang Asli students from school has also been relatively high.[16] For instance, only 3,145 of the 4,431 Orang Asli pupils who completed primary school[17] in 2009 went on to register for secondary school[18] in 2010.[19] In 2008, 47.8 per cent of Orang Asli students who registered for secondary school in 2004 failed to complete their secondary education.[20] As for the tertiary level, government figures show that of the 94,622 students who graduated from Malaysian public institutes of higher learning in

[11] For constitutional definitions of these four groups, see below nn 107-10.
[12] World Bank, *GDP (Current US$)*, 22 June 2012 <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.
[13] World Bank, *GDP Per Capita (Current US$)*, 22 June 2012 <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.
[14] Economic Planning Unit, Prime Minister's Department, *Tenth Malaysia Plan 2011-2015* (Prime Minister's Department, Malaysia, 2010), 149, 151, 162. This document states that the overall poverty rate in Malaysia has dropped from 49.3 per cent in 1970 to 3.8 per cent in 2009 (at 149), an achievement not shared by Orang Asli. Recent statistics from the *DOAD* indicate that the poverty rate of Orang Asli for the year 2010 reduced to 31.16 per cent (see *DOAD*, above n 10, 30-1).
[15] Economic Planning Unit, Prime Minister's Department, *Ninth Malaysia Plan 2006-2010* (Prime Minister's Department, Malaysia, 2006), 358.
[16] Human Rights Commission of Malaysia, *Rights of Orang Asal* (SUHAKAM, 2003), 15.
[17] Primary school refers to the first six years of school education.
[18] Secondary school refers to the first five years of secondary education.
[19] Kementerian Kemajuan Luar Bandar dan Wilayah [Ministry of Rural and Regional Development], *Pelan Induk Pembangunan Luarbandar* [*Rural Development Masterplan*] (Ministry of Rural and Regional Development, 2010) (translated from the Malay language by the candidate), 53.
[20] Jabatan Hal Ehwal Orang Asli [Department of Orang Asli Affairs] ('*DOA*'), *Data Maklumat Asas* [*Basic Information Data*] (Planning and Research Section, Department of Orang Asli Affairs, 2008) (translated from the Malay language by the candidate), 48.

2008,[21] only 63 were Orang Asli.[22] These figures show that the low percentage (0.067 per cent) of Orang Asli qualifying from Malaysian public institutions of higher learning is disproportionate to the Orang Asli population as a percentage of the total population (around 0.6 per cent). These institutions are the most affordable yet do not accommodate Orang Asli. Other Indigenous groups in Malaysia possess constitutional rights for the reservation of a reasonable number of places in local institutions of higher education (see art 153 *Malaysian Constitution*).[23]

Despite improvement in recent years, relatively uncommon diseases such as filariasis, malaria and leprosy still pose a health risk to the Orang Asli.[24] In 2002, the infant mortality rate (of close to 20 per thousand) amongst the Orang Asli was three times higher than the national average (6-7 per thousand).[25] In 2010, water and electricity supply only covered 67.4 per cent and 76.1 per cent of Orang Asli villages respectively.[26] This pales in comparison to the corresponding national rural averages of 97 per cent and 98 per cent.[27] However, steps are being taken to improve the basic infrastructure available to rural areas under the Rural Development Masterplan and Orang Asli Strategic Development Plan,[28] both part of the ongoing National Economic Transformation Programme initiative.[29] Notwithstanding these

[21] *Kementerian Pengajian Tinggi* [Ministry of Higher Learning], Malaysia, *Perangkaan Pengajian Tinggi 2008* [*Higher Learning Statistics 2008*], 22 June 2012 <http://www.mohe.gov.my/web_statistik/Buku_Perangkaan_2008.pdf> (translated from the Malay language by the candidate), 10.
[22] *DOA*, *Basic Information Data*, above n 20, 39.
[23] These 'affirmative action' constitutional provisions are examined further in Section IIB3(a) (see below, 34-8).
[24] See eg. *DOAD*, above n 10, 52; Saiah Abdullah, 'Health of Orang Asli' (Presentation 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, Universiti Malaya, 18-19 November 2008); Gurpreet Kaur, 'Predictors of Malaria Among Malaysian Aborigines' (2009) 21(2) *Asia-Pacific Journal of Public Health* 205, 205.
[25] Abdullah, above n 24.
[26] *DOAD*, above n 10, 34-5.
[27] 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 from the Malay language by the candidate), 15.
[28] *DOAD*, above n 10.
[29] See Ministry of Rural and Regional Development, Malaysia, above n 19.

efforts, the question remains whether Orang Asli stand to lose more of their customary lands as a result of these improvements.[30]

These figures suggest that Orang Asli, whose welfare is the responsibility of the state,[31] have not been equal beneficiaries of Malaysia's rapid development and that it may be opportune for the Malaysian government to explore alternative policies for Orang Asli.

B *Orang Asli and the Outside World*

This section introduces the Orang Asli sub-groups of Peninsular Malaysia by their respective broad category classifications, namely, *Negrito*, *Senoi* and *Aboriginal Malay*.

Beforehand, a summary of the population and ethnic breakdown of Orang Asli is provided in the table below:

[30] Government policies in respect of Orang Asli customary lands are critically examined in Section IIB4 (see below, 46-63).
[31] Section IIB3(a) and (b) (see below, 34-42).

Table 2.1 Orang Asli population breakdown by ethnic group

Category	Ethnic group	Population
Negrito	*Kensiu*	224
	Kintak	112
	Lanoh	244
	Jahai	1,663
	Mendriq	268
	Batek	1,180
Senoi	*Temiar*	24,908
	Semai	42,383
	Semoq Beri	3,972
	Che Wong	456
	Jah Hut	3,762
	Mah Meri	3,675
Aboriginal Malay	*Temuan*	22,736
	Semelai	6,272
	Jakun	24,977
	Orang Kanaq	157
	Orang Kuala	3,010
	Orang Seletar	1,251
Total		141,230

Source: *DOA* (2008)[32]

The *Negrito* ethnic groups occupy interior areas of northern Peninsular Malaysia. They are labelled semi-nomadic because of their opportunistic foraging practices and their extraction of forest products.[33] Notwithstanding these practices, they remain within fixed traditional territories as far as possible.[34] *Negrito* live in settlements in Northeast Kedah (the *Kensiu* people), along the Kedah-Perak border

[32] *DOA*, *Basic Information Data*, above n 20, 9. More recent publicly-available figures provide a breakdown by category but not individual ethnic group. According to these figures, the total Orang Asli population as at 2010 is 178,197 of which 5009 (2.8 per cent) are Negrito, 97,856 (54.9 per cent) are Senoi and 75,332 (42.3 per cent) are Aboriginal Malay (*DOAD*, above n 10, 18-9).

[33] See eg. Geoffrey Benjamin, 'Introduction' in Paul Schebesta, *Among the Forest Dwarfs in Malaya: An Introduction to the Author* (Oxford University Press, 1973), v.

[34] Iskandar Carey, *Orang Asli: The Aboriginal Tribes of Peninsular Malaysia* (Oxford University Press, 1976), 37-8; Schebesta, above n 33, 83, 149.

(*Kintak*), Northeast Perak and West Kelantan (*Jahai*), North central Perak (*Lanoh*), Southeast Kelantan (*Mendriq*) and Northeast Pahang and South Kelantan (*Batek*). They are the smallest group, accounting for less than 5 per cent of the Orang Asli population. Generally, their language is Austro-Asiatic and dissimilar to the Malay language, an Austronesian language.[35]

The *Senoi* ethnic groups occupy areas in central Peninsular Malaysia and lead a more sedentary lifestyle within defined areas that are demarcated by natural boundaries such as ridges and streams.[36] They traditionally engage in swidden farming,[37] some hunting and trapping[38] and the collection of forest produce. Those *Senoi* communities closer to settled parts of the peninsula also participate in permanent agriculture and the wage-earning sector. *Senoi* ethnic groups traditionally live mainly on both slopes of the main Titiwangsa range in Perak, Kelantan and Pahang (*Semai* and *Temiar*), in Central Pahang (*Jah Hut* and *Che Wong*), coastal Selangor (*Mah Meri*) and South-central Pahang (*Semoq Beri*). They are the largest group of Orang Asli covering almost 55 per cent of the population. They speak their own languages, which also belong to the Austro-Asiatic branch.

About 42 per cent of the Orang Asli population fall under the *Aboriginal Malay* ethnic groups. They live in the southern half of the Peninsula, in Selangor and Negeri Sembilan (*Temuan*), Central Pahang and Negeri Sembilan (*Semelai*), South Pahang and North Johor (*Jakun*), East Johor (*Orang Kanaq*) and central coasts of Johor (*Orang Kuala* and *Orang Seletar*) and are settled peoples, engaging mostly in

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[35] For a succinct view on Orang Asli languages vis-à-vis Malayan languages, see Geoffrey Benjamin, 'On Being Tribal in the Malay World' in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Institute of Southeast Asian Studies, 2002), 25-30. For Orang Asli languages generally, see eg. G Diffloth, 'Aslian Languages and Southeast Asian Prehistory' (1979) 24 *Federation Museums Journal* 3; W W Skeat and K O Blagden, *Pagan Races of the Malay Peninsula* (Frank Cass, 1906), vol 1, 385-413.

[36] In relation to the *Semai*, see Alberto G Gomes, *Looking for Money: Capitalism and Modernity in An Orang Asli Village* (Center for Orang Asli Concerns, Trans Pacific Press, 2004), 40. For the *Temiar*, see H D Noone, 'Report on the Settlements and Welfare of the Ple-Temiar Senoi of the Perak-Kelantan Watershed' (1936) XIX *Journal of the Federated Malay States Museums* 1, 24, 41.

[37] Swidden farming is a form of shifting agriculture that involves temporary cultivation by cutting and burning the vegetation. The used agricultural fields are then abandoned to allow regeneration of the forest and its soils for possible future use. For swidden farming techniques of the *Semai*, see R K Dentan, 'Some Senoi Semai Planting Techniques' (1971) 25(2) *Economic Botany* 136.

[38] See eg. Geoffrey Benjamin, 'In the Long Term: Three Themes in Malayan Cultural Ecology' in Karl L Hutterer, A Terry Rambo and George Lovelace (eds), *Cultural Values and Tropical Ecology in Southeast Asia* (Center for South and Southeast Asian Studies, University of Michigan, 1985), 219.

permanent agriculture or fishing and the collection and trade of forest produce.[39] *Orang Kuala* and *Orang Seletar*, descendants of the *Orang Laut* (Sea Nomads) of the Malay Archipelago, have lived as settled communities for the last 50 years but still engage in traditional fishing and foraging activities in fixed areas around the coastal and riverine waters and mangrove swamps of southern Johor. Aboriginal Malay languages remain ancient variants of the Malay language (except the *Semelai* languages that have links to the Senoic languages).

Thus, 'Orang Asli' is in reality a collective term to describe distinct groups of peoples possessing their own respective cultures and languages. However, non-Orang Asli and ideological perceptions in the administration of Orang Asli resulted in the official use of 'Orang Asli' as a generic term to describe these communities during the Malayan Emergency.[40] Literally translated, the term means 'natural people', and is now taken to mean 'original' or 'first' people as well.[41] Nonetheless, 'Orang Asli' is now generally accepted by the various Orang Asli ethnic groups. The development of a common Orang Asli identity is probably more due to shared experiences these groups have had with the dominant society.[42] More recently, this common identity has strengthened joint advocacy of Orang Asli rights.[43]

1 Pre-British period

Notwithstanding the respect that certain Malay settlers and kingdoms had for Orang Asli as first peoples, pre-colonial Orang Asli-Malay relations changed with increased external cultural and religious influence, economic expansion and trade

[39] See eg. ibid; Carey, *Orang Asli*, above n 34, ch 15; Colin Nicholas, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia* (IWGIA, Center for Orang Asli Concerns, 2000), 4.

[40] The Malayan Emergency describes the communist insurgency in Malaya from 1948 to 1960. The Emergency officially ended in 1989. For the position of Orang Asli during the Malayan Emergency, see Section IIB2(b) (see below, 32-3). For further reading on the adoption of the term Orang Asli, see eg. Carey, *Orang Asli*, above n 34, 3; Colin Nicholas, 'Organizing Orang Asli Identity' in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Institute of Southeast Asian Studies, 2002), 119.

[41] See eg. Leonard Y Andaya, 'Orang Asli and the Melayu in the History of the Malay Peninsula' (2002) 75(1) *Journal of the Malaysian Branch of the Royal Asiatic Society* 23, 25; Carey, *Orang Asli*, above n 34, 5.

[42] See Nicholas, 'Organizing Orang Asli Identity', above n 40, 119.

[43] The pursuance of Orang Asli rights, particularly in respect of their customary lands, is examined in Section IIIB (see below, 67-72).

within Malay society. These changes laid the foundations for the current paternalistic treatment of Orang Asli by the state. Further, it is suggested that instances of historical absorption of some Orang Asli into Malay society goes some way towards blurring the distinction between Orang Asli and Malay identity.

(a) Early interaction with outside societies

Archaeological evidence strongly suggests that Orang Asli, particularly the *Negrito* and to a lesser extent the *Senoi*, are descendants of Hoabinhians,[44] whose sites on the Malay peninsula are between 16000 and 8000 years old.[45] These peoples, at least in the case of most Orang Asli ethnic groups, have intermarried with the subsequent Neolithic Mon-Khmer-speaking immigrants from modern-day Thailand and Austronesian sea-faring peoples from present-day Indonesia.[46] Malays, the ethnic majority in Malaysia, stemmed from Austronesian-speakers settling in the peninsular coasts from 1000 BC.[47] It is therefore arguable that present day Orang Asli are descendants of the first recorded peoples of the Malay peninsula, or at least share this status with the Malays.

Settling in riverine and coastal areas of the Peninsula, Austronesian *Malay* migrants displaced these Austro-Asiatic speakers (Orang Asli) and adapted their own lifestyles to suit environments which ranged from the deep jungle to the open seas.[48] Some scholars nonetheless believe that Malays developed from the same genetic pool as Orang Asli, with the presence or absence of specific biological characteristics attributed to adaptation to local circumstances.[49] This belief can be attributed to the effects of intermarrying and absorption, evident in the case of the *Aboriginal Malays* in the south of the Malay peninsula where Orang Asli dialects

[44] Except for the small Orang Asli sub-group, *Orang Kuala* occupying the South and West coasts of Johor (numbered at around 3010 in December 2008 (*DOA*, *Basic Information Data*, above n 20, 9) that migrated from Sumatra around 500 years ago (see Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 4).
[45] Andaya, above n 41, 25-6.
[46] Dentan et al, above n 2, 10-12.
[47] Andaya, above n 41, 25-7.
[48] Barbara Watson Andaya and Leonard Y Andaya, *A History of Malaysia* (Palgrave Macmillan, 2nd edn, 2001), 10.
[49] See R O Winstedt, *The Malays – A Cultural History (revised in 1981 by Tham Seong Chee)* (Graham Brash, 1981), 7-15; Andaya and Andaya, *A History of Malaysia* (2nd edn), above n 48, 10.

tend to be Austronesian-based rather than Austro-Asiatic-based.[50] However, it may not be the case that *Aboriginal Malays* are a precursor to Malays. Sullivan suggests that *Aboriginal Malays* are the remains of a people that originally lived along the coast and were pushed back by Malay settlement and, over the course of time, interacted with Malays and adopted the Malay language.[51] Notwithstanding this, Orang Asli, especially in the interior, remained distinct from Malay society with the former residing in the interiors and the latter establishing kingdoms, embracing Islam and residing along the coast and rivers.[52] Orang Asli identified themselves by their specific ecological niche, namely, their customary (*adat*) or ancestral (*saka*) land, and developed a close cultural and religious affinity with it.[53] This historical relationship suggests that the current notion of assimilation with Malays existed long before the arrival of Islam,[54] albeit in different circumstances.

Andaya suggests that barter was part of Orang Asli culture from at least 8000 BC.[55] In the first millennium AD, Orang Asli, as opposed to the Malays, were said to be the sole inhabitants beyond coastal areas and near-exclusive primary collector-traders of forest produce.[56] Until the establishment of the Malacca sultanate in the early 15th century, Orang Asli who chose not to be absorbed lived independently of earlier Malay kingdoms.[57] The historical assimilation of some Orang Asli into Malay society emphasises the unique challenge faced by Orang Asli in sustaining a distinct identity and culture from that of Malays in modern Malaysia.

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[50] See eg. Benjamin, 'On Being Tribal in the Malay World', above n 35, 52-3; Andaya and Andaya, *A History of Malaysia* (2nd edn), above n 48, 10.

[51] Patrick Sullivan, 'Orang Asli and the Malays: Equity and Native Title in Malaysia' in Catherine J Iorns Magallanes and Malcolm Hollick (eds), *Land Conflicts in Southeast Asia: Indigenous Peoples, Environment and International Law* (White Lotus Co, 1998), 65-6.

[52] See eg. Benjamin, 'On Being Tribal in the Malay World', above n 35, 9-10; R J Wilkinson, *A History of the Peninsular Malays with Chapters on Perak and Selangor* (Kelly & Walsh, 1923), 1 and dictum of Mokhtar Sidin JCA in *Adong 1* [1997] 1 MLJ 418, 429.

[53] Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 12.

[54] Benjamin, 'On Being Tribal in the Malay World', above n 35, 9-10, 52-3.

[55] Andaya, above n 41, 29.

[56] Ibid 43; F L Dunn, *Rain Forest Collectors and Traders: A Study of Resource Utilization in Modern and Ancient Malaya* (Malaysian Branch of the Royal Asiatic Society Monograph No 5, 1975) (Reprint, 1982), 106-9, 110-4, 117.

[57] The second and third century saw the establishment of various small Malay kingdoms in the coastal areas of the Malay peninsula. These kingdoms spread mainly across the East and West coasts of the Malay Peninsula and came under the loose control of the Srivijaya Empire from the 7th to the 13th centuries. The Srivijaya empire originated from a Malay kingdom in Sumatra, a large island off the coast of the Malay peninsula. At the height of the Empire, its influence and vassal states spread across the whole of Sumatra, the Malay Peninsula, West Java and West Borneo.

(b) Malay sultanates and Orang Asli

In the early 15th century, a Hindu Palembang prince, Paramesvara established the kingdom of Malacca (now Melaka). Paramesvara subsequently converted to Islam. These events culminated in the establishment of the classical Malay state political structure where the religion of Islam was prevalent.[58] New Sumatran settlers in Malacca intermarried with some Orang Asli and these Orang Asli were willing to be associated with the new regime for economic reasons and the prestige of having ties with the new Malay rulers.[59]

The respect that Malay rulers had for Orang Asli as original lords of the soil is documented in, among others, the work of Andaya and Andaya.[60] For instance, the supreme law giver or *Undang* in Rembau (now part of Negeri Sembilan) during the Malacca sultanate was the son of a *Jakun* woman. In Peninsular Malaysia, the Malacca sultanate expanded from the south to Perak in the north and Pahang in the east. When Malacca fell to the Portuguese in 1511, the fleeing Sultan of Malacca became the first ruler from Malacca to rule what is now known as Johor. Once again, a process of interaction between the new kingdom and Orang Asli took place, resembling that in Malacca 100 years earlier.[61]

Some Malay settlers respected the Orang Asli whenever they came across them. For example, the *Adat Perpatih*[62] in Negeri Sembilan recognised Orang Asli ownership of waste lands. The *Adat* accepted that whenever waste lands were taken up for cultivation, compensation had to be provided, but only for the hunting of which the Orang Asli were deprived.[63] Those Orang Asli communities who lived closer to Malay settlements and actively took part in the process of early formation of the Malay states[64] were accepted and absorbed as part of Malay society. However, the

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[58] Sullivan, above n 51, 64.
[59] Andaya and Andaya, *A History of Malaysia* (2nd edn), above n 48, 48.
[60] See eg. ibid 48-9, 59; Andaya, above n 41, 31-4.
[61] See eg. Andaya and Andaya, *A History of Malaysia* (2nd edn), above n 48, 59.
[62] A system of law found primarily in the States of Negeri Sembilan and parts of Malacca established by Minangkabau settlers from Sumatra which assumes a kinship principle of matriliny confined to family law and law relating to Malay customary ownership (see M B Hooker, *Readings in Malay Adat Laws* (Singapore University Press, 1970), xi).
[63] Hooker, *Readings in Malay Adat Laws*, above n 62, 25-6.
[64] Benjamin, 'On Being Tribal in the Malay World', above n 35, 52-3.

'lowly' status of Orang Asli vis-à-vis the Malay ruling class suggests that the inclusion of Orang Asli in some Malay states may have been more for the purposes of legitimising Malay sovereignty rather than shared Malay-Orang Asli sovereignty. Throughout this period, Orang Asli who were beyond the reach of the Malay sultanates continued to live independently.

(c) Malay-Orang Asli relations at the advent of British colonialism

Those Orang Asli communities which retreated or remained in the interior of the Peninsula lived outside the orbit of Malay sultanates.[65] Carey has reconstructed the status of Orang Asli in the Malay political structure prior to colonialism as follows:

> Briefly, the Orang Asli in the deep jungle had lived an almost completely independent existence, their lives being governed by their own customs… and their own system of leadership. In places more adjacent to the settled areas, their dealings with the Malays, largely through the village headman, were exclusively of an economic nature. They had very few connexions with…the district chief, and although the latter could not levy any tax on them, the personality of the *Datok* (translated, Malay village head) was at times a strong influence in their relations with the Malay community. Finally, the Orang Asli were normally unaware of the existence of a Sultan in the state capital.[66]

Despite the increased influence of the political authority of the Malay sultans, Orang Asli were viewed by Malay society as jural non-persons, living outside the web of ethical, political, and moral ties which bind people together and govern their behaviour.[67] Again, Orang Asli within the reach of Malay society seem to have had the choice of becoming Malay peasants through assimilation and absorption into

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[65] See eg. Noone, above n 36, 60-1; W E Maxwell, 'The Law and Customs of the Malays with reference to the Tenure of Land' (1884) 13 *Journal of the Straits Branch of the Royal Asiatic Society* 75, 81; Kirk Endicott and Robert Knox Dentan, 'Into the Mainstream or Into the Backwater: Malaysian Assimilation of Orang Asli' in Christopher R Duncan (ed), *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities* (NUS Press, 2008), 26; Sharifah Suhanah Syed Ahmad, *Malaysian Legal System* (Malayan Law Journal, 2nd edn, 2007), 91. See also below Chapter 6, 235-40.

[66] Carey, *Orang Asli*, above n 34, 286. Compare Edo who examines the acknowledgment of the Malay sultans by Orang Asli groups and vice versa (see Juli Edo, 'Traditional Alliances: Contact Between the Semais and the Malay State in Pre-modern Perak', in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Institute of Southeast Asian Studies, 2002), 137). However, the subjugation of independent Orang Asli communities in the forest to the Malay rulers and their sovereignty is questionable (see below n 69 and accompanying text).

[67] Barbara Watson Andaya and Leonard Y Andaya, *A History of Malaysia* (Macmillan Education, 1982), 160-1.

Malay society[68] or retreating further into the interior. The distinctive relationship between Orang Asli and Malay societies before the British period argued here has been canvassed by Wilkinson, a colonial historian:

> It is a matter of common knowledge that the Malays were not the first inhabitants of the Peninsula. Though they have inter-married with the Aborigines and show many traces of mixed blood they have failed to absorb completely the races they supplanted. The Malay settlers kept to the rivers: at their coming the earlier races took to the mountains and the swamps. Some of the old tribes have died out; some have adopted the life of the Malays; others have retained their own language and their primitive culture… [69]

With the Malays' growing involvement in extractive industries through interaction with foreigners, trade in forest produce dwindled while exploitation of Orang Asli and their lands increased.[70] In 1844, for example, *Bendahara* (the Malay sultanate equivalent of a Prime Minister) Ali appointed an Orang Asli headman as his representative over all Orang Asli in the Endau river area in southern Pahang, while the Sultanate of Johor posted agents at numerous Aboriginal settlements to supervise forest produce collection.[71] As Malays grew in dominance and their visibility to the outside world, so did their prejudices against Orang Asli and their culture. Dentan argues that the Malay ruling class, who had established kingdoms ruled by Rajas and embraced Islam, increasingly viewed Orang Asli who had not been absorbed into Malay society as wild (meaning shy or undomesticated), free (meaning unsupervised) and dirty physically.[72] From ethnocentric perspectives, Malays, heavily influenced by Islamic culture, found that Orang Asli lacked culture worth saving or, for that matter, 'worthy of a name'.[73]

Hence, the use of Orang Asli as slaves was seen as acceptable because they were not Muslim and, for the most part, thought to be 'exotic, wild playthings which could be

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[68] See eg. Noone, above n 36, 56-7; Benjamin, 'On Being Tribal in the Malay World', above n 35, 9.
[69] Wilkinson, *A History of the Peninsular Malays with Chapters on Perak and Selangor*, above n 52, 1.
[70] Andaya, above n 41, 38-9.
[71] Andaya and Andaya, *A History of Malaysia* (2nd edn), above n 48, 136-7.
[72] Robert Knox Dentan, 'The Persistence of Received Truth: How the Malaysian Ruling Class Constructs Orang Asli' in Robert L Winzelar (ed), *Indigenous Peoples and the State: Politics, Land, Ethnicity in the Malayan Peninsula and Borneo* (Yale University Southeast Asian Studies, 1997), 108-12.
[73] Ibid 115-8.

tamed, fed, beaten or killed without compunction'.[74] Dentan et al argue that previous slaving practices have made Orang Asli cautious of Malays and prone to retreat from situations that could escalate into violence.[75] The persistence of Orang Asli in maintaining their lifestyle and not embracing Islam merely reinforced Malay preconceptions that Orang Asli lacked 'civilisation'. These perceptions served to complement British colonial expansion into the Malay Peninsula without regard to Orang Asli territoriality. Later in this section, it will be demonstrated how these views bear resemblance to the rationalisation of state policies towards Orang Asli and their lands today.

2 British period

After observing a policy of non-intervention in the Malay states,[76] the British changed their policy to that of intervention in the 1870s. Between 1874 and 1914, each of nine sovereign Malay states became British protectorates by treaty, the terms of which included the acceptance of a British Resident[77] as advisor.[78] This situation prevailed until 1946 when the Straits Settlements of Penang and Malacca and the

[74] See eg. Benjamin, 'On Being Tribal in the Malay World', above n 35, 48-9; Dentan et al, above n 2, 55-7. In respect of the practice of slave raids, see eg. Dentan et al, above n 2, 56-7; Noone, above n 36, 54-6, 60.

[75] See Dentan et al, above n 2, 54.

[76] At the time of first British intervention in 1786, Peninsular Malaysia consisted of distinct Malay sultanates and the Dutch colony, Malacca. The Perlis, Kedah, Kelantan and Terengganu sultanates in the north were dependencies of the Kingdom of Siam. The other independent sultanates consisted of Perak, Selangor, Pahang, Johor and the nine Minangkabau kingdoms (now Negeri Sembilan). The island of Penang and a small province across it on the mainland (Province Wellesley) were ceded by Kedah to the British in 1786 and 1800 respectively. In 1819, the island of Singapore was ceded by Johor to the British. After the Napoleonic wars, the small State of Malacca was ceded to the British via the Treaty of Holland of 1824 in exchange for amongst others, British interests in what is now Indonesia. These three colonies, namely, Penang, Malacca and Singapore then formed part of the British Straits Settlements Colonies. The other Straits Settlements colonies were the island of Labuan (ceded to North Borneo (now Sabah) in 1946), Cocos (Keeling) Island (ceded to Australia in 1955) and Christmas Island (ceded to Australia in 1957) (see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens, 1966), 716).

[77] A British Resident is essentially a British-appointed advisor to the Sultan whose advice, except for matters of Malay culture and religion, must be adhered to by the Sultan.

[78] Between 1874 and 1895, Perak, Selangor, Pahang and Negeri Sembilan became British protectorates accepting a British Resident as advisor. In 1895, these four States were administered under the Federated Malay States, where the respective four British Residents came under the Resident-General who was responsible to the Governor of the Straits Settlements. The four nothern States of Kedah, Perlis, Kelantan and Terengganu were freed from Siamese influence by the Anglo-Siamese treaty of 1909. Following this, a series of agreements were entered into between Great Britain and Kedah (1923), Kelantan (1910), Terengganu (1910) and Perlis (1930) culminating in these States becoming British protectorates. Johor became a British protectorate in 1914.

nine Malay states were federated under the Malayan Union.[79] However, dissatisfaction of ethnic Malays with the Malayan Union saw the formation of the Federation of Malaya ('Malaya') in 1948.[80] The constitutional position of Malaya as a British protectorate nevertheless remained until Malaya gained independence in 1957. In 1963, Malaya was enlarged into the Federation of Malaysia with the inclusion of Singapore and the British colonies of Sarawak and Sabah. Singapore broke away from the Federation in 1965 to form the Republic of Singapore.

(a) Colonial rule and Orang Asli lands

In consolidating their power over the Malay states, the British colonial administration did not engage with Orang Asli on Orang Asli sovereignty, territoriality and ownership over their customary lands and territories. Instead, the British dealt with the Malay sultans, 'assuming that the Malay rulers were Indigenous and that the Orang Asli were their dependants'.[81] Furthermore, there was no practical compulsion for the British to include Orang Asli communities in the formulation of land tenure policies in the Malay states partly because Orang Asli were insignificant demographically, economically and politically.[82]

Justification for the British to engage only with Malay society can also be found in then prevailing Eurocentric prejudice against societies possessing social structures regarded as unfamiliar or primitive compared to European standards.[83] Evidence of this prejudice has found its way into history books written by colonial historians. Winstedt, for example, described the 'hunter-gatherer' *Negrito* as having 'no tribal

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[79] Almost simultaneously, the island of Singapore and surrounding islands and the Cocos and Keeling Islands were constituted as the colony of Singapore. British North Borneo was ceded by the British North Borneo Company and joined Labuan to constitute the colony of Borneo. Sarawak was ceded to the British as a colony by the 'white' rajah, Rajah Brooke (see L A Sheridan (ed), *Malaya and Singapore The Borneo Territories: The Development of their Laws and Constitutions* (Stevens, 1961), xvi).

[80] R H Hickling, *An Introduction to the Federal Constitution* (Federation of Malaya Information Services, 1960), 10.

[81] Sullivan, above n 51, 61.

[82] Alice M Nah, *Negotiating Orang Asli Identity in Postcolonial Malaysia* (Master of Social Science Thesis, National University of Singapore, 2004), 26-7, 33. In relation to land tenurial policies, see below Chapter 6, 235-40.

[83] See eg. the Privy Council appeal case of *Re Southern Rhodesia* [1919] AC 211 where it was held that local communities would have to meet the Eurocentric 'scale of social organisation test' before being recognised as a society 'civilised' enough to possess customary land rights.

organisation' while Malays were described as 'civilised'.[84] Manickam argues that Malays were pivotal in geographical and physical access to Orang Asli and consequently, the crafting of knowledge on Orang Asli.[85] The coincidence of thinking between the Malay intelligentsia and British on Orang Asli culture and the Malay 'agency' element in accessing Orang Asli mutually reinforced their respective ethnocentric views of Orang Asli.[86] The kind of social system the British encountered in the Malay peninsula determined the form of state they produced for colonial rule. These states 'were very much British creations and within which there was no recognition of Orang Asli rights to the land'.[87]

More palatable to the British, the dominant, numerically superior and geographically accessible Malay society lived a 'settled' way of life and possessed social structures and hierarchies resembling kingdoms and sultanates previously encountered in Java, India and Turkey. Orang Asli were viewed by the British as a sub-category of the Malay race[88] but lower in rank in terms of social evolution. For the most part, European ethnography placed Orang Asli at an early stage of Malay development in a 'slow march towards a settled' and 'civilised existence' through 'absorption' into the larger Malay community.[89] These views justified negotiations between the British and the Malay Sultans, as sole representatives of all native peoples. For example, the criticised concept of a Sultan's paramount ownership of all land in the Malay states examined in Chapter 6[90] enabled the expansion of British administrative power over lands because the Sultan, as absolute owner, could grant or otherwise deal with his lands and make new laws through the British administration.[91] In the creation of the land registration system in the Malay states, Orang Asli did not enjoy the concomitant land reservation rights afforded to the Malays under the various State Malay reservation laws brought into force from the

[84] Winstedt, above n 49, 45.
[85] See Sandra Khor Manickam, 'Common Ground: Race and the Colonial Universe in Malaya' (2009) 40(3) *Journal of South East Asian Studies* 593, 607.
[86] Ibid 606-8.
[87] Sullivan, above n 51, 64.
[88] Rusaslina Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia* (PhD Thesis, Harvard University, 2008), 142-4, 154-5.
[89] T N Harper, 'The Politics of the Forest in Colonial Malaya' (1997) 31(1) *Modern Asian Studies* 1, 5.
[90] The possible fallacy of this notion is examined in Chapter 6 (see below, 236-8).
[91] David Wong, *Tenure and Land Dealings in the Malay States* (Singapore University Press, 1975), 24.

early 20th century. The lack of recognition and protection for Orang Asli lands facilitated the exploitation of frontier lands occupied by Orang Asli for the ownership and use of others, and consequently drove many Orang Asli into the interior of the Malay peninsula. The exploitation continues until today.

As a result of the efforts of H D Noone, a British anthropologist, the *Aboriginal Tribes Enactment 1939* was passed in Perak.[92] The protectionist tone of this Enactment formed the core of the current *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*'),[93] introduced in Section IIB3(b) below. During World War II, the Japanese occupation of the Malay states pushed Orang Asli further into the interior of Malaya. They were befriended by the *Malaysian Peoples Anti-Japanese Army* ('*MPAJA*'), a communist force that formed the resistance against the Japanese occupiers. The *MPAJA* offered protection to Orang Asli and, in return, the Orang Asli aided the *MPAJA* and other resistance forces.[94]

(b) The Effect of the Emergency (1948-60) on Orang Asli: Protectionism and control

After the surrender of the Japanese in 1945, the British returned to the Malay states to re-establish rule. The British excluded the communist leaders (many of whom were members of the *MPAJA*) from the post-war government, resulting in the communists' return to armed struggle. The communist insurgency in the Malay Peninsula (1948-60) after World War II was popularly known as the 'Emergency'.

The communists' retreat into the jungle rekindled old friendships with the Orang Asli.[95] In an effort to cut off support to the guerrillas, the British military authorities

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[92] For an examination of the provisions of the Enactment, see Sothi Rachagan, 'Constitutional and Statutory Provisions Governing the Orang Asli' in Lim Teck Ghee and Alberto G Gomes (eds), *Tribal Peoples and Development in Southeast Asia* (Department of Anthropology and Sociology, University of Malaya, 1990), 101.

[93] Endicott and Dentan, above n 65, 27.

[94] Alun Jones, 'The Orang Asli: An Outline of their Progress in Modern Malaya (1968) 9(2) *Journal of Southeast Asian History* 286, 293-4.

[95] See Ibid 295; Carey, *Orang Asli*, above n 34, 308. For further reading on Orang Asli during the Emergency, see eg. John D Leary, *Violence and the Dream People: The Orang Asli in the Malayan Emergency, 1948-1960* (Monographs in International Studies, Southeast Asia Series, No 95, Ohio, 1995).

decided to resettle Orang Asli outside the forest. The resettlement policy resulted in many Orang Asli deaths as a result of lack of shelter, poor nutrition, unsanitary conditions and total social and psychological upheaval.[96] These devastating outcomes pushed many remaining Orang Asli further into the jungle and stoked their support for the communist insurgents.[97] The British responded by trying to gain the favour of Orang Asli through the nascent Department of Orang Asli Affairs ('*DOA*'). The *DOA* learned about the concerns of Orang Asli and took over the education and medical treatment of Orang Asli.[98]

In 1954, the colonial administration passed the *Aboriginal Peoples Ordinance* ('*APO*') (predecessor to the *APA*), an act to provide for the protection, well-being and advancement of Orang Asli. The *APO* took away a number of fundamental freedoms normally available to citizens. It provides for extensive control over Orang Asli and their customary lands, in the interest of national security.[99] Despite the end of the communist insurgency in 1989, almost all provisions of the *APO* remain in force through the *APA*. These provisions are revisited in Section IIB3(b) below.

3 Post-colonial era: Orang Asli as citizens

This section suggests that the primary laws affecting Orang Asli as a distinct group of citizens after Malaya's independence are an articulation of the protectionist mindset towards Orang Asli, and in turn, provide the legal foundation for policies affecting Orang Asli today.[100] These laws, meant for the purpose of protecting Orang Asli in the newly formed nation-state, place Orang Asli and their lands under the power of the state, which can decide and implement measures for Orang Asli 'protection, well-being or advancement'.[101] By the same token, these legal controls

[96] See eg. Iskandar Carey, 'The Resettlement of the Orang Asli from a Historical Perspective' (1979) 24 *Federation Museums Journal* 159; Carey, *Orang Asli*, above n 34, 308; Jones, above n 94, 297.
[97] Carey, *Orang Asli*, above n 34, 305, 308, 311; Jones, above n 94, 297.
[98] Dentan et al, above n 2, 64-5. The British forces went on to recruit Orang Asli to an anti-guerilla military unit called the *Senoi Praak* who were successful in deep forest duties, tracking and liaising with local Orang Asli (see Carey, *Orang Asli*, above n 34, 317-8).
[99] For an examination of the *APA*, see Section IIIB3(b) (see below, 38-42) and Chapter 5 (see below, 152-60, 166-94).
[100] An examination of constitutional provisions and laws concerning Orang Asli land and resource rights in the context of this thesis is conducted in Chapters 4 and 5 below respectively.
[101] *Malaysian Constitution,* art 8(5)(c).

also empower the state to introduce policies that may adversely affect Orang Asli land and identity in the name of their 'protection, well-being or advancement'.

(a) The constitutional position of Orang Asli: A hierarchy of 'Indigenous' rights

The *Malaysian Constitution* is the supreme law of Malaysia and contains the basic laws for governance of the Malaysian constitutional monarchy. As Malaya pushed for independence from the British in 1957, drafting a Constitution provided the unique challenge of reaching a satisfactory compromise between the interests of the major ethnic groups, namely, the Malays and the immigrant ethnic Chinese and Indians, many of whom had resided in Malaya for a few generations. Amongst the compromises were constitutional provisions for the protection of the Malay community. These express special privileges were agreed to before the independence of Malaya.[102] Subsequently, the natives of Sabah and Sarawak were also given special privileges when these States joined the Federation of Malaysia.

Orang Asli did not participate in the consultations held with the various communities prior to the drafting of the *Malaysian Constitution*. The first draft Constitution, prepared by the Reid Commission,[103] did not even refer to Orang Asli as a distinct community, let alone grant them the special privileges afforded to Malays. After all, 'Aborigines' were already governed as a 'protected' ethnic group under the *APO* at the time. Commentators have given various reasons for the omission of Malay-style constitutional privileges for Orang Asli[104] but what emerges from these reasons is: (1) the weak political and demographic position of Orang

[102] For an illuminating account of the 'social contract' that preceded the *Malaysian Constitution*, see Tommy Thomas, 'The Social Contract: The Constitutional Covenant' [2008] 1 *Malayan Law Journal* cxxxii. For further reading, see eg. Joseph Fernando, *The Making of the Malayan Constitution* (Malaysian Branch of the Royal British Asiatic Society Monograph No 31, 2002).

[103] The Reid Commission, headed by Lord Reid, was appointed by the Council of Rulers of the Malay States and Her Majesty the Queen to make recommendations for the Constitution of the newly formed independent Federation of Malaya (see Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (HMSO, 1957)).

[104] They include the earlier inclusion of Orang Asli under the category of 'Malays' in the population census, an intentional oversight to deny Orang Asli their rights, tipping the delicate majority population balance in Malaya in favour of ethnic Malays, 'merging' Malays and Orang Asli as 'natives' or 'sons of the soil' thus justifying Malay protection or a combination of all these factors (see eg. Dentan et al, above n 2, 70-3; Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88, 164).

Asli; and (2) the perceived social and cultural inferiority of Orang Asli compared to their Malay counterparts. As will be observed in Section IIB3,[105] these factors contribute to the identity challenges faced by Orang Asli today. Orang Asli were nonetheless included as a distinct group in the finalised draft Constitution (following appeals from the Malay community)[106] albeit with lesser constitutional privileges if compared to Malays.

Constitutionally, Orang Asli,[107] ethnic Malays,[108] natives of Sabah[109] and natives of Sarawak[110] are afforded distinct rights and privileges by virtue of their ethnicity. Article 153 of the *Malaysian Constitution* obliges the *Yang Dipertuan Agong*[111] to safeguard the 'special position of the Malays and natives of any of the States of Sabah and Sarawak' while art 161A extends to the natives of Sabah and Sarawak the same 'special privileges' as the Malays.[112] Amendment to this provision can only take place with a two-thirds majority of both houses of Parliament and the consent of the Conference of Rulers of the Malay States.[113] This special position includes reservations of positions in the public service, scholarships and other educational and training privileges and licences for the operation of any trade or business

[105] See below, 44-6.
[106] Orang Asli were included at the behest of Malay representatives (see Nah, *Negotiating Orang Asli Identity in Postcolonial Malaysia*, above n 82, 26-7, 33).
[107] For an examination of the definition of an Orang Asli, see below, 37, 39-40).
[108] 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 (31 August 1957) born in Malaya or Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of that person (see art 160(2) *Malaysian Constitution*).
[109] 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. Ramy Bulan, 'Native Title in Malaysia: A 'Complementary' Sui Generis Proprietary Right under the Federal Constitution' (2007) 11(1) *Australian Indigenous Law Review* 54, 58.
[110] 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 blood deriving exclusively from these races. For further reading, see eg. Ramy Bulan, 'Indigenous Identity and the Law: Who is a Native?' (1998) 25 *Journal of Malaysian and Comparative Law* 127.
[111] 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).
[112] This article was introduced when Sabah and Sarawak joined the Federation of Malaya and Singapore to form Malaysia in 1963.
[113] See *Malaysian Constitution* arts 159(3) and 159(5) respectively.

required by Federal law.[114] In respect of land, Malay reservations created immediately before Independence Day (31 August 1957) shall continue unless a State enactment is passed to the contrary by a two-thirds majority in the relevant State legislative assembly and both houses of parliament.[115]

Orang Asli do not enjoy equivalent constitutional rights but are dependent on the Federal Government for their welfare. Item 16 of the ninth sch List I of the *Malaysian Constitution* specifically empowers the Federal Government to legislate for the welfare of Orang Asli.[116] Article 8(1) is the equal protection clause of the *Malaysian Constitution* and states 'all persons are equal before the law and entitled to equal protection of the law'. Art 8(5)(c) of the *Malaysian Constitution* permits 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 art 8(1). Therefore, legislative provisions enacted for the welfare of the Orang Asli that come within the ambit of art 8(5)(c) would be valid.[117] Despite enabling positive discrimination laws in favour of Orang Asli, these constitutional provisions do not *expressly* oblige the Federal Government[118] to safeguard the position of Orang Asli. In contrast, the state is *obliged* to safeguard the privileged status of the Malays and natives of Sabah and Sarawak on a potentially wider scope of protections.[119] Unlike Malay reservations, there are also limited constitutional safeguards for Orang Asli customary lands.

Article 45(2) of the *Malaysian Constitution* empowers the *Yang Dipertuan Agong* to appoint a Senator 'capable of representing the interests' of Orang Asli in the Senate, the upper house of Parliament. However, Orang Asli themselves have never appointed such a person. Instead, the *de facto* power of such appointment lies with

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[114] Ibid art 153(2).
[115] Ibid art 89(1).
[116] Article 74(1) of the *Malaysian Constitution* empowers the Federal Government to legislate for matters enumerated in the Federal list (Ninth sch List I) and Concurrent List (Ninth sch List III).
[117] The potential of art 8(5)(c) to accommodate legislation consistent with *UNDRIP* Standards is examined in Chapter 4 (see below, 113-49).
[118] In this context, the fiduciary duty owed by the state to Orang Asli as decided by the Malaysian courts may not be a *constitutional* fiduciary duty but a *common law* fiduciary duty supported by constitutional and legislative provisions and other sources. This doctrine is examined in Chapters 6 and 7 respectively (see below, 217-8, 222-3, 253 and 296-302 respectively).
[119] See above, 35-6 and below, 37-8.

the executive, which, on the advice of the *DOA*, makes the necessary recommendation to the *Yang Dipertuan Agong*.[120] The impact of state power over Orang Asli leadership, representivity and decision-making is examined in Chapter 5.

Unlike the other three privileged groups that possess relatively clear constitutional definitions, the definition of an Orang Asli under art 160(2) of the *Malaysian Constitution* merely states that an Orang Asli or 'aborigine' is an 'aborigine of the Malay Peninsula'. The implications of this constitutional definition are dealt with in Section IIB3(b) and (c) below.[121] Malays and natives of Sabah and Sarawak have constitutional protection against the laws that touch upon their respective customs and generally, Islamic law (arts 76(2) and 150(6A)).[122] Islam, the religion of all Malays (as defined in the *Malaysian Constitution*),[123] is the official religion of Malaysia (art 3(1)) while the Malay language is the national language (art 152). Orang Asli have no such protection in respect of their languages, laws, traditions, customs and institutions.

Despite the *Malaysian Constitution* containing explicit provisions that contemplate the 'welfare' of Orang Asli, Orang Asli are largely reliant on the goodwill of the state for their welfare as there are no mandatory provisions for their protection. Accordingly, their status under the *Malaysian Constitution* must be distinguished from that of Malays and the natives of Sabah and Sarawak.[124] Colonial perceptions of which people were 'Indigenous' or 'tribal' in Malaya reduced Orang Asli to an ethnic group incapable of self-determination and in need of state protection for their protection, well-being and advancement. On the other hand, Malays were ascribed special privileges and rights under the Constitution with due respect to their respective laws, customs and religious beliefs. Following this reasoning, the political compromise in affording all native groups of Sabah and Sarawak, whether 'tribal' or

[120] See Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: from Rhetoric to Recognition* (Center for Orang Asli Concerns, 2010), 114-5.
[121] See below, 38-46.
[122] There are constitutional rights for the resolution of such disputes by the Syariah courts (see *Malaysian Constitution*, art 121(1A)) in respect of Malays and native courts (see *Malaysian Constitution*, art 72(20) and Ninth sch, List IIA, Item 13) in respect of natives of Sabah and Sarawak.
[123] For a definition of 'Malay' under art 160(2) of the *Malaysian Constitution*, see above n 108.
[124] For further discussion, see Rachagan, above n 92, 102.

not, similar privileges as Malays under art 153 when Sabah and Sarawak joined the Federation seems ironic, at least, from an Orang Asli standpoint.

(b) The APA

The evaluation of land rights provisions in the *APA* with reference to *UNDRIP* Standards is conducted in Chapter 5.[125] Meanwhile, this section provides a preview of how the *APA*, the main statute governing the administration and rights of Orang Asli, is a double-edged sword, functioning not only to protect Orang Asli but to secure and perpetuate control over Orang Asli and their lands and resources.

Carey has described the *APA* as an act of 'patronising benevolence' by the British, empowering the Government to protect Orang Asli from the 'ravages of modern life'.[126] In addition, the *APA* was passed during the Emergency in a climate where the British administration saw Orang Asli, especially those in the fringes and interior, as communist sympathisers. Nonetheless, the Select Committee of the Legislative Council on the *APO* outlined the main principle and aims of the legislation in the following terms:

> [t]o ensure that the Aborigines were protected from unscrupulous exploitation to safeguard their tribal organisation and tribal way of life from the too rapid advance of civilisation and to remove any obstacles which might hinder their gradual advancement along the lines best suited to them in accordance with their changing environment.[127]

Whatever noble intentions the legislators may have had when drafting this law, the reality is that it also served as a British-instigated measure to extend 'protection' to Aboriginal groups from communist influence.[128]

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[125] See below, 152-60, 166-84.
[126] Carey, *Orang Asli*, above n 34, 289.
[127] Legislative Council, Federation of Malaya, *Report of the Select Committee appointed to consider Aboriginal Peoples Bill, 1953; No. 2 of 1954* (1954), 1.
[128] For an examination of the British administration of Orang Asli during this period, see eg. Carey, *Orang Asli*, above n 34, 305-320; John Leary, 'The Importance of the Orang Asli in the Malayan Emergency 1948-1960' (Working Paper No 56, Center of Southeast Asian Studies, Monash University, 1989).

The preamble describes the *APA* as an act for the protection, welfare and well-being of Orang Asli. Section 3(1) of *APA* defines an aborigine (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 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.

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[129] may, by order, declare to be an Aboriginal ethnic group.

Three observations can be made about this definition. First, the identity of an Orang Asli can be changed by a simple amendment to the *APA*. This can be achieved by a simple majority of both houses of Parliament.[130] Given that one political alliance, *Barisan Nasional*, has controlled the Federal Government since Malaysia's inception, the practicability of such an amendment would pose minimal problems for legislators. This provision is discriminatory when compared to Malays and natives of Sabah and Sarawak as their respective definitions are constitutionally protected.

Second, s 3(3) empowers the Minister having charge of Aboriginal Affairs to determine whether any person is an Orang Asli. While possibly understandable during the communist insurgency when there were concerns over the infiltration of

[129] 'State Authority', whenever referred to in this thesis, means the Ruler or Governor of the individual State in Peninsular Malaysia (see *National Land Code 1965* (NLC), s 5).
[130] See *Malaysian Constitution*, art 62(3).

communist insurgents and ideologies into remote Orang Asli communities,[131] the continued existence of this provision grants the state extensive control over the composition of the Orang Asli community and fails to respect the community's right to self-identification. Such extensive ministerial power does not apply to Malays and natives of Sabah and Sarawak. Third, the definition may result in Orang Asli losing their identity as 'Orang Asli' if they stop observing what the relevant Minister deems to be an 'Aboriginal way of life'. Further, the wide constitutional definition of a 'Malay', namely, a person who is domiciled in Malaysia on 31 August 1957, professes the religion of Islam, habitually speaks Malay and observes Malay customs or is the issue of that person,[132] may facilitate the absorption of Orang Asli into the Malay race. This situation may well occur if an Orang Asli were to convert to Islam and is seen to observe Malay customs and 'habitually' speaks Malay, the national language. In sum, the attributes of this definition are incompatible with the self-identification of Orang Asli as a distinct group of peoples.

Section 16(1) of the *APA* states that Orang Asli communities who do not have a hereditary headman are to select, through their members, a headman commonly known as a *Batin*. However, this appointment is subject to confirmation by the Minister having charge of Orang Asli (s 16(1)). The Minister may also remove any such headman (s 16(2)).[133] As will be observed in Chapter 5,[134] there is potential for abuse of such excessive state control over the headman. The Federal Government also has extensive powers to exclude persons from entering or remaining on Orang Asli reserves, areas, 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

[131] The communist insurgency ended in 1989 with the signing of a peace accord between the Communist Party of Malaysia and the Malaysian Government.
[132] For the definition of a 'Malay' under art 160(2) of the *Malaysian Constitution*, see above n 108.
[133] 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 120, 114-5.
[134] See below, 180-2.

exercising their right to freedom of association, a constitutionally guaranteed right under art 10 of the *Malaysian Constitution*. The Minister also possesses the power to restrict any written, printed, or photographic matter deemed harmful by the state (s 19).

In respect of Orang Asli lands, the State Authority has the power, by gazette notification, to declare any area inhabited by Orang Asli to be an Aboriginal area (s 6(1)) or Aboriginal reserve (s 7(1)). Gazettal provides limited security of tenure against encroachment while the lands remain a declared Aboriginal area (s 6(2)) or Aboriginal reserve (s 7(2)) but rights of occupancy within such lands are no better than those of a tenant at will (s 8(2)). Further, the State Authority has the unilateral power, by similar gazette notification, to revoke wholly or in part or vary any declaration of an Aboriginal area (s 6(3)) or Aboriginal reserve (s 7(3)). Evidence of the vulnerability of gazetted Orang Asli lands can be seen in the fact that between 1990 and 1999, 76 per cent of Orang Asli reserves were degazetted in the State of Selangor alone.[135]

To compound matters, the performance of the State in gazetting Orang Asli lands since the inception of the *APA* in 1954 has been poor. Official figures indicate that less than 15 per cent of officially-acknowledged Orang Asli lands were gazetted Aboriginal reserves or areas as at 31 December 2010.[136] 18.1 per cent of officially-acknowledged Orang Asli lands had been approved for gazettal but were yet to be gazetted while 59.1 per cent were still pending approval.[137] Except for compensation for the loss of fruit and rubber trees,[138] Orang Asli lands not approved for gazettal have no statutory protection from alienation, reservation and encroachment. Further, there are no explicit statutory rights of appeal or review against any decision to degazette Orang Asli lands.[139]

[135] Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 36-7.
[136] *DOAD*, above n 10, 55.
[137] Ibid 56.
[138] *APA*, s 6.
[139] For the general challenges Orang Asli face in bringing litigation to the courts, see below, 67-9 and Chapter 7, 284-8.

Compulsory compensation for deprivation of Orang Asli lands under the *APA* is limited to fruit or rubber trees where an Orang Asli is able to establish claims to such rights on State land.[140] In possible violation of art 13 of the *Malaysian Constitution* that provides for mandatory adequate compensation for state 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 individual State. Mandatory and adequate compensation for 'acquisition or use' of Orang Asli lands is not available as of right and can only be claimed if Orang Asli are able to establish common law Orang Asli customary land rights in the courts.[141]

The principal legislation governing titles, dealings and interests in land in Peninsular Malaysia, the *National Land Code 1965* (Malaysia) ('*NLC*'), confers indefeasible title on proprietors but does not apply to 'any law for the time being in force relating to customary tenure'.[142] As such, Orang Asli do not possess the level of security of tenure enjoyed by other proprietors under the *NLC*. These statutory provisions are re-examined in Chapter 5.[143]

In essence, Orang Asli are left to contend with the *APA* where the ultimate power over their identity, lands and destiny is vested in the state. No other ethnic community in Malaysia is subject to such restrictions.

(c) Orang Asli and indigeneity in Malaysia: Not solely a question of rights

In Sections IIB2 and IIB3, it has been observed that the forging of the Malaysian nation-state as dictated by the British colonial administration culminated in disparate constitutional privileges afforded to Malays and Orang Asli.[144] Given the international indigenous rights-based benchmark used in this thesis, two pertinent legal issues arise from this domestic setting. The first issue is whether Orang Asli

[140] Section 11(1).
[141] See eg. *Adong 1* [1997] 1 MLJ 418. For the obstacles faced by Orang Asli in establishing such claims, see below, 67-9; Chapter 7, 263-88.
[142] See *NLC* s 4(2)(a); *Sagong 2* [2005] 6 MLJ 289, 307-308 (Court of Appeal, Malaysia).
[143] See below Chapter 5, 155-60, 167-76.
[144] Sullivan argues that colonisers 'systematically disinheriting non-state-oriented societies such as hunter gatherers and shifting horticulturalists' while forging 'something approximating their idea of a nation-state out of those they ruled' was not uncommon during the decolonisation process, and was indeed the case in Peninsular Malaysia (Sullivan, above n 51, 57).

can be regarded as 'Indigenous people' by international standards and second, the interplay of such classification domestically with the position of Malays as *bumiputera* or 'sons of the soil'.

With regard to the first issue, international law documents and literature provide various criteria relevant to the determination of 'Indigenous peoples'.[145] In relation to Orang Asli, Nicholas et al argue convincingly that Orang Asli meet all criteria for international definitions of Indigenous peoples, namely, self-identification, non-dominant status within a wider society, history of particular subjugation, marginalisation, dispossession, exclusion and discrimination, land rights prior to colonisation or occupation by other groups, and a land-based culture and a willingness to preserve it.[146] On the other hand, Malays are said not to meet international definitions of 'Indigenous peoples' due to religious 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.[147] In addition, the dominant political and demographic position of Malays within Malaysian society militates against them falling within the international term 'Indigenous people'.[148] Further, recent migrants who fulfill the cultural and religious criteria laid down in art 160(2) of the *Malaysian Constitution*[149] can also be considered 'Malay'.

However, the Malay-Orang Asli Indigenous debate, at least in international law, may well be misconceived as the establishment of Malays as 'Indigenous people'

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[145] For the various international definitions of 'Indigenous peoples', see eg. Jose R Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7, Add.4 (1986), para 34; Commission on Human Rights Working Group on Indigenous Peoples, *Working Paper by the Chairperson-Rapporteur, Mrs Erica-Irene A Daes, on the Concept of "indigenous people"* UN Doc E/CN.4/sub 2/AC.4/1996/2 (1996), 22; World Bank, Operation Manual OP 4.10 (July 2005), para 4. For commentary, see Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002), 33-60; Siegfried Wiessner, 'Rights and Status of International Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57, 114; Benedict Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *American Journal of International Law* 414; J Corntassel and T Primeau, 'Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"' (1995) 17 *Human Rights Quarterly* 343, 345-8.

[146] See Nicholas, Engi and Teh, above n 120, 11-24.

[147] Ibid 16-7.

[148] Sullivan, above n 51, 61-2. See also Kirk Endicott, 'Indigenous Rights Issues in Malaysia' in Bartholomew Dean and Jerome M Levi (eds), *At the Risk of Being Heard: Identity, Indigenous Rights and Postcolonial States* (Ann Arbor, Michigan, 2003), 146.

[149] For the definition of a 'Malay' under art 160(2) of the *Malaysian Constitution*, see above n 108.

under international law does not negate the categorisation of Orang Asli as such. In this regard, Rodolfo Stavenhagen, the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, has aptly emphasised '[f]rom a human rights perspective, the question is not who came first but the shared experiences of dispossession and marginalization'.[150]

As for the second issue, it must be noted beforehand that the word 'Indigenous' is not contained in the *Malaysian Constitution*. However, the earlier examination of the relevant constitutional provisions demonstrates that Orang Asli are distinct from the Malays in Peninsular Malaysia, and have fewer constitutional privileges than Malays.[151] The Malaysian courts have confirmed this position by historical analysis of the relationship between Malay and Orang Asli[152] and when adjudicating Orang Asli rights to Malay reservation lands.[153]

Beyond legal interpretation, however, Orang Asli indigeneity vis-à-vis Malays involves complex historical, political and national issues that have been dealt with comprehensively elsewhere.[154] It is important to appreciate these issues in the context of their potential effect on the domestic recognition of Orang Asli as distinct Indigenous people.

The Indigenous rights debate in Malaysia 'accepts that Orang Asli are different in culture and origins, but denies that they are a sovereign people like the Malays, with equal and separate rights'.[155] Reminiscent of the discriminatory social evolutionary practices of British colonials,[156] two ex-Prime Ministers of Malaysia, have justified Malays as being 'Indigenous' and the 'definitive people' of Peninsular Malaysia

[150] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN GA Doc A/62/286 (2007), para 23.
[151] See above Section IIB3(a), 34-8.
[152] See *Adong 1* [1997] 1 MLJ 418, 429.
[153] See *Sagong 1* [2002] 2 MLJ 591, 621.
[154] For more recent work on these issues, see eg. Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88; Nah, *Negotiating Orang Asli Identity in Postcolonial Malaysia*, above n 82; Saroja Dorairajoo, *The Orang Asli of Peninsular Malaysia: Aborigine but yet not Bumiputera* (Master of Arts dissertation, Cornell University, 1996).
[155] Sullivan, above n 51, 59.
[156] See above, 30-2.

over the 'primitive' Orang Asli because the latter did not form 'effective governments'.[157]

Concerns over the lack of state acknowledgment of Orang Asli as a distinct indigenous group are not unfounded. Past experience has shown that Orang Asli identity has fluctuated between being categorised as a distinct group and 'Malay' depending on the agenda of the government of the day. For example, the *conflation* of Orang Asli and Malays for census purposes in the 1950s was said to assuage any scepticism that the politically and numerically dominant Malays were the true natives or 'sons of the soil'.[158] However, this categorisation as 'Malay' did not result in the full gamut of constitutional privileges for Orang Asli. Conversely, the *distinction* between Orang Asli and Malays has been used to justify exclusive Malay indigeneity based on perceptions that the latter possessed a higher scale of social organisation.[159] According to Idrus, the Federal Government, at times, also positions Orang Asli as 'poorer cousins' of the Malays who need to follow the Malay development path in order to be successful.[160]

The relatively weak political, legal, social and numerical position of Orang Asli as an ethnic group poses significant challenges to the continued vibrancy of their distinct identity. Inclusion of Orang Asli under the category 'Malay' may function to socially confirm 'the indigenousness of the Malays'[161] and morally reinforce the special position of Malays under the *Malaysian Constitution*. In an environment where Orang Asli can be regarded as Malay,[162] the extensive powers currently possessed by the state over Orang Asli may be used to legitimise laws and policies that function to conflate Orang Asli with Malays.

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[157] See Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88, 160-2; Dentan et al, above n 2, 19-22; Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 90.
[158] See Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88, 155, 164.
[159] Ibid 160-2.
[160] Ibid 165-7; 171-2.
[161] Sullivan, above n 51, 59. See also Gordon P Means, 'The Orang Asli: Aboriginal Policies in Malaysia' (1985-1986) 58(4) *Pacific Affairs* 637, 646.
[162] See Alice M Nah, 'Negotiating Indigenous Identity in Postcolonial Malaysia: Beyond Being 'Not Quite/Not Malay' (2003) 9(4) *Social Identities* 511.

If there is the will to secure the position of Orang Asli as a distinct Indigenous group within Malaysian society, the state would need to explore alternatives for the legal recognition of Orang Asli as peoples. Domestic resistance to the due recognition of Orang Asli as a distinct indigenous group is revisited in Chapter 8.[163] However, these historical, political and national issues are distinct from the inquiry in this thesis, namely, the evaluation of laws affecting Orang Asli land and resources by reference to *UNDRIP* standards and the ability of the Malaysian legal system to accommodate such standards by way of law reform.

4 Government policies

The Malaysian Government's long term goal is to make Malaysia a fully industrialised country with the standard of living of a developed country, by the year 2020. This goal is known as *Wawasan 2020* (translated, Vision 2020).[164] The New Economic Model ('NEM'), launched by the Government in 2010, also contains reform initiatives to propel Malaysia toward the goals set forth in Vision 2020.[165] 'Development' from the Malaysian Government's perspective still largely corresponds with post-World War II 'modernisation' theories.[166] Rostow's 1960 'stages of economic growth model'[167] is used to argue that the end 'developed' state in this genre of 'modernisation' theories is an industrialized society like those of the capitalist West. Thus, development requires imposing capitalist economic practices, markets, divisions of labour, bureaucratic rationality, modern state structures and 'modern' technology. By Malay conception, 'modernity' has been said to lead to

[163] See below, 381-3, 385.

[164] For further reading, see Mahathir Mohamad, *The Way Forward – Vision 2020*, 22 June 2012 <http:www.wawasan2020.com/vision>. In 2009, Prime Minister Najib Tun Razak launched the *1Malaysia* concept to nurture unity among Malaysian citizens of all races based on a number of core values to be practised by every citizen. The *1Malaysia* concept explicitly reaffirms *Vision 2020*. According to the Prime Minister's department, the *1Malaysia* concept aids the achievement of the nation's aspiration encapsulated in *Vision 2020* (see Malaysian Prime Minister's Department, *1Malaysia Booklet*, 22 June 2012 <www.1malaysia.com.my/wp-content/uploads/2010/09/1/1MalaysiaBooklet.pdf>).

[165] National Economic Advisory Council, *New Economic Model for Malaysia: Part 1 Strategic Policy Directions* (National Economic Advisory Council, 2010), iii.

[166] Jimin bin Idris et al, *Planning and Administration of Development Programmes for Tribal Negrito Groups and Semi-Nomadic Peoples* (CIRDAP, 1983).

[167] See W W Rostow, *The Stages of Economic Growth: A Non-communist Manifesto* (Cambridge University Press, 1960). According to Rostow, developing societies like Malaysia pass through five stages: (1) traditional; (2) pre-takeoff; (3) takeoff; (4) the drive to maturity; and (5) mass consumption.

'many negative judgments about attitudes derived from the past'.[168] Indeed, such modernisation leaves little room for 'traditional practices and social forms', the basis of Orang Asli customary land rights. In this scenario, 'development' rationalises the appropriation of Orang Asli customary lands for more 'productive' use, whether for Orang Asli or others.

In 1996, Hooker observed that 'development' in relation to Orang Asli policies was defined as 'growth plus change' which consists of economic improvement through land development and commercial schemes, and provision of services to the same standard as available nationally.[169] To a large extent, these 'mainstreaming' development policies still apply to state policies on Orang Asli. As part of the implementation process for the achievement of the NEM, the Ministry of Rural and Regional Development, the Ministry having charge of Orang Asli affairs, unveiled the Rural Development Masterplan in October 2010.[170] The Masterplan provides for the transformation of rural areas, focusing on poverty eradication through economic and industrial activity, improvement of basic infrastructure, education and rural management. The transformation initiative includes Orang Asli resettlement and development of Orang Asli lands mainly through cash crop agriculture.[171]

As part of the rural development initiative, the 2011 Department of Orang Asli Development ('*DOAD*') Strategic Development Plan ('*DOAD* Plan') focuses on six core areas:

- Human capital development;
- Initiation of integrated economic activities and competitive, sustainable and progressive industries;
- Expanding infrastructure access;
- Raising the quality of life of the Orang Asli community;

[168] See eg. Robert M McKinley, 'Zaman dan Masa, Eras and Periods: Religious Evolution and the Permanence of Epistemological Ages in Malay Culture' in A L Becker and Aram A Yengoyan (eds), *The Imagination of Reality: Essays in Southeast Asian Coherence Systems* (Ablex, 1979), 303, 314.
[169] M B Hooker, 'The Orang Asli and the Laws of Malaysia: With Special Reference to Land' (1996) 48 *Akademika* 21, 25.
[170] See Ministry of Rural and Regional Development, Malaysia, above n 19.
[171] For example, see ibid 70, 94.

- Research, collection, preservation and promotion of Orang Asli traditional knowledge and heritage; and
- Strengthening services and management.[172]

In respect of Orang Asli land, one of the main challenges acknowledged by the *DOAD* is to encourage individual ownership among Orang Asli, to be achieved through discussions, planned economic activities and orderly resettlement.[173] Individual ownership of lands is also reflected in the 2009 proposed Orang Asli land titles policy.[174] Customary lands and community-based systems, characteristic of many Orang Asli villages,[175] appear not to be a priority.

Frequently, attempts by Orang Asli to maintain their culture and identity are used by government officials to brand Orang Asli as being 'anti-development' and 'backward and unmotivated'.[176] Such views give wider Malaysian society the inaccurate impression that Orang Asli do not wish to partake in the development and nation-building process. Much to the contrary, Orang Asli have sought development (including economic development) based on their 'wants and needs' for at least two decades.[177] In terms of nation-building, Rashid argues that Orang Asli are willing to

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[172] *DOAD*, above n 10, 73-133.
[173] Ibid 68-9.
[174] Ibid 57-9. The proposed policy is discussed at Section IIB4(e)(iii) (see below, 61-3).
[175] See eg. Kirk Endicott, 'The Impact of Economic Modernization on the *Orang Asli* (Aborigines) of Northern Peninsular Malaysia' in James C Jackson and Martin Rudner (eds), *Issues in Malaysian Development* (Heinemann Educational Books (Asia), 1979), 168-75.
[176] See eg. Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88, ch 2; Lye Tuck-Po, 'Forest People, Conservation Boundaries and the Problem of Modernity in Malaysia' in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Institute of Southeast Asian Studies, 2002), 160; Razha Rashid, 'Introduction' in Razha Rashid (ed), *Indigenous Minorities of Peninsular Malaysia: Selected Issues and Ethnographies* (Intersocietal and Scientific (INAS), 1995), 6.
[177] See Bah Tony Williams-Hunt, 'Contemporary Needs and Aspirations: Orang Asli Memorandum to the Government' (1992) 4 *Pernloi Gah* 5. A three day conference and *Bicara* (translated from the Malay language, discussions, conversations or opinions from a collective group) in 1994 organised by the Malaysian Social Science Association, attended by Orang Asli representatives from eight Peninsular Malaysia States also demonstrated a general consensus that Orang Asli were in favour of development. Participants were also apprehensive and in some instances, critical of the policies used by the government to 'develop' Orang Asli and the economic merits of such policies. There were also representatives who commented that the government did not plan policies in accordance with the wants and needs of the Orang Asli community. This comment can be viewed as a call for the right to self-determination. These discussions are available in the Malay language, see Zawawi Ibrahim (ed), *Kami Bukan Anti-Pembangunan: Bicara Orang Asli Menuju Wawasan 2020* [*We are not Anti-Development: Orang Asli Conversations towards Vision 2020*] (Malaysian Social Science Association, 1996) (translated from the Malay language by the candidate).

assimilate culturally to develop a Malaysian sense of identity but without losing their own cultural diversity.[178]

Further, the historical assimilation and conflation of Orang Asli with Malays highlighted in Section IIB1-3 above further justifies the integration and absorption of Orang Asli into the broader section of 'Malay' society. In other words, elements of such integration and absorption in government policies can be justified as part and parcel of Orang Asli destiny in its evolution towards progress.

With this background in mind, Sections IIB4(a)-(e) below contend that Federal Government policies for the 'protection, well-being and advancement' of Orang Asli have veered away from protection of Orang Asli customary land and resource rights. Instead, the focus has changed to 'mainstreaming' Orang Asli through socio-economic development policies. Islam is also used as a tool for Orang Asli development and integration into mainstream society. While not necessarily abhorrent, these government policies have had adverse effects on both Orang Asli and their lands and resources but have not necessarily achieved the desired effect of 'mainstreaming' Orang Asli. On a more critical note, the poor implementation of these policies has also functioned to perpetuate Orang Asli dependence on the state. Further, government policies thus far have placed little emphasis on Orang Asli self-determination and instead have put Orang Asli under constant pressure to progress at the cost of their lands, identity and culture. Land policies are largely facilitated by the state's view that Orang Asli lack security of tenure in and over their lands, except for those limited rights provided and granted under the *APA*.

(a) The 1961 Policy

In 1961, the Minister for the Interior issued a *Statement of Policy regarding the Long Term Administration of the Aborigine Peoples in the Federation of Malaya*[179] ('the *1961 Policy*'). Case law indicates that the *DOA* still considers the *1961 Policy*

[178] Rashid, above n 176, 2.
[179] Ministry of the Interior, Federation of Malaya, 20 November 1961.

applicable.[180] An evaluation of the *1961 Policy* by *UNDRIP* Standards is conducted in Chapter 5.[181]

The *1961 Policy* is the most progressive policy for the protection of Orang Asli culture and rights. Paragraph (d) of the *1961 Policy* provides that the 'special position of Aborigines in respect of land usage and land rights shall be recognised' and Orang Asli are not to be 'moved from their traditional lands without their full consent'. Paragraph (c) provides for the retention of Orang Asli customs, political systems, laws and institutions provided that they are not incompatible with the national legal system. The promotion of education,[182] health services,[183] participation in the form of 'collaboration'[184] and the preservation of cultural heritage[185] are also provided for in the *1961 Policy*. However, the *1961 Policy* does not have the force of law.

In line with then prevailing international standards and prejudices towards 'tribal' peoples,[186] the *1961 Policy*, however, carries the ultimate objective of integrating Orang Asli with the Malay section of society, or at least wider society.[187] Further evidence of the integrationist trend within the document are: (1) the prescriptive wording of paragraph (b) that calls for the promotion of natural integration of the Aboriginal community (neglecting self-determination); (2) paragraph (f) that mentions replacement of special training with 'the advance of the process of integration'; and (3) paragraph (iii)(b) of the notes of explanation to the *1961 Policy* that encourages the ultimate replacement of shifting cultivation practised by certain Orang Asli groups with permanent agriculture. These paragraphs suggest that the *1961 Policy*'s broader 'integration' objective can equally function as an escape clause for policy makers when confronted with allegations of contravention of the *1961 Policy*, particularly those paragraphs relating to the protection Orang Asli culture and lands.

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[180] See *Sagong 1* [2002] 2 MLJ 591, 619.
[181] Below, 176-80.
[182] Paras (e) and (i).
[183] Para (g).
[184] Para (j).
[185] Para (h).
[186] For further discussion, especially in relation to *ILO Convention 107*, see below Chapter 3, 80-2.
[187] See the Introduction and preamble of the *1961 Policy*.

It will be argued in Sections IIB4(b)-(e) below that the actual practice and implementation of the *1961 Policy* resembles forced integration[188] rather than self-determination. To compound matters, it will be shown that current Federal Government policy towards the Orang Asli ignores or directly contradicts the provisions of the *1961 Policy*.[189]

(b) The Department of Orang Asli Affairs ('DOA')

Under s 4 of the *APA*, the responsibility for implementing laws and policies on Orang Asli affairs is assigned to the Commissioner for Aboriginal Affairs, a position now held by the Director-General of *DOA* (since 2011, *DOAD*). The Director-General has under his charge the *DOA*, a Federal Government department which essentially operates as a single multi-functional agency, devising strategies and programmes towards implementing policies on Orang Asli. Other Government agencies also play roles in collaboration with the *DOA* when delivery of services to Orang Asli comes within their respective portfolios.

Despite its purview, most *DOA* employees, especially those in positions of authority, are non-Orang Asli.[190] The *DOA* has also never been headed by an Orang Asli. Salleh further argues that a pro-Malay bias has manifested itself in *DOA* dealings with Orang Asli. Malay officials have developed a paternalistic attitude towards Orang Asli and feel it is within their rights to show Orang Asli 'the proper way to live in the modern world'.[191] Perceived cultural superiority amongst some *DOA* officials merits the correction of Orang Asli behavioural patterns.[192] Religious differences between Malay (Muslim) officers and Orang Asli have also been said to cause dissatisfaction and discomfort in their interaction with Orang Asli.[193]

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[188] For similar views, see eg. Dentan et al, above n 2, 79-83; Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 98-101.
[189] This has also been argued from a socio-economic perspective by Mohd Tap bin Salleh, *An Examination of Development Planning Among the Rural Orang Asli of West Malaysia* (PhD Thesis, University of Bath, 1990), 45-6, 450.
[190] See *DOA*, *Basic Information Data*, above n 20, 2.
[191] Salleh, above n 189, 461.
[192] Ibid 461-3.
[193] Ibid 34.

The *DOA*, a by-product of colonial action during the communist insurgency, has been called an anachronism[194] that has failed to safeguard Orang Asli customary lands through paternalistic and assimilationist policies.[195] There have also been many calls for its abolition that have fallen on deaf years.[196]

Further, Nicholas contends that the *DOA* frequently appears to be in a position of conflict of interest especially where the state wishes to appropriate Orang Asli customary lands. On the one hand, they represent Orang Asli interests, and on the other hand, their status as a government agency may necessarily involve advancing state interests.[197] These competing tensions place the *DOA* in a difficult position whenever it may need to question government action in carrying out its assumed function of representing Orang Asli interests.

In January 2011, the *DOA* changed its name to the Department of Orang Asli Development ('*DOAD*'), presumably to reflect its position as the agency responsible for the development of Orang Asli and their lands pursuant to the Rural Development Masterplan[198] and the *DOAD* Plan.[199] Rather than ensuring the protection, well-being and advancement of the Orang Asli community in a manner respectful to Orang Asli lands and their culture, the *DOA*, or now the *DOAD*, seems to function as an agency for the implementation of state-imposed land development policies for Orang Asli. These policies are reviewed in Section IIB(e) below.

(c) Assimilation and islamisation

Despite containing the ultimate objective of integrating Orang Asli into 'the Malay section of the community', the *1961 Policy* contains inherent tensions as it also

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[194] Hood Salleh, 'The Orang Asli of Malaysia: An Overview of Recent Development Policy and Its Impact', in Lim Teck Ghee and Alberto G Gomes (eds), *Tribal Peoples and Development in South East Asia* (Department of Anthropology and Sociology, University of Malaya, 1990), 141, 145.
[195] Amy Dennison, 'Evolving Conceptions of Native Title in Malaysia and Australia – A Cross Nation Comparison' (2007) 11(1) *Australian Indigenous Law Review* 79, 80.
[196] See eg. Evangeline Majawat, 'Call to do away with department for Orang Asli', *New Straits Times*, 9 August 2009; Nigel Aw, 'Orang Asli vow to protest if gov't takes land', *Malaysiakini* (Malaysia), 26 August 2011 <http://www.malaysiakini.com/news/174223>.
[197] Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 110.
[198] See above nn 170-1 and accompanying text.
[199] *DOAD*, above n 10.

provides for the retention of Orang Asli customs, political system, laws and institutions.[200] These parts of the Policy suggest that Orang Asli maintain a close relationship with the Malays, but remain culturally distinct from them.[201] In later official communications, the objective of the *1961 Policy* was said to change to 'ultimate integration with the wider Malaysian society', 'integration with more advanced sections of the population' or 'integration with the national mainstream'.[202] However, earlier Director-Generals of *DOA* treated the integration objective as secondary to Orang Asli development. To them, integration would only be possible if Orang Asli achieved an acceptable level of socio-economic development beforehand.[203]

In the 1980s, the integrationist approach was arguably stretched to what may be seen as an assimilationist approach, namely, the *dakwah* (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*.[204] 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 convert to Islam, with material benefits given both individually and via development projects.[205] Despite not being overtly pursued, the abundance of literature examining the islamisation policy suggests it is an open secret.[206]

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[200] See *1961 Policy* paras (b) and (c).
[201] See Salleh, above n 189, 112-9; Dentan et al, above n 2, 79-80.
[202] Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 94.
[203] Ibid.
[204] See definition of 'Malay' above at n 108. 'Becoming' Malay is not a mere consitutional construct and has been going on for centuries. Malay civilisation in the Malay peninsula has been termed as an 'expansive' ethnicity as it has tended to absorb many different ethnic migrant groups, including Achenese, Bugis, Javanese, Batak, Thai, Indians, Persians and Arabs into its fold. During this period, Islam has been regarded as the only hurdle for those wishing to become Malay (see Andaya, above n 41, 39-41).
[205] See eg. Endicott and Dentan, above n 65, 34; Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 98-102. Nicholas refers, amongst others, to a 1983 *DOA* Strategy paper in support of this argument (at 98).
[206] There is a plethora of literature on the islamisation policy and its existence, see eg. Nobuta Toshihiro, *Living in the Periphery: Development and Islamisation Among the Orang Asli in Malaysia* (Center for Orang Asli Concerns, 2009); Benjamin, 'On Being Tribal in the Malay World', above n 35, 50-54; Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 98-103; Endicott and Dentan, above n 65, 29-30; 44-47; Idris et al, above n 166, 90-91; Dentan et al, above n 2, 79-83; 142-150.

Commentators have cited a number of reasons for the islamisation policy. Similar to arguments for the 'lumping' of Orang Asli into the classification 'Malay',[207] Endicott and Dentan argue that the absorption of Orang Asli into the Malay population would increase the number of Malay votes and eliminate a category of people arguably 'more Indigenous' than the Malays.[208] Assimilation is also seen as acceptable by some quarters of the Malay community where Orang Asli are perceived as 'incomplete' Malays, requiring only Islam and an acceptance of social hierarchy to make them complete.[209] Some devout Muslim Malays believe that conversion to Islam would uplift Orang Asli and provide Orang Asli 'spiritual development'.[210] Nicholas goes further by contending that the islamisation policy coupled with other Regroupment and development policies have a unifying ideological objective. They enable the control of a people and their traditional territories.[211] This contention dovetails with the argument put forward in Section IIIA, that Orang Asli need their customary lands if they are to remain a distinct Indigenous community in Malaysia and determine their own development in an autonomous manner. Complete Islamisation and 'becoming' Malay may result in eventual emasculation of Orang Asli traditions and customs and consequently, a loss of customary lands and identity.

The extensive legal power that the state holds over Orang Asli and their lands and identity under the *APA*[212] facilitates this state of affairs.

(d) National development and the dispossession of Orang Asli

The argument in this section is that the state has subordinated Orang Asli customary lands in pursuing its national development agenda without making Orang Asli equal participants and stakeholders in these initiatives.

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[207] See above n 104. Idrus describes instances of conflation of Malay and Orang Asli identity as the 'lumping' of Orang Asli into the 'Malay' category (above n 88).
[208] Endicott and Dentan, above n 65, 30.
[209] Benjamin, 'On Being Tribal in the Malay World', above n 35, 51.
[210] Dentan et al, above n 2, 81.
[211] Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 102-3.
[212] These extensive powers are discussed in Section II (see above, 38-42) and evaluated with regard to the *UNDRIP* Standards in Chapter 5.

State initiatives to 'productively' utilise 'undeveloped' lands have often ended up in the loss of Orang Asli lands.[213] This predicament is attributed to a lack of state recognition and respect for Orang Asli customary lands. Legally, Orang Asli customary lands were not part of the domestic application of the Torrens land registration system[214] introduced in the 1890s.[215] In terms of reservations, the large proportion of ungazetted Orang Asli lands is also effectively 'invisible' to the respective State land registries. Under the *APA*, gazetted Orang Asli lands, the principle form of statutory protection for Orang Asli lands, can be degazetted at the stroke of an executive pen[216] and without adequate compensation.[217] The weak statutory protection of Orang Asli lands provides a legal environment conducive for the dispossession of Orang Asli from their customary lands.

Orang Asli's 'failure to improve' is also used as a rationale 'for their dispossession, and as the justification to assign resources to people who will make better use of them'.[218] Large infrastructure and commercial projects, such as the building of dams, highways and airports, and the expansion of plantations have all seen the dispossession of Orang Asli, regarded by the state as having an interest in land no better than a tenant-at-will. The two leading cases on Orang Asli customary land rights involved lands taken for large public infrastructure projects. The case of *Adong 1*[219] involved around 53,000 acres of *Jakun* customary land alienated for the construction of a hydroelectric dam in Johor. *Sagong 1*[220] concerned land occupied by a *Temuan* settlement acquired for the construction of a highway to Kuala Lumpur International Airport.

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[213] See eg. Andaya, above n 41, 37-8; Barbara Nowak, 'The Format of Aboriginal Reserves: The Effects of Land Loss and Development on Btsisi of Peninsular Malaysia' in George N Appell (ed), *Modernisation and the Emergence of a Landless Peasantry: Essays on the Integration of Peripheries to Socio-economic Centres* (Department of Anthropology, College of William and Mary, 1985), 85; Means, above n 161, 648-9.
[214] See NLC, s 4(2)(a) as interpreted in *Sagong 1* [2002] 2 MLJ 591, 618; *Sagong 2* [2005] 6 MLJ 289, 308.
[215] For commentary on the Malaysian Torrens system, see eg. Wong, above n 91.
[216] *APA*, ss 6(3) and 7(3).
[217] *APA*, s 12.
[218] Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88, 64-5.
[219] [1997] 1 MLJ 418.
[220] [2002] 2 MLJ 591.

Despite the success of these two Orang Asli claims for compensation in respect of loss of their lands on the basis of common law customary land rights,[221] state officials continue to regard the Orang Asli as having no rights to their customary lands. The land encroachment in Kampung Sebir typifies the attitude of the state. In early 2009, a *Temuan* settlement in Kampung Sebir in the State of Negeri Sembilan complained of encroachment by land developers on their customary lands. The State Authority (presumably on behalf of the developers) contended that it leased the land to the developers. In response, the local State assemblyman (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.[222] In spite of the *DOA* being party to both landmark customary land cases, the State director for the *DOA* was quoted as saying that Orang Asli customary land 'does not belong to them'.[223] The lack of further investigation into the existence of Orang Asli customary land rights in Kampung Sebir by the *DOA* epitomises the continued apathy of the state in respect of Orang Asli customary land rights.

(e) Economic modernisation and Orang Asli lands

Since the official end of the Emergency in 1989, *DOA* officials say that the management of Orang Asli affairs has shifted from overcoming the security threat posed by communist influence to integration with mainstream society, eradication of poverty and the improvement of Orang Asli quality of life.[224] This translates to modernising Orang Asli economies by shifting them from subsistence activities (for example, hunting, gathering and growing crops for their own consumption) to activities directed toward market exchange (for example, selling commodities or

[221] For a discussion and examination of the common law doctrine in Malaysia, see below, Chapters 6 and 7 (at 195-310).
[222] See Dharshini Balan and Heidi Foo, 'Show consideration and respect to us, pleads Tok Batin', *New Straits Times*, 16 February 2009; Dharshini Balan and Heidi Foo, 'Ungazetted customary land belonged to state government', *New Straits Times*, 16 February 2009.
[223] Sarban Singh and C S Nathan, 'Orang asli land dispute', *The Star Metro* (Malaysia), 3 January 2009.
[224] See *DOA*, 'Prestasi Pembangunan Sosioekonomi Masyarakat Orang Asli' [Performance of Socio-economic Development Among Orang Asli Community] (Presentation 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, Universiti Malaya, 18-19 November 2008) (translated from the Malay language by the candidate); *DOAD*, above n 10, 11 (Table 2).

labour or buying food and other necessities) and sedentarisation. Traditional activities like swidden farming[225] are seen by officials as backward and embarrassing, while market oriented activities are seen as 'progressive' and 'modern'.[226] While these views may be justifiable, it will be observed that policies for 'modernisation' and 'development' of Orang Asli introduced by the Federal Government usually involve a disproportionate loss of Orang Asli customary lands.

(i) Regroupment programmes

The state has prescribed a variety of land policies for Orang Asli protection, integration and development.[227] From a customary land perspective, the outcome of these policies has also been the loss of these lands towards more 'productive' use. The state does not see these land policies as problematic because they are introduced for the good of Orang Asli and national interests, but not necessarily in that order. Again, such prescriptive land policies are facilitated by the state's legal power over Orang Asli and the limited legal recognition and protection of Orang Asli lands under the *APA*.[228] The statutory recognition of Orang Asli land rights is critically examined in Chapter 5.[229]

This section focuses on an assessment of the most common of state 'Regroupment' programmes, namely, *Rancangan Pengumpulan Semula* ('*RPS*').[230] In addition to contributing to the loss of Orang Asli customary lands and their socio-cultural

[225] For the definition of swidden farming, see above n 37.
[226] Endicott and Dentan, above n 65, 40.
[227] See *DOAD*, above n 10, 24-36. For a critique of these policies, see eg. Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 80-2, ch 5, 113-26.
[228] See above, 38-42.
[229] See below, 150-94.
[230] Another example is the *Tanam Semula Komersial* ('TSK') (Commercial Replanting) scheme that involves a collaboration between an Orang Asli village, the *DOA* and a development agency (for example, the Rubber Industries Smallholders Development Agency (RISDA)) for the clearing and/or replanting of Orang Asli lands for rubber or palm oil cultivation. Orang Asli receive individual dividends as a source of income. Effects of a TSK scheme include the clearing and loss of customary lands and the grant of leases to individual Orang Asli. TSKs have also been criticised by Orang Asli for enriching RISDA rather than Orang Asli (see eg. *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*] (17 March 2010) (translated from the Malay language by the candidate), 3.

upheaval, the socio-economic benefits derived by Orang Asli from *RPS* are debatable.

The general aim of *RPS* is an orderly resettlement of traditional Orang Asli villages that transforms participants into settled, self-sufficient farmers.[231] An *RPS* community should be a relatively self-contained community with an administrative centre surrounded by family farms and communal plots of land for grazing livestock. Typically, each family would get, depending on the terms of the particular scheme, up to ten acres of land for cash crops and two acres for a house and subsistence crops.[232] The *DOA* would supply and provide common infrastructure facilities like school and hostel facilities, a medical clinic, a cooperative shop, an administrative and management office, a multi-purpose hall, farming equipment, seedlings and fertilisers. Orang Asli participants would provide the labour for planting and tending to the crops and do not have to pay back the cost for developing the land. However, Orang Asli are not issued documents of title for lands allocated under *RPS*.[233] In Pahang, where land titles are issued to Orang Asli households subject to *RPS,* the exercise of Orang Asli customary rights over the remainder of their customary lands, for example, gravesites, hunting and foraging areas, is at the will of the State.[234] As the consent to exercise these rights can be revoked at any time by the State, the State deems itself fit to deal with these lands in any way thought appropriate.

In terms of their objective of bringing economic development to Orang Asli, *RPS* have had limited success. A study in relation to the 11 *RPS* involving 1905 of the 4,322 participating Orang Asli families revealed that 53.5 per cent of the households remain below the poverty level.[235] This percentage is not far different from the

[231] Endicott and Dentan, above n 65, 40.
[232] Ibid.
[233] Dentan et al, above n 2, 119-20; Lim Heng Seng, 'The Land Rights of the Orang Asli' in Consumers' Association of Penang (ed), *Tanah Air Ku* [*My Motherland*]*: Land Issues in Malaysia* (Consumers' Association of Penang, 1998) (translated from the Malay language by the candidate), 183; M B Hooker, ''Native Title' in Malaysia: *Adong's* case' (2001) 3(2) *Australian Journal of Asian Law* 198, 199.
[234] See Pengarah Tanah dan Galian, Pahang [Director of Lands and Minerals, Pahang], *Kajian Semula Dasar dan Kaedah Pemilikan Tanah Orang Asli di Negeri Pahang* [*Revision of Policy and Procedure for Orang Asli Land Ownership in Pahang*], *Arahan Pentadbiran Tanah Negeri Pahang Darul Makmur Bil 4/2006* [*Administration Direction of the State of Pahang Darul Makmur No 4/2006*] (2006) (translated from the Malay language by the candidate), para 2(3).
[235] Omar, above n 27, 9.

corresponding national Orang Asli poverty rate of 50 per cent at the time of the study. Some Orang Asli in *RPS* end up reverting to their traditional activities to supplement their income particularly where they still have access to the forest.[236] Lack of work opportunities have also driven Orang Asli youths to find low wage-earning jobs in urban areas.[237] Further, the development of *RPS* infrastructure, the responsibility of the *DOA*, has been poor.[238] There have been frequent disruptions to electricity and water supply in many *RPS*. For example, electricity was only made available a decade after resettlement in *RPS* Pos Pulat while in places like *RPS* Legap, there has been limited electricity supply.[239] Proper and full access roads have not been completed in a number of *RPS*.[240] Often, *RPS* are located on lands belonging to other Orang Asli groups causing tensions between old and new Orang Asli occupants.[241] There have also been complaints that soils in *RPS* lands have been unsuitable for agriculture and that *DOA* have recruited incompetent contractors who have not completed their jobs.[242]

More importantly, *RPS* has resulted in the loss of Orang Asli customary lands. When Orang Asli villages are regrouped, their customary lands are substantially diminished in size, and have been said to average between 1 and 2 per cent of their land before resettlement.[243] In *RPS* Betau, a group of east *Semai* was allotted only 95.1 hectares from their claim to 7000 hectares of communal land.[244] *RPS* also do not provide any security of tenure to Orang Asli as no titles are issued in respect of land subject to the scheme. Furthermore, these lands are not gazetted under the *APA*

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[236] Ibid 10.
[237] Ibid 10-1.
[238] See eg. Omar, above n 27. For further reading, see Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 113-9; Dentan et al, above n 2, 130-6.
[239] Omar, above n 27, 16.
[240] Ibid.
[241] Examples include regroupment schemes at Banun in Perak and Jeli in Kelantan. See 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 (INAS), 1995), 43.
[242] Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 116.
[243] Robert Knox Dentan, 'The Semai of Malaysia' in Leslie E Sponsel (ed), *Endangered Peoples of Southeast and East Asia: Struggles to Survive and Thrive* (Greenwood Press, 2000), 212.
[244] See Colin Nicholas, 'In the Name of the Semai? The State and Semai Society in Peninsular Malaysia' in Lim Teck Ghee and Alberto G Gomes (eds), *Tribal Peoples and Development in Southeast Asia* (Department of Anthropology and Sociology, University of Malaya, 1990), 71.

rendering participating Orang Asli worse off as far as security of tenure is concerned.[245]

(ii) Regroupment programmes: An evaluation

There is little doubt that *RPS* have been successful in integrating some Orang Asli into mainstream society by exposing them to the market economy and shifting their mentality towards self-development.[246] However, the net effects of *RPS* are questionable. Participation in the market economy has not necessarily made Orang Asli better-off holistically. Poverty is still prevalent and arguably, seems to have been exacerbated by these schemes. Price fluctuations especially in palm oil and rubber prices and unscrupulous middle-men, common phenomenon in the market economy, have left many Orang Asli in *RPS* with an insecure source of income.[247] Opportunities of moving to other businesses seem limited for those who do not possess a range of alternative skills. Orang Asli in such a position may become more dependent on the state. The breakdown of traditional social organisations stemming from this form of resettlement is partly responsible for social ills like alcohol abuse and prostitution.[248] Statistics from the *DOA* also reveal that Orang Asli households who have adopted a small agricultural palm oil or rubber cultivation lifestyle do not appear to be much better-off than other members of the Orang Asli community.[249] According to the *DOA*, 60 per cent of Orang Asli households earn a monthly income

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[245] See Lim, above n 233, 183. For instance, issuance of titles to Orang Asli pursuant to relocation/*RPS* in the State of Pahang diminishes their rights to customary lands (see Pengarah Tanah dan Galian, Pahang, above n 234, para 2(3).

[246] See eg. Juli Edo et al, *Pemetaan Impak Rancangan Penempatan Semula Berdasarkan Aplikasi GIS dan Persepsi* [*Mapping the Impact of Regroupment Programmes based on the Application of GIS and Perceptions*] (Centre for Malaysian Indigenous Studies, 2010) (translated from the Malay language by the candidate), 157; Ramle bin Abdullah, 'Pembangunan dan Transformasi Sosio-Ekonomi Orang Asli: Kes Masyarakat Orang Asli Di Negeri Terengganu' [Socio-economic Development and Transformation of Orang Asli: The Case of the Orang Asli Community in the State of Terengganu] (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, Universiti Malaya, 18-19 November 2008) (translated from the Malay language by the candidate).

[247] Dentan et al, above n 2, 136-7.

[248] Ibid 140-1.

[249] See *DOA*, 'Performance of Socio-economic Development Among Orang Asli Community', above n 224.

of more than RM1000 (USD333) a month while only close to 20 per cent of Orang Asli who participate in agricultural farming earn more than the same amount.[250]

The rubber or palm oil smallholder lifestyle advocated by these schemes carries adverse socio-cultural effects on Orang Asli.[251] No longer possessing customary lands, Orang Asli participants face erosion of their traditional knowledge and a severance of the strong cultural affiliation that they have with their lands.[252] In other words, these schemes may pose a threat to the existence of Orang Asli as a distinct Indigenous community. Finally, *RPS* has also brought about the loss of traditional territories without any compensation or redress for such loss. In the meantime, lands no longer occupied by the Orang Asli are available for the creation of other interests by the State.

(iii) The land titles solution

From the mid-1990s, the *DOA* have responded to outcries to stem the tide of loss of Orang Asli customary lands by announcing that land will be alienated to the Orang Asli through the issuance of land titles.[253] After refinement of the land titles 'solution' for more than a decade, the National Land Council passed the Orang Asli land titles policy ('the Proposed Policy') on 4 December 2009. The Proposed Policy is evaluated with regard to *UNDRIP* Standards in Chapter 5.[254]

Under the Proposed Policy, every Orang Asli head of household is to be individually granted between two and six acres of plantation lands and up to half an acre for housing depending on land availability as determined by the individual State.[255] According to the *DOAD*, the granting of individual titles under privatised cash crop development schemes would increase economic activity and income.[256]

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[250] Ibid.
[251] Edo et al, above n 246, 137.
[252] Ibid 157.
[253] See eg. 'End of orang asli woes in sight', *The Star* (Malaysia), 25 March 1996.
[254] See below, 183-4, 187-9.
[255] *DOAD*, above n 10, 57-8.
[256] Ibid. The land would be cleared and cultivated by a third party contractor. Orang Asli who are granted the titles would have to repay all costs associated with the issuance of such titles once the plantations become productive.

Overall, the Proposed Policy would enable Orang Asli to enter the market economy as contributing cash crop farmers possessing security of tenure over their lands. However, these titles come at the ultimate price to Orang Asli customary lands. The Proposed Policy prohibits Orang Asli who receive benefits under the policy from making any further claim in relation to their customary land rights.[257] Additionally, the Proposed Policy only covers gazetted Orang Asli lands and approved but ungazetted Orang Asli lands. As a result of this limitation, an estimated 85,987.34 hectares[258] or about 59.14 per cent of land considered *by the state* as occupied by Orang Asli stands to be lost without compensation. This loss discounts additional lands considered *by Orang Asli* to be part of their customary lands. At the time of writing, the Proposed Policy is silent whether an Orang Asli community or village can continue to occupy, use and enjoy their customary lands without accepting the grant of an individual title. Even if Orang Asli can do so, they would be back in the same vulnerable position they are with regard to their customary lands. The Proposed Policy may arguably 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 residential plots and plantations lands diminishes Orang Asli autonomy over their customary lands.

On 17 March 2010, 2,500 Orang Asli marched to Putrajaya, the administrative capital of Malaysia, in protest against the Proposed Policy. They delivered to the Prime Minister a protest memorandum signed by 12,000 Orang Asli. 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 was formulated and passed without prior consultation with the Orang Asli community.[259] Unfortunately, subsequent discussions for the refinement of the Proposed Policy have mainly involved the *DOA*, other government agencies and members of the

[257] *POASM* and *Gabungan NGO-NGO Orang Asli Semenanjung Malaysia* [Peninsular Malaysia Orang Asli NGO Network], above n 230, Enc 1.
[258] *DOAD*, above n 10, 55-6.
[259] *POASM* and Peninsular Malaysia Orang Asli NGO Network, above n 230, 5.

State executive with very few Orang Asli participants. At the time of writing, the Proposed Policy still looms over the Orang Asli.

The lack of effective engagement with Orang Asli in formulating the Proposed Policy and after the Orang Asli protest suggests a lack of respect for the wishes of Orang Asli as an Indigenous community. The Proposed Policy, that appears to convert Orang Asli into rubber and palm oil smallholders, bears some resemblance to the *RPS* save for the grant of individual titles and privatisation of land development. Accordingly, similar social and economic problems associated with *RPS* in Section IIB4(e)(ii) may confront beneficiaries of the Proposed Policy. It is therefore questionable whether the land titles solution would propel Orang Asli into the position of equal beneficiaries of the market economy. Further, the Proposed Policy has a common but unfortunate theme with earlier government land policies towards the Orang Asli. In addition to being devised without satisfactory engagement with Orang Asli, the Proposed Policy fails to recognise Orang Asli customary land and disregards the development of Orang Asli culture, lands and identity on Orang Asli terms.

5 The future: Mainstreaming Orang Asli and their lands

The relationship between Malay and Orang Asli society cannot simply be defined as one of 'ruler and subject' or 'master and servant'. In the pre-British period, Malay perceptions of Orang Asli ranged from being respected original owners of the land to an uncivilised society fit for enslavement. Any pre-existing cultural bias Malay society had towards Orang Asli complemented prejudices that the incoming British colonials had against tribal societies similar to Orang Asli. Practically, their respective prejudices functioned to exclude Orang Asli territoriality through skewed notions of paramount State land ownership. The ensuing land laws enacted by the British coupled with the lack of recognition for Orang Asli land rights enabled the use and exploitation of Orang Asli lands. The *APA*, enacted for the protection, well-being and advancement of Orang Asli, is a protective and paternalistic statute that provides little security of tenure to Orang Asli in respect of their customary lands.

The weak form of constitutional protection proffered to Orang Asli arguably facilitates the use of Orang Asli identity and lands for purposes that the state deems fit, including the furtherance of the political, social, cultural and economic agendas of the dominant political power. Certain commentators have described the Orang Asli situation as 'ethnocide'[260] and 'internal colonialism'.[261] Unfortunately, there has been minimal amendment to the extensive state controls available under the *APA*. State policies towards Orang Asli continue to disregard Orang Asli customary land rights. It is arguable that the state's approach to integrating Orang Asli into mainstream society has had the effect of threatening the existence of Orang Asli as a distinct community while failing to make them equal beneficiaries of the market economy. It is also incongruous for the state to maintain that they are 'mainstreaming' Orang Asli while retaining preservationist and outdated laws that virtually deem Orang Asli unfit to manage their own affairs.

As far as the state is concerned, Orang Asli land issues still appear to be a 'zero-sum game' that necessarily involves the inordinate loss of Orang Asli customary lands as the price for progress. In the meantime, Orang Asli continue to lose lands to the state and private interests. Without any legislative reform or executive action towards the legal empowerment of Orang Asli over their customary lands, state paternalism over Orang Asli decision-making and control over Orang Asli resources, including their lands, is likely to continue unabated.

III INCREASED ASSERTION OF LAND RIGHTS

The increased assertion of fundamental liberties and Indigenous rights by Orang Asli through the courts and public human rights advocacy, particularly in relation to their customary lands, suggests that Orang Asli continue to view their customary lands as crucial for the continued vitality of their distinct culture and identity, and for their socio-economic advancement. This section supports the recognition and protection of Orang Asli customary lands consistent with the *UNDRIP* by demonstrating:

[260] See Kirk Endicott and Robert Knox Dentan, 'Ethnocide Malaysian Style: Turning Aboriginals into Malays' (2004), 22 June 2012 <http:www.magickriver.net/ethnocide.htm>.
[261] See Dentan et al, above n 2, 116.

- the continued centrality of customary land rights; and
- the prominence of the *UNDRIP*

in asserting Orang Asli rights.

A *Orang Asli Perceptions of Land*

This section introduces Orang Asli perceptions of land. Orang Asli spiritual and cultural identity is intricately tied to a pre-capitalist notion of land, the concept of *tanah saka* (ancestral land).[262] For Orang Asli, land is an *amanah* (trust) which must be upheld and safeguarded in order to ensure the survival of the next generation.[263] Many Orang Asli still maintain a close physical, cultural and spiritual relationship with the environment.[264] Anthony (Bah Tony) Williams-Hunt, an Orang Asli activist and lawyer, has summarised Orang Asli relationship with land as follows:

> The Orang Asli share the same conception of land as other indigenous groups throughout the world. Land is a gift from God who created it to provide everything that is needed to sustain life. For the Orang Asli land and everything it contains, are the major source of food, income, medicine, fuel and all materials necessary for their existence. Land therefore is the source of life and is crucial for their continued survival. Besides its material importance, land has special social and religious significance. It defines social relations and it is through common ownership of land that a group is bound into a society. Land is closely associated with definitions of territory, history and most important of all, culture and identity. It is thus a heritage, metaphorically embodied in the statement that '*it is from the land that we come and it is to the land that we will eventually go*'. Land stands for the way of life of the Orang Asli, and symbolises the cultural vitality and continuity of the community…[265]

In addition to its material, social and religious importance, land defines the territory, history, culture and identity of Orang Asli. Land is seen as the foundation of Orang Asli rights such as the right to reside and to practise social life, customary law and religion.[266] Orang Asli customary land is also a repository for valuable traditional

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[262] Zawawi Ibrahim, 'Orang Asli Identity in the Nation-State' (1998) 25 *Journal of Malaysian and Comparative Law* 175, 180.
[263] Ibid 181.
[264] Nicholas, *The Orang Asli and the Contest for Resources*, above n 39, 32-3.
[265] Williams-Hunt, above n 241, 35-6.
[266] Jarold Joseph, *Discrimination and Affirmative Action and Implementation: The case of Semai Orang Asli in Perak* (Masters of Arts dissertation, Mahidol University, 2005), 14.

knowledge[267] and a site for the continuance of laws, traditions, customs and institutions.[268]

The high regard that Orang Asli have for their land, a consequence of their realisation that their existence depends on their nurture of, and respect for, the land, has caused them to maintain and develop a philosophy that is homogenous to all Orang Asli groups. According to Nicholas et al, the concept of balance and harmony – harmony between humans and the environment, and harmony between humans and humans is at the core of this ethos.[269] The maintenance of this harmony obliges humans not to put nature at risk while enjoying its fruits and to ensure the continued enjoyment of these fruits by future generations. Accordingly, traditional Orang Asli land tenure systems include communal 'ownership' of their customary lands in which land is inalienable.[270] For example, traditional *Semai* territory (*nengriik* or *lengrii*) is controlled collectively by village residents through cognatic ambilineal descent (*mai pasak*) in which there exists both exclusive and non-exclusive individual use of land and resources.[271] As the foundation of Orang Asli culture and identity is intricately connected with their customary lands, the severance of the link between Orang Asli and their lands would be hazardous to the vitality of Orang Asli as a distinct group of peoples.

Living in harmony with the land is an important consideration for Orang Asli. Resettlement introduces constant tensions with the spiritual entities.[272] Disassociation from ancestral land perpetuates a psychological fear of spiritual retribution and pessimism about the future.[273] Similar to other Indigenous communities, removal from their land may be tantamount to taking away their culture, traditions and history because for many of these groups, land is more than an economic concept, it is a basis of their

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[267] Lim Hin Fui, *Orang Asli, Forest and Development* (FRIM, 1997), 120-1.
[268] For example, there is a close link between Semelai and Temiar healing practices and their customary lands and resources. In relation to the *belian* healing rights, see H M S Hood, 'The Cultural Context of Semelai Trance' (1979) 24 *Federation Museums Journal* 107. As for Temiar healing songs, see Marina Roseman, ''Blowing' cross the crest of Mount Galeng', winds of the voice, winds of the spirit' (2007) *Journal of the Royal Anthropological Institute* S55).
[269] See eg. Nicholas, Engi and Teh, above n 120, 21-4.
[270] Williams-Hunt, above n 241, 36.
[271] Gomes, *Looking for Money: Capitalism and Modernity in An Orang Asli Village*, above n 36, 40.
[272] 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 (INAS), 1995), 24.
[273] Ibid.

cultural identity and life itself.[274] Thus, mainstream notions of property ownership as applied in domestic land legislation, where for the most part property is treated as a commodity,[275] are incompatible with these values.

B *Assertion of Orang Asli Land Rights: From Pleas to Demands*

The similar issues faced by all Orang Asli groups, particularly in relation to their lands, have fortified their common identity[276] and the collective struggle of Orang Asli as 'peoples'. For decades, Orang Asli representatives have been pleading their case to the state and politicians on a variety of issues including improved autonomy, health, education, land protection and social, cultural and religious protection.[277] Central to these aspirations has been the recognition of their customary land rights. The Orang Asli Association of Malaysia ('*POASM*')[278] has repeatedly called for the recognition of Orang Asli rights to their land by legislation and the gazetting and granting of titles in respect of these lands for at least 20 years.[279] The state's political response has been to promise the protection and gazettal of Orang Asli lands[280] but it has yet to deliver on its promises. In addition, the state approved the Proposed Policy,[281] an individual Orang Asli land title policy that arguably runs contrary to communal customary land arrangements implicit within gazetted Aboriginal lands under the *APA*. So far, there has

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[274] The Kayans in Sarawak claim that their land and forest are not just a source of livelihood but constitute life itself (see *Kajing 1* [1996] 2 MLJ 388). In Peninsular Malaysia, deprivation of Aboriginal customary rights over land has been held to include deprivation of heritage land, inhabitation or movement, produce of the forest, future living for the current and future generations and may amount to deprivation of life itself (see *Adong 1* [1997] 1 MLJ 418, 436 (Mokhtar Sidin JCA); *Adong 2* [1998] 2 MLJ 158, 164 (Gopal Sri Ram JCA)).

[275] 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 *Malayan Law Journal* xxx, xxxiii.

[276] Nicholas, 'Organizing Orang Asli Identity', above n 40, 123.

[277] See eg. 'Memorandum 1982' in Means, above n 161, 650-2.

[278] *POASM* was established in 1976 and consisted of mostly a few hundred *DOA* employees for almost a decade. After an active membership drive in the late 1980s, membership swelled to 10,000. As at 2011, *POASM* had around 30,000 members (see Simon Khoo, 'Emergency fund for Orang Asli', *The Star* (Malaysia), 5 September 2011).

[279] See eg. Dentan et al, above n 2, 156; *POASM*, *Memorandum kepada YB Dato Seri Abdul Aziz bin Shamsuddin, Menteri Pembangunan Luarbandar dan Wilayah, Malaysia* [*Memorandum to the Right Honourable Dato Seri Abdul Aziz bin Shamsuddin, Minister for Rural and Regional Development, Malaysia*] (7 August 2005) (translated from the Malay language by the candidate).

[280] See eg. 'Large areas of Orang Asli land to be gazetted', *The Star* (Malaysia), 10 May 1999; 'Najib: Orang asli heritage safe', *The Star* (Malaysia), 17 November 2011.

[281] The Proposed Policy has been discussed in Section IIB4(e)(iii) (above, 61-3).

been no legislative response towards recognition of Orang Asli customary lands. The inordinate delay in the gazettal of Orang Asli lands has not helped matters.[282] In the meantime, Orang Asli lands continue to be encroached upon and taken with the approval of the state.

Orang Asli faced with this predicament had to rethink previous Orang Asli representative strategies of taking a subordinate position when negotiating land rights.[283] Edo attributes the adoption of this previous strategy to a lack of bargaining power as well as lack of legal protection.[284] The defensive strategy employed is understandable as Orang Asli have in the past experienced negative repercussions of engaging in more open opposition towards the state.[285] However, the continued failure of the state to protect Orang Asli customary lands has prompted disgruntled Orang Asli to venture beyond the executive and legislature and assert their rights through: (1) the courts; and (2) other forms of rights advocacy.

1 The courts

Since 1996, Malaysian courts have recognised the pre-existing Orang Asli rights to their customary lands through the common law.[286] Applying common law native title jurisprudence from Australia, Canada, United States and other common law jurisdictions, the Court in *Adong 1*[287] held that Orang Asli common law rights in Malaysia included, amongst other things, the right to live on their land as their forefathers had lived and that this extended to future generations.[288] In the case of *Sagong 1*,[289] the Court decided as a matter of law that the proprietary interest of

[282] As at December 2010 only 14.21 per cent of lands regarded by the state as occupied by Orang Asli had been gazetted (*DOAD*, above n 10, 55-6).
[283] Juli Edo, *Claiming Our Ancestors Land: An Ethnohistorical Study of* Sengoi *Land Rights in Perak* (PhD thesis, Australian National University, 1998), 324.
[284] Ibid.
[285] Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88, 76-7.
[286] See *Adong 1* [1997] 1 MLJ 418; *Adong 2* [1998] 2 MLJ 158 (Court of Appeal, Malaysia); *Sagong 1* [2002] 2 MLJ 591; *Sagong 2* [2005] 6 MLJ 289 (Court of Appeal, Malaysia).
[287] [1997] 1 MLJ 418.
[288] Ibid 430 (Mokhtar Sidin JCA). The Court of Appeal subsequently affirmed the decision of the High Court (see *Adong 2* [1998] 2 MLJ 158 (Gopal Sri Ram JCA)).
[289] [2002] 2 MLJ 591.

Aboriginal people in their customary and ancestral lands was an interest in and to the land.[290]

This doctrine is examined in Chapters 6 and 7. For the purposes of this section, the use of the courts as a mechanism for Orang Asli to combat encroachment and loss of their customary lands points not only towards an assertion of their inclusion as distinct Indigenous citizens[291] but also to the continued importance of their customary lands to them. Involvement in these cases has also increased Orang Asli awareness of common problems faced by Indigenous communities worldwide and accordingly strengthened the common identity of Orang Asli as Indigenous peoples.

Braving possible ramifications from the state and the daunting task of attending court and challenging their 'guardians', Orang Asli have in many ways taken a relatively alien step in resorting to the courts for recognition of their land rights.[292] In addition to cultural reticence, Orang Asli litigants have had to overcome a lack of knowledge, legal advice and resources, and internal conflict in bringing their claims to the courts. However, the relative success of Orang Asli claims with *pro bono* assistance from the Malaysian Bar Council[293] has inspired more Orang Asli to institute legal action for the protection of their customary land rights. Recent estimates from the Malaysian Bar Council Committee on Orang Asli Rights ('COAR') suggest that there are 10 pending cases in the courts and that there are between 50 and 60 more such cases in the pipeline.[294] The increase in litigation is exponential considering that civil claims by Orang Asli against the state were virtually unheard of before 1990.

2 Public human rights advocacy

In Section IIIB above, it was observed that Orang Asli have historically avoided the confrontational approach in advocating their land rights due to the power imbalance

[290] Ibid 615. The defendants' appeal to the Court of Appeal was dismissed (see *Sagong 2* [2005] 6 MLJ 289 (Gopal Sri Ram JCA)).
[291] See Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88.
[292] Researching politics of Orang Asli identity, Nah has observed the unique challenges that Orang Asli face in appearing as witnesses (see eg. Nah, *Negotiating Orang Asli Identity in Postcolonial Malaysia*, above n 82).
[293] See Shaila Koshy, 'Protecting orang asli title rights', *The Star* (Malaysia), 1 December 2010.
[294] See Shaila Koshy, '70 lawyers to act for orang asli', *The Star* (Malaysia), 12 February 2011.

between the state and Orang Asli. Additionally, Dentan has attributed the difficulty Orang Asli face in rights activism to, amongst other factors, Orang Asli culture.[295] As an example, he argues that the proper response of *Semai* to being badly treated is to *krad'dii* (to withdraw or sulk for a while).

However, recent public displays of discontent by Orang Asli are atypical of these non-confrontational responses.[296] These displays suggest that Orang Asli have transcended cultural norms to voice their demands asserting their identity as Indigenous peoples. The 2008 petition prepared for the *Yang Dipertuan Agong* from 21 Indigenous minority organisations in Malaysia (including those representing Orang Asli interests) asked for the recognition and protection of Orang Asli customary lands in line with the *UNDRIP*.[297] The initiative taken by Orang Asli to collaborate with the natives of Sabah and Sarawak suggests that Orang Asli have begun to realise the benefits of sharing a common rights-advocacy platform with these larger Indigenous minority groups. Increased exposure of Orang Asli to the established and better funded non-governmental organisations from Sabah and Sarawak has also opened Orang Asli to international rights-advocacy programmes to help their cause. While the march to deliver the petition was ultimately derailed by the Police, the memorandum nonetheless succeeded in creating better awareness of the *UNDRIP* among the general populace.[298] Another example of a public display of Orang Asli dissatisfaction was the unprecedented 17 March 2010 peaceful assembly where 2,500 Orang Asli marched in protest against the Proposed Policy and to deliver a protest memorandum to the Prime Minister signed by 12,000 Orang Asli.[299] The memorandum stated, among other matters, that the Proposed Policy was

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[295] Dentan, above n 243, 226.

[296] The two examples cited in this paragraph are peaceful assemblies involving Orang Asli that resulted in national-level written demands for the recognition of Indigenous rights. For more recent instances of other state and domestic level peaceful assemblies, protests and blockades by Orang Asli in relation to their land rights, see for example, the Center for Orang Asli Concerns ('COAC') website at http://www.coac.org.my and the *Facebook* pages of COAC and Jaringan Kampung Orang Asli Semenanjung Malaysia ('*JKOASM*') at http://www.facebook.com.

[297] See Jaringan Orang Asal SeMalaysia ('JOAS'), *Memorandum to DYMM Seri Paduka Baginda Yang Dipertuan Agong Al-Watiqu Billah Tuanku Mizan Zainal Abidin Ibni Al-Marhum Sultan Mahmud Al-Muqtafi Billah Shah from Jaringan Orang Asal SeMalaysia*, 13 September 2008.

[298] Nicholas, Engi and Teh, above n 120, 4-6.

[299] The Proposed Policy is discussed above Section IIB4(e)(iii), 61-3 and examined below in Chapter 5, 183-4, 188-9.

in violation of the *UNDRIP* and called for the recognition of their customary land based on the *UNDRIP*.[300]

For the purposes of this thesis, two points arise from the demands made by Orang Asli representatives to the state during these two assemblies. First, Orang Asli have constantly emphasised the importance of the recognition and protection of their customary lands. Secondly, international human rights standards in the form of the *UNDRIP* figured prominently in both memoranda. However, it must be appreciated that Orang Asli are not completely united in their stand on customary land rights. To some Orang Asli, the *APA* is sufficient in its current form when it comes to land. It is more a question of poor state performance in protecting Orang Asli lands. Others favour and have demanded stronger legal protection for the existing reservation system under the *APA*, a system that still leaves land under the protection of the state.[301] There are also Orang Asli leaders who see nothing wrong in principle with the Proposed Policy, meaning exchanging customary lands for individually-titled lots. To them, it is a question of the economic viability or the size of the title allocation.[302] These differing stands on customary lands need not necessarily translate to disunity among Orang Asli, but may merely symbolise a 'continuum of strategies' followed by Orang Asli 'for surviving in their changing world'.[303]

The pursuance of rights, particularly among Orang Asli grassroots, is a relatively new phenomenon. Accustomed to the state 'protecting' their rights, many communities are grappling with the notion of fundamental liberties and international

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[300] See *POASM* and Peninsular Malaysia Orang Asli NGO Network, above n 230, 2, 6.
[301] See eg. *POASM*, above n 279.
[302] See for example, the President of *POASM*'s comments in 'Review land proposal', *The Star* (Malaysia), 18 March 2010.
[303] Endicott suggests that the *Batek* Orang Asli response to external pressures ranges from intense resistance to cultural change to wholehearted adoption of Malay culture with intermediate positions in between these extremes. Flexibility and keeping options do not reflect discrete categories of peoples but a continuum of strategies for surviving in their changing world (Kirk Endicott, 'The Batek of Malaysia' in Leslie E Sponsel (ed), *Endangered Peoples of Southeast and East Asia: Struggles to Survive and Thrive* (Greenwood Press, 2000), 114-8. The resilience of Orang Asli in adopting to the changing environment in Malaysia has been observed by other commentators (see eg. Wazir Jahan Karim, 'Transformations in Ma'Betise' Economics and Ideology: Recurrent Themes of Nomadism' in Razha Rashid (ed), *Indigenous Minorities of Peninsular Malaysia: Selected Issues and Ethnographies* (Intersocietal and Scientific (INAS), 1995), 109; Alberto G Gomes, 'The Semai: The Making of an Ethnic Group in South East Asia' in A Terry Rambo, Kathleen Gillogly and Karl L Hutterer (eds), *Ethnic Diversity and the Control of Natural Resources in Southeast Asia* (Center for South and Southeast Asian Studies, University of Michigan, 1988), 99).

human rights, and, perhaps more importantly, the potential and possibilities of the recognition of these rights by the state. Idrus's inquiry into rights preferred by Orang Asli found the answer to be varied, with responses ranging from wanting special rights as first peoples to rights expressed in practical terms, for example, the right to clean water and housing.[304] As Idrus aptly concludes, '[a]ll these rights are ongoing and developing, they will continue to change and reconfigure in the future'.[305] The recent use of the internet and social media by Orang Asli in discussing community problems and pursuing their rights[306] is reflective of the dynamic nature of Orang Asli rights advocacy.

Notwithstanding different voices within the community, it is equally undeniable that there exists a substantial body of Orang Asli opinion which supports the application of *UNDRIP* standards in the recognition and protection of Orang Asli customary lands.

IV CONCLUSION

The reform of the current administration and management of Orang Asli and their customary lands is very much in order. In this chapter, it has been suggested that the seeds of discrimination against Orang Asli were sown prior to British colonisation and have continued to permeate society. The views that dominant society had towards Orang Asli, amongst other things, justified:

- policies for the gradual integration of Orang Asli into the Malay section of society;
- the legal dispossession of Orang Asli customary lands; and
- state protection and control over both Orang Asli and their lands.

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[304] Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia*, above n 88, 86-7.
[305] Ibid 87.
[306] For example, the social media tool, *Facebook*, has gained popularity among Orang Asli non-governmental organisations and networks (for example, the *Facebook* pages of the COAC, *JKOASM* and JOAS)) and Orang Asli activists (for example, the *Facebook* pages of Han Yok Chopil (Tijah Yok Chopil), Shafie Dris (Shafie bin Dris), Rizuan Tempek, Bob Manolan, Yus Jahut (Yusri Ahon) and others) as a medium for the dissemination of information and the discussion of ideas (in this regard, see the respective *Facebook* pages at http://www.facebook.com).

The resultant constitutional protection afforded to Orang Asli is weaker than other privileged ethnic groups in Malaysia and places the future of the Orang Asli community in the hands of the Federal Government. The outmoded *APA* grants the state extensive powers over almost every aspect of Orang Asli lives, including their lands. Orang Asli also lack control and security of tenure over their customary lands under the *APA*.

While the 'protected' legal position of Orang Asli may not necessarily be detrimental, recognition and protection of Orang Asli and their lands is largely dependent on government action. Unfortunately for the Orang Asli, the Federal and State Governments' poor performance in exercising their power to gazette and protect Orang Asli customary lands has exacerbated the Orang Asli community's weak legal position. This combination of historical, legal and administrative factors has:

- facilitated the subordination, and consequently, the loss of Orang Asli customary lands to national development; and
- allowed the state to foist upon Orang Asli developmental policies that involve the inordinate loss of their customary lands.

The outcome, but not necessarily the objective, of these policies is a marginalised and socio-economically deprived community that is not only at risk of losing the remainder of its customary lands but its distinct cultural identity.

Throughout this time, Orang Asli have shown great resilience. In their assertion of rights, many Orang Asli have been explicit that the recognition and protection of customary land is crucial to the maintenance and development of Orang Asli culture and identity as a distinct Indigenous group of peoples. Effective recognition of Orang Asli customary land rights would provide the necessary platform for: (1) Orang Asli to earn their livelihood safely and control resources on their lands; (2) the avoidance of unnecessary 'paternalistic' intervention by the state; and (3) increased economic, social and cultural autonomy. Orang Asli have also demanded

that *UNDRIP* standards be taken into account in the formulation of policies affecting their customary lands. With this in mind, Chapter 3 explores the *UNDRIP* in order to derive standards for the effective recognition and protection of Indigenous lands.

Chapter 3

INTERNATIONAL STANDARDS FOR ORANG ASLI CUSTOMARY LAND RIGHTS: THE *UNDRIP*

I INTRODUCTION

The challenges Orang Asli face in relation to their identity as a distinct Indigenous group and the recognition of customary land rights highlighted in Chapter 2 are not dissimilar to those encountered by Indigenous communities worldwide. In spite of the importance of traditional lands and territories to the survival and vitality of Indigenous peoples, Indigenous peoples have been repeatedly deprived of their lands, territories and resources.[1] Increased demand for resources in a globalised economy create added pressure on Indigenous lands and tensions between the interests of states, Indigenous peoples and both transnational and domestic corporations.

As a result of difficulties in seeking justice domestically, Indigenous communities and non-governmental organisations have increasingly turned to international organisations over the past 30 years. The international community has responded with a number of international treaties, declarations and documents that address various aspects of Indigenous rights including the recognition and protection of customary lands and territories. Rather than describe these developments, Section II of this chapter highlights the appropriateness of the most recent universal affirmation of international Indigenous rights, the *UNDRIP*, as a source for the normative framework of this thesis.

Section III determines and sets out the ideal standards for the effective recognition and protection of Indigenous land and resource rights ('*UNDRIP* Standards') against which Orang Asli land and resource rights will be examined later in this thesis.

[1] Erica-Irene A Daes, *Indigenous Peoples and their Relationship to Land: Final Working Paper Presented by the Special Rapporteur*, UN Doc E/CN.4/Sub. 2/2001/21 (2001).

II THE UTILISATION OF THE *UNDRIP* AS A STANDARD

The *UNDRIP* is stated to be non-binding.[2] Moreover, Malaysia has inherited a dualist theory of law where international law has no direct application domestically.[3] While there may be arguments for the incorporation of international norms domestically through the development of the common law[4] or that many provisions of the *UNDRIP* already form part of customary international law,[5] the legal enforceability of the *UNDRIP* is a separate inquiry from that conducted in this thesis. The focus here is the evaluation and reform of Orang Asli land rights based on *UNDRIP* Standards, *assuming* there is the political will to give effect to the

[2] Department of Public Information, News and Media Division, United Nations General Assembly, *General Assembly Adopts Declaration on Rights of Indigenous Peoples: 'Major Step Forward' Towards Human Rights for All, Says President*, 13 September 2007, UNGA 10612, 61st sess, 107th & 108th mtgs (2007), 22 June 2012 <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. For further discussion on the enforceability of the *UNDRIP* in an Orang Asli land rights context, see Yogeswaran Subramaniam, 'The United Nations Declaration on the Rights of Indigenous Peoples: Additional Enforceable Rights for the Orang Asli?' [2008] 2 *Malayan Law Journal* lxxv where the author argues that although certain provisions may already form part of international law, the *UNDRIP* as a whole creates a moral but not a legal obligation on the Malaysian Government to pursue the achievement of its terms. The author also contends that the courts are at liberty to have regard to the provisions of the *UNDRIP* in developing the Malaysian common law. In *Bato Bagi*, the majority of the Federal Court ruled that the *UNDRIP* does not form part of domestic local law (see [2011] 6 MLJ 297, 307 (Zaki CJ), 338 (Raus FCJ)). However, Zaki CJ appeared ambivalent on the use of the *UNDRIP* as a guide to interpret the *Malaysian Constitution*, holding that the invocation of the *UNDRIP* 'must be read in the context of our Constitution' possibly suggesting that it may still be used to give full effect to the provisions of the *Malaysian Constitution* (see [2011] 6 MLJ 297, 307).

[3] 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, Kuala Lumpur, 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, 26-7 May 2005).

[4] Retired Malaysian Federal Court judge, Gopal Sri Ram has contended the Courts are at liberty to introduce international norms that are not inconsistent with provisions of the *Malaysian Constitution* (see Gopal Sri Ram, 'Human Rights: Incorporating International Law into the Present System' (Paper presented at the Seminar on Constitutionalism, Human Rights and Good Governance, Kuala Lumpur, 30 September – 1 October 2003)). See also Clive Baldwin and Cynthia Morel, 'Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011); Izawati Wook, 'The Role of International Human Rights Norms in Malaysian Courts' [2011] 5 *Malayan Law Journal* cxlviii.

[5] See eg. Siegfried Wiessner, 'Rights and Status of International Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57; S James Anaya and Siegfried Wiessner, The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment 22 June 2012 <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>.

UNDRIP domestically. As such, this section will limit itself to arguing: (1) the domestic appeal of the *UNDRIP*; and (2) for the utilisation of the *UNDRIP* to derive a benchmark for the effective recognition and protection of Indigenous land and resource rights over the two prevailing international conventions on Indigenous rights, *ILO Conventions 107* and *169*.

A *The* UNDRIP *and Malaysia*

The *UNDRIP* was adopted by the UN General Assembly on 13 September 2007 with 143 nations in favour, four against and 11 abstentions.[6] All four nations that voted against the *UNDRIP* and two abstainer nations have since reversed their positions and now support the *UNDRIP*. As such, the *UNDRIP* arguably represents the general consensus of a 'standard of achievement' for Indigenous rights to be pursued in 'a spirit of partnership and mutual respect'.[7] Additionally, the elaboration of the Draft *UNDRIP* included the participation of many delegates from Indigenous communities.[8] Indigenous participation enhances the credibility of the *UNDRIP* as an international document that has considered the views of Indigenous communities worldwide.

Another compelling factor for the use of the *UNDRIP* as a foundation for reform in Malaysia was Malaysia's votes in favour of the *UNDRIP* at both Human Rights Council and General Assembly levels. Although expressed to be non-binding by nature,[9] the Malaysian Government's vote creates a genuine moral and political expectation that it would pursue the achievement of the standards in the *UNDRIP*.

The *UNDRIP* reflects contemporary standards that the international community, including Malaysia, has pledged to pursue in the spirit of partnership and mutual respect. This view is supported by preambular para 24 that explicitly mentions this

[6] Department of Public Information, News and Media Division, above n 2.
[7] *UNDRIP*, preambular para 24.
[8] For Indigenous participation in the elaboration of the draft *UNDRIP*, see Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, 1998), 42; Wiessner, above n 5, 103.
[9] For further discussion on the enforceability of the *UNDRIP* in an Orang Asli land rights context, see Subramaniam, above n 2.

pledge but, more importantly, the resounding vote in favour of the *UNDRIP* at the UN General Assembly. In this sense, the *UNDRIP* lays out a 'roadmap for the future realisation of Indigenous rights'.[10]

Malaysia is a member of the UN and the UN Human Rights Council. As a member of the UN, Malaysia has obligations to promote and protect human rights under arts 1(3), 13(1)(b), 55(c), 56, 62(2) and 76(c) of the *Charter of the United Nations* ('*UN Charter*').[11] Of these provisions, art 56 of the *UN Charter* obliges member states 'to take joint and separate cooperation with the organization' for the promotion and protection of human rights and fundamental freedoms under art 55. As a member of the Human Rights Council, Malaysia is further obligated to 'uphold the highest standards in the promotion and protection of human rights'.[12]

In Malaysia, the *UNDRIP* has also found favour locally. The Malaysian national human rights institution, SUHAKAM[13] and the Malaysian Bar[14] have cited the *UNDRIP* as a standard in their respective calls for the protection of Orang Asli customary land rights. In 2008, Indigenous non-governmental organisation networks in Malaysia petitioned for the recognition and protection of their customary lands in line with the principles outlined in the *UNDRIP*.[15] This petition did not only involve Orang Asli. Civil society networks of natives of Sabah and Sarawak joined forces with Orang Asli in demanding the Federal Government's compliance with the *UNDRIP*.[16] In their 2010 protest against a proposed Orang Asli land titles policy,[17] Orang Asli also demanded recognition of their customary land rights consistent with the *UNDRIP*. There is, therefore, considerable non-governmental and popular support for the *UNDRIP* in Malaysia.

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[10] 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), 327.
[11] Adopted 26 June 1945, UN Doc 892 UNTS 119 (entered into force 24 October 1945).
[12] *Human Rights Council*, GA Res, UN GAOR, 60th sess UN Doc A/RES/60/251 (2006), para 9.
[13] See eg. Bernama, 'Suhakam urges govt to protect Orang Asli rights', *New Straits Times*, 19 November 2008.
[14] *Malaysian Bar Resolution on Indigenous Peoples Rights*, 63rd Annual General Meeting, 14 March 2009.
[15] See Jaringan Orang Asal SeMalaysia ('JOAS'), *Memorandum to DYMM Seri Paduka Baginda Yang Dipertuan Agong Al-Watiqu Billah Tuanku Mizan Zainal Abidin Ibni Al-Marhum Sultan Mahmud Al-Muqtafi Billah Shah from Jaringan Orang Asal SeMalaysia*, 13 September 2008.
[16] Ibid.
[17] See above Chapter 2, 61-3.

However, the harsh reality remains. Without the political will to discard current paternalistic policies in respect of Orang Asli and their lands, law reform in line with the *UNDRIP* will remain impossible.

B *Shortcomings of* ILO Convention 107 *and* ILO Convention 169

A plethora of international law treaties, instruments and documents particularly, at the United Nations ('UN'), International Labour Organisation ('ILO') and Organisation of American States ('*OAS*'), indicate that Indigenous rights have become part of international human rights law.[18] There are two international instruments that specifically address Indigenous rights besides the *UNDRIP*. They are *ILO Convention 107*[19] ('*ILO Convention 107*') and *ILO Convention 169*[20] ('*ILO Convention 169*').

It is therefore only apt to justify the preference for the use of the *UNDRIP* as a benchmark in this thesis over these two conventions. Other international human rights treaties and documents that affect Indigenous rights are considered less appropriate as a benchmark. Despite extending to Indigenous land rights from various perspectives through the body of their respective texts or subsequent interpretation, these norms have understandably not addressed Indigenous land rights holistically given the different objectives for which they were meant (for

[18] These developments have been covered extensively in contemporary literature. See eg. Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007); S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd edn, 2004); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002); Wiessner, above n 5, 99-109; Russel Lawrence Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law' (1994) 7 *Harvard Human Rights Journal* 33; Gillian Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the Native Title Act 1998' (Cth) (1999) 23 *Melbourne University Law Review* 372, 375-394; Pritchard (ed), above n 8; Yogeswaran Subramaniam, *International Indigenous Rights: Evolution, Progress & Regress* (Center for Orang Asli Concerns, Partners of Community Organizations Trust, 2007).

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

[20] *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted 27 June 1989, ILO C 169 (entered into force 5 September 1991).

example, human rights generally, racial discrimination, environmental concerns, state financial aid, minority groups, and protection of other vulnerable groups (children)). Accordingly, they will not be compared with the *UNDRIP* for the purposes of this section.

This section examines the problems related to *ILO Convention 107* and *ILO Convention 169* with regard to the protection of Indigenous lands and resources. *ILO Convention 107* will be shown to be an outdated document that has lost touch with international perceptions on Indigenous rights.[21] The section then moves on to make an argument for the use of the *UNDRIP* as a standard for reform over *ILO Convention 169*.

1 *ILO Convention 107* and *ILO Convention 169*

From an Indigenous rights perspective, *ILO Convention 107* is problematic both in the manner Indigenous peoples are viewed and the level of protection afforded to Indigenous lands and resources. Article 1(1)(a) refers to Indigenous and tribal populations as being 'less advanced' whereas art 2(1)(a) promotes the eventuality of possible 'national integration' with mainstream societies. In spite of attempting to strike a balance between integration and the protection of Indigenous rights within art 2,[22] it has been said that *ILO Convention 107* merely justifies and reinforces the integrationist tendencies of some states.[23] As observed by the Meeting of Experts on the Revision of *ILO Convention 107*, the Convention presumes that Indigenous and tribal populations will disappear as separate groups once they have the opportunity

[21] For a critique of *ILO Convention 107* in comparison to *ILO Convention 169*, see eg. Lee Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' (1990) 15 *Oklahoma City University Law Review* 677. With regard to commentary on ILO Coventions and the revision process of *ILO Convention 107*, see eg. Xanthaki, above n 18, ch 2; Russel Lawrence Barsh, 'An Advocate's Guide to the Convention on Indigenous and Tribal Peoples' (1990) *Oklahoma University Law Review* 209; Howard R Berman, 'The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No 107 at the 75th session of the International Labour Conference, 1988' (1988) 41 *The Review (International Commission of Jurists)*, 48; Lee Swepston and Roger Plant, 'International Standards and the Protection of the Land Rights of Indigenous Populations' (1985) 124 *International Labour Review* 91.

[22] For example, art 2(2)(c) protects Indigenous populations from 'artificial assimilation'. The limitation of the protection of this provision to assimilation that is 'artificial' suggests that non-artificial assimilation by states in the process of integration may be acceptable.

[23] Lee Swepston, above n 21, 682-3.

to participate fully in the national society, and attempts to ease the transitional period.[24]

Mounting pressure from Indigenous groups and other non-governmental organisations and the special attention given by international organisations to the evolution of standards concerning the rights of Indigenous populations[25] culminated in a Meeting of Experts convened in 1986 to revise the provisions of *ILO Convention No 107.* The Meeting of Experts concurred that a situation where national governments decided what was best for Indigenous populations and imposed its own concepts without consultation could not be maintained.[26] Consequently, the Meeting of Experts recommended a revision of *ILO Convention 107* taking full account of the views expressed at the meeting,[27] namely, the recognition of the rights of Indigenous peoples to determine their own cultural and economic rights, participate in matters affecting them and better protection of their traditional land rights.

The view that *ILO Convention 107* is outdated is explicit in preambular para 4 of *ILO Convention 169* that reads:

> 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 earlier standards…

The new orientation of *ILO Convention 169* that respects Indigenous peoples' rights to exercise control over their institutions, way of life, economic development and identity suggests a move from the vertical and hierarchical narratives of 1957 towards horizontal recognition of an 'equality with a difference' approach.[28] The

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[24] *Working Document for the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107)* (International Labour Organisation, 1986) ('*ILO Convention 107 Working Document*'), 34.
[25] See eg. Jose R Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7, Add.4 (1986).
[26] *ILO Convention 107 Working Document*, above n 24, 10.
[27] Ibid.
[28] Xanthaki, above n 18, 71.

principle of non-discrimination as to the enjoyment of human rights and fundamental freedoms is thus contained in art 3 of *ILO Convention 169*.

As for rights to lands and resources, *ILO Convention 169* discards the general tone of eventual integration and paternalism in *ILO Convention 107* and provides strong guarantees for Indigenous peoples. Article 7 of *ILO Convention 169* recognises, amongst other rights, the right of Indigenous peoples to decide their own priorities for the development of their lands and to exercise control, to the extent possible, over their own economic, social and cultural development. The special importance of Indigenous peoples' relationship with lands and territories which they occupy or otherwise use is to be respected by Convention states.[29] Article 13 para 2 extends the term 'lands' to include the concept of 'territories', which covers the total environment of the areas which the Indigenous peoples concerned occupy or otherwise use. Article 14 para 1 recognises the rights of ownership and possession over lands 'traditionally' occupied by Indigenous peoples. The phrase 'traditionally occupy' in the provision has been interpreted by the ILO to extend only to 'lands which have been recently lost', thus negating claims for most lands lost over the course of history.[30]

Article 15 para 1 provides safeguards for Indigenous peoples' rights to 'the natural resources pertaining to their lands'. These rights include the right of Indigenous peoples to participate in the use, management and conservation of these resources. Article 15 para 2, however, acknowledges that states can retain exclusive ownership of 'mineral or sub-surface resources' but obliges states to establish pre-exploration or exploitation procedures in relation to such resources in order to ascertain 'whether and to what degree' Indigenous interests would be 'prejudiced'. The paragraph also expressly provides for Indigenous participation in the benefits of such activities and the payment of fair compensation for any damages sustained as a result of such activities. Nonetheless, the rights to participation and payment of compensation under this provision do not contain precise commitments and is qualified by the limitation, 'wherever possible'.

[29] *ILO Convention 169*, art 13 para 1.
[30] ILO, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No 169): A Manual* (International Labour Organisation, 2003), 31.

The right of Indigenous peoples not to be relocated from their lands without their free and informed consent is covered in art 16 of *ILO Convention 169*. The article also includes the right to return to their traditional lands whenever possible (para 3). Where such return is not possible, Indigenous peoples are to be provided alternate lands of at least equal quality and legal status or if there is an expression of a preference for compensation, compensation for any resulting loss or injury (para 4). Paragraph 2 of art 16 that encompasses 'free and informed consent' is not a right of veto. It states:

> Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

Notwithstanding that it is not a right to say no, the paragraph affords Indigenous peoples a fair opportunity to be heard and potentially affect any decision made to relocate them. Article 17 respects procedures established by Indigenous peoples for the transmission of land rights within members of the community. Finally, art 18 urges states to take measures to prevent and adequately punish the unauthorised intrusion upon, or use of, the lands of Indigenous peoples.

2 Reasons for favouring *UNDRIP* over *ILO Convention 169*

In spite of the comprehensive nature of *ILO Convention 169*, the provisions of the *UNDRIP* are preferred as the basis for the normative framework for the effective recognition and protection of Indigenous land and resource rights due to the following reasons. First, the *UNDRIP* shows a demonstrably higher level of support as an international aspiration than both *ILO* Conventions 107 and 169. In comparison to the support of 147 states, *ILO Convention 169* and *ILO Convention 107* have only been ratified by 22[31] and 17 states[32] respectively. Secondly, Malaysia

[31] International Labour Organisation, *ILOLEX Database of International Labour Standards*, 22 June 2012 <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.
[32] International Labour Organisation, *ILOLEX Database of International Labour Standards*, 22 June 2012 <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>.

voted in favour of the *UNDRIP*. Thirdly, the nature of the obligations contained in the *UNDRIP* provides a flexible framework from which the *UNDRIP* Standards can be drawn compared to the definitive treaty obligations contained in *ILO Convention 169*. Unlike the stringent mandates contained in *ILO Convention 169*, the non-binding and flexible nature of the *UNDRIP* caters for the distinct needs of different and diverse states and Indigenous communities.[33]

Finally, the *UNDRIP* provides stronger recognition and protection for Indigenous land and resources than *ILO Convention 169*. Art 25 of the *UNDRIP* pays better regard to the special relationship between Indigenous peoples' and their lands. It reads:

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

This provision goes further than art 13 of *ILO Convention 169* by recognising the inter-generational approach to Indigenous lands. The *UNDRIP*'s reference to responsibilities towards future generations is 'perhaps indicative of international law's willingness to start addressing the underdeveloped arena of legal obligations and rights that flow from inter-generational considerations'.[34] In contrast to art 15 of *ILO Convention 169* that provides for limited safeguards for Indigenous rights to natural resources,[35] art 26 para 2 of the *UNDRIP* recognises the right of Indigenous peoples 'to own, use, develop, and control' the lands, territories and *resources* currently possessed by reason of traditional ownership or occupation as well as those which they have otherwise acquired. The scope of 'resources' is examined in Section IIIB1(c) below.[36]

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[33] Viniyanka Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008) 9 *Chicago Journal of International Law* 297, 313. See also Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International Comparative and Law Quarterly Review* 957, 964-8.
[34] Gilbert and Doyle, above n 10, 294-5.
[35] For a discussion of art 15, see above, 82.
[36] See below, 97-8.

In the context of rights to lands, territories and resources, the *UNDRIP* requires free prior and informed consent ('FPIC') of Indigenous peoples in three situations. First, it is required prior to any relocation of Indigenous peoples from their lands and territories (art 10). Article 16 of *ILO Convention 169* also contains the requirement of free and informed consent prior to the removal of Indigenous peoples from lands which they occupy but 'consent' within the meaning of the article is limited. The state may consider relocation of the Indigenous communities from their lands as a 'necessary measure', in which case Indigenous peoples only have procedural rights to ensure they are effectively represented.[37] The second and third situations in the *UNDRIP* where FPIC of Indigenous peoples is required in relation to their lands and resources are not explicitly covered by *ILO Convention 169*. FPIC must be obtained prior to the storage or disposal of hazardous materials in Indigenous lands and territories.[38] Article 32 para 2 requires FPIC prior to the approval of 'any project affecting Indigenous lands, territories and resources. The protection afforded by this article, while limited to 'projects' affecting Indigenous lands, territories and resources, is stronger than that afforded by the 'participatory and consultation' orientation of arts 15 and 16 of *ILO Convention 169* relating to removal from lands and natural resources respectively.

The scope of compensation under *ILO Convention 169* is narrower than that available under the *UNDRIP*.[39] Article 28 of the *UNDRIP* provides for restitution of Indigenous lands, territories and resources which have been confiscated, taken, occupied, used or damaged without their prior free and informed consent. Where restitution is not possible, art 28 para 2 provides for just, fair and equitable compensation to the peoples concerned in the form of lands, territories and resources equal in quality, size and legal status, monetary compensation or other appropriate redress. On the issue of adjudication of Indigenous land rights, *ILO Convention 169* does not oblige states to recognise Indigenous laws, traditions, customs and institutions but calls for 'adequate procedures within the national legal system to resolve land claims'.[40] Conversely, arts 26 para 3 of the *UNDRIP* calls for the legal

[37] *ILO Convention 169*, art 16 para 2.
[38] *UNDRIP*, art 29.
[39] For a discussion of the relevant provisions of *ILO Convention 169*, see above, 82-3, 84-5.
[40] Art 14 para 3.

recognition and protection of Indigenous lands, territories and resources with due regard to the customs, traditions and land tenure systems of the Indigenous peoples concerned. Further, the process for the recognition and adjudication of Indigenous lands and resource claims shall give due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems and include Indigenous participation.[41]

III THE *UNDRIP*

The *UNDRIP* contains 46 articles[42] that can be summarised as follows.[43] Articles 1-6 recognise the rights of Indigenous peoples to enjoy human rights and fundamental rights, equality and freedom from adverse discrimination, self-determination and nationality. Articles 7-10 encompass the rights to life, integrity and security of their culture and lands. Articles 11-13 deal with rights relating to Indigenous culture, spirituality and linguistic identity. Rights to Indigenous education, information and labour are covered in arts 14-17. Articles 18-23 are generally participatory rights elaborating development and other economic and social rights, but include a provision for the protection of women and children against all forms of violence and discrimination.

Specific rights to lands, territories and resources are contained in arts 24-30. Articles 31-36 elaborates the right to Indigenous self determination, including matters relating to internal local affairs such as culture, identity, education, information, media, housing, employment, social welfare, economic activities, land and resources. Article 37 contains the right to conclude treaties, agreements and constructive arrangements with states. Article 38 provides that states, in cooperation with Indigenous peoples, shall take measures, including legislative measures, to achieve the ends of the *UNDRIP*. The right to financial and technical assistance from the states for the enjoyment of *UNDRIP* rights is contained in art 39. The rights recognised in the *UNDRIP* are minimum standards for the survival, dignity and

[41] *UNDRIP*, art 27.
[42] The full text of the *UNDRIP* is reproduced in Appendix 1.
[43] The summary of the content of the *UNDRIP* is adopted with some modifications from Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 11(3) *Australian Indigenous Law Review* 55, 60-1.

well-being of Indigenous peoples (art 43) that are guaranteed equally to male and female Indigenous individuals (art 44). Article 45 saves the *UNDRIP* from being construed as diminishing or extinguishing the rights Indigenous peoples have now or may acquire in the future. Finally, arts 40-42 provide for implementation rights expounding the role of the state and international organisations in recognising and giving effect to the rights provided in the *UNDRIP*.

The current UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people ('the Special Rapporteur'), S James Anaya, has described the *UNDRIP* in the following manner:

> [a]n authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law…the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.[44]

Despite being described as a 'contextualised elaboration' of human rights principles and rights to the 'circumstances of Indigenous peoples', the *UNDRIP* equally includes two relatively 'controversial' principles,[45] namely self-determination and collective rights, as its fundamental basis. In view of the importance of self-determination and collective rights to the *UNDRIP*, Section IIIA outlines the scope of these principles in order to appreciate the perspective of the *UNDRIP* provisions relating to lands and resources. Bearing in mind the context of the *UNDRIP* land and resource provisions, Section IIIB elaborates the *UNDRIP* Standards. The *UNDRIP* Standards are utilised as a benchmark for the effective recognition and protection of Indigenous lands and resources.

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[44] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, *S James Anaya*, UN GA Doc A/HRC/9/9 (2008), paras 85-6.

[45] For controversies surrounding the principles of self-determination and collective rights and how they relate to the *UNDRIP* and Indigenous rights, see eg. Erica-Irene A Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 26-34; Christopher J Fromherz, 'Indigenous Peoples Courts: Egalitarian Judicial Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 156 *University of Pennsylvania Law Review* 1341, 1346-9; Davis, above n 43, 57-8; Kanchana Kariyawasam, 'The Significance of the UN Declaration on the Rights of Indigenous Peoples: The Australian Perspective' (2010) *Asia-Pacific Journal on Human Rights and Law* 1, 3-10; Xanthaki, above n 18, 107-112.

A *Self-determination and Collective Rights*

In spite of their controversies during the elaboration of the Draft *UNDRIP*,[46] self-determination and collective rights were included in the final text of the *UNDRIP*. The principles of self-determination and collective rights are crucial in providing the necessary context and meaning to the particular human rights challenges faced by Indigenous communities and the consequent rights contained in the *UNDRIP*. Self-determination has been described as the 'cornerstone'[47] of the *UNDRIP* while collective rights 'have always been an important pillar of the Declaration'.[48] The inclusion of these two principles in the preamble to the *UNDRIP* signifies their importance to the overall declaration. Preambular para 17 states that nothing in the *UNDRIP* 'may be used to deny any peoples their right to *self-determination*, exercised in conformity with international law'. Preambular paragraph 22 recognises that *collective rights* are indispensable for the existence, well-being and integral development of Indigenous peoples as peoples.

Sections IIIA1 and 2 outline the principles of self-determination and collective rights within the framework of the *UNDRIP*. The exercise provides context for the interpretation of the land and resource provisions of the *UNDRIP* in Section IIIB.

1 Self-determination

The contentious scope of self-determination in the context of Indigenous rights will not be examined in this section.[49] The full right to self-determination: (1) potentially

[46] For commentary on these controversies, see ibid.
[47] See eg. Davis, above n 43, 57; Kariyawasam, above n 45, 5.
[48] Alexandra Xanthaki 'The UN Declaration on the Rights of Indigenous Peoples and Collective Rights; Whats the Future for Indigenous Women?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 414.
[49] From a state point of view, self-determination is seen as a threat to its sovereignty (for further reading, see eg. Helen Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 259; Fromherz, above n 45, 1346-9; Xanthaki, above n 18, 131-154; Anaya, above n 18; C E Foster, 'Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12 *European Journal of International Law* 141; Triggs, above n 18, 384; Erica-Irene A Daes, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' (1993) 3 *Transnational Law and Contemporary Problems* 4; Barsh, above n 18, 35-9. In practical

allows claims for secession; (2) may fuel inter-communal discontent; and (3) possibly threatens international peace and security given the risk of conflict of spilling over into neighbouring states.[50] In relation to self-determination, arts 3 and 4 of the *UNDRIP* state as follows:

> *Article 3*
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> *Article 4*
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

While there may be possible arguments against curtailing the scope of Indigenous self-determination under the *UNDRIP*,[51] the right of self-determination for the purposes of this thesis will be limited to the rights of Indigenous peoples to control matters relating to their internal and local affairs.[52] In this context, art 46 para 1 explicitly provides that nothing in the *UNDRIP* shall be 'construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.'

The importance of the right to self-determination is reflected in the number of provisions that concern self-determination. These provisions include rights to:

(1) maintain and strengthen Indigenous institutions while retaining the right to participate fully in state life;[53]
(2) participate through their representatives in decisions affecting their rights;[54]

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terms, further examination of expansive Indigenous rights to self-determination is unnecessary due to the focus of this thesis, namely, the recognition of Orang Asli customary land rights within the confines of the Malaysian legal system.

[50] Quane, above n 49, 285.

[51] For some of these arguments, see eg, Daes, 'The UNDRIP: Background and Appraisal' above n 45, 38-9; Fromherz, above n 45.

[52] For commentary on the limited right of self-determination, see eg. Quane, above n 49; Fromherz, above n 45.

[53] Art 5.

[54] Art 18.

(3) free and informed consent throughout the *UNDRIP* including those matters affecting their lands and resources;[55]

(4) belong to Indigenous communities or nations;[56]

(5) determine their own identity, membership and institutions;[57]

(6) the right to maintain and develop their cultural knowledge and expressions;[58]

(7) their lands and resources;[59] and

(8) collective rights whether as a group, settlement, community or as peoples.[60]

Self-determination in this sense allows Indigenous communities to exercise effective control over their land and resources in a manner meaningful to the community.

2 Collective rights

Collective rights, whether as a group, settlement, community or as peoples, are one of the characteristics that make Indigenous rights distinct from other human rights. As they formed one of the core considerations during the drafting of the *UNDRIP*, these rights are contained in a number of provisions. The collective rights recognised in the *UNDRIP* include the right to:

(1) live in freedom, peace and security as distinct peoples;[61]

(2) belong to Indigenous communities or nations;[62]

(3) be consulted when legislative and administrative measures affecting them are devised and implemented;[63]

(4) traditional land and resource rights;[64]

(5) maintain and develop their cultural knowledge and expressions;[65]

(6) determine their own identity, membership and institutions;[66] and

[55] See arts 10, 19, 32 para 2.
[56] Art 9.
[57] Art 33.
[58] Art 31 para 1.
[59] Art 26.
[60] Art 1 provides for Indigenous peoples to enjoy human rights both 'as a collective or as individuals'. Indigenous peoples possess the collective right to live in freedom, peace and security as distinct peoples (art 7(2)) and the right to remedies for infringements of both individual and collective rights (art 40).
[61] Art 7 para 2.
[62] Art 9.
[63] Art 19.
[64] Art 26.
[65] Art 31 para 1.

(7) self-determination.[67]

In terms of lands and resources, the recognition of collective rights is consistent with existing international standards. For example, art 13 para 1 of *ILO Convention 169* recognises the collective nature of property in lands belonging to Indigenous peoples.[68] The UN Committee on the Elimination of Racial Discrimination ('CERD') also acknowledges the 'communal lands, territories and resources' of Indigenous peoples.[69]

However, the notion of collective rights in the *UNDRIP* does not exclude Indigenous individuals from the full enjoyment of all human rights and fundamental freedoms available under international human rights law.[70] Art 1 expressly provides that such human rights and fundamental freedoms are to be enjoyed as a 'collective or as individuals'. A number of articles make specific reference to individual rights,[71] thus strengthening the co-existence of collective and individual rights within the *UNDRIP*. The Declaration has therefore been to said to seek 'a fair balance between collective and individual rights by endorsing a conciliatory vision whereby each individual has individual rights and responsibilities within the context of collective rights'.[72]

From the perspective of Indigenous laws, traditions, customs and institutions, the notion of Indigenous rights to communal lands and resources contained in the *UNDRIP* does not necessarily conflict with Indigenous individual rights to lands and resources. As observed by the ILO in relation to Indigenous lands and territories, '[t]he rights of ownership and possession comprise both individual and collective aspects. The concept of land encompasses the land which a community of people

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[66] Art 33.
[67] See above nn 53-60 and accompanying text.
[68] For further reading, see eg. ILO, *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No 169* (ILO, 2009), 91-102.
[69] CERD, *General Recommendation XXIII (General Comments) on the Rights of Indigenous Peoples* (adopted at CERD's 135th meeting, 18 August 1997), para 5.
[70] *UNDRIP*, art 1.
[71] See *UNDRIP*, arts 1, 2, 6, 7, 8, 9, 14, 17, 24, 33, 35, 40 and 44.
[72] Barelli, above n 33, 963-4.

uses and cares for as a whole. It also includes land which is used and possessed individually, eg. for a home or dwelling'.[73]

B *The* UNDRIP *Standards*

The research question in this thesis calls for:

- the evaluation of existing recognition and protection of Orang Asli customary land and resource rights; and
- the exploration of better recognition and protection of Orang Asli land and resource rights,

with reference to ideal standards for such recognition and protection drawn from the *UNDRIP*.[74] Focusing the research question on the 'recognition' and 'protection' aspects of the: (1) normative framework; (2) existing law; and (3) proposed legal framework respectively, facilitates the comparative analysis between the normative framework and the subject matter of this research, Orang Asli land and resource rights.

The terms 'recognition' and 'protection' above require explanation. In the context of this thesis, 'recognition' and 'protection' are deemed to be two key components of land and resource rights. 'Recognition' refers to the legal recognition of *interests* in land and resources and concomitant *institutions*, and the *process* by which such recognition is gained. Due to the particular historical dispossession of land, territories and resources suffered by Indigenous communities,[75] 'protection' encompasses the resilience of the recognised interests in land and resources and institutions against outside intervention. More particularly, 'protection' refers to the methods for *preventing* outside intervention into such institutions and interests in land and resources, and the *curative* redress available in the event of such intervention.

[73] ILO, above n 68, 94.
[74] See above Chapter 1, 2-3.
[75] *UNDRIP*, preambular para 6.

The 'ideal standards' contained in the research question form the normative framework in this thesis. Applying the term 'recognition' to these ideal standards, 'recognition' contains two main sub-components, namely: (1) the *ideal Indigenous institutions and interest* in Indigenous land and resources envisaged in the *UNDRIP*; and (2) the accompanying *ideal process* by which such interest is recognised. Applying the term 'protection' to these ideal standards, 'protection' consists of two separate aspects, first, the *ideal* methods for the *prevention* of the confiscation, taking, occupation, use, exploitation or damage of Indigenous lands and resources under the *UNDRIP* and, second, the *ideal curative* redress in the event of such actions.

It is also pertinent to note that provisions touching upon the *recognition* and *protection* of Indigenous land and resource rights in the *UNDRIP* are contained in various articles and sub-articles of the document. As will be observed in IIIB1-3 below, there are provisions in the *UNDRIP* that touch upon both *recognition* and *protection* of Indigenous lands and resources as envisaged in this thesis. For instance, art 27, that provides for the process for recognition *and* adjudication of matters relating to Indigeneous lands and resources, may extend to cover disputes relating to the recognition of Indigenous lands and resources, preventative standards for a proposed action affecting Indigenous lands and also redress for the loss of Indigenous lands and resources. The *UNDRIP* Standards adumbrated below function to avoid repetition and overlap in the analysis, and more importantly, facilitate the focus on the 'recognition' and 'protection' components of Orang Asli land and resource rights.

Drawing from the relevant provisions of the *UNDRIP* and having regard to the principles of self-determination and collective rights outlined in Section IIIA1 and 2 above, the normative framework can be synthesised in the following manner:

- Effective 'recognition' of Indigenous land and resource rights encompasses 'ownership, management and use of Indigenous lands and resources with due

respect for Indigenous laws, traditions, customs and institutions' (the first *UNDRIP* Standard);

- The *prevention* aspect of effective 'protection' of Indigenous land and resource rights entails 'FPIC in matters affecting Indigenous lands and resources' (the second *UNDRIP* Standard); and
- The *curative* aspect of effective 'protection' of Indigenous land and resource rights entails 'just redress for dispossession' (the third *UNDRIP* Standard).

These standards, or collectively, the '*UNDRIP* Standards' are elaborated in the ensuing sections.

1 Ownership, management and use of Indigenous lands and resources with due respect for Indigenous laws, traditions, customs and institutions

Given the significant link between many Indigenous peoples and their lands and territories, Indigenous ownership, management and use of their lands and resources are vital in realising their aspirations for self-determination, particularly, autonomy or self-government in matters relating to their internal affairs. 'Due respect for Indigenous laws, traditions, customs and institutions' ensures, amongst other matters, that the collective nature of the Indigenous relationship to land is respected.

(a) 'Ownership, 'management' and 'use'

Article 26 of the *UNDRIP* recognises the rights Indigenous peoples have in respect of traditional lands, territories and resources that they have owned, occupied or otherwise used or acquired. It reads:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional

ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

There has been considerable debate whether Indigenous land mean a right to ownership or a right to use the land.[76] The belief of some Indigenous groups that land cannot be 'owned', just entrusted from generation to generation,[77] underlies these debates. Non-Indigenous characteristics of property ownership that include alienability may also not be necessarily consistent with Indigenous laws, customs, traditions and land tenure systems.

It must however be appreciated that the *UNDRIP* avoids the debate on what constitutes Indigenous land rights by adopting a broad approach to the content of the right to lands and resources, which includes a right of 'ownership' and 'use' and further, a right to 'develop' and 'control'.[78] Article 32 para 1 of the *UNDRIP* provides for the right of Indigenous peoples to determine and develop priorities for the development and use of their lands, territories and resources. It would be difficult for Indigenous communities to fully enjoy this right without the prior recognition of the collective ownership of Indigenous lands and resources. In the final stages of the elaboration of the Draft *UNDRIP*, states conceded that a reasonable understanding of the fundamental right to non-discrimination demands that Indigenous peoples' land use gives rise to ownership rights.[79] In effect, it would be a contradiction in terms not to include rights of 'ownership' under the first *UNDRIP* Standard or make compromises on the viability of the concept at this juncture.

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[76] See eg. *Jeremie Gilbert, Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (New York, 2006).

[77] ILO, *Report VI(1) Partial Revisions of the Indigenous and Tribal Populations* (International Labour Conference, 1988), 110-1.

[78] Gilbert and Doyle, above n 10, 297. The inclusion of 'ownership' was debated from the early days of the Declaration (see eg. Commission on Human Rights, *Report of the Working Group on Indigenous Peoples on its eleventh session*, UN Doc E/CN.4/Sub.2/1993/29 (1993), paras 39, 71-3, Annexe I, art 29) and finally included in the text of the *UNDRIP*.

[79] Matthias Ahren, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009), 207.

However, the inclusion of 'ownership' in this *UNDRIP* Standard does not underplay the complexities of applying this Standard domestically. In the specific context of Orang Asli, these issues are revisited during the evaluation of the content of common law Orang Asli customary land rights (Chapter 7)[80] and the proposed land tenure for the effective recognition and protection of Orang Asli customary land and resource rights (Chapter 8).[81]

Finally, the use of the words 'develop' and 'control' in art 26 para 2 suggest Indigenous 'management' of their lands and resources in this *UNDRIP* Standard. Limitations to the right to 'ownership' and 'management' of resources are examined in Section IIIB1(c) below.[82]

(b) 'Ownership, management and use of Indigenous lands'

Article 26 distinguishes between rights to lands, territories and resources that Indigenous peoples 'possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired' (para 2) and those rights relating to lands, territories and resources 'traditionally *owned, occupied or otherwise used or acquired*' by Indigenous peoples (para 1). In other words, art 26 makes a distinction between lands, territories and resources 'now in possession of Indigenous peoples and those that are not'.[83] In the former case, art 26 para 2 provides the 'right to own, use, develop and control' the lands, territories and resources. In the latter case, art 26 para 1 only provides 'rights' to these lands, territories and resources without defining these 'rights'.

In respect of this *UNDRIP* Standard, the position taken regarding lands coming under the purview of art 26 para 1 is that of Gilbert and Doyle. They explain that the right to land traditionally owned but no longer occupied by Indigenous peoples represents an ambiguous compromise: 'ambiguous because it will be up to national

[80] See below, 288-96.
[81] See below, 332-44.
[82] See below, 97-98.
[83] Gilbert and Doyle, above n 10, 297-8.

jurisdictions to interpret what rights indigenous peoples have to the lands that they have traditionally occupied or used in the past; and a compromise because it does not adopt the position of the states which wanted to ensure that land rights were only recognised in terms of lands presently occupied'.[84] For the purposes of this thesis, the said 'ambiguity' provides the necessary flexibility in exploring an acceptable domestic framework for the reparation of past wrongs particularly in relation to Indigenous lands, territories and resources, a concern expressed in preambular para 6 of the *UNDRIP*. These reparations include possible restitution of lands no longer 'traditionally owned or otherwise occupied or used' which 'have been confiscated, taken, occupied, used or damaged' without FPIC of the Indigenous peoples concerned.[85]

Current 'possession' in this *UNDRIP* Standard adopts the wording of art 26 para 2 so as to include 'possession' by reason of lands, territories and resources *traditionally* owned, occupied or otherwise used or acquired by Indigenous peoples. The inclusion of 'traditional' notions of possession is to give effect to Indigenous conceptions of ownership, occupation and use when applying this *UNDRIP* Standard domestically.

(c) Ownership, management and use of 'resources'

Art 26 para 2 of the *UNDRIP* extends to cover Indigenous rights to 'own, use, develop and control' *resources* they have traditionally owned, occupied or otherwise used or acquired. However, the issue whether this right includes 'subsurface' or 'subsoil' resources is contentious. As Anaya has acknowledged, 'when indigenous land tenure systems encompass subsoil resources and therefore conflict with the state property regime, the result is unclear'.[86]

Article 26 does not expressly differentiate between surface and subsurface resources. Upon examining the deliberations of the UN Working Group on the Draft

[84] Ibid 298.
[85] *UNDRIP*, art 28 para 1.
[86] See S James Anaya, 'Indigenous Peoples Participatory Rights in Relation to decisions about Natural Resource Extraction' (2005) *Arizona Journal of International and Comparative Law* 17, 22.

Declaration, Errico has observed that numerous attempts by Indigenous representatives to include an express reference to 'subsurface' resources in the text of the Draft *UNDRIP* were unsuccessful.[87] Based on *UNDRIP*'s drafting history, she concludes 'that there is indeed very little room left for arguing that the Declaration differentiates itself from the general practice denying indigenous peoples control over subsoil resources'.[88] However, she suggests that the lack of Indigenous ownership of subsoil resources does not negate the right to be 'consulted effectively' in connection with projects for the exploitation of subsoil resources to be carried out on their lands.[89]

Notwithstanding art 43 that regards the rights recognised in the *UNDRIP* (including rights to resources) as a 'minimum standard' and art 45 that manifests the evolutionary nature of the rights contained in the *UNDRIP*,[90] subsoil resources are excluded from this *UNDRIP* Standard based on the drafting history of art 26 and the contentious nature of subsoil resources at the international level.[91] This exclusion does not mean that Indigenous peoples have no rights to subsoil resources. Protections afforded in respect of projects affecting Indigenous lands, including those involving subsoil resources, are examined in Section IIIB2.[92]

(d) 'Due respect for Indigenous laws, traditions, customs and institutions'

As stated in art 26 para 3, recognition of Indigenous lands, territories and resources shall be with due respect to customs, traditions and land tenure systems of the Indigenous peoples concerned. In this regard, art 27 of the *UNDRIP* provides for states to *recognise* and *adjudicate* rights of Indigenous peoples to their lands, territories and resources:

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[87] Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 338-41.
[88] Ibid 340-1.
[89] Ibid 365.
[90] See above, 87.
[91] Commission on Human Rights, *Indigenous Peoples' Permanent Sovereignty over Natural Resources, Final Report of the Special Rapporteur (Erica-Irene A Daes)*, UN Doc E/CN.4/Sub.2/2004/30 (2004), para 39-42.
[92] See below, 100-8.

- by giving due recognition to Indigenous peoples' laws, traditions, customs and tenure systems; and
- in conjunction with Indigenous peoples concerned, through a fair, independent, open and transparent process.

The word 'adjudicate' in relation to art 27 is wider than the recognition process and includes all disputes relating to the rights of Indigenous peoples to their lands, territories and resources. Art 27 also expressly provides for Indigenous participation in the process. Effective participation would include meaningful Indigenous participation in the formulation and administration of the process.

Under this Standard, respect for Indigenous 'institutions' and decision-making processes form part of 'due respect' for Indigenous laws, traditions, customs and institutions.[93] Provisions for the protection, maintenance and development of Indigenous institutions are found throughout the *UNDRIP*. Article 5 of the *UNDRIP* provides for the right of Indigenous peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state.[94] Specifically, this right includes the right to maintain and develop their own decision-making (art 18), education (art 14 para 1) and development (art 23) institutions. These traditional institutions would also represent the community in any matters requiring their FPIC[95] and consultation.[96] Indigenous peoples also have the right to determine the structure and membership of their institutions in accordance with their own procedures.[97] In order to reduce conflict between Indigenous laws, traditions, customs and institutions and the protection of basic human rights available to groups or individuals (for example, gender equality), 'due

[93] In respect of Indigenous internal decision-making processes and institutions, see Expert Mechanism on the Rights of Indigenous Peoples ('*EMRIP*'), *Final study of the Expert Mechanism on the Rights of indigenous peoples on the indigenous peoples and the right to participate in decision-making*, UNGA Doc A/HRC/18/42 (2011).
[94] See also arts 20 para 1 (maintenance and development of systems or institutions to secure enjoyment of subsistence and development) and 34 (promotion, development and maintenance of institutional structures).
[95] Arts 10 (relocation), 19 (Legislative and administrative matters) and 32 para 2 (Projects affecting lands, territories or resources).
[96] Art 30 para 2 (Military activities over lands and territories).
[97] Art 33 para 2.

respect' for the purposes of the First *UNDRIP* Standard must be in accordance with international human rights standards (art 34).

2 Free, prior and informed consent ('FPIC') and consultation in matters affecting Indigenous lands and resources

FPIC is integral to the exercise of Indigenous rights to self-determination over their lands and resources.[98] Motoc and the Tebtebba Foundation, an organisation of Indigenous peoples from the Philippines, in providing legal commentary on the concept of FPIC to the UN Working Group on Indigenous Populations at its 23rd session in 2005, observe that the concept:

> is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources – a complex and inextricably related and interdependent right encapsulated in the right to self-determination, to their lands, territories and resources.[99]

Similarly, Anaya observes that the duty of states to effectively consult with Indigenous peoples 'derives from the overarching right of indigenous peoples to self-determination and from principles of democracy and popular sovereignty'.[100] In turn, the right of self-determination is 'a foundational right without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed'.[101] The rights of Indigenous peoples to participate in decision-making is of paramount importance as it is linked to fundamental principles such as constitutionalism, the rule of law and the protection of sub-national groups.[102] The importance of FPIC and consultation are reflected in preambular para 10 which

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[98] UN Permanent Forum on Indigenous Issues ('*UNPFII*'), *Report of the International Expert Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* ('*UNPFII* FPIC Report'), UN ECOSOC Doc E/C.19/2005/3 (2005), para 41.

[99] 'Legal Commentary on the Concept of Free, Prior and Informed Consent', *Expanded working paper submitted by Mrs Antoanella-Iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of Implementation of the principle of free, prior and informed consent of indigenous peoples in relation to the development affecting their lands and natural resources*, UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1 (2005), 15.

[100] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc A/HRC/12/34 (2009), paras 41, 62.

[101] Ibid.

[102] *Re Secession of Quebec* [1998] 2 SCR 217 (Supreme Court, Canada), [90].

provides that Indigenous peoples' control over developments affecting their lands will enable them to maintain and strengthen their institutions, cultures and traditions and promote their development in accordance with their aspirations and needs. 'Control' over developments affecting Indigenous lands and resources is manifested in the conferral and exercise of the right to FPIC and consultation.

Sections IIIB(2)(a) and (b) below set out the ideal definitions and scope of both FPIC and consultation in the *UNDRIP*, particularly in relation to matters affecting Indigenous lands and resources. The 'definitions' in the ensuing sections provide the respective parameters of such FPIC and consultation. The 'scope' of FPIC and consultation clarifies the circumstances in which the requirements for FPIC and/or consultation, as the case may be, arise. In elaborating this standard, guidance is sought from the views of UN institutions, particularly the Permanent Forum on Indigenous Issues ('*UNPFII*'), Expert Mechanism on the Rights of Indigenous Peoples ('*EMRIP*') and the Special Rapporteur. It is acknowledged that the selection of the definitions and scope of FPIC may be criticised as being skewed towards protecting the interests of Indigenous peoples. Nevertheless, it is felt that the views of these institutions would best reflect *ideal* international standards for the FPIC and consultation of Indigenous communities.

(a) FPIC

FPIC is essential in preventing any action which has the aim or has the effect of dispossessing Indigenous peoples from their lands, territories and resources. The International Workshop on Methodologies regarding FPIC was convened in accordance with Economic and Social Council decision 2004/287 of 22 July 2004, following a recommendation of the *UNPFII* at its third session. The Workshop identified elements of a common understanding of FPIC and indigenous peoples, and promoted better methodologies regarding this area. The resulting *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples*,[103] endorsed by the *UNPFII* at its fourth session in 2005 ('*UNPFII* FPIC Report') summarises the elements of FPIC as follows:

[103] Above n 98.

What?

• ***Free*** should imply no coercion, intimidation or manipulation;

• ***Prior*** should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes;

• ***Informed*** – should imply that information is provided that covers (at least) the following aspects:

a. The nature, size, pace, reversibility and scope of any proposed project or activity;

b. The reason/s or purpose of the project and/or activity;

c. The duration of the above;

d. The locality of areas that will be affected;

e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;

f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); and

g. Procedures that the project may entail.

Consent

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. 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. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

When?

FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

Who?

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

How?

Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.[104]

[104] See ibid paras 46-8. For further guidance on engagements with Indigenous communities, see *Guidelines for Engagement with Indigenous Peoples* developed at International Workshop on Engaging Communities in Brisbane in August 2005, 22 June 2012 <http://www.humanrights.gov.au/social_justice/conference/engaging_communities/sjr-unws-bw.pdf>.

Although all the above elements of FPIC have yet to gain universal acceptance, they nonetheless are said to constitute a convergence 'towards a common practical understanding' of FPIC based on 'existing international and national policies, standards and practices, as well as national and international jurisprudence'.[105] These elements have been subsequently endorsed by the UN Development Group[106] and the *EMRIP*.[107] Admittedly, FPIC is an 'evolving principle and its further development should be adaptable to different realities'.[108] Notwithstanding this, the elements of FPIC summarised above remain the standard for FPIC acknowledged by the UN institutions on Indigenous rights.

In addition to recognising the right to FPIC before the adoption and implementation of legislative or administrative measures affecting Indigenous peoples,[109] the *UNDRIP* requires Indigenous FPIC relating to lands, territories and resources in four contexts.[110] First, art 10 requires FPIC prior to *any* relocation of Indigenous peoples from their lands and territories. Secondly, art 29 states that FPIC must be obtained prior to the storage or disposal of hazardous materials in their lands or territories. Thirdly, there is a right to redress wherever 'lands, territories and resources owned or otherwise occupied or used' by Indigenous peoples 'have been confiscated, taken, occupied, used or damaged' without their FPIC.[111] Fourthly, art 32 para 2 provides that states shall consult and cooperate in good faith with Indigenous peoples concerned in order to obtain their FPIC for '*any* project affecting their lands or territories or other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'. According to Gilbert and Doyle, art 32 para 2 must be understood in the context of art 32 para 1 that recognises the right of Indigenous peoples 'to determine and develop priorities and strategies for the development or use of their lands, territories and other resources'.[112] FPIC is 'a prerequisite for the realisation of a self-determined

[105] *UNPFII*, *UNPFII* FPIC Report, above n 98, para 44.
[106] *UN Development Group Guidelines on Indigenous Peoples' Issues* (New York, 2008), 28.
[107] *EMRIP*, *Final study of the Expert Mechanism on the Rights of indigenous peoples on the indigenous peoples and the right to participate in decision-making*, above n 93, Annex, para 25.
[108] *UNPFII*, *UNPFII* FPIC Report, above n 98, para 42.
[109] See art 19.
[110] For such categorisation, see Gilbert and Doyle, above n 10, 313-4.
[111] Art 28.
[112] Gilbert and Doyle, above n 10, 313-4.

development path premised over lands and resources'.[113] Accordingly, FPIC would seem to be required for 'any project affecting lands or territories or other resources'.

Notwithstanding the above interpretation, there exist two broad categories of opinion as to when the requirement of FPIC is triggered in respect of matters affecting Indigenous lands and resources.[114] The first is aligned with the view of many Indigenous peoples and holds that FPIC is required for any project or activity affecting their lands, territories and resources and their well-being, The second, holds that FPIC is only absolutely essential when there is potential for a profound or major impact on the property rights of an Indigenous people or where their physical or cultural survival is endangered. This division is a culmination of objections raised by states that the requirement for FPIC in the draft *UNDRIP* could be used as a veto by Indigenous peoples against decisions and projects affecting Indigenous peoples that also concern the interests of the broader population.[115]

In this regard, the views of UN Special Rapporteur, S James Anaya are pertinent:

> 46. …The Declaration establishes that, in general, consultations with indigenous peoples are to be carried out in "good faith … in order to obtain their free, prior and informed consent" (art. 19). This provision of the Declaration should not be regarded as according indigenous peoples a general "veto power" over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous people…
>
> …47. Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure

[113] Ibid 314.
[114] For a discussion on these views, see Gilbert and Doyle, above n 10, 316-8.
[115] Objections raised by the states with regard to the right of veto during the elaboration of the Draft *UNDRIP* have been commented upon extensively in contemporary literature. See eg. Albert K Barume, 'Responding to concerns in African States' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009), 170; Luis Enrique Chavez, 'The Declaration on the Rights of Indigenous Peoples: Breaking the Impasse: The Middle Ground' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009), 103-4; Kariyawasam, above n 45, Gilbert and Doyle, above n 10, 316-20; Errico, above n 87, 361-2; Marco Odello, 'United Nations Declaration on Indigenous Peoples' (2008) 82 *Australian Law Journal* 306. See further, see eg. Russel Lawrence Barsh, 'Indigenous People and the UN Commission on Human Rights; A Case of the Immovable Object and the Irresistible Force' 18 (1996) *Human Rights Quarterly* 782.

should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent. The Declaration recognizes two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. These situations include when the project will result in the relocation of a group from its traditional lands, and in cases involving the storage or disposal of toxic waste within indigenous lands (arts. 10 and 29, para. 2, respectively)…

… 48. In all cases in which indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. As stated, this requirement does not provide indigenous peoples with a "veto power", but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned. The Special Rapporteur regrets that in many situations the discussion over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that they could wield to halt development projects. The Special Rapporteur considers that focusing the debate in this way is not in line with the spirit or character of the principles of consultation and consent as they have developed in international human rights law and have been incorporated into the Declaration.

49. These principles are designed to build dialogue in which both States and indigenous peoples are to work in good faith towards consensus and try in earnest to arrive at a mutually satisfactory agreement…At the same time, principles of consultation and consent do not bestow on indigenous peoples a right to unilaterally impose their will on States when the latter act legitimately and faithfully in the public interest. Rather, the principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making.[116]

However, limiting the right of consent to a proposed measure that has 'a significant, direct impact on indigenous peoples' lives or territories' as suggested by Anaya could 'lead to a shift in the burden of proof away from the state and onto indigenous peoples in a manner incompatible with the Declaration'[117] and raise questions of interpretation that may not favour Indigenous peoples. In other words, such limitation may do little in practice to alleviate the current power balance that favours the state.

[116] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S James Anaya*, above n 100, paras 46-9.
[117] Gilbert and Doyle, above n 10, 319-20.

The Chairperson-Rapporteur of the Working Group to elaborate the Draft *UNDRIP* from 1999 to 2006, Luis Enrique Chavez, observes that the *UNDRIP* could not recognise a right of veto in relation to state action.[118] During the Working Group's deliberations on art 19 concerning FPIC for legislative and administrative measures affecting Indigenous peoples, the Chairman's proposals 'established an obligation regarding the means (consultation and cooperation in good faith with a view to obtaining consent) but, not in any way, an obligation regarding the result, which would mean having to obtain that consent'.[119] It is suggested that states, in consultation with Indigenous peoples,[120] and in recognition of the *UNDRIP* as a minimum standard for the recognition and protection of Indigenous rights,[121] recognise and address the implications of the possible lack of a right to veto under arts 19 and 32 para 2 in the domestic implementation of FPIC and consultation.

For the purposes of evaluation of Orang Asli land rights in Chapters 5 and 7, Anaya's views on FPIC and consultation in relation to matters affecting Indigenous lands and resources are used as guidance. Consent would therefore be compulsory in situations covered by art 10 (relocation) and art 29 (storage or disposal of toxic wastes) of the *UNDRIP*. However, Anaya states that not all proposed measures affecting Indigenous peoples' interests provide Indigenous peoples with a 'veto power'. Consent would be required in respect of a proposed measure that has 'a significant, direct impact on indigenous peoples' lives or territories'. To mitigate the power balance issue highlighted earlier, the decision of whether a proposed measure falls within the 'significant' and 'direct impact' criteria above should be determined through a fair, independent, impartial, open and transparent process that gives: (1) due recognition to Indigenous peoples' laws, traditions, customs and land tenure; and (2) provides effective rights of Indigenous participation.[122] For cases that do not fall within such criteria, consultation procedures should be framed in a manner that 'makes every effort to build consensus on the part of all concerned'. Based on this interpretation, contextualised recommendations are made on the scope of FPIC when

[118] See Chavez, above n 115, 103.
[119] Ibid 103-4.
[120] The rights to Indigenous consultation, participation and consent in the domestic application of the *UNDRIP* are spelt out in arts 19 and 38.
[121] See *UNDRIP*, art 43.
[122] Art 27. Further, see above, 98-100.

an alternative legal framework for the recognition of Orang Asli land rights is crafted in Chapter 8.

(b) Consultation

In addition to being a requirement in circumstances where FPIC is necessary under the *UNDRIP*,[123] the right to prior consultation in respect of Indigenous lands and resources within state borders exists in respect of military activities (art 30 para 2), and measures, including legislative measures, to achieve the ends of the Declaration (art 38). Further, Indigenous peoples also possess the right to participate in:

- decision-making in matters which would affect their rights;[124] and
- the process to recognise and adjudicate the rights of Indigenous peoples pertaining to their lands territories and resources.[125]

According to the *UNPFII* FPIC Report, consultation and participation:

> …are crucial components of a consent process. Consultation should be undertaken in good faith. 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. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it. [126]

'Participation' in this context means 'effective' Indigenous participation including the right to freely determine their representatives[127] at any consultation and the provision of Indigenous access to adequate technical capacity and financial

[123] See *UNDRIP*, arts 10, 19, 28 para 1, 29 para 2, 32 para 2 and the *UNPFII* FPIC Report examined in Section IIIB2(a) (above, 101-7).
[124] Art 18.
[125] Art 27.
[126] *UNPFII*, *UNPFII* FPIC Report, above n 98, para 47.
[127] *UNDRIP*, art 18.

resources.[128] 'Prior' consultation suggests that such consultations should be sufficiently in advance of any authorisation or commencement of planned activities and should respect time requirements of Indigenous consultation/consensus processes.[129] Further, mechanisms for consultation and participation that are included into laws or regulations, as well as ad hoc mechanisms of consultation, should themselves be developed in consultation with Indigenous peoples.[130]

Accordingly, consultations for the purpose of this *UNDRIP* Standard should be undertaken in good faith by all parties and include the timely provision of full and comprehensible information on the likely impact of the proposed action to Indigenous peoples.[131] Consultations should neither be conducted for the purpose of providing Indigenous peoples with decisions already made or in the making[132] nor convincing the Indigenous community of the state's point of view. Even without the requirement of FPIC, consultations under the *UNDRIP* should still genuinely allow Indigenous peoples to 'influence the decision-making process' affecting Indigenous lands and resources.[133]

3 Just redress for dispossession

This *UNDRIP* Standard provides remedial measures for the dispossession of Indigenous peoples from their lands, territories and resources. Article 8(2)(b) provides that states shall provide effective mechanisms of redress for any action which has the aim or effect of dispossessing Indigenous peoples of their lands, territories and resources.

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[128] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S James Anaya*, above n 100, paras 70-1.
[129] *UNPFII* FPIC Report, above n 98, para 46.
[130] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S James Anaya*, above n 100, para 67.
[131] See further, *EMRIP*, *Final study of the Expert Mechanism on the Rights of indigenous peoples on the indigenous peoples and the right to participate in decision-making*, above n 93, Annex, paras 8-16.
[132] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S James Anaya*, above n 100, para 46.
[133] Ibid.

Article 28 of the *UNDRIP* states:

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

A broad reading of art 28 suggests four forms of redress for loss or dispossession of Indigenous lands, territories and resources due to a lack of FPIC: (1) restitution of lands and resources; (2) just, fair and equitable compensation in the form of lands, territories and resources of equal size, quality and legal status; (3) just, fair and equitable financial compensation; and (4) other appropriate redress.

Restitution is the fundamental principle of redress under art 28 para 1 and compensation is to be resorted to when restitution is impossible.[134] When restitution is not possible, compensation should take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.[135] Given the special attachment that Indigenous communities have with their lands, territories and resources, Fitzmaurice doubts the appropriateness of financial compensation and favours the alternative form of compensation available under art 28 para 2, namely, compensation in the form of lands, territories and resources of equal quality and legal status.[136] 'Just, fair and equitable monetary compensation' is therefore the final alternative. The assessment of monetary compensation must also take into account the environmental, cultural, social and economic impact on the affected Indigenous community and their future generations. These factors are relevant in view of the multi-dimensional relationship between Indigenous peoples and their lands and resources and the right of

[134] Malgosia Fitzmaurice, 'Recent Developments regarding the Saami People of the North' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 538. See further, Chavez, above n 115, 104.
[135] Art 28 para 2.
[136] Fitzmaurice, above n 134, 538.

Indigenous peoples to uphold their responsibility towards their future generations in relation to traditional lands, resources and territories contained in art 25. The option for the return of lands or territories, where possible, is additionally available for relocation of Indigenous peoples.[137]

'Redress' in the context of art 28 is therefore an overarching concept that includes the restitution of 'lands, territories and resources which [Indigenous peoples] have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'.[138] Restitution as the preferred form of redress in the *UNDRIP* recognises the special relationship that Indigenous peoples have with their lands, territories and resources. This recognition reaffirms Indigenous self-determination and collective rights over their lands, territories and resources.

The use of the expression lands, territories and resources 'which they have traditionally owned or otherwise occupied or used' in art 28 legitimises Indigenous peoples' claims irrespective of the historical or current legal status of their traditionally owned, occupied and used lands.[139] Such redress is problematic particularly where third parties have established rights over lands, territories and resources no longer owned, occupied or otherwise used by Indigenous peoples. The extent of states' obligations to provide restitution of lands, territories and resources lost by Indigenous peoples in the distant past requires further clarification. In this context, *UNPFII*'s upcoming discussion of their special theme for the year 2012, namely, 'The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (arts 28 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples)' may provide useful guidance in respect of art 28.[140] In view of the lack of authoritative guidance on retrospective

[137] Art 10.
[138] See eg. Fitzmaurice, above n 134, 538-9; Gilbert and Doyle, above n 10, 299.
[139] See Gilbert and Doyle, above n 10, 299-300; Adelfo Regina Montes and Gustavo Torres Cisneros, 'The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples and Societies' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009), 160.
[140] *UNPFII*, *Permanent Forum on Indigenous Issues, Report on the tenth session, 16-27 May 2011*, Economic and Social Council, Official Records, 2011, Supplement No 23, UN ECOSOC Doc E/2011/43-E/C.19/2011/14 (2011), para 1.

redress pursuant to art 28 and its contentious nature, restitution for past dispossession does not form part of the *UNDRIP* Standard of 'just redress for dispossession'.

Further, art 32 para 3 provides for 'effective mechanisms for just and fair redress' in respect of any project affecting Indigenous lands or territories and other resources. Consistent with indigenous self-determination, the process for adjudicating any redress in respect of Indigenous lands and territories should be fair, independent, impartial, open and transparent with due recognition of Indigenous peoples' laws, traditions, customs and land tenure and with the right of Indigenous participation in the process.[141]

IV CONCLUSION

This chapter justifies and develops the normative framework for the evaluative and exploratory process in this thesis. The *UNDRIP* is justified as a preferred source for the normative framework by examining its appeal in a Malaysian context and comparing it with ILO Conventions 107 and 169 on Indigenous peoples.

This chapter has also elaborated standards for the ideal recognition and protection of Indigenous land rights based on the relevant provisions of the *UNDRIP* and having regard to the principles of self-determination and collective rights contained in the *UNDRIP*. In this thesis, effective 'recognition' of Indigenous land and resource rights encompasses 'ownership, management and use of lands and resources with due respect for Indigenous laws, traditions, customs and institutions' (the first *UNDRIP* Standard). Effective 'protection' of Indigenous covers 'FPIC and consultation in matters affecting Indigenous lands and resources' (the second *UNDRIP* Standard) and 'just redress for dispossession' (the third *UNDRIP* Standard').

[141] Art 27. Further, see above, 98-100.

These three standards, collectively called the *UNDRIP* Standards, serve as a benchmark for:

- evaluating the existing recognition and protection of Orang Asli land and resource rights conducted in Chapters 5 and 7; and
- developing a legal framework for the better recognition and protection of Orang Asli customary land and resource rights in Chapter 8.

Chapter 4

RECOGNITION OF ORANG ASLI LANDS AND CONSTITUTIONALITY

I INTRODUCTION

Bearing in mind the domestic application of *UNDRIP* Standards envisaged in Chapters 5, 7 and 8, it is necessary to examine beforehand the constitutionality of recognition and protection of Orang Asli customary lands and resources. This chapter determines whether there exists, based on the Constitution document and its interpretation by the Malaysian courts, any constitutional impediment to the idea of recognition and protection for Orang Asli customary lands in a manner different from other forms of land tenure. For brevity, the term used in this chapter to describe this idea is 'contextualised'[1] protection of Orang Asli customary lands and resources.

If such an impediment exists, corresponding law reforms are liable to be struck down by the courts for their unconstitutionality.[2] On the other hand, the existence of constitutional provisions that permit positive discrimination may facilitate contextualised reforms for Orang Asli based on *UNDRIP* Standards. However, it must be appreciated that this chapter does not contend that all forms of reform for the protection of Orang Asli customary lands and resources based on the *UNDRIP* Standards are constitutional. The chapter canvasses the preliminary issue of whether the idea of positive discrimination for Orang Asli customary land rights would be harmonious with the *Malaysian Constitution*. The constitutionality of specific

[1] The term 'contextualised' has been preferred over 'special' in this chapter. Anaya talks of the *UNDRIP* as a contextualised elaboration of rights for Indigenous peoples based on contemporary international human rights standards rather than a document that confers 'special' rights upon Indigenous peoples (see *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S James Anaya*, UN GA Doc A/HRC/9/9 (2008), paras 85-6).

[2] *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, 219-20; *Public Prosecutor v Datuk Harun bin Haji Idris* [1976] 2 MLJ 116, 124.

proposals for reform is revisited when an alternative legal framework for the recognition and protection of Orang Asli customary lands and resources is explored in Chapter 8.

The analysis in this chapter is conducted with reference to provisions of the *Malaysian Constitution* relating to fundamental liberties and the Federal and State power division. Section II discusses the constitutional viability of contextualised protection for Orang Asli customary lands, focusing on constitutional fundamental liberties, particularly those provisions relating to life, equality and property. As for relations between the Federation and the State, Section III examines whether the Federal and State power divide constitutes an obstacle to a uniform law for the contextualised protection of Orang Asli land rights throughout Peninsular Malaysia.

II FUNDAMENTAL LIBERTIES

Part II (arts 5-13) of the *Malaysian Constitution* is the Malaysian bill of rights that sets out fundamental liberties. As stated by the Reid Commission,[3] fundamental rights are 'generally regarded as essential conditions for a free and democratic way of life.'[4]

Article 5 of the *Malaysian Constitution* provides for the right to life and personal liberty, habeas corpus, the right to be informed of grounds of arrest, the right to legal representation and the right to be placed speedily in the hands of the judiciary when arrested. The prohibition against slavery and forced labour is covered by art 6. Article 7 encompasses the protection against retrospective criminal laws and double

[3] The Reid Commission, headed by Lord Reid, was the Commission appointed by the Council of Rulers of the Malay states and Her Majesty the Queen to make recommendations for the Constitution of the newly formed independent Federation of Malaya (for the Reid Commission report, see Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (HMSO, 1957)). Subject to further amendments before independence (see eg. Her Majesty's Colonial Office, *Constitutional Proposals for the Federation of Malaya* (HMSO, 1957)), the Reid Commission Report and draft Constitution attached to it forms the starting point of the Malaysian Constitutional document as it stands today. Historical background to the *Malaysian Constitution* is an aid to its interpretation (see eg. *Dato Menteri Othman bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, 32 (Raja Azlan Shah CJ), 38 (Suffian LP) (Federal Court); *East Union (Malaya) Sdn Bhd v Government of the State of Johore* [1981] 1 MLJ 151, 152-3 (Federal Court)).

[4] Federation of Malaya Constitutional Commission, above n 3, 70.

jeopardy. Equality before the law and rights in respect of education are addressed by arts 8 and 12 respectively. Article 9 covers the prohibition of banishment and freedom of movement. The rights to freedom of speech and expression, the right to peaceable assembly and the right to form associations are contained in art 10. Article 11 contains the guarantee of freedom of religion and from proselytization. Finally, the right to property and the right to be compensated for expropriation are provided for under art 13.

There are four essential factors to consider before the relevant provisions of the *Malaysian Constitution* are examined in this section. First, art 160(2) of the *Malaysian Constitution*, in defining the term 'law', provides for the recognition of 'any custom or usage having the force of law'. Unlike many other jurisdictions, there is consequently constitutional potential to give effect to Indigenous laws and customs. The second concerns judicial approaches to constitutional interpretation of fundamental liberties in Malaysia. Malaysian courts have demonstrated a noticeable 'pendulum' movement between the traditional narrow approach and a broad and liberal approach towards constitutional interpretation. Applying the broad approach, a constitution, being a living piece of legislation, 'must be construed broadly and not in a pedantic way'.[5] However, the first few years of the new millennium saw the Federal Court[6] reverting to a narrower and more literal approach particularly when interpreting federal laws in the light of the constitutional guarantees contained in Part II of the *Malaysian Constitution*.[7]

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[5] *Dato Menteri Othman bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, 32 (Federal Court). For further application of the broad constitutional interpretation approach, see for example, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 310-1 (Federal Court); *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, 339; *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, 310-1 (Nik Hashim FCJ), 316-8 (Hashim Yusuff FCJ, Azmel FCJ concurring), 325 (Zulkefli FCJ) (Federal Court); *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, 219 (Court of Appeal); *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697, 709 (Supreme Court); *Palm Oil Research and Development Board Malaysia v Premium Vegetable Oils Sdn Bhd* [2005] 3 MLJ 97, 119-20 (Federal Court); *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261, 288 (Gopal Sri Ram JCA) (Court of Appeal).

[6] In Malaysia, the High Court is the third highest court in the judicial hierarchy. The appellate court from the High Court is the Court of Appeal, the second highest court in the hierarchy, below the Federal Court, the apex court. For further reading on the court structure in Malaysia, see eg. Sharifah Suhanah Syed Ahmad, *Malaysian Legal System* (Malayan Law Journal, 2nd edn, 2007), 143-56.

[7] See eg. *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council, Intervener)* [2004] 2 MLJ 257 (Federal Court); *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 (Federal Court).

Subsequent trends in Federal Court decisions suggest that the Court may have departed from the narrow approach to constitutional interpretation. The end of 2007 saw the majority (by 4:1) of the Federal Court in *Badan Peguam Malaysia v Kerajaan Malaysia* endorsing the broad approach to constitutional interpretation.[8] All four judges approved the decision of the Federal Court in *Dato Menteri Othman bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus*[9] which decided that courts, in interpreting constitutional provisions, are to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.[10] In *Lee Kwan Woh v PP*, Gopal Sri Ram FCJ decided that the 'statutory interpretation' approach to constitutional interpretation prescribed by the Federal Court thirty years earlier in *Government of Malaysia v Loh Wai Kong*[11] ('*Loh Wai Kong*') was 'worthless precedent' in this regard.[12] Further, the Federal Court held:

> [t]he Constitution is a document sui generis governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights.[13]

In 2010, the full bench of the Federal Court unanimously endorsed the broad approach to the interpretation of constitutional fundamental liberties.[14] Ariffin Zakaria CJ (Malaya), on behalf of the full five-judge panel, followed the Privy Council decision of *Ministry of Home Affairs v Fisher*[15] in holding that fundamental liberties provisions call for 'a generous interpretation' to give to 'individuals the full measure of the fundamental rights and freedoms'.[16] Nonetheless, His Lordship added that due 'respect must be paid to the language that had been employed'.[17] The

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[8] [2008] 2 MLJ 285, 310-1 (Nik Hashim FCJ), 316-8 (Hashim Yusuff FCJ, Azmel FCJ concurring), 325 (Zulkefli FCJ) (Federal Court).
[9] [1981] 1 MLJ 29.
[10] Ibid 32.
[11] [1979] 2 MLJ 33, 34 (Federal Court).
[12] *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 310-1.
[13] Ibid 311. This approach has been endorsed by the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, 339.
[14] *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Dr Zambry bin Abd Kadir (Attorney General of Malaysia, intervener*) [2010] 2 MLJ 285.
[15] [1979] 3 ALL ER 21.
[16] *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Dr Zambry bin Abd Kadir (Attorney General of Malaysia, intervener*) [2010] 2 MLJ 285, 298.
[17] Ibid 298, 307.

Court was also inclined to the organic theory of constitutional interpretation, where no one provision bearing upon a particular subject is separate from others, and considered alone. Instead, the Constitution is interpreted to 'effectuate the great purpose of the instrument'.[18] Unfortunately, both Courts did not see fit to address decisions of the Federal Court that applied *Loh Wai Kong* or adopted a more literal approach to constitutional interpretation.[19]

More recently, the Federal Court in *Bato Bagi*[20] seemed divided in its approaches to constitutional interpretation.[21] In short, the issue before the Federal Court was whether s 5(2) of the *Sarawak Land Code* ('SLC') (not applicable to Orang Asli) was ultra vires art 5, read with art 13, of the *Malaysian Constitution*. The majority of the panel decided not to answer the question posed in view of the particular facts and the appellants' arguments that their Lordships felt focused more on whether the case should be remitted back to the trial court for the summary dismissal of the appellants' claims.[22] However, Malanjum CJSS explicitly disapproved of the lower Courts' approach to constitutional interpretation that His Lordship felt seemed to be 'one of 'strict constructionist', literal, dogmatic and overly reliance (*sic*) on the English philosophy of legal positivism'.[23] His Lordship favoured a 'pragmatic, purposive and liberal' approach to constitutional interpretation that went beyond express rights to those rights implicit within the provision.[24] In the case of a constitutionally-impugned legal provision, Malanjum CJSS suggested that the rights and principle-based approach would be supplemented by an objective inquiry into constitutionality, having regard to the presumption of constitutionality, namely, that 'the court should try and sustain its validity as much as possible'.[25] Zaki Tun Azmi CJ did not express any view on principles of constitutional interpretation. In answering the question posed in the negative, Raus Sharif FCJ favoured the 'narrow'

[18] Ibid 299.
[19] For cases, see above n 7.
[20] [2011] 6 MLJ 297. The candidate was a member of the legal team for the appellants during the hearing of the Federal Court appeal.
[21] This decision is examined further in the analyses of the relevant fundamental liberties provisions at Sections IIA-C (see below, 120-45).
[22] *Bato Bagi* [2011] 6 MLJ 297, 307-8 (Zaki CJ), 321-2, 323 (Malanjum CJSS).
[23] Ibid 317, 323 (Malanjum CJSS).
[24] Ibid 317 (Malanjum CJSS).
[25] Ibid.

approach followed by the lower Courts, holding the provision in question valid.[26] Given that previous Federal Courts have not always been unanimous in their approach to constitutional interpretation,[27] it remains to be seen whether the Federal Court will permanently discard the narrow approach to constitutional interpretation.

Third, many of the fundamental liberties provisions are not absolute. In some circumstances, they have been expressly made subject to federal law. The relevant limitations are dealt with when the constitutionality of contextualised protection for Orang Asli customary lands and resources is examined in Sections IIA-C below. The fourth concerns methodology. As constitutional provisions can be interpreted both broadly and narrowly, the analysis in this section takes into account both 'best case' (where the Constitution is interpreted broadly) and 'worst case' (where the Constitution is interpreted narrowly) scenarios when testing the recognition of Orang Asli customary land rights against the *Malaysian Constitution*.

In this regard, the principle of proportionality has, on occasion, been judicially incorporated into the interpretation of art 8(1). In *Sivarasa Rasiah v Badan Peguam Malaysia*, the Federal Court defined the principle of proportionality in the following terms:

> In other words, all forms of state action - whether legislative or executive - that infringe a fundamental right must (i) have an objective that is sufficiently important to justify limiting the right in question; (ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve. It is clear from the foregoing discussion that the equal protection clause houses within it the doctrine of proportionality.[28]

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[26] Ibid 334-8 (Raus Sharif FCJ).

[27] After progressively moving towards a broad and liberal approach in the mid to late 1990s mainly through the judgments of Gopal Sri Ram JCA (as he then was), the higher courts demonstrated a trend towards the 'narrow' approach to constitutional interpretation. This regressive trend has been critically analysed elsewhere and for brevity, is not discussed here. For further reading, see eg. Cyrus Das, 'Trends in Constitutional Litigation: Malaysia and India – No Longer a Shared Experience' [2005] 2 *The Law Review* 270; Cyrus Das, 'Judicial Approaches to Constitutional Litigation in Malaysia' [2008] 2 *The Law Review* 255; Gopal Sri Ram, 'Human Rights: Incorporating International Law into the Present System' (Paper presented at the Seminar on Constitutionalism, Human Rights and Good Governance, Kuala Lumpur, 30 September – 1 October 2003); Shad Saleem Faruqi, 'Constitutional Interpretation in a Globalised World' (Paper presented at the 13th Malaysian Law Conference, Kuala Lumpur, 16-18 November 2005).

[28] [2010] 2 MLJ 333, 350.

Proportionality requires the means used to impair the fundamental right or freedom to be no more than is necessary to accomplish the objective of the legislature or executive.[29] In testing the validity of a state action with regard to fundamental rights, what must be considered is whether the action directly affects the fundamental rights concerned or has the inevitable effect or consequence that makes the exercise of such fundamental right ineffective or illusory.[30]

Proposed reforms to Orang Asli customary land rights should not therefore encroach on non-Orang Asli fundamental rights to the extent that the latter rights are rendered ineffective or illusory. Accordingly, the proportionality of contextualised protection for Orang Asli customary land rights would further have to be measured against fundamental guarantee provisions elaborated in Sections IIA-C below. Having said this, the proportionality principle and equality should also take into account the special circumstances of Orang Asli under the *Malaysian Constitution*[31] and as an Indigenous minority in Malaysia.

The most relevant fundamental liberties provisions that would affect any law providing for the protection of Orang Asli customary land rights are arts 5 (particularly, the right to life), 8 (equality before the law) and 13 (right to property). In line with the organic theory of constitutional interpretation adopted by the Malaysian courts,[32] these provisions shall be examined in turn and in the light of other relevant constitutional provisions. The separate treatment of these provisions does not suggest that they are to be read in isolation. Articles 5 and 13 are read harmoniously with the fundamental right to equality contained in art 8. Accordingly, art 8 will form the starting point and be considered in the light of arts 5 and 13.[33] In the words of Gopal Sri Ram JCA (as he then was), 'when interpreting other parts of

[29] Ibid 350.
[30] *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697, 712 (Supreme Court).
[31] For their special position in this regard, see below Section IIA1-3, 120-30. Generally, see above Chapter 2, 34-8.
[32] See above, 117.
[33] The approach to constitutionality suggested by the candidate in his article entitled 'The UNDRIP and the Malaysian Constitution: Is Special Recognition and Protection of Orang Asli Customary Lands Permissible?' [2011] 2 *Malayan Law Journal* cxxvi that was largely based on this Chapter was cited with approval by Malanjum CJSS in the Federal Court decision of *Bato Bagi* (see [2011] 6 MLJ 297, 322-3 (Malanjum CJSS).

the Constitution, the court must bear in mind the all pervading provision of art 8(1). That article guarantees fairness of all forms of state action'.[34]

It must be noted that Sections IIA-C below are not meant to function as a comprehensive review of arts 5, 8 and 13 of the *Malaysian Constitution*. Instead, they focus on the following question, that is, would the idea of contextualised recognition and protection for Orang Asli customary land rights be consistent with the rights to equality, life and property provided for under the *Malaysian Constitution*?

A *Contextualised Protection for Orang Asli Land Rights v the Right to Equality*

Article 8 of the *Malaysian Constitution* provides for the constitutional guarantee of equality and non-discrimination. The relevant portion of the article is reproduced below:

> 8(1) All persons are equal before the law and entitled to equal protection of the law.
>
> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State…
>
> (5) The Article does not invalidate or prohibit –
>
> …(c) any provision for the protection, well being or advancement of the Aboriginal peoples of the Malay peninsula (including the reservation of land) or the reservation to Aborigines of a reasonable proportion of suitable positions in the public service;…

[34] *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, 219 (Court of Appeal). This passage has been cited with approval by the highest court of the land (see *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, 318 (Hashim Yusuff FCJ, Azmel FCJ concurring) (Federal Court); *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 312 (Federal Court)).

The issue examined in this section is whether the idea of having laws for positive discrimination in favour of Orang Asli customary lands would violate art 8 of the *Malaysian Constitution*.

1 Article 8 and Orang Asli customary lands

In *Datuk Haji Harun Idris v Public Prosecutor* ('*Datuk Harun*'), Suffian LP set out ten principles pertaining to equality under art 8, namely:

> 1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
> 2. The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8….
> 3. The prohibition of unequal treatment applies not only to the legislature but also to the executive…
> 4. The prohibition applies to both substantive and procedural law.
> 5. Article 8 itself envisages that there may be lawful discrimination based on classification – thus…Aborigines as opposed to others (para (c));…and Malays and natives of Borneo as opposed to others who are not (Article 153).
> 6. …the first question we should ask is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask a further question, is it allowed? If it is, the law is good, and if it is not, the law is void.
> 7. …discriminatory law is good law if it is based on "reasonable" or "permissible" classification…provided that
>   (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>   (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question…
>
>   As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification…the courts should consider the reasonableness of the classification.
> 8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority…The fact that the executive

> may choose either procedure does not in itself affect the validity of the law…
> 9. In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy...
> 10. Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause…[35]

The initial inference that can be drawn from paragraphs 1, 2, 4 and 5 of this passage is that laws for the contextualised treatment for Orang Asli customary lands under art 8 of the *Malaysian Constitution* are permissible. The words '[e]xcept as expressly authorised by this Constitution' at the beginning of art 8(2) enable lawful discrimination if it is authorised by the *Malaysian Constitution*. In turn, art 8(5)(c) expressly permits positive discrimination legislation for 'the protection, well being or advancement of the Aboriginal peoples of the Malay peninsula (including the reservation of land)'.

2 Article 8(5)(c): An exception or an elaboration of equality?

The Malaysian courts have described the Orang Asli as enjoying 'a special position' under art 8(5)(c).[36] In holding that the State and Federal governments owed a fiduciary duty to the Orang Asli claimants, the Court of first instance in *Sagong 1* held that art 8(5)(c) is an exception to the equality provision in art 8.[37] On appeal, Gopal Sri Ram JCA, favoured the lower court's liberal interpretation of the *Land Acquisition Act 1960* (Malaysia) ('*LAA*') to award compensation for loss of customary land based on market value.[38] His Lordship said that this approach was merely to give 'full effect to art 8(5)(c) of the *Malaysian Constitution* which sanctions positive discrimination in favour of the Aborigines'.[39] The Court's liberal

[35] *Datuk Haji Harun Idris v Public Prosecutor* [1977] 2 MLJ 155, 165-6 (Federal Court).
[36] *Sagong 1* [2002] 2 MLJ 591, 617. See further *Adong 1* [1997] 1 MLJ 418, 431. The Court of Appeal dismissed the appeal against the decision and fully endorsed the views expressed by Court of first instance (see *Adong 2* [1998] 2 MLJ 158, 164). Subsequently, the Federal Court dismissed the appeal (see Gopal Sri Ram JCA's comment in *Sagong 2* [2005] 6 MLJ 289, 302).
[37] *Sagong 1* [2002] 2 MLJ 591, 619-20.
[38] *Sagong 2* [2005] 6 MLJ 289, 308-11.
[39] Ibid 311.

views of art 8(5)(c) are consistent with the 'broad' approach to constitutional interpretation.

Notwithstanding the broad approach to constitutional interpretation used by Malaysian courts when adjudicating Orang Asli rights, art 8(5)(c) may still be interpreted narrowly if it is regarded as a proviso derogating from the guaranteed rights contained in art 8. There is ample authority to show that provisos of this nature are to be given a strict and narrow interpretation, rather than a broad construction.[40] In *Sagong 1*, the trial judge held that art 8(5)(c) is an exception to the equality provision in art 8.[41] Unfortunately, the Court proffered no explanation as to why art 8(5)(c) was considered an exception. As there are no local cases on this point, Indian cases may be instructive in determining whether art 8(5)(c) is indeed an exception to art 8(1). The persuasive value of Indian cases in interpreting the *Malaysian Constitution* has been acknowledged by the Malaysian courts. In *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia*, Suffian LP held '[j]udgments of the Indian Supreme Court are of great persuasive value here, particularly on the Constitution, because to a great extent the Indian Constitution was the model for our Constitution'.[42]

The legal position regarding the application of Indian cases to constitutional interpretation in Malaysia has been aptly summed up by Abdoolcader J:

> Our Constitution… has been primarily drawn from Indian sources, and accordingly decisions of the Supreme Court of India, and indeed also the High Courts of her several States, are of great persuasive authority here upon the borrowed provisions and will be entitled to great weight in interpreting and considering the relevant local statutory counterparts, subject of course to such modifications as may be necessary owing to variation in language or context. The position would therefore appear that where there is a dearth of authority, the Indian decisions are entitled to the greatest respect and will normally be followed unless the court has cause to disagree with the reasoning of any such decision.[43]

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[40] See eg. *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 313 (Federal Court); *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, 317 (Hashim Yusuff FCJ, Azmel FCJ concurring) (Federal Court); *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, 218-9 (Court of Appeal) applying, amongst others, *Pinder v The Queen* [2003] 1 AC 620, 637-8 (Privy Council); *R v Hughes* [2002] AC 259, 277 (Privy Council).
[41] *Sagong 1* [2002] 2 MLJ 591, 619-20.
[42] [1969] 2 MLJ 129, 147.
[43] *Yeap Hock Seng v Ministry for Home Affairs, Malaysia* [1975] 2 MLJ 279, 281.

Notwithstanding these passages, the Malaysian courts have on many occasions not followed Indian decisions because 'each country frames its Constitution according to its genius and for the good of its own society'.[44] Indian cases nonetheless remain relevant in providing guidance to the courts in constitutional interpretation particularly when there are corresponding provisions, there are no local cases[45] and when the Courts have favoured a progressive approach to interpretation.[46] Thus far, the Malaysian courts have also tended to favour a broad approach to constitutional interpretation when adjudicating Orang Asli customary land rights claims.[47]

In many ways, art 8 of the *Malaysian Constitution* is a condensed version of arts 14, 15, 16 and 19(1)(g) of the *Indian Constitution*. Of these articles, arts 14, 15 and 16 are pertinent to the discussion here. Article 14 of the *Indian Constitution* provides that '[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'. Article 15(1) of the *Indian Constitution* prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(4) states that '[n]othing in this article or in clause (2) of article 29[48] shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes'. Article 16 guarantees equality of opportunity in matters of public employment. Article 16(1) provides that 'there shall be equality of opportunity for all citizens in matters relating to employment or appointment…'. Article 16(4) states

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[44] *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, 188-9 (Raja Azlan Shah FJ). For other examples of where the superior courts have not followed Indian cases, see eg. *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener*) [2009] 5 MLJ 464, 492-3 (Raus Sharif JCA), 562-3 (Ahmad Maarop JCA) (Court of Appeal); *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 (Federal Court); *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert (No 2)* [1986] 2 MLJ 420 (Supreme Court); *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 (Federal Court).

[45] See eg. *Datuk Haji Harun Idris v Public Prosecutor* [1977] 2 MLJ 155, 165 (Federal Court).

[46] See eg. *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 310-1 (Federal Court); *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261, 288 (Gopal Sri Ram JCA) (Court of Appeal).

[47] See above nn 36-39 and accompanying text. The Court in *Adong 1* also applied Indian constitutional cases when interpreting the word 'property' in art 13 of the *Malaysian Constitution* broadly enough to include Orang Asli customary land rights. For further discussion, see below Section IIC1, 133-40.

[48] Article 29(2) states 'No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.'

that '[n]othing in this article shall prevent the State from making any provisions for the reservation of appointments or posts in favour of any backward class of citizens….'. Similar to art 8(5)(c) of the *Malaysian Constitution* that provides for the protection, well-being and advancement of Orang Asli, arts 15(4) and 16(4) of the *Indian Constitution* sanction affirmative action for socially and economically disadvantaged groups, namely 'Scheduled Tribes', 'Scheduled Castes' and any 'backward' classes of peoples. Hence, Indian decisions on the nature of these provisions may be of assistance in determining whether art 8(5)(c) is an exception to art 8(1) of the *Malaysian Constitution*.

In 1962, the Indian Supreme Court decided that art 15(4) is a 'proviso or an exception' to art 15(1) and art 29(2).[49] Following this, it was held by the majority of the Indian Supreme Court that art 16(4) was also a proviso or an exception to art 16(1).[50] In *Indra Sawhney v Union of India*, the Indian Supreme Court subsequently ruled that art 16(4) is not an exception, but an 'instance of classification' permitted by art 16(1).[51] In other words, art 16(4) is 'merely an emphatic way of stating that (*sic*) is implicit in clause (1)'.[52] With regard to the earlier decisions, the Court observed they were decided at a time when the Indian Supreme Court did not regard art 16(1) as a facet of art 14 which permitted classification.[53] Once this feature was recognised, the theory of clause (4) being an exception became untenable. Further, the Court also held that the power conferred on the state under art 16(4) is one coupled with a duty and therefore, the state has to exercise that power for the benefit of all those for whom it is intended.[54]

It is open for Malaysian courts to regard art 8(5)(c) as an exception to art 8 as Indian Supreme Court cases are not binding precedent. However, the persuasive reasoning of the Indian Supreme Court as to its interpretation art 16(4) cannot be ignored especially since reasonable classification is permitted under art 8(1) of *Malaysian*

[49] *M R Balaji v State of Mysore* AIR 1963 SC 649, 657.
[50] *Devadasan T v Union of India* AIR 1964 SC 179.
[51] *Indra Sawhney v Union of India* AIR 1993 SC 477, 539 (Jeevan Reddy J, on behalf of M H Kania CJ, M N Venkatacheliah, A M Ahmadi JJ).
[52] Ibid 643 (P B Sawant J).
[53] Ibid 540 (Jeevan Reddy J, on behalf of MH Kania CJ, MN Venkatacheliah, A M Ahmadi JJ).
[54] Ibid 632 (Ratnavale Pandian J).

Constitution.[55] If such classification is permitted, it is axiomatic, following the logic of the Indian Supreme Court, that the circumstances mentioned in art 8(5) of the *Malaysian Constitution* are an elaboration of the principle of equality contained in art 8(1) rather than an exception to it.

Additionally, art 153 of the *Malaysian Constitution* that expressly safeguards the special position of Malays and natives of Sabah and Sarawak[56] has been treated in a manner consistent with the principle of equality under art 8. In *Fan Yew Teng v Public Prosecutor*, Lee Hun Hoe CJ held in respect of art 153, '[t]hese provisions cannot be questioned and are necessary to assist the less advanced or fortunate in the light of conditions prevailing at the time of independence'.[57]

This statement suggests that special privileges under art 153 should be read as an embodiment of the principal of substantive equality in terms of outcome rather than an exception to the right to equality contained in art 8(1). Further, recent dictum from the Federal Court suggests that the purpose of art 8 is to also safeguard the interests of the minority notwithstanding the will of the majority as manifested in

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[55] See *Datuk Haji Harun Idris v Public Prosecutor* [1977] 2 MLJ 155, 165-6; *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165, 168 (Salleh Abas LP), 170-2 (Mohamad Azmi SCJ) (Supreme Court). More recently, see eg. *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council, Intervener)* [2004] 2 MLJ 257, 273 (Federal Court). The concept of reasonable classification and its application is explained below (at 127-9).

[56] Art 153 also obliges the constitutional monarch (the *Yang Dipertuan Agung*) to 'safeguard the legitimate interests of other communities' in accordance with its provisions. The wording of this article suggests that the Orang Asli community may have 'legitimate interests' under art 153 based on their position as a marginalised Indigenous group. The Malaysian courts are yet to explore this part of art 153 in the context of Orang Asli. From an Orang Asli customary land rights perspective, art 153 does not explicitly enhance the constitutional position of Orang Asli lands. In the first place, the special privileges afforded under art 153 do not encompass land. There also exist express constitutional provisions relating to lands for all privileged ethnic groups in Malaysia, namely, arts 8(5)(c) (Orang Asli), 89 (Malays) and 161A(5) (natives of Sabah and Sarawak). In the light of these provisions, it is questionable whether the 'legitimate interests' provision of art 153 will be extended by the courts in a manner that obliges Federal and State Executive action for the effective recognition and protection of Orang Asli lands. Perhaps more importantly, the decision of whether the interests of a particular community are indeed 'legitimate' or if there is a need for any executive action in favour of Orang Asli lands appears to be political. Interpreting the *Malaysian Constitution* conservatively, any decision by the constitutional monarch as to whether a particular state of affairs exists or on any executive action, should be generally made in accordance with the advice of the Federal Cabinet (see art 40(1); *Madhavan Nair v Government of Malaysia* [1975] 3 MLJ 286; Federation of Malaya Constitutional Commission, above n 3, para 38; Her Majesty's Colonial Office, above n 3, para 54; *Teh Cheng Poh v PP* [1979] 1 MLJ 50; cf *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119). On the other hand, this provision reveals the constitutional potential to recognise Orang Asli as a distinct group and Orang Asli lands provided there is the political will to do so.

[57] [1975] 2 MLJ 235, 238.

legislative acts.[58] Reading together the Orang Asli's special position under art 8 and the need to safeguard minorities, it is contended that the principle of substantive equality should be extended to the interpretation of art 8(5)(c), and consequently, Orang Asli.

3 Article 8 and proportionality

If art 8(5)(c) of the *Malaysian Constitution* were to be regarded as an exception, the provision would have to be read narrowly.[59] As observed in Chapter 2,[60] this provision permits laws for the advancement of Orang Asli, '*including* reservation of land,' suggesting that laws for 'advancement' extend to laws beyond mere 'reservation of lands'. On the other hand, a narrow reading of art 8(5)(c) may, for instance, enable 'reservation of land' legislation for Orang Asli and the like but not allow *ownership* of Orang Asli lands and resources as envisaged in the *UNDRIP* Standards. This possible scenario necessitates an examination of the constitutionality of affirmative action for Orang Asli customary lands that goes beyond a narrow reading of art 8(5)(c).

Analysis of the relevant case law reveals that the approach taken by the Malaysian courts in ascertaining if a discriminatory law is good law under art 8 can generally be categorised into two methods. The first traditional method is known as the 'reasonable classification' or 'rational nexus' doctrine.[61] The second method imports the principle of 'proportionality' into the 'reasonable classification' doctrine, particularly favoured by Gopal Sri Ram FCJ. The latter method has made inroads

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[58] In *Bato Bagi*, Malanjum CJSS observed:
'With due respect, a piece of legislation passed by Parliament or State Assembly may be the will of the majority but it is the court that must be the conscience of society so as to ensure that the rights and interests of the minority are safeguarded. For what use is there in the acclamation that 'All persons are equal before the law and entitled to equal protection of the law (Art 8 of the FC) when it is illusory.'
See [2011] 6 MLJ 297, 316 (Malanjum CJSS).
[59] See above n 40 and accompanying text.
[60] See above, 36.
[61] See eg. *Datuk Haji Harun Idris v Public Prosecutor* [1977] 2 MLJ 155, 165-6; *Public Prosecutor v Oh Keng Seng* [1977] 2 MLJ 206 (Federal Court); *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165, 168 (Salleh Abas LP), 170-2 (Mohamad Azmi SCJ) (Supreme Court). More recently, see eg. *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council, Intervener)* [2004] 2 MLJ 257, 273 (Federal Court).

into more recent decisions particularly where the facts involve the judicial review of executive or administrative action.[62] However, the Federal Court, when deciding the constitutionality of s 72 of the *Pengurusan Danaharta Act 1998* (Malaysia) in the light of art 8, held that the 'reasonable classification' test was the only consideration when determining the constitutionality of a piece of legislation.[63] Notwithstanding this decision, the superior courts have subsequently held that the principle of proportionality applies in determining the constitutionality of legislative acts under art 8.[64] Recently, the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia* applied the principle of proportionality in determining whether s 46A(1) of the *Legal Profession Act 1976* (Malaysia) violated art 8 of the *Malaysian Constitution*.[65] It remains to be seen whether this trend will be permanent.

Assuming art 8(5)(c) of the *Malaysian Constitution* is to be read narrowly as not covering laws beyond the 'reservation' of Orang Asli lands, it would be prudent to test the constitutionality of laws for the contextualised recognition and protection of Orang Asli lands and resources against both the 'rational classification' test and principle of proportionality. If either requirement is not satisfied, treatment for Orang Asli customary lands would have to be limited to the narrow scope of art 8(5)(c).

It is therefore necessary to outline the doctrine of reasonable or rational classification. The doctrine can be seen from sub-paragraphs 7 (i) and (ii) of the excerpt of the judgment in *Datuk Haji Harun Idris v Public Prosecutor* cited above.[66] In short, there might be lawful discrimination based on a classification:

- founded on 'intelligible differentia' which distinguish persons or things that were grouped together from others left out of the group; and

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[62] See eg. *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261, 284-5 (Gopal Sri Ram JCA) (Court of Appeal); *Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493, 513 (Court of Appeal).
[63] *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council, Intervener)* [2004] 2 MLJ 257, 273.
[64] See eg. *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, 219 (Gopal Sri Ram JCA (Court of Appeal); *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 313 (Gopal Sri Ram JCA) (Federal Court); *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, 317 (Hashim Yusuff FCJ, Azmel FCJ concurring) (Federal Court).
[65] [2010] 2 MLJ 333, 346-52.
[66] See above n 35 and accompanying text.

- the differentia had to have a rational nexus to the object sought to be achieved by the statute in question.

Positive discriminatory treatment for Orang Asli customary lands would only apply to Orang Asli who are already defined in s 3 of the *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*'). Provided the term 'Orang Asli' is defined and discernible from the law, the classification would be clearly based on 'intelligible differentia'. Second, would such differentia have a reasonable nexus with the object of the law? If the law for positive discrimination in respect of Orang Asli customary lands carries the objective of advancement of Orang Asli as provided in art 8(5)(c) of the *Malaysian Constitution*, there would be a strong nexus between the racial identity classification and the object of the law. Finally, such classification would be reasonable in view of the following factors:

- the culturally and socio-economically disadvantaged position of Orang Asli;[67]
- their special position under the *Malaysian Constitution*;[68] and
- the strong link between Orang Asli customary lands and the survival of their distinct culture and identity.[69]

If the principle of proportionality were to be added or imported to the 'reasonable classification test', laws for the contextualised treatment of Orang Asli customary lands should not directly affect the fundamental rights guaranteed by the *Malaysian Constitution* or carry the effect or consequence of making the exercise of such right ineffective or illusory.[70] Given the special position of Orang Asli, the principle of proportionality is not diametrically opposed to laws for the contextualised protection of Orang Asli customary rights. Where, however, affirmative action for the recognition and protection of Orang Asli customary lands and resources directly

[67] See eg. above Chapter 2, 17-20; 72-3.
[68] See *Malaysian Constitution*, arts 8(5)(c) and 45(2) and Ninth sch Federal List no 16. See further *Sagong 1* [2002] 2 MLJ 591, 617. See further *Adong 1* [1997] 1 MLJ 418, 431. Further, see above nn 36-39 and accompanying text.
[69] See above Chapter 2, 65-7.
[70] For the application of the test, see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261, 284-5 (Gopal Sri Ram JCA) (Court of Appeal); *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697, 712 (Supreme Court).

affects the fundamental rights of other Malaysians or renders the exercise of such rights illusory and ineffective, it would have to be determined whether the specific law is disproportionate to its object and consequently void. An obvious example would be where a law provides for Orang Asli customary land rights over alienated land belonging to other non-Orang Asli Malaysians. In such a case, the non-Orang Asli grantees could claim that their constitutional right to property (art 13) or perhaps livelihood (art 5) would be infringed. However, such a determination can only made once the extent of the recognition and protection is articulated. This issue is revisited when an alternative legal framework for the recognition of Orang Asli customary land rights is explored in Chapter 8.

It can be concluded that a broad reading of art 8(5)(c) of the *Malaysian Constitution* generally allows laws for the recognition and protection of Orang Asli customary lands and resources. If art 8(5)(c) were to be construed narrowly, laws that go beyond 'reservation of lands' would nonetheless fulfil the traditional 'reasonable classification' test and consequently, be consistent with art 8 of the *Malaysian Constitution*. If the principle of proportionality were to be applied, it is contended that the idea of contextualised recognition and protection for Orang Asli customary lands and resources would still be permissible.

B *Orang Asli Customary Land Rights and the Right to Life*

Article 5 of the *Malaysian Constitution* covers a wide array of matters pertaining to the life and liberty of a person. This section focuses on the scope of the right to life in Malaysia and its consistency with the idea of contextualised recognition of Orang Asli customary land rights. The relevant provision is art 5(1). It states, 'No person shall be deprived of his life or personal liberty save in accordance with the law'.

In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* ('*Tan Tek Seng*'), Gopal Sri Ram JCA (as he then was) held:

> I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment.[71]

The Federal Court subsequently endorsed the broad and liberal approach to the expression 'life' in art 5(1) and ruled that the categories of matters encompassing life are not closed.[72] Following this development, the *Tan Tek Seng* approach to the expression 'life' found its way into judgments involving Indigenous minorities. In *Ketua Pengarah Jabatan Alam Sekitar v Kajing bin Tubek*, the Court of Appeal held that deprivation of the *Penan* (natives of Sarawak) community's livelihood and way of life amounted to deprivation of life itself.[73] Subsequently, the Court of Appeal also held that dispossession from land deprived Orang Asli of their livelihood and therefore, life itself.[74] In Sabah and Sarawak, there are several decisions of the High Court that have held that native customary rights equate to the right to life under art 5(1) as they could 'be considered as a right to livelihood'.[75]

However, in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* ('*Sugumar*'), the Federal Court disapproved of the wider exposition of 'life' in *Tan Tek Seng* and restricted the concept to 'personal liberty' within art 5(1).[76] However, this case did not concern the right to life of an Indigenous community but the judicial review of a decision to cancel an entry permit of a non-resident into Sabah. Recent comments from the Federal Court in *Bato Bagi* suggest that the courts may be in favour of a broad reading of 'life' particularly in respect of Indigeous communities. Citing *Tan Tek Seng* with approval, Malanjum CJSS observed that if natives can demonstrate that extinguishment of their customary rights has had an adverse effect on their livelihoods, it would only be fair that they be afforded protection under art 5, namely, by way of an 'opportunity to present their case' before native customary

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[71] [1996] 1 MLJ 261, 288.
[72] *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145, 190 (Edgar Joseph FCJ).
[73] [1997] 3 MLJ 23, 43.
[74] *Adong 2* [1998] 2 MLJ 158, 164.
[75] In relation to Sarawak, see eg. *Nor Nyawai 1* [2001] 6 MLJ 241, 266-7; *Mohamad Rambli bin Kawi v Superintendent of Lands, Kuching* [2010] MLJU 120, 5. In respect of Sabah, see eg. *Andawan bin Ansapi v PP* (Unreported, David Wong Dak Wah J, Kota Kinabalu High Court File K41-128 of 2010, 4 March 2011), 7.
[76] [2002] 3 MLJ 72, 100-2.

rights are extinguished.[77] According to Malanjum CJSS, this right was also a matter of 'essential justice and procedural fairness' on the part of a public decision maker.[78] However, His Lordship declined to set out the law relating to the scope of the right to life for Indigenous communities under art 5, stating that this issue was not fully ventilated.[79] In view of the Federal Court's more recent inclinations towards a broad and liberal interpretation of constitutional guarantees that have not been taken away by the law,[80] a broad reading of the right to life especially in the context of Orang Asli may prevail. Nonetheless, merely utilising the 'loss of livelihood' argument to categorise the loss of Indigenous lands as a deprivation of the right to life in the context of art 5, as suggested by Malanjum CJSS in *Bato Bagi*, may not be an accurate depiction of the true extent of loss suffered by Indigenous communities who are deprived of their customary lands. Such a method fails to adequately appreciate the social, cultural and spiritual dimensions of the relationship between Indigenous communities and their customary lands.

A broad reading of art 5 to encompass Orang Asli customary lands rights would further support the contextualised recognition and protection of Orang Asli lands and resources. Conversely, a narrow reading of art 5 does not render the idea of such protection unconstitutional by virtue of the special position of Orang Asli under article 8(5)(c) of the *Malaysian Constitution*.[81]

C *Orang Asli Customary Land Rights and the Right to Property*

Article 13 of the *Malaysian Constitution* provides:

(1) No person shall be deprived of property save in accordance with the law.

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[77] *Bato Bagi* [2011] 6 MLJ 297, 322 (Malanjum CJSS).
[78] Ibid.
[79] Ibid 321-2, 323 (Malanjum CJSS).
[80] See *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, 310-1 (Nik Hashim FCJ), 316-8 (Hashim Yusuff FCJ, Azmel FCJ concurring), 325 (Zulkefli FCJ); *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 311; *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, 346.
[81] For arguments in relation to the right to equality under art 8, see above Section IIA, 120-30.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

This right provides constitutional safeguards against the deprivation of property but is worded in the negative. In essence, art 13(1) contains the due process guarantee that ensures that all deprivations of property are imposed according to the law and not arbitrarily. Article 13(2) guarantees adequate compensation for the expropriation of property.

Once again, the focus of this section is on the concept of contextualised protection of Orang Asli customary land rights. The issue examined is whether contextualised Orang Asli customary land rights are capable of the protection under art 13 of the *Malaysian Constitution*.

1 The meaning of 'property'

In *Adong 1*, the Court of first instance interpreted proprietary rights widely and held that Orang Asli rights to their foraging lands under the common law and statutory law were proprietary rights protected under art 13 of the *Malaysian Constitution*.[82] In arriving at its decision, the Court relied on two cases.

First, Mokhtar Sidin JCA relied on the Indian case of *Rabindra Kumar v Forest Officer*[83] ('*Rabindra*') when defining 'property' in a constitutional context.[84] Property rights were defined widely and were held to include the following concepts:

> In the strict legal sense, the word property signifies valuable legal rights or interests protected by the law and this is the primary appropriate and broader signification of the term. In modern legal systems, property includes practically all valuable rights…it can be enjoyed as property and recognized as equitable interests as well as legal interests and extending to every species of valuable rights or interests in either real or personal property or in easements, franchises and incorporeal hereditaments.[85]

[82] *Adong 1* [1997] 1 MLJ 418, 433.
[83] AIR 1955 Manipur 49.
[84] *Adong 1* [1997] 1 MLJ 418, 432-3.
[85] *Rabindra Kumar v Forest Officer* AIR 1955 Manipur 49, 54.

Second, His Lordship based reliance on *Rabindra* with reference to the Federal Court decision of *Selangor Pilot Association (1946) v Government of Malaysia*.[86] In this case, the Federal Court held that the pre-1955 art 31 of the *Indian Constitution* (also the provision in issue in *Rabindra*) 'approximates to' art 13 of the *Malaysian Constitution* and, for the purposes of art 13, adopted the construction of the Indian Supreme Court on the previous art 31.[87] The Court in *Adong 1* further elaborated that the foraging rights the *Jakun* of Linggiu Valley had acquired through their continuous occupation and traditional connection to the land was a proprietary interest.[88] The loss of these lands was a loss to the *Jakun* community's livelihood.[89]

On appeal, the Court of Appeal fully endorsed the views of Mokhtar Sidin JCA, including those on art 13. Gopal Sri Ram JCA, after reproducing the relevant passages from the judgment at first instance held:

> We find nothing objectionable with the foregoing passages. Indeed, we entirely agree with the views expressed by the learned judge in his judgment upon the issue of liability. Those views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled that deprivation of livelihood may amount to deprivation of life itself and state action which produces such consequence may be impugned on well-established grounds…The learned judge was therefore correct in concluding that where state action had the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.[90]

It can be noted from the above passages that both judges were consistent in holding that the livelihood of Orang Asli from hunting and foraging fell within the definition of art 13. In *Madeli 2*, the Federal Court explicitly endorsed *Adong 1* in terms of recognition of common law Orang Asli customary land rights.[91]

[86] See [1975] 2 MLJ 66, 69 (Federal Court).
[87] *Adong 1* [1997] 1 MLJ 418, 433.
[88] Ibid 433.
[89] Ibid 433-4.
[90] *Adong 2* [1998] 2 MLJ 158, 164.
[91] *Madeli 2* [2008] 2 MLJ 677.

However, two potential arguments may be raised against the part of the decision that relates to the definition of 'property' under art 13.[92] The first relates to the historical characterization of native customary land tenure as usufructuary.[93] This line of argument sees Orang Asli customary hunting and foraging rights as a personal right of use that is dependent on the goodwill of the Sovereign.[94] Therefore, *personal* rights cannot constitute a legal or beneficial interest in land (a *proprietary* interest) and, as such, cannot be regarded as 'property' under art 13.

This argument does not reflect the current state of the law in other Commonwealth jurisdictions and domestically. As early as 1921, the Privy Council in *Amodu* cautioned against the tendency to regard customary 'title conceptually in terms which are appropriate only to systems which have grown up under English law'.[95] Consequently, there is a need to ascertain rights possessed by Indigenous peoples through their own laws, customs and usages instead of merely importing preconceived conceptions of property rights under the common law.[96] As explained in the landmark Canadian case of *Delgamuukw*, the generalisation of Aboriginal title as a usufructuary right is 'not particularly helpful to explain the various dimensions of Aboriginal title'.[97] In the same decision, Lamer CJ further explained that the reference to the interest as personal (in the sense of being inalienable) does not mean that it is a non-proprietary interest. His Honour said:

> This Court has taken pains to clarify that Aboriginal title is only 'personal' in this sense, and does not mean that Aboriginal title is a non-proprietary interest which amounts to no more than a license to use and occupy the land and cannot compete on an equal footing with other interests.[98]

This approach is a manifestation of the *sui generis* nature of Indigenous land rights.

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[92] For criticisms of the decision, see R R Sethu, 'The Orang Asli Cases and Property Cases' in Andrew Harding and H P Lee (eds), *Constitutional Landmarks in Malaysia: The First Fifty Years* (LexisNexis, 2007), ch 17. These arguments are addressed in Chapter 6 below (at 232-3).

[93] For a useful account of these issues in the context of Sarawak, see G N Appell, 'The History of Research on Traditional Land Tenure and Tree Ownership in Borneo' (1997) 28(3) *Borneo Research Bulletin* 82; Dimbab Ngidang, 'A Clash between Culture and Market Forces: Problems and Prospects for Native Customary Development in Sarawak' in M Leigh (ed), *Environment, Conservation and Land* (Universiti Malaysia Sarawak, 2000), 237.

[94] See *St Catherine* (1888) 14 AC 46.

[95] *Amodu* [1921] 2 AC 399, 404 (Viscount Haldane LC).

[96] Ibid.

[97] [1997] 3 SCR 1010 at [112] (Supreme Court, Canada).

[98] Ibid [113].

In the Australian High Court decision of *Mabo No 2*, Brennan J held:

> Whether or not land is owned by the individual members of a community, a community which asserts and asserts effectively that none of its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong in my opinion, to point to the inalienability of land by the community and, by importing definitions of 'property' which require alienability under the municipal laws of our society, to deny that the indigenous people owned the land…
>
> …Indeed it is not possible to admit traditional usufructuary rights without admitting proprietary communal title. There may be difficulties of proof of boundaries or membership of the community or of the representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws and customs and are dependent on the community. A fortiori, there can be no impediment to the recognition of individual proprietary rights.[99]

The Malaysian courts had the opportunity of exploring this issue in *Sagong 1*.[100] Mohd Noor Ahmad J (as he then was) referred to, amongst others, the above passage in *Mabo No 2*, *Delgamuukw* and *Amodu* in holding that 'the proprietary interest of the Orang Asli in their customary lands is an interest in and to the land'.[101] His Lordship then applied *Adong 1* in holding that 'Aboriginal rights, both under the common law and statutory law are proprietary rights protected under art 13 of the Constitution'.[102] The Court of Appeal affirmed the decision in this respect except to add that Orang Asli customary title was 'a question of fact'.[103] In other words, Orang Asli customary rights would fall within the scope of 'property' under art 13 once a claim is established to the satisfaction of the primary trier of fact.

Since then, the Federal Court has ruled it is a correct general statement of the common law that the courts will assume that the Crown intends that the property rights of the inhabitants are to be fully respected.[104] In *Madeli 2*, the application of

[99] (1992) 175 CLR 1, 51-2.
[100] [2002] 2 MLJ 591.
[101] Ibid 615.
[102] Ibid 617.
[103] *Sagong 2* [2005] 6 MLJ 289, 301-2 (Gopal Sri Ram JCA).
[104] *Madeli 2* [2008] 2 MLJ 677, 691.

the principles contained in *Mabo No 2* and the Canadian Supreme Court in *Calder*[105] by the courts in *Adong 1*[106] and the Sarawakian case of *Nor Nyawai 1*[107] was held to be correct, as the proposition of law enunciated in these two cases 'reflected the common law position with regard to native titles throughout the Commonwealth'.[108] Therefore, the notion of 'property' under art 13 is broad enough to cover Orang Asli customary land rights. This broad approach is consistent with the Federal Court's recent liberal views on the interpretation of fundamental liberties.[109]

(a) Selangor Pilot Association

The second potential argument against Orang Asli customary tenure being regarded as 'property' mainly[110] relates to the 1977 Privy Council decision in *Selangor Pilot Association*,[111] a case which interprets art 13. In *Adong 1*, the Court applied the Federal Court decision in *Selangor Pilot Association*,[112] which was subsequently overruled by the Privy Council by a majority of 4:1. In *Selangor Pilot Association*, the *Port Authorities (Amendment) Act 1972* transformed and imposed controls over the respondents' provision of pilotage services. In establishing state control, amendments in this Act effectively prohibited the respondents from carrying on their business. The physical assets of the respondents were sold to the Federal Government, who paid for them. Dissatisfied, the respondents sought a court declaration that they were entitled to additional compensation for the loss of business goodwill which they contended constituted 'property' under art 13 of the

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[105] (1973) 34 DLR (3d) 145.
[106] [1997] 1 MLJ 418.
[107] *Nor Nyawai 1* [2001] 6 MLJ 241.
[108] *Madeli 2* [2008] 2 MLJ 677, 692. For a more recent reaffirmation of these cases, see *Bato Bagi* [2011] 6 MLJ 297, 305, 306 (Zaki CJ), 324-5 (Malanjum CJSS).
[109] See *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 311; *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, 310-1 (Nik Hashim FCJ), 316-8 (Hashim Yusuff FCJ, Azmel FCJ concurring), 325 (Zulkefli FCJ) (Federal Court); *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, 339; *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Dr Zambry bin Abd Kadir (Attorney General of Malaysia, intervener*) [2010] 2 MLJ 285, 298 (Federal Court).
[110] See also the Federal Court decision in *Station Hotels Bhd v Malayan Railway Administration* [1977] 1 MLJ 112 where the Court held by a majority of 2:1 that the benefit of a lease conferring proprietary rights, cannot be 'property' within art 13 when the state is acting as a contracting party with rights and liabilities of a private person. This decision is not explored further as treaty and contractual rights currently do not concern the recognition and protection of Orang Asli customary land rights.
[111] *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133.
[112] See *Adong 1* [1997] 1 MLJ 418, 433 where *Selangor Pilot Association (1946) v Government of Malaysia* [1975] 2 MLJ 66 (Federal Court) was cited with approval.

Malaysian Constitution, and in the alternative, that the relevant amendment provision was unconstitutional as it violated art 13. The High Court dismissed the action at first instance but the respondents successfully appealed to the Federal Court.[113]

The Privy Council reversed the decision of the Federal Court. In respect of the right to 'property', the majority considered that all the respondents lost as a result of the amendments 'was the right to act as pilots unless employed by the Authority and the right to employ others on pilotage, neither right being property.[114] In a strong dissenting opinion, Lord Salmon pointed out that these rights, when looked at in isolation, did not amount to rights in property. His Lordship went on to hold that the legislative measures had the inevitable effect of putting the respondents out of business and, as such, deprived them of their 'property in the business'.[115]

The majority also felt that the application of Indian cases by the Federal Court in relation to 'deprivation' was erroneous because art 13 of the *Malaysian Constitution* 'cannot properly be construed in the way in which art 31 of the Constitution of India has been construed'.[116] Given that the Federal Court in *Selangor Pilot Association* applied Indian cases in giving 'property' in art 13 a wide enough interpretation to include goodwill,[117] the issue to consider would be whether this approach is still correct in view of the Privy Council decision. In other words, is the wide interpretation of 'property' under art 13 in *Adong 1* in reliance on *Rabindra* and the Federal Court in *Selangor Pilot Association*[118] justifiable in view of the Privy Council decision in *Selangor Pilot Association*?

In effect, the majority Privy Council decision in *Selangor Pilot Association* was based on its finding that that there was no 'acquisition' of property (as opposed to

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[113] See *Selangor Pilot Association (1946) v Government of Malaysia* [1975] 2 MLJ 66 (Federal Court).
[114] *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133, 134 (Viscount Dilhorne).
[115] Ibid 137.
[116] Ibid 134.
[117] See *Selangor Pilot Association (1946) v Government of Malaysia* [1975] 2 MLJ 66, 67 (Suffian LP, Ali FJ concurring) (Federal Court).
[118] See above, 133-4 (above nn 83-91 and accompanying text).

deprivation) pursuant to art 13(2) of the *Malaysian Constitution*.[119] Viscount Dilhorne held:

> Even if the right of the association to employ licensed pilots which was destroyed by the amending Act can be regarded as property, in the view of the majority of their Lordships the Association's right to employ pilots was not acquired or used by the Port Authority.[120]

The limited reading of 'property' should only affect rights discussed in the judgment, namely the loss of employment, right to employ others and possibly, goodwill of a business.[121] Limiting the effect of the remarks made on the concept 'property' to the facts of the case is not unreasonable given that the Privy Council did not elaborate the concept beyond the factual scenario in *Selangor Pilot Association*. Orang Asli customary rights are thus distinguishable from the loss of goodwill of a business. Of greater concern is the majority view that Indian cases are not relevant in interpreting art 13.[122] If this view is taken to apply to art 13 in general, it could be argued that the Federal Court's reliance on the Indian Supreme Court[123] in defining 'property' is erroneous. However, Viscount Dilhorne's judgment seemed to focus on Indian cases which held that 'deprivation' under the pre-1955 art 31(1) and 'acquisition or use' under art 31(2) were not mutually exclusive and must be read together.[124] Having done so, His Lordship concluded that:

> Their Lordships have carefully considered the views expressed in these Indian cases to which reference has been made and the judgments of the Federal Court in this case and have come to the conclusion that Article 13 of the Constitution of Malaysia cannot be construed in the way in which Article 31 of the Constitution of India has

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[119] *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133, 134 (Viscount Dilhorne).
[120] Ibid 134.
[121] For a further critique of *Selangor Pilots Association*, see eg. A J Harding, 'Property Rights under the Malaysian Constitution' in F A Trindade and H P Lee (eds), *The Constitution of Malaysia: Further Perspectives in Developments* (Oxford University Press, 1986), 65.
[122] *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133, 134 (Viscount Dilhorne).
[123] See *Selangor Pilot Association (1946) v Government of Malaysia* [1975] 2 MLJ 66, 67 where the Court relied on the Indian Supreme Court case of *Dwarkadas Shrinivas v The Sholapur Spinning & Weaving Co Ltd* AIR 1954 SC 119 in adopting a wide definition of 'property' under art 13.
[124] *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133, 134 (Viscount Dilhorne).

> been construed. A person may be deprived of his property by another acquiring it or using it but those are not the only ways by which he can be deprived.[125]

As such, the interpretation of the Privy Council on the relevance of Indian cases should be limited to the disjunctive reading of the concept of 'deprivation' in art 13(1) and 'acquisition or use' in art 13(2) but *not* be extended to the scope of the term 'property'.

(b) 'Property' in an Orang Asli customary land rights context

After the abolition of Privy Council appeals in 1985, the Judicial Committee of the Privy Council ceased to occupy the apex position of the hierarchical structure of the Malaysian courts.[126] Consequently, Malaysian courts are at liberty to depart from decisions of the Privy Council,[127] particularly those that no longer reflect the current state of the law.[128] If the Privy Council decision is still taken as authority for the narrow reading of the term 'property' contained in art 13, it is suggested that the preferred approach is a broad and liberal approach to give effect to the fundamental right to property. The Federal Court seems to be headed in that direction. In *Bato Bagi*, Zaki Tun Azmi CJ observed that the term 'property' was wide enough to encompass loss of livelihood in an Indigenous context, explicitly reaffirming *Adong 1* in this regard.[129] Unfortunately, His Lordship and the majority did not address the issues raised by *Selangor Pilot Association*. If the approach of Zaki Tun Azmi CJ were to be followed, Orang Asli customary land rights should therefore come within the ambit of 'property' in art 13 of the *Malaysian Constitution*.

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[125] Ibid.
[126] See *Constitution (Amendment) Act 1983* (Malaysia); *Courts of Judicature (Amendment) Act 1984* (Malaysia); *Courts of Judicature (Amendment) (No 2) Act 1984* (Malaysia).
[127] See eg. *Adong 1* [1997] 1 MLJ 418, 427; *Arulpragasan a/l Sundaraju v PP* [1997] 1 MLJ 1; *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungei Gelugor Dengan Tanggungan* [1999] 3 MLJ 1.
[128] See eg. *Syarikat Kenderaan Melayu Kelantan Berhad v Transport Workers' Union* [1995] 2 MLJ 317, 342-3 (Gopal Sri Ram JCA), 360-1 (V C George JCA) (Court of Appeal).
[129] His Lordship expressly reaffirmed *Adong 1* and *Adong 2* (*Bato Bagi* [2011] 6 MLJ 297, 306-7 (Zaki CJ)).

2 'Deprivation' and 'acquisition or use'

Despite holding that a person may be deprived of his property by a mere negative or restrictive provision, the majority of the Privy Council in *Selangor Pilot Association* held that there must be an actual 'acquisition or use' of property before a person is entitled to 'adequate compensation' under art 13(2).[130] Following this view, legislation that does not involve an acquisition or use but has the effect of taking property without compensation may not violate art 13(2). However, the majority qualified their view in cases where the legislation is a 'colourable device' to secure property without compensation.[131]

In respect of 'deprivation' and 'use' in the context of Orang Asli customary land rights, the Court in *Adong 1* held:

> It has been long recognised under our law that when a person is deprived of any proprietary right under an executive exercise pursuant to powers given by statute, that person must be compensated…
>
> Since the defendants have failed to establish the right to deprive the plaintiffs of their rights, I will hold that this deprivation without compensation was unlawful. I therefore hold that the plaintiffs are entitled to the compensation in accordance with art 13(2)…The Federal Constitution art 13 supersedes both statutory law and common law and mandates that all acquisition of proprietary rights shall be compensated and that any law made for the compulsory acquisition or use of property without compensation shall be rendered void…[132]

On appeal, Gopal Sri Ram JCA held that 'where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the *Malaysian Constitution*'.[133] This view seems to conflate 'deprivation' and 'acquisition and use', possibly preferring the Indian approach to the pre-1955 art 31 of the *Indian Constutution* to that of the Privy Council in *Selangor Pilot Association*.

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[130] *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133, 134 (Viscount Dilhorne). The distinction between 'deprivation' and 'acquisition and use' has been applied subsequently by the Federal Court in *Kulasingam* (see [1982] 1 MLJ 204, 211).
[131] *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133, 135-6, 139 (Lord Salmon).
[132] *Adong 1* [1997] 1 MLJ 418, 434.
[133] *Adong 2* [1998] 2 MLJ 158, 164.

Unfortunately, the Court did not elaborate its conflation presumably because the facts in *Adong 1* involved 'use' of the land for the purpose of construction of a dam. Recent observations from the Federal Court suggest that Malaysian courts are still grappling with concepts of 'deprivation' and 'acquisition or use' in article 13 of the *Malaysian Constitution* and the way they relate to Indigenous property rights. In *Bato Bagi*, Malanjum CJSS observed, 'there is no principle in law which states that extinguishment is on equal footing with acquisition' in the context of art 13 para 2 and questioned whether the *Sarawak Land Code* intended 'that native customary rights could be extinguished in the first place'.[134] In making this observation, His Lordship failed to consider the *Selangor Pilot Association* interpretation of art 13 that permits 'deprivation' of property without compensation in cases where there is no 'acquisition or use' of property involved in such deprivation. Perhaps a more pertinent issue for Malanjum CJSS to have considered may be whether 'extinguishment' falls within the purview of 'deprivation' pursuant to art 13 para 1. In any event, His Lordship went on to say this point 'requires thorough deliberations when the need arises'.[135] These dictum are yet to be explored in the Malaysian courts.

Until such time, any law for the contextualised recognition and protection of Orang Asli customary lands should justly address the mutually exclusive interpretation of 'deprivation' and 'acquisition or use' in art 13 in a manner that ensures that all forms of deprivation of Orang Asli customary lands under art 13 para 1 provide for the right to adequate compensation.

3 'Adequate compensation'

In *Adong 1*, the Court assessed 'adequate compensation' for loss of hunting and foraging lands having regard to deprivations of heritage land, freedom of inhabitation or movement, produce of the forest and the future living of the Orang Asli claimants, their immediate family and descendants.[136] In acknowledging that 'market value' compensation is inappropriate for Orang Asli traditional lands, the

[134] *Bato Bagi* [2011] 6 MLJ 297, 326.
[135] Ibid.
[136] *Adong 1* [1997] 1 MLJ 418, 436.

Court assessed compensation on the loss at a much lower level than the market value.[137]

Compensation in *Sagong 1*, a case that concerned 'settled lands', was awarded in accordance with the *Land Acquisition Act 1960* (Malaysia) ('*LAA*').[138] The *LAA*, the national legislation for land acquisition by the state, awards compensation at market value. In doing so, the learned judge in *Sagong 1* gave a broad construction to 'land occupied under customary title' under s 2 of the *LAA*, bringing Orang Asli customary lands within the scope of the provision.[139] On appeal, this approach was said to 'give full effect' to art 8(5)(c) of the *Malaysian Constitution*.[140]

Section 12 of the *APA* states:

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

Applying the presumption of constitutionality,[141] the Court of Appeal interpreted the word 'may' to mean 'shall' and introduced the word 'adequate' before the word 'compensation' in s 12 of the *APA*.[142] The purposive approach taken by the Court of Appeal in providing mandatory adequate compensation for loss of lands under s 12 of the *APA* was said to bring the provision in line with art 13(2) of the *Malaysian Constitution*.[143]

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[137] Ibid 435.
[138] *Sagong 1* [2002] 2 MLJ 591, 618, 621.
[139] Ibid 618.
[140] *Sagong 2* [2005] 6 MLJ 289, 311.
[141] For an elaboration of the presumption, see above n 25 and accompanying text.
[142] Ibid 310.
[143] Ibid.

The stand taken in *Sagong 1* is a departure from the position taken in *Adong 1* because the Court in *Sagong 1* awarded compensation based on market value of the property as opposed to deprivation of livelihood. A possible explanation for the market value compensation award in *Sagong 1* may be the trial court's limitation of the proprietary interest in Orang Asli customary rights to the area that forms an Orang Asli 'settlement, but not to the jungles at large where they…roam to forage for their livelihood in accordance with their tradition'.[144] Unfortunately, the Court did not proffer any explanation for drawing a distinction between 'settlement' lands and 'foraging' lands.[145] More importantly, the statement was made obiter dicta and consequently has no bearing on *Adong 1* which involved 'foraging' lands. Hence, in assessing compensation for loss of Orang Asli customary lands there remains a distinction between hunting and foraging lands and 'settled' lands which lacks any satisfactory explanation.

It is pertinent to note that both methods of assessing compensation fail to appreciate that customary rights are imbued with cultural, spiritual, communal and economic dimensions far beyond the market value of private registered land.[146] Despite not deciding on the issue, Malanjum CJSS in *Bato Bagi* opined that 'adequate compensation' in the context of natives should not only be adequate but 'sufficient and reasonable based on the long term scale'[147] having regard to the 'total dependency'[148] that native claimants have on their lands. On the other hand, Zaki Tun Azmi CJ defined 'adequate' rather ambiguously to mean 'adequate, fair or sufficient', choosing to focus solely on livelihood rather than the connection between natives and their lands.[149] Hence, the scope of the term 'adequate compensation', particularly in the context of loss of Indigenous lands, remains open.

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[144] *Sagong 1* [2002] 2 MLJ 591, 615.
[145] For an examination of this distinction, see below Chapter 6, 242-5 and Chapter 7, 288-93.
[146] Cheah Wui Ling, 'Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestone or False Start' (2004) 2 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/cheah>. Cheah further argues that the Court could have taken a further step by drawing on the provisions in the *Malaysian Constitution*, the draft *Declaration on the Rights of Indigenous Peoples*, *ILO Convention 169* and other international documents to protect and give effect to the various dimensions of Orang Asli land (at 13-14). See further, Anuar Alias and Md Nasir Daud, *Saka: Adequate Compensation for Orang Asli Land* (Universiti Tun Hussein Onn Malaysia, 2011), 69.
[147] *Bato Bagi* [2011] 6 MLJ 297, 326.
[148] Ibid.
[149] Ibid 306-7 (Zaki CJ). Raus Sharif FCJ expressed no opinion as he answered the constitutional question in the negative, preferring a narrow reading of the constitutional provisions in question.

If the word 'adequate' were to be read liberally, the term 'adequate compensation' under art 13 could extend to cover additional compensation and alternative forms of compensation as envisaged in the *UNDRIP*. Nonetheless, the extent of such alternative forms of 'adequate compensation' would be subject to art 8 of the *Malaysian Constitution* and proportionality.

4 Article 13 and proportionality

It appears that Orang Asli customary land rights would fall within the term 'property' under art 13 of the *Malaysian Constitution* and consequently be protected by art 13. However, particular law reforms to Orang Asli customary land rights that potentially fall outside the scope of art 8(5)(c) must first consider the exclusivity of the terms 'deprivation' and 'acquisition or use' in art 13 to ensure that Orang Asli are not denied their right to adequate compensation and secondly, withstand the 'reasonable classification' test of art 8 and the principle of proportionality so that the protection afforded to Orang Asli under art 13 does not infringe the fundamental rights of others.

III FEDERAL AND STATE POWERS

The purpose of this section is to determine whether a uniform law and policy across Peninsular Malaysia on Orang Asli customary lands is permissible under the *Malaysian Constitution*. This question emanates from art 74 that delineates Federal and State powers of legislation. Article 74(1) gives Federal Parliament the power to make laws with respect to any of the matters enumerated in the Federal list (sch 9 List I) and Concurrent list (sch 9 List III). Article 74(2) gives power to the Legislature of a State to make laws in respect of any matters enumerated on the State list (sch 9 List II) and Concurrent list (sch 9 List III). The residuary power of legislation for matters not enumerated in any of the lists set out in sch 9 rests with the State.[150] The States of Sabah and Sarawak have supplementary powers of legislation contained in sch 9 lists IIA and IIIA respectively. Provisions relevant to

[150] See *Malaysian Constitution*, art 77.

Sabah and Sarawak are beyond the scope of discussion in this section as Orang Asli are not indigenous to these two States.

Item 16 of the Federal list empowers the Federal Government to legislate for the welfare of Orang Asli.[151] This power would necessarily include the recognition of Orang Asli customary land rights, a legislative action inextricably linked to the vitality of Orang Asli identity, culture and well-being, and consequently welfare. However, land, including land tenure, registration of titles and land titles, mining[152] and forests[153] are within the jurisdiction of the individual State Governments. The problem here appears to be that the Federal Government, through the Department of Orang Asli Development (formerly, the *DOA*), can only *request* that the individual State Authority recognise Orang Asli lands.

However, art 83(1) of the *Malaysian Constitution* provides:

> If the Federal Government is satisfied that land in a State, not being alienated land, is needed for federal purposes, that Government may, after consultation with the State Government, require the State Government, and it shall then be the duty of that Government, to cause to be made to the Federation, or to such other public authority as the Federal Government may direct, such grant of the land as the Federal Government may direct:
>
> Provided that the Federal Government shall not require the grant of any land reserved for a State purpose unless it is satisfied that it is in the national interest to do so.

While constitutionally permissible, alienation of land by the State to the Federal Government pursuant to art 83(1) has limitations. First, payment of appropriate quit rent[154] and a premium equivalent to the market value of the grant is required from the Federal Government (art 83(2)). This course of action may involve inordinate costs. Secondly, art 83 allows grants to be made to the Federation of Malaysia or such other public authority that the Federation may direct, suggesting that alienation to Indigenous communities may not be possible. Orang Asli interests under this

[151] Ibid Ninth sch List I - Federal List Item 16.
[152] Ibid Ninth sch List II - State List Item 2.
[153] Ibid Ninth sch List II - State List Item 3.
[154] Quit rent refers to the annual sum payable to the State Authority in respect of any alienated land as consideration for alienation of title by the State (see *NLC*, s 76(b)).

provision may thereby be limited to reservations where the Federal Government or a public authority would be the beneficial owner. Nonetheless, the Federal Government may subsequently transfer such property to Orang Asli subject to the payment of the necessary duties, and accordingly, incur double transaction costs.

Plausible alternatives for the recognition and protection of Orang Asli customary lands and resources lie in arts 76 and 91. Article 76 allows Federal Parliament to make laws with respect to any matter enumerated in the State list in certain circumstances. In particular, art 76(4) states as follows:

> Parliament, may for the purpose only of ensuring uniformity of law and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and Clauses (1)(b) and (3) shall not apply to any law relating to any such matter.

This article expressly excludes art 76(3) of the *Malaysian Constitution*. Article 76(3) provides that any laws passed under art 76 (except those relating to the implementation of international law under art 76(1)) shall not come into operation until it has been adopted by a law passed by the legislature of the State. This requirement is not necessary for laws passed under art 76(4) of the *Malaysian Constitution* rendering such laws automatically binding on all States. There is also no power for the State to modify these laws.[155]

It is reasonably clear that the recognition of Orang Asli customary tenure would come within the scope of 'land tenure' or 'other rights and interests in land' in art 76(4). However, laws passed under art 76(4) must be for the sole purpose of 'ensuring uniformity of law and policy' relating to land matters.[156] Notwithstanding this, the Federal Government may justify using art 76(4) of the *Malaysian Constitution* for legislation recognising Orang Asli customary lands and resources.

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[155] *East Union (Malaya) Sdn Bhd v Government of the State of Johore* [1981] 1 MLJ 151, 154 (Federal Court).

[156] See *Malaysian Constitution*, art 76; *East Union (Malaya) Sdn Bhd v Government of the State of Johore* [1981] 1 MLJ 151, 154 (Federal Court). For examples of laws passed under art 76(4), see *Lim Chee Cheng v Pentadbir Tanah Daerah Seberang Perai Tengah, Bukit Mertajam* [1999] 4 MLJ 213, 215 (Court of Appeal) (*National Land Code* (Act No 56 of 1965) (Malaysia), s 214); *Koh Boon Yew v Happy Realty Sdn Bhd* [2002] 5 MLJ 305 *(Control of Rent (Repeal) Act 1997* (Malaysia)).

The welfare of the Orang Asli is a matter within the competence of the Federal Government. Orang Asli 'welfare' in terms of their continued existence as a vibrant and distinct group is intricately connected to their lands. Accordingly, a policy for the recognition of Orang Asli lands has a close nexus with Orang Asli welfare, a matter of Federal concern. Given that Orang Asli occupy most States in Peninsular Malaysia, a policy for the recognition of Orang Asli customary lands can only implemented successfully if there is a uniform law across Peninsular Malaysia.

Further, any policy on Orang Asli land and resources can be introduced through the National Land Council consisting of one representative of each of the States (totalling eleven), not more than ten representatives of the Federal Government and a Federal Minister.[157] This constitutional body, established pursuant to art 91 of the *Malaysian Constitution*, has a duty to formulate national policies for the promotion and control of the utilisation of land throughout the Federation and for the administration of any such laws.[158] Art 91(5) provides that the Federal and State Governments shall follow any policy so formulated. An important limitation of this method is the requirement of a majority vote by the National Land Council. Therefore, a proposed Federal policy can be derailed if all States do not subscribe to the policy.

Although it is not mandatory for the Federal Government to consult with the National Land Council in matters relating to any proposed legislation dealing with land or the administration of any such law,[159] there is usually consultation and the consent of the State Governments regarding federal land policies.[160] A relevant illustration of this practice is the controversial Orang Asli land titles policy introduced by the Federal Government that was approved by the National Land Council in 2009. Provided there is the political will to do so, the Federal and State power divide under the *Malaysian Constitution* is not an impediment to the

[157] See *Malaysian Constitution*, art 91(1).
[158] Ibid art 91(5).
[159] Ibid art 91(6).
[160] For further reading on consultation provisions in the *Malaysian Constitution*, see Choo Chin Thye and Lucy Chang Ngee Weng, 'Constitutional Procedure of Consultation in Malaysia's Federal System' [2005] 4 *Malayan Law Journal* xiii.

introduction of a uniform land policy for the recognition of Orang Asli customary lands and resources throughout Peninsular Malaysia.

IV CONCLUSION

In this chapter, it has been demonstrated that the concept of contextualised protection for Orang Asli lands and resources is not diametrically opposed to current arrangements contained in the *Malaysian Constitution*. The special position of Orang Asli has indeed proven to be in favour of Orang Asli this time.[161] Article 8(5)(c) sanctions positive discrimination in favour of Orang Asli and enables laws for contextualised recognition of Orang Asli customary lands. However, specific provisions for reform would have to undergo the constitutionality test again. Having said this, contextualised protection of Orang Asli customary land rights is, at least in principle, consistent and harmonious with the *Malaysian Constitution*. Such protection does not require any amendment to the Constitution and is well within the constitutional potential of Malaysia. Political will aside, there is no constitutional or legal impediment to the Government commencing consultations for the recognition and protection of Orang Asli customary land rights in line with the *UNDRIP*.

However, full adoption of the *UNDRIP* Standards to such law reform efforts may result in the encroachment on the fundamental rights of non-Orang Asli and larger national interests. These potential intrusions affect previous interests granted under the existing land tenure system and state sovereignty over lands and resources. In view of possible legal limitations to the full adoption of the *UNDRIP* Standards domestically, issues of constitutionality are revisited when reforms to Orang Asli land rights are proposed in Chapter 8.

[161] For the extensive control that the Federal Government exercises over Orang Asli by virtue of their special position and the issues associated with such control, see above Chapter 2, 72-4.

Chapter 5

ORANG ASLI STATUTORY LAND RIGHTS: AN EVALUATION BY *UNDRIP* STANDARDS

I INTRODUCTION

In Chapter 2, it was suggested that the *Aboriginal Peoples Act* ('*APA*'), the principal statute governing Orang Asli administration, functions as a double-edged sword that serves not only to protect Orang Asli but to secure and perpetuate state control over Orang Asli identity, self-determination, and lands and resources. It was also observed that such control has not necessarily resulted in positive outcomes for Orang Asli 'protection, well-being and advancement', particularly in respect of customary lands. However, this situation does not mean that existing legislation affecting Orang Asli lands and resources falls short of the *UNDRIP* Standards.

In other words, do the extensive statutory powers conferred on the state effectively recognise and protect Orang Asli rights to their lands and resources? How do these laws and the way in which they function through state policies and practice compare to the *UNDRIP* Standards? This chapter evaluates the extent to which Orang Asli statutory land and resource rights meet the *UNDRIP* Standards. For ease of reference, the *UNDRIP* Standards are reproduced in Appendix 2.[1]

Methodologically, the statutory regime in respect of Orang Asli land rights is dealt with separately from common law Orang Asli customary land rights for two reasons. First, an assessment of statutory rights indicates the extent of legislative and executive action towards the protection of Orang Asli customary land rights. Also, the emerging common law recognition of Orang Asli customary land rights has been the culmination of Orang Asli-initiated litigation rather than state action. Hence, a separate assessment of statutory rights with reference to the *UNDRIP* Standards

[1] See below, 401.

would contribute towards answering the question of whether reform of domestic laws in relation to Orang Asli customary land rights is necessary.

Secondly, common law Orang Asli customary land rights have been recognised by the Malaysian courts through the doctrine of Indigenous title, a doctrine that exists independent of any legislative or executive declaration.[2] The Malaysian courts have consistently dealt with the common law doctrine separately,[3] albeit regarding statutory and common law rights as 'complementary'.[4]

This chapter evaluates statutory Orang Asli customary land rights by applying the *UNDRIP* Standards to legislation affecting Orang Asli lands and resources, and the implementation of these laws. Orang Asli customary land and resource interests contained in key statutes such as the *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*') and other statutes are introduced in Section II. Section III evaluates these statutory interests with reference to the *UNDRIP* Standards before a conclusion is drawn in Section IV.

II ORANG ASLI STATUTORY LAND RIGHTS

As a backdrop to the evaluation of Orang Asli statutory rights against *UNDRIP* Standards conducted in Section III, this section introduces the current statutory regime affecting Orang Asli lands and resources. In doing so, it highlights the extensive decision-making power conferred upon the state over Orang Asli, particularly with regard to their lands and resources. The ways in which these statutory provisions play out in practice are highlighted during the evaluation process in Section III.

[2] See eg. *Sagong 1* [2002] 2 MLJ 591, 611 (Mohd Noor Ahmad J) (cited with approval by the Malaysian Court of Appeal in *Nor Nyawai 2* [2006] 1 MLJ 256, 268-9).
[3] See *Adong 1* [1997] 1 MLJ 418, 426-31 (Mokhtar Sidin JCA).
[4] This doctrine is examined and evaluated in Chapters 6 and 7 respectively. See also, for example, *Adong 1* [1997] 1 MLJ 418, 430-1 (Mokhtar Sidin JCA) (affirmed on appeal, see *Adong 2* [1998] 2 MLJ 158, 163-4 (Gopal Sri Ram JCA)).

A *The* APA

The statute governing Orang Asli lands is the *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*'). The *National Land Code 1965* (Malaysia) ('*NLC*'), the principal statute governing titles and dealings in land, and interests in land in Peninsular Malaysia, does not extend to cover lands held under customary title.[5]

In *Sagong 1*, the Court ruled that the provision for 'Malay' land reservations under art 89 of the *Malaysian Constitution*[6] does not encompass Orang Asli and the word 'native' in the same article (art 89(6)) refers only to natives of Sabah and Sarawak and not Orang Asli.[7] In drawing such a conclusion, the Court also appears to have suggested that Orang Asli do not fall within the constitutional definition of 'Malay'. Consistent with this interpretation, none of the State Malay reservation enactments and laws relating to Malay customary tenure include Orang Asli within their respective definitions of 'Malay'. As far as statutory protection of their areas of 'inhabitation'[8] is concerned, Orang Asli rely on the *APA*. As argued in Chapter 2, the *APA* was passed during the colonial era when protectionism and paternalism towards 'tribal' societies in a manner that may currently be viewed as patronising or discriminatory was acceptable. The high level of protectionism and control in the *APA* was further compounded by prevailing security concerns in the jungles of Malaya caused by communist insurgents. However, the *APA* has seen minimal amendment since 1954, prompting one commentator to describe the statute as 'deficient being designed for a static status no longer appropriate to modern Malaysia'.[9]

The following sections describe Orang Asli rights under the *APA* as a precursor to their evaluation in Section III. Section IIA1 demonstrates that the *APA* functions as a legal tool to empower the Federal and State Governments as ultimate decision-

[5] See s 4(2)(a); *Sagong 1* [2002] 2 MLJ 591, 618; *Sagong 2* [2005] 6 MLJ 289, 308.
[6] For the constitutional protection afforded in respect of Malay reservations or lands reserved for Malays, see above Chapter 2, 36 and below Chapter 8, 330-1, 373-4.
[7] *Sagong 1* [2002] 2 MLJ 591, 621.
[8] The *APA* uses the word 'inhabit' when describing Orang Asli interests in land (see eg. *APA* ss 2, 6(1) and 7(1) in respect of Aboriginal reserves, Aboriginal areas and Aboriginal inhabited places respectively).
[9] M B Hooker, 'The Orang Asli and the Laws of Malaysia: With Special Reference to Land' (1996) 48 *Akademika* 21, 48.

makers over Orang Asli affairs. With particular focus on the three categories of Orang Asli lands under the *APA*, namely, 'Aboriginal (meaning Orang Asli) reserves', 'Aboriginal areas' and an 'Aboriginal inhabited place', Section IIA2 observes that the rights of Orang Asli customary lands under the *APA* are, in effect, a limited form of state-controlled occupancy and use of Orang Asli lands and resources that can be terminated unilaterally without mandatory and adequate redress.

1 The state as decision maker for Orang Asli

True to its protectionist tendencies, the *APA* vests the bulk of decision-making powers affecting Orang Asli in the Federal Executive. Section 4 states that the Commissioner for Orang Asli Affairs, a position held by the Director General of the Department of Orang Asli Development ('*DOAD*'), a Federal government agency, shall be responsible for the 'general administration, welfare and advancement' of Orang Asli.[10] As land is a matter within the purview of the individual State of the Federation,[11] decisions concerning Orang Asli lands under the *APA*, however, are made by the respective State Authority.[12] The only legal recourse available to Orang Asli if they are dissatisfied with any decision of the Federal or State Government or their respective agencies is by way of common law judicial review. Given the time limit of three months from the date of communication of the decision to commence an administrative law action,[13] this route poses significant challenges to Orang Asli claimants, who may also lack the necessary financial resources, information, and perhaps more importantly, confidence in challenging the state.[14]

[10] For other examples of Federal powers over Orang Asli under the *APA*, see ss 3(3), 14(1), 15(1) and 16(1) discussed later in this section.
[11] *Malaysian Constitution*, Ninth sch List II - State List Item 2.
[12] 'State Authority' is defined as the Ruler or Governor of the individual State of the Federation of Malaysia, as the case may be (*NLC*, s 5). In executive matters relating to land including Aboriginal areas and Aboriginal reserves, the Ruler or Governor of the State is generally obliged to act in accordance with the advice of the relevant State Executive Council. The State Executive Council is appointed by the Ruler or the Governor and consists of members of the State Legislative Assembly. For an examination of the relevant provisions of the *APA*, see below, 155-60, 166-7.
[13] See Order 53 rule 3(6) of *Rules of Court 2012* (Malaysia).
[14] For the challenges faced by Orang Asli in instituting litigation, see above Chapter 2, 67-9 and below Chapter 7, 284-8.

Section 3(3) of the *APA* empowers the Federal 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. Section 3(3) effectively empowers the Minister to unilaterally regulate and control the composition of the Orang Asli community. Section 16(1) of the *APA* states that, Orang Asli communities who do not have a hereditary headman are to select, through their respective members, a headman, commonly known as a *Batin*. Under s 4, a *Batin* is not precluded from 'exercising his authority in matters of aboriginal custom and belief in any aboriginal community or aboriginal ethnic group'. However, the appointment of a *Batin* is subject to confirmation by the Minister (s 16(1)). The Minister may also remove any such headman (s 16(2)).[15] This method of appointment, selection and removal does not recognise many other forms of traditional and communal Orang Asli decision-making institutions and processes. Further, the *Batin* or headman concept imposed in the *APA* is not common to all Orang Asli ethnic groups. Examples of traditional institutions include the *Mairaknak* (Elders consultation council) in the case of the *West Semai* sub-group, *Lemaga Adat* (Customary Council) in the case of *Jah Hut* and *Lembaga Adat* (Customary Council) in the case of the *Temuan*. The practical impact of s 16 of the *APA* is examined in Section IIIA4.

As for participation in the Malaysian political system, art 45(2) of the *Malaysian Constitution* provides for the appointment by the *Yang Dipertuan Agong*[16] of a Senator capable of representing Orang Asli in the upper house of the Malaysian parliament, the Senate. However, Orang Asli have never appointed this person themselves. Instead, the *de facto* power of such appointment lies with the Minister who, on the advice of the *DOAD*, makes the necessary recommendation to the *Yang Dipertuan Agong*.[17]

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[15] This may compromise the interests of Orang Asli. For a critique on the selection and removal of Orang Asli headmen, see eg. Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: from Rhetoric to Recognition* (Center for Orang Asli Concerns, 2010), 114-5.

[16] This position is the equivalent of the King of Malaysia who is appointed on a rotational basis every five years by the Council of Rulers of States in Peninsular Malaysia that have Sultans as a head of State. These States are Perlis, Kedah, Kelantan, Perak, Terengganu, Pahang, Selangor, Negeri Sembilan and Johor (see *Malaysian Constitution*, arts 33-8, Third and Fifth schs).

[17] Nicholas, Engi and Teh, *The Orang Asli and the UNDRIP*, above n 15, 114-5.

The Minister also possesses the power to exclude persons from entering or remaining on Orang Asli areas or reserves or inhabited places (s 14(1)). Further, the Director-General of the *DOAD* and any police officer may detain and remove any persons found in these areas whose activities are believed to be 'detrimental to the welfare of any Aborigine or any Aboriginal community' (s 15(1)). These powers potentially allow the Federal Executive to decide who can associate with Orang Asli.

2 State power over lands under the *APA*

Despite emanating from a statute for the 'protection, well-being and advancement' of Orang Asli, the provisions of the *APA* relating to all three statutory categories of Orang Asli land, namely, Aboriginal reserves, Aboriginal areas and Aboriginal inhabited areas, may be regarded as a limited form of state-controlled occupancy and use of Orang Asli lands and resources. These statutory rights of occupancy and use are analogous to rights available to a tenant at will in that they can be terminated without mandatory and adequate redress.

(a) Aboriginal reserves: State controlled rights of occupancy

The first category of Orang Asli land under the *APA* is the 'Aboriginal reserve'. Section 2 defines an 'Aboriginal reserve' to mean 'an Aboriginal reserve declared to be as such'. Section 7 is the main provision concerning Aboriginal reserves. Despite offering a measure of protection to Orang Asli lands under s 7(2), the State Authority possesses the power to declare an area as an Aboriginal reserve by gazette notification (s 7(1)) and revoke wholly or in part or vary any such declaration by similar notification (s 7(3)). Within an Aboriginal reserve:

- No land shall be declared as a Malay reservation, wildlife sanctuary or reserve or a forest reserve pursuant to any written law pertaining to these matters (ss 7(2)(i)-(iii)).
- No land shall be alienated, granted, leased or disposed of except to Orang Asli normally resident within the reserve (s 7(2)(iv)). However, such

dealings are subject to the consent of the Commissioner for Orang Asli Affairs (s 9).

- No temporary occupation of any land shall be permitted under any written law relating to land (s 7(2)(iv)).

Orang Asli lands are, therefore, afforded statutory protection by virtue of the status of their land being declared an Aboriginal reserve. However, the State Authority can strip this status by a gazette notification.[18]

Section 8 of the *APA* creates a 'special form of tenure'[19] for Orang Asli but again vests power to grant such tenure in the State Authority. Under s 8, the State Authority may grant rights of occupancy within Aboriginal reserves to any individual Orang Asli or members of any Orang Asli family or community but such interests 'shall be deemed *not* to confer any better title than that of a tenant at will'.[20] A tenant at will in this context means that any rights of occupancy granted to Orang Asli can simply be terminated by a notification from the State Authority.[21] Section 8(3) does not preclude the alienation or grant or lease of any such land to any Orang Asli. However, any dealings in land by Orang Asli require the consent of the Commissioner for Orang Asli Affairs (s 9).

In respect of compensation for loss of lands, the State Authority *may* grant compensation to any Orang Asli or Orang Asli community where any Aboriginal reserve is excised or land within an Aboriginal area is alienated, granted, leased or otherwise disposed of or of any right or privilege in any Aboriginal reserve is revoked wholly or in part (s 12). Compensation for loss of lands within an

[18] See *APA*, s 7(3).
[19] See Legislative Council, Federation of Malaya, *Report of the Select Committee appointed to consider Aboriginal Peoples Bill, 1953; No. 2 of 1954* (1954), 2.
[20] Section 8(1) states '[t]he State Authority may grant rights of occupancy of any land not being alienated land or land leased for any purpose within any Aboriginal area or Aboriginal reserve.' Section 8(2) states '[r]ights of occupancy may be granted (a) to (i) any individual aborigine; (ii) members of any family of Aborigines; or (iii) members of any Aboriginal community; (b) free of rent or subject to such rents as may be imposed in the grant; and (c) subject to such conditions as may be imposed by the grant, and shall be deemed not to confer on any person any better title than that of a tenant at will'.
[21] The concept of a tenancy at will at common law has been applied by the Malaysian courts (see eg. *Tan Khien Toong v Hoong Bee & Co* [1987] 1 MLJ 387, 391 (Supreme Court); *Lee Ah Low v Cheong Lep Keen* [1970] 1 MLJ 8, 10 (Federal Court, Malaysia); *Cheah Leong Keah v Mydin bin Tamby Bappoo* (1932) 1 MLJ 98, 99).

Aboriginal reserve or area appears to be discretionary. In *Sagong 1*, the Court of Appeal interpreted the word 'may' in s 12 to mean 'shall' and introduced the word 'adequate' before the word 'compensation'.[22] The purposive approach taken by the Court was to bring s 12 in line with art 13(2) of the *Malaysian Constitution*.[23] Article 13(2) states that '[n]o law shall provide for compulsory acquisition or use of property without adequate compensation'. The legal effect of this decision and its impact on state practice is examined in Section IIIC below.[24]

An Aboriginal reserve under the *APA* provides relatively little security of tenure to Orang Asli as it confers power upon the individual State Authority to declare, vary or revoke the reserve.[25] However, the Courts have imposed a common law fiduciary duty to gazette Orang Asli lands.[26] The scope of this duty is examined further when common law Orang Asli customary land rights are evaluated in Chapter 7.[27] Nonetheless, the fact remains that there is no express statutory duty to gazette an Aboriginal reserve or in respect of the degazettal of an Aboriginal reserve.

(b) Aboriginal areas

The second category of Orang Asli land under the *APA* is the 'Aboriginal area'. It is defined by s 2 to mean 'an Aboriginal area declared to be as such under this act'. Section 6 of the *APA* is the main provision relating to Aboriginal areas.

Under s 6(1), Aboriginal areas cover a broader scope than Aboriginal reserves as they can extend to cover areas: (1) 'predominantly' (as opposed to exclusively)

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[22] Section 12 states: 'If any land is excised from any Aboriginal area or Aboriginal reserve or if any land in any Aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any Aboriginal area or Aboriginal reserve granted to any aborigine or Aboriginal community is revoked wholly or in part, the State Authority *may* grant compensation therefor and may pay compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Commissioner to be held by him as a common fund for such persons or for such Aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the Minister'. [*Emphasis added*]

[23] *Sagong 2* [2005] 6 MLJ 289, 309-10.

[24] See below, 193-4.

[25] But see *Sagong 2* [2005] 6 MLJ 289, 312-4 where the Court of Appeal held that the Federal and State Governments were under a duty to gazette Orang Asli lands, by virtue of its fiduciary duty owed to the Orang Asli claimants in the case.

[26] *Sagong 2* [2005] 6 MLJ 289, 313-4.

[27] Below, 303-8.

inhabited by Orang Asli; and (2) with more than one Aboriginal ethnic group, subject to divisions into cantons. Although a declaration of an Aboriginal area can only be made in an area that has not been declared an Aboriginal reserve under s 7, an Aboriginal reserve may be constituted within an Aboriginal area (s7(1)(ii)).

Similar to Aboriginal reserves, the powers to declare, vary and revoke an Aboriginal area,[28] grant rights of occupancy[29] and award compensation for loss of land within an Aboriginal area[30] are vested in the State Authority. Within an Aboriginal area, no land shall be declared as a Malay reservation or wildlife sanctuary or reserve pursuant to any written law pertaining to these matters (s 6(2)(i)-(ii)).

In other respects, the protection against the creation of interests within Aboriginal areas is lower if compared to Aboriginal reserves. Unlike s 7(2)(iii) in relation to Aboriginal reserves, there is no like prohibition for the creation of forest reserves or the granting of temporary occupational licences within Aboriginal areas under s 6(2) of the *APA*. Further, s 6(2)(iv) also allows licences for the collection of forest produce to be granted to non-Aborigines or commercial undertakings provided the Director-General of the *DOAD* is consulted. In *Koperasi Kijang Mas v Kerajaan Negeri Perak*,[31] the Court ordered that logging conducted by any body, organisation, foundation or representative and their agents *not* owned by the affected Orang Asli violated s 6(2)(iv) of the *APA*,[32] possibly suggesting exclusive Orang Asli rights to forest produce within Aboriginal areas. However, the decision is not helpful in exploring this possibility as it did not attempt to reconcile its ruling and the express wording of s 6(2)(iv) that provides for licenses in favour of non-Orang Asli. Section 6(2)(iii) also *allows* alienation, grants, leases or disposal of lands within an Aboriginal area to non-Orang Asli provided the Director-General of the *DOAD* is consulted.

[28] See ss 6(1) and (3).
[29] See s 8.
[30] See s 12.
[31] *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] 1 CLJ 486, 487-8.
[32] Ibid.

(c) Aboriginal inhabited places: At the will of the State

The third category of Orang Asli land under the *APA* is the 'Aboriginal inhabited place'. Section 2 defines it to mean 'any place inhabited by an Aboriginal community but which has not been declared to be an Aboriginal area or Aboriginal reserve'. An Aboriginal inhabited place therefore covers all residual places inhabited by Orang Asli communities that are neither Aboriginal reserves nor Aboriginal areas.

Orang Asli communities in Aboriginal inhabited places have minimal statutory protection. Section 10(1) of the *APA* allows an Orang Asli community resident in an area declared to be a Malay Reservation, forest reserve or game reserve under any written law to continue residing on such areas. However, the State Authority may order any Aboriginal community out of such lands and further, make consequential provisions, including the payment of compensation in accordance with the general compensation provision contained in s 12 (see ss 10(3) and (4)).[33] Payment of compensation under s 10(3) and 10(4), however, is at the discretion of the State Authority and only applies to Orang Asli communities residing within Malay Reservations, forest or game reserves. In practice, Orang Asli in Aboriginal inhabited places also occupy State land,[34] land reserved for State purposes (for example, forest reserves), national parks and private land.[35] In respect of Orang Asli inhabiting these lands, Orang Asli communities do not possess express statutory rights of occupancy. Subject to establishing such a claim, Orang Asli occupying *State land* are, nevertheless, entitled to just compensation for the loss of their fruit and rubber trees (s 11(1)).

[33] For compensation under s 12 of the *APA*, see above, 156-7.
[34] 'State land' means all land in the individual State (including so much of the bed of any river, and of the foreshore and bed of the sea, as is within the territories of the State or the limits of the territorial waters) other than (a) alienated land; (b) reserved land; (c) mining land; (d) any land which under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest (see *NLC*, s 5).
[35] 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), 9.

Unless Orang Asli establish common law customary land rights, the *NLC* would apply to Aboriginal inhabited areas.[36] Section 40 of the *NLC* vests all State land within the territories of the respective State within Peninsular Malaysia in the individual State Authority. Section 48 of the *NLC* provides that '[n]o title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever'. Consequently, Orang Asli inhabiting State land without common law customary rights would be deemed unable to acquire good title against the State by virtue of their possession or occupation. As for Orang Asli communities on alienated land, they would potentially be open to civil action. Section 341 of the *NLC* states that adverse possession of land for any length of time shall not constitute a bar to the bringing of any action for the recovery thereof by the registered proprietor or any person or body entitled to an interest in the land.

In such circumstances, protection under s 10 of the *APA* is limited because the provision only applies to Orang Asli inhabiting Malay reservations, reserved forests and game reserves. Further, s 10 empowers the State Authority to dispossess Orang Asli inhabiting these lands and leaves compensation to the discretion of the State Authority. Mandatory compensation under s 11(1) is limited to the loss of fruit and rubber trees located on State land and belonging to Orang Asli.

Three conclusions can be drawn from the examination of Orang Asli lands under the *APA* conducted in Sections IIA2(a)-(c) above. First, legal control over the ultimate occupancy and use of such lands under the *APA* lies with the individual State Authority. Orang Asli have no express participatory rights over decisions affecting their lands. Secondly, all these rights are terminable by the State Authority without explicit statutory protection in favour of Orang Asli. Thirdly, the State Authority possesses the power, except in the case of Orang Asli fruit and rubber trees growing on State land under s 11, to determine if compensation is payable for the loss of Orang Asli lands. Such extensive powers can function to wrest control of Orang Asli lands with little or no redress available to Orang Asli.

[36] See above n 5 and accompanying text.

B *Other Statutory Rights Relating to Land*

This section examines other statutory rights Orang Asli have in relation to land by discussing:

- two statutes that contain explicit rights and special privileges for Orang Asli relating to forest produce and wildlife; and
- resource and land development-based statutes.

Except for a degree of protection and privileges granted to Orang Asli under forestry and wildlife legislation, other resource and land development statutes are silent on Orang Asli rights. These laws fail to appreciate the specific context of Orang Asli, treating them no differently from other Malaysian citizens. From an Orang Asli land rights perspective, formal 'equality' in this sense does not fulfil the potential of art 8(5)(c) of the *Malaysian Constitution*, which permits contextualised laws for the 'protection, well-being and advancement' of Orang Asli.

1 *NFA*

The *National Forestry Act 1984* (Malaysia) ('*NFA*') provides for the administration, management and conservation of forests, and forestry development in Peninsular Malaysia.

Section 14 of the *NFA* vests property in all forest produce in the individual State. However, s 40(3) of the *NFA* provides that the State Authority may exempt forest produce[37] removed from alienated land by Orang Asli for any of the purposes specified under s 62(2)(b). An exemption under s 62(2)(b) negates the requirement

[37] 'Forest produce' is defined in s 2 of the *NFA* to include '(a) the following when found in or brought from a permanent reserved forest: guano, peat, rock, sea-sand, sea-shells and the surface soil; (b) the following when found in or brought from a permanent reserved forest or State land: (i) trees and parts or produce not hereinafter mentioned of trees; (ii) plants including climbers, creepers and grasses, and all parts or produce of such plants; (iii) silk, cocoons, honey and wax and edible bird's nests; (c) the following whether found in or brought from a permanent reserved forest, State land, mining land, reserved land or alienated land: timber, fuelwood, charcoal, *getah* [rubber], *getah taban* leaves, wood oil, bark, extracts of bark, *damar* and *atap*.

for a licence to remove forest produce under the *NFA*.[38] Subject to any contrary direction by the State Authority, s 62(2)(b) provides that the State[39] Director of Forestry may also 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) fuel wood or other domestic purposes; or

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

These provisions do not confer express rights for the removal of forest produce. Nonetheless, they provide for the State Authority or the Executive, as the case may be, to grant Orang Asli statutory privileges from licensing requirements and royalty payments in respect of the removal or taking of forest produce for the purposes specified in s 62(2)(b).

However, the exemption from licensing requirements under s 40(3) and the royalty privileges under s 62(2)(b) are subject to limitations. First, the exemption under s 40(3) is not automatic and requires the State Authority to exercise its discretion to exempt in favour of the Orang Asli concerned. Notwithstanding this, Orang Asli in Aboriginal reserves have been held to possess exclusive rights to removal of forest produce within Aboriginal reserves or Aboriginal areas or lands approved as such but not yet gazetted. In *Koperasi Kijang Mas v Kerajaan Negeri Perak*,[40] the Perak State Government accepted a commercial tender to log certain areas in Kuala Kangsar which included lands that had been approved by the State Authority as Aboriginal reserves. The Court ruled that only Orang Asli were entitled to the forest produce in those areas[41] and that the commercial undertaking had no rights to carry

[38] Section 40 provides for the requirement of a licence for the removal of forest products. For further discussion, see below, 162-3.

[39] This Act applies throughout Peninsular Malaysia through its adoption 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).

[40] [1991] 1 CLJ 486.

[41] *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] 1 CLJ 486, 487. For analysis of this part of the decision, see above, 158.

on logging activities over these areas. Secondly, the exemption under s 40(3) only applies to alienated land but not State or reserved land. Any forest produce taken by Orang Asli from State land may, however, be granted a *waiver* in respect of any payment of royalty subject to the limited confines of s 62(2)(b) of the *NFA*.

Thirdly, an exemption under s 40(3) can only be granted for the four purposes mentioned in s 62(2)(b).[42] This limitation equally applies to royalty privileges available to Orang Asli under s 62(2)(b). The purposes stated in s 62(2)(b) do not cater for the removal of forest produce in accordance with Orang Asli customs and traditions. The purposes mentioned in ss 62(2)(b)(i) and (iv) are subject to further restrictions. In respect of s 62(2)(b)(i), an exemption for the construction and repair of dwellings is limited to 'temporary' huts that are 'lawfully' occupied by Orang Asli. This provision raises issues as to whether the State Authority can exercise its discretion in respect of forest produce taken for the construction and repair of *permanent* dwellings. Further, the use of the word 'lawfully' confers a discretion on the State Authority not to grant exemptions for Orang Asli that it feels are residing on land *unlawfully*. In respect of s 62(2)(b)(iv), an exemption can be granted for construction or maintenance of any work for the 'common benefit' of the Orang Asli. The decision of whether or not the construction or maintenance is for the 'common benefit' of the Orang Asli concerned is not made by Orang Asli but the State Director of Forestry subject to any contrary direction by the State Authority. Royalty privileges under s 62(2)(b) also require a positive act by the relevant State body and are limited to State or alienated land. As such, reserved lands including those lands gazetted pursuant to the *APA* are not covered by s 62(2)(b).

The extent of the limited privileges afforded to Orang Asli under the *NFA*, once again, are dependent on the individual State, who can take these privileges away at any time.

[42] See above, 162.

2 *WCA*

Before 2010, the *Protection of Wildlife Act 1972* (Malaysia) ('*PWA*') was the principal act for, amongst other matters, the protection of wildlife. Previously, s 52 of the *PWA* allowed Orang Asli to engage in subsistence hunting activities without the need of a licence, permit or special permit required under the *PWA*. This right did not extend to totally protected animals (sch 1), totally protected wild birds (sch 3) and protected insects (sch 5) but covered hundreds of species of animals, wild birds and insects.

In 2010, the *PWA* was repealed and replaced by the *Wildlife Conservation Act 2010* (Malaysia) ('*WCA*'). Section 51(1) of the *WCA* reduced the number of species that *Orang Asli* can hunt for subsistence purposes from hundreds to only ten.[43] There does not appear to have been any effective consultation process with Orang Asli prior to the 2010 enactment. Subject to the courts expanding common law Orang Asli customary land rights to include customary hunting rights, the new provision potentially outlaws many Orang Asli customary laws, traditions and customs with regard to the use of wildlife.[44]

3 Other laws: Formal 'equality' for Orang Asli

This section discusses other laws affecting Orang Asli lands and resources with a view to determine if the current statutory scheme envisages the contextualised recognition and protection of Orang Asli interests. Despite the Federal Government's constitutional power to legislate for their 'protection, well-being and advancement', there are no provisions in these laws that protect Orang Asli and their special relationship with their customary lands. Orang Asli in occupation of their lands are treated no differently from other citizens under these laws, so much so that

[43] See Sixth schedule.

[44] For examples of customs relating to hunting and food taboos, see eg. P D R Williams-Hunt, *An Introduction to the Malayan Aborigines* (Government Press, 1952); Robert Dentan, *Some Senoi dietary superstitions: a study of food behaviour in a Malaysian hill tribe* (PhD Thesis dissertation, Yale University, 1965).

they, for the most part, appear legally 'invisible' as stakeholders to their lands and resources.

(a) Resource laws

Federal and State laws pertaining to National and State parks do not contain any provisions covering Orang Asli despite their occupation of some of these areas.[45] For example, s 9 of the *National Parks Act 1980* (Malaysia) empowers the executive to lease or permit the use or occupation of any land within a national park for limited purposes.[46] None of the purposes in s 9 encompass Orang Asli use or occupation of park areas. The *Fisheries Act 1960* (Malaysia), the statute governing maritime and estuarine fishing, does not cover Orang Asli separately, some of whom traditionally rely on fishing for subsistence and livelihood. 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 individual State with no provision for Orang Asli.[47] Section 40(b) of the *NLC* vests all minerals and rock material within the individual State that has not been specifically disposed of by the State Authority in the State Authority. It must however be noted that the Malaysian courts are yet to decide whether common law Orang Asli customary land rights relating to these resources are extinguished or impaired.[48]

(b) Land development laws

The *NLC*, the general statute that governs, amongst other matters, the alienation and conditions for use of land in Peninsular Malaysia, is silent on Orang Asli customary lands because lands held under customary tenure are exempted from the *NLC*[49] and

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[45] See eg. *National Parks Act 1980* (Malaysia).
[46] Under sub-sections (a)-(e), these purposes include: (a) the construction and maintenance of roads; (b) the construction and maintenance of airstrips; (c) the construction and maintenance of dams and reservoirs; (d) the construction and maintenance of hotels, rest houses, dwelling houses, buildings and works of public utility, where the State Authority considers any of these purposes to be necessary and in the interests of the development of the National Park in accordance with the object referred to in s 4; and (e) mining or prospecting in accordance with s 10.
[47] See eg. *Waters Act 1920* (Malaysia), s 3.
[48] See Yogeswaran Subramaniam, 'Common Law Native Title in Malaysia: Selected Issues for Forest Stakeholders' [2010] 1 *Malayan Law Journal* xv. For an examination of common law Orang Asli rights to resources, see Chapter 7 below (at 288-96).
[49] See above n 5 and accompanying text.

covered by the *APA* land protection system. However, s 62 of the *NLC* confers upon the State Authority a general power of reservation of State land for any public purpose. The effectiveness of using this general power to protect Orang Asli customary land rights is revisited in Section III below.

Orang Asli lands that have not been gazetted by the State Authority as reserves are thus 'invisible' as far as the land register is concerned. This invisibility allows the State Authority to create interests over these lands pursuant to the *NLC*. Admittedly, Orang Asli in this situation can institute common law claims but, as observed in Chapter 2, legal action has its own challenges for Orang Asli.[50] The *Land (Group Settlement Area) Act 1960* (Malaysia), the enabling law for the development of large land settlement and agricultural schemes, does not factor in Orang Asli land and resource interests that may be affected by these schemes.

The *Land Conservation Act 1960* (Malaysia), that prohibits the clearance of hills and short term crops without a permit does not consider traditional Orang Asli shifting cultivation practices within their customary lands. Equally, Federal legislation regulating land development and resource utilisation including the *Land Development Act 1956*, *Local Government Act 1976*, *Town and Country Planning Act 1972*, *Environmental Quality Act 1974*, *Water Services Industry Act 2006* and the various State Mining and Water Enactments neither envisage Orang Asli nor their customary lands.

C *Preliminary Observations*

There are several observations that can be made about the statutory provisions relating to Orang Asli land and resource rights introduced in Sections IIA and B above. First, the statutory rights and privileges conferred on Orang Asli in respect of their lands and resources are State-controlled and limited both in terms of scope and nature. For instance, Orang Asli are not granted rights but are only eligible for restricted privileges to forest produce under the *NFA*. The rights granted to Orang

[50] See above Chapter 2, 68-9 and below Chapter 7, 284-88.

Asli in respect of their customary lands are also weak. For example, the highest right of occupancy afforded to Orang Asli under the *APA* is no better than a tenant at will.[51] The strongest protection in respect of Orang Asli customary lands, an Aboriginal reserve, is granted at the discretion of the State Authority. An Aboriginal reserve can equally be revoked or varied at the sole discretion of the State Authority without explicit statutory protection. Second, statutory rights in respect of Orang Asli lands are terminable without express statutory redress against the individual State. The total dependence of Orang Asli on the State Authority in respect of their customary lands and resources is connected with the third observation. Laws affecting Orang Asli, such as the *APA*, vest decision-making power in the Federal and State Governments as opposed to Orang Asli. Such decision-making power brings to the fore another important issue, that is, the performance of the respective governments in exercising their power for the protection of Orang Asli customary lands under the *APA*. Government policies and practice in relation to their statutory power are examined during the evaluation process in Section III. Fourth, the limited land and resource rights granted under the statutory scheme pay little regard to Orang Asli laws, traditions, customs, institutions and land tenure systems. Fifth, other laws affecting Orang Asli lands and resources do not even envisage Orang Asli, let alone recognise their important role as stakeholders in decisions affecting their lands and resources.

III EVALUATION OF ORANG ASLI STATUTORY LAND RIGHTS

Having introduced the statutory land and resource rights provisions affecting Orang Asli and identified the key vulnerabilities associated with the existing statutory regime, this section evaluates these rights with reference to the *UNDRIP* Standards.[52] State policies and practice are used to highlight the practical effect of the existing statutory regime on Orang Asli customary lands and resources.

[51] For an explanation of the term 'tenant at will' in this regard, see above n 21 and accompanying text.
[52] See Appendix 2, 401.

The statutory power vested in the state (meaning the Federal Government (through its functionary, the *DOAD*) and the individual State Authority) to safeguard Orang Asli lands and resources underscores the importance of its performance in protecting these interests. The failure of the state to 'protect' Orang Asli lands would leave such lands and resources open to alternative utilisation. Dependent on the state to safeguard their land and resource interests, Orang Asli facing dispossession due to the failure of the state to protect such interests would have no legal recourse except to undergo the arduous court process of gaining recognition of their common law customary land rights or suing the state for possible breach of fiduciary duty.[53]

'Protection' within the context of the domestic statutory scheme would necessarily translate to the gazettal of Orang Asli lands. The following are the most recent and complete publicly-available statistics on officially acknowledged Orang Asli lands.

Table 5.1: Orang Asli Land Status as at December 2008

	Land Status	Area (hectares)
1	Gazetted lands	19,713.65
2	Approved for gazetting but not gazetted yet	30,849.86
3	Applications for gazettal	81,535.24
4	Orang Asli-owned lands (Housing lots/areas) (Individual titles)	1,148.40
5	Orang Asli-owned lands (Agricultural lands)	1,270.51
6	Occupied lands without formal application	6,642.63
7	Lands approved for Department of Orang Asli Affairs Use (Federal land)	121.50
8	Total	141, 481.88

Source: *DOA* (2008)[54]

[53] For the challenges faced by Orang Asli in succeeding in such claims, see below Chapter 7, 263-88.
[54] Jabatan Hal Ehwal Orang Asli [Department of Orang Asli Affairs] ('*DOA*'), *Data Maklumat Asas* [*Basic Information Data*] (Planning and Research Section, Department of Orang Asli Affairs, 2008) (translated from the Malay language by the candidate), 18. As at December 2010, the total number of Orang Asli lands increased to 145,379.67 acres comprising gazetted Orang Asli reserves and areas (20,670.83 hectares (14.21 per cent)), approved Orang Asli areas but not gazetted (26,288.47 hectares (18.08 per cent)), pending applications for reservation as Orang Asli areas (85,987.34 hectares (59.14 per cent)) and individually owned lands (1,424.31 hectares) (see *DOAD*, *Pelan Strategik Jabatan*

The officially acknowledged Orang Asli lands in Table 5.1 above could well increase if customary land rights are recognised in accordance with Orang Asli laws and customs.[55] Table 5.1 may not cover the full extent of Orang Asli customary lands as the status and area of officially acknowledged lands are not necessarily determined in accordance with Orang Asli laws and customs. Instead, these figures are determined by: (1) the *DOAD* when it classifies Orang Asli-occupied lands or applies for gazettal of Orang Asli lands; and (2) the individual State Authority when it approves and gazettes these lands. Notwithstanding this, these figures demonstrate that the state's performance in gazetting officially-acknowledged Orang Asli lands has been dismal.[56] Less than 15 per cent of officially-acknowledged Orang Asli customary lands (discounting individually owned lands (items 4 and 5) and Federal lands (item 7)) are gazetted.

Lands approved by the State Authority but not gazetted account for 22.2 per cent of officially-acknowledged Orang Asli lands. Following *Koperasi Kijang Mas v Kerajaan Negeri Perak*, this category of lands would enjoy the protection of Aboriginal reserves and areas under the *APA* without the need of a gazette notification.[57] In this case, the Court held that the lack of care or neglect of the State Authority in failing to gazette Orang Asli land after its approval for gazettal does not mean that such approval is no longer applicable.[58] However, the enforcement of rights on approved Orang Asli lands that have not been gazetted would be by way of the courts as these lands are not officially demarcated in the land registry and

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Kemajuan Orang Asli 2011-2015 [*Department of Orang Asli Development Strategic Plan 2011-2015*] (Planning and Research Section, Department of Orang Asli Development, 2011) (translated from the Malay language by the candidate), 55-6). It must be noted that these figures conflate aboriginal reserves, aboriginal areas and *NLC* reservations and do not provide a complete breakdown of the total figures. Of note is the *reduction* of total approved and gazetted Orang Asli lands from 50,563.51 hectares in 2008 to 46,959.3 hectares in 2010. As a complete breakdown of Orang Asli lands is not publicly available at the time of writing, the 2008 figures have been used for this thesis.

[55] See 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).

[56] For historical figures on the status of Orang Asli lands, see eg. Colin Nicholas, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia* (IWGIA, Center for Orang Asli Concerns, 2000), 32-40.

[57] *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] 1 CLJ 486, 487.

[58] Ibid 488. For a recent application of this principle, see *Khalip bin Bachik v Pengarah Tanah dan Galian Johor* [2010] Johor Bahru High Court Civil Suit No 24-3675-2008 (Unreported, Zakiah Kassim JC, 21 May 2012), [7.4].

surveyed maps. Under the *APA*, the remaining lands (63.6 per cent) occupied by Orang Asli would fall under the category of 'Aboriginal inhabited areas'. 'Aboriginal inhabited areas' merely confer statutory rights of permissive occupancy over prescribed forms of reserved lands that are, in any event, terminable at the will of the State.[59]

More recently, individual States have resorted to the general 'public purpose' land reservation provision contained in s 62 of the *NLC* to gazette Orang Asli lands.[60] Section 62 allows State land to be reserved by the State Authority for any public purpose. However, s 64 allows for the revocation of such reservation by the State Authority. This method of reservation is evaluated in Sections IIIA-C.

The *DOAD* often attributes the poor performance and delay in protecting Orang Asli land to the fact that land matters fall under the constitutional jurisdiction of the individual State.[61] The statutory power to gazette and degazette lands as either Aboriginal reserves or areas under the *APA* or reserved lands under the *NLC* is vested in the individual State Authority. The *DOAD*, a Federal Government agency, has no jurisdiction over the individual State when it comes to land matters. While this excuse may be acceptable to a degree, there is equally little doubt that the overall poor performance in protecting Orang Asli lands suggests a lack of priority and concerted will from both Federal and State Governments to protect Orang Asli customary lands under the statutory scheme.[62]

The status of Orang Asli land provides the necessary context for the evaluation conducted in Sections IIIA-C, particularly with regard to the effectiveness of protectionist legal provisions that empower the state to manage Orang Asli affairs.

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[59] *APA*, s 10.
[60] In March 2012, the Perak State Government reserved around 2,341 hectares of State land for the purposes of Orang Asli *settlements* pursuant to s 62 of the *NLC* (see Perak State Government, *Government of Perak Gazette* (7 March 2012) Vol 165 No 5 Add No 3).
[61] See eg. *DOAD*, *Department of Orang Asli Development Strategic Plan 2011*-2015, above n 54, 56-7.
[62] The Federal-State power divide was not an impediment to the passing of the proposed Orang Asli land titles policy by the National Land Council on 4 December 2009 (see above Chapter 4, 148-9).

A *Ownership, Management and Use of Indigenous Lands and Resources with Due Respect for Indigenous Laws, Traditions, Customs and Institutions*

The statutory regime affecting Orang Asli lands falls short of the first *UNDRIP* Standard that provides for 'ownership, management and use of lands and resources with due respect for Indigenous laws, traditions, customs and institutions'. Further, as will be demonstrated in Sections IIIA3-4 below, state policies and practice do not suggest any move towards the recognition of Orang Asli customary land rights in the manner envisaged by this *UNDRIP* Standard.

1 Ownership, management and use of lands

There is no statutory provision that provides for the *right* to collective *ownership* of Orang Asli customary lands and resources.[63] Instead, the *APA* provides for Aboriginal areas[64] and Aboriginal reserves[65] to be declared by the State Authority but only in respect of areas 'inhabited' by Orang Asli. The word 'may', contained in both ss 6(1) and 7(1) of the *APA* in respect of Aboriginal areas and Aboriginal reserves respectively, leaves the State Authority with discretion to make such a declaration. Similarly, s 62 of the *NLC* is a general land reservation provision that vests the power to reserve any State land for 'any public purpose' in the State Authority. Section 64 of the *NLC* also permits the revocation of any such reserved land.[66] Consequently, Orang Asli do not possess statutory 'rights' to their lands

[63] Collective land arrangements exist within the Orang Asli community. For an example of such an arrangement in respect of the *Semai* ethnic sub-group, see below Chapter 7, 289.
[64] *APA*, s 6(1).
[65] Ibid s 7(1).
[66] Under s 64 of the *NLC*, any proposed revocation of a reserve for any public purpose requires an inquiry to be held by the individual State Director of Lands and Mines where the State Authority shall consider beforehand any objections to a proposed revocation received by the State Director. The State Authority may accordingly revoke the reservation in accordance with the original proposal as published or modify the proposal in such respects as the State Authority may consider 'necessary or desirable'. While possibly providing some recourse to Orang Asli for the proposed revocation of a s 62 *NLC* reserve, s 64 does not grant express authority for the State Authority to cancel a proposed revocation and only empowers the State Authority to modify any proposal for revocation as it deems 'necessary or desirable'. Perhaps consistent with the 'public purpose' objective of s 62 of the *NLC*, there are also no express statutory rights to compensation for 'private' loss of reserved lands under s 62. Due to its relatively recent use, the courts are yet to interpret s 64 in an Orang Asli lands context.

unless the individual State exercises its discretion to gazette particular areas on a case-by-case basis. Assuming that such a right is granted, the lands are still not 'owned' by the Orang Asli community but merely temporarily set aside for the community at the will of the State Authority.

Within an Aboriginal reserve or Aboriginal area under the *APA*, Orang Asli possess rights of occupation, use of forest produce [67] and limited hunting activities.[68] There is also a degree of protection against the creation of interests in and over land within an Aboriginal reserve or area.[69] Once again, the protection that accompanies an Aboriginal reserve or Aboriginal area is relatively weak as it can be taken away by a gazette notification by the State Authority revoking the declaration of an Aboriginal reserve or area.[70]

Management and *use* of Indigenous lands, a key component of this *UNDRIP* Standard, are crucial for the realisation of Indigenous internal autonomy over their lands.[71] Consistent with the protectionist tendencies of the *APA*, Orang Asli are not granted the power to develop and control lands within Aboriginal reserves and areas in accordance with their own changing needs. The lack of such power suggests that Orang Asli do not possess statutory power to *manage* their lands. Further, the limited *use* of lands within Aboriginal reserves and areas does not afford due respect to Orang Asli laws, customs and traditions. This limitation potentially restricts Orang Asli laws, customs and traditions to static subsistence activities when, in reality, laws, customs and traditions evolve with time and the changing environment. Reservations under s 62 of the *NLC* do not confer any statutory rights of management and use of Orang Asli lands and resources.

The statutory power of the State Authority to declare and revoke Aboriginal reserves or areas under the *APA* or reserves under s 62 of the *NLC* without any corresponding obligation to afford 'respect to Orang Asli laws, traditions, customs and institutions' falls short of this *UNDRIP* Standard. Recognition and adjudication processes

[67] *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] 1 CLJ 486.
[68] See *WCA*, s 51(1).
[69] See *APA*, ss 7(2) and 6(2) respectively.
[70] See *APA*, ss 7(3) and 6(3) respectively.
[71] See above Chapter 3, 94-6.

relating to Indigenous lands, territories and resources should be carried out with due respect for and recognition of Indigenous laws, traditions, customs and tenure systems.[72] Under the current statutory scheme, neither the *DOAD* (as representative of Orang Asli interests) nor the State Authority are statutorily obliged to demarcate and gazette lands in accordance with Orang Asli laws, customs and tenure systems. Traditional Orang Asli decision-making institutions like the *Lembaga Adat* (in respect of the *Temuan* sub-ethnic group) are neither recognised nor have any rights conferred on them in the gazettal and revocation process. As such, the individual State, as holder of radical title of land, can determine the extent of 'recognition' of Orang Asli customary lands and revoke such recognition in accordance with its own priorities.

Three observations illustrate the impact of these theoretical shortfalls. First, less than 15 per cent of officially-acknowledged Orang Asli lands have been gazetted.[73] Under the statutory scheme, the remaining lands may be utilised by the State Authority as it deems fit subject to mandatory statutory compensation only in respect of loss of fruit and rubber trees located on State land (s 11). The remaining Orang Asli lands that are neither Aboriginal reserves nor Aboriginal areas fall within the residue 'Aboriginal inhabited place'. Unless their lands are gazetted as reserved land under s 62 of the *NLC*, Orang Asli who inhabit an 'Aboriginal inhabited place' that is located on 'Malay reservations, a reserved forest or a game reserve' possess statutory rights to reside on such lands subject to any conditions as the State Authority may prescribe.[74] These Orang Asli communities remain in these areas at the pleasure of the State Authority, who may order any such community to leave and remain out of any such area, and include the payment of compensation, as *may* be necessary.[75]

Second, degazettal of Orang Asli lands under the *APA* is not an uncommon phenomenon. For instance, 76 per cent of gazetted Orang Asli reserves were

[72] *UNDRIP*, arts 26 para 3 and 27. Further, see above Chapter 3, 98-100.
[73] See Table 5.1 above (at 168).
[74] *APA*, s 10(1).
[75] Ibid s 10(3).

degazetted between 1990 and 1999 in the State of Selangor alone.[76] Further, Government figures reveal that the total lands approved for gazettal and gazetted lands reduced from 56,743.29 hectares in 1990[77] to 50,563.3 hectares in 2008.[78] Even if the total 2,418.91 hectares of individually-owned Orang Asli land as at 2008[79] is taken into account to cater for alienation of these lands to Orang Asli during this period, there is still an overall decrease of 3,761.08 hectares. Despite possible fluctuations in the interim period due to other factors, including additional approvals, the overall decrease in lands approved for gazettal and gazetted lands suggests that these lands can lose their respective status.

The third observation is with regard to the state's view on common law customary land rights. Despite the recognition of common law Orang Asli customary land rights by the courts, the Federal and nearly all State Governments continue to regard Orang Asli as not having rights over their customary lands beyond statutorily gazetted lands. The example of the 2009 Kampung Sebir land dispute cited in Chapter 2 illustrates the point.[80] More than a decade after the common law recognition of Orang Asli customary land rights, state representatives from both the Federal and State Governments maintained that the *Temuan* community in Kampung Sebir had no customary land rights outside Aboriginal reserves. The state also continues to contest claims by Orang Asli for common law customary rights.[81]

The limited rights of occupation, management and use of lands possessed by Orang Asli when compared to the first *UNDRIP* Standard are aggravated by the poor record of the state in prioritising and protecting Orang Asli lands. The poor record

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[76] Colin Nicholas, *The Orang Asli and the Contest for Resources*, above n 56, 36-7. The *Pendor* case involves the degazettal of an Orang Asli reserve to facilitate a water transfer project (see [2011] Kuala Lumpur High Court Application for Judicial Review R2-25-292-2007 (Unreported, Mohd Zawawi Salleh J, 11 April 2011). For further examination of *Pendor*, see below Chapter 6, 229-30, 253.

[77] See *DOA*, *Data Tanah Orang Asli* [*Orang Asli Land Data*] (Department of Orang Asli Affairs, 1990) (translated from the Malay language by the candidate).

[78] See Table 5.1 above (at 168).

[79] Ibid.

[80] See above Chapter 2, 56.

[81] For current examples of the Federal and State governments' position in this regard, see eg. *Heerby bt Siam v Majlis Perbandaran Alor Gajah* (Melaka High Court Application for Judicial Review No 16NCVC1-10-2011); *Sangka bin Chuka v Pentadbir Tanah Daerah Mersing, Johor* (Johor Bahru High Court Application for Judicial Review No 25-27-02/2012). The candidate is co-legal counsel in both applications.

also calls into question the utility of the executive power wielded by the state over Orang Asli lands in delivering effective outcomes in respect of the recognition and protection of Orang Asli lands.

2 Ownership, management and use of resources

Short of this *UNDRIP* Standard, Orang Asli have not been granted statutory rights of *ownership* of resources. As observed in Section IIB, property in forest produce, water, mineral and rock materials are statutorily vested in the individual State. Of these surface and sub-surface resources, Orang Asli only possess limited statutory rights to use of forest produce and to hunting wildlife for subsistence purposes.

Under the *APA*, Orang Asli have limited rights to use of forest produce from within Aboriginal reserves and areas or lands approved for gazettal as such.[82] However, Aboriginal reserves and areas may be degazetted at any time.[83] Further, there are no statutory provisions for Orang Asli 'development' and 'control' of forest produce, a component of 'management' of resources under this *UNDRIP* Standard.[84] As observed in Section IIB1, Orang Asli residing in Aboriginal inhabited places have limited statutory privileges for the use of forest produce under the *NFA* but the granting of these privileges lies in the hands of State Authority or the State Director

[82] See *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] 1 CLJ 486, 487-8.
[83] See *APA*, ss 7(3) and 6(3) respectively.
[84] See above Chapter 3, 94-8. It should be noted that Criterion 3.1 of the 2011 *Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest)*, the national standard used for assessing forest management certification of natural forests, provides for Orang Asli control of forest management on their lands and territories unless delegated by free, prior and informed consent. In addition to statutory rights as a verifier for fulfilment of Criterion 3.1, Criterion 3.1 provides for verification through, amongst other verifiers, records of consultations, decisions of the civil courts relating to legal or customary rights within a Permanent Forest Reserve under the *NFA* and the *UNDRIP* generally. While this certification criteria is an incremental step towards the domestic application of international standards on Indigenous rights, its utility in the recognition and protection of Orang Asli customary land and resource rights appears limited. The certification criteria applies to natural forests within a forest management unit as designated by the individual State Executive. Accordingly, the criteria potentially excludes Orang Asli lands located on State land, National and State Parks, wildlife reserves, non-designated forest reserves or permanent reserved forests, non-gazetted Orang Asli lands and alienated land. The certification criteria also does not clarify the scope and extent of the application of the *UNDRIP*. The *UNDRIP* is also noticeably missing from other verification criterion for the protection of Indigenous rights. More importantly, the certification criteria does not have statutory force. The legal enforceability of the certification criteria against the Federal and State Government is yet to be tested in the Malaysian courts *(*See Malaysian Timber Certification Council*, Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest),* 6 December 2011 (entry into force 1 July 2012)).

of Forestry, as the case may be. These privileges do not cover reserved lands (for example, forest reserves), also occupied by Orang Asli. Against this *UNDRIP* Standard, these limitations severely curtail Orang Asli rights to manage and use forest produce in a manner deemed appropriate for their changing needs and in accordance with their laws, customs and traditions.

As for hunting rights, Orang Asli are individually permitted to hunt only ten species of wildlife for subsistence purposes.[85] As such, these rights also do not amount to 'management and use' of wildlife resources with 'due respect to Indigenous laws, customs, traditions and institutions'[86] as they are limited in scope (ten species of wildlife) and purpose (subsistence). Once again, the static nature of the limited subsistence rights and privileges afforded to Orang Asli in respect of forest produce and hunting activities do not pay due respect and recognition to the dynamism of Orang Asli laws, customs, traditions and institutions.[87]

3 The *1961 Policy*

In *Sagong 1*, it was determined that the 1961 *Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia* ('*1961 Policy*')[88] is still in force.[89] The *1961 Policy* is by far the most progressive in terms of recognition of Orang Asli customary land rights. However, it reflects then prevailing international attitudes towards Indigenous populations as peoples in need of protection pending their eventual integration into mainstream society through policies for their advancement.

This perspective is evidenced by the first paragraph of the *1961 Policy* that states, amongst other matters, that the 'Government should adopt suitable measures designed for their protection and advancement with a view to their ultimate integration with the Malay section of the community'. This paragraph bears some

[85] *WCA*, s 51(1).
[86] See above Chapter 3, 94, 97-100.
[87] Ibid 97-100.
[88] Ministry of the Interior, Federation of Malaya (1961).
[89] *Sagong 1* [2002] 2 MLJ 591, 619.

resemblance to *ILO Convention 107*,[90] the sole international instrument on international Indigenous rights prevailing at the time the *1961 Policy* came into force. Art 2 para 1 of *ILO Convention 107* states that 'Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries'. Despite providing for natural integration as opposed to artificial assimilation in principle (c), the *1961 Policy* is clear in its ultimate objective of absorbing the Orang Asli community into the Malay[91] section of the community.

As noted in Chapter 3, the paternalistic nature and assimilationist tendencies of *ILO Convention 107* has come under severe criticism for not recognising the rights of Indigenous communities to determine their own cultural and economic rights, participate in matters affecting them and better protection of their traditional land rights.[92] *ILO Convention 169*[93] has subsequently moved away from the 'assimilationist orientation' of *ILO Convention 107*. In effect, the integrationist approach of the *1961 Policy* does not reflect contemporary international standards on Indigenous rights, more particularly, the *UNDRIP*. Principles of self-determination and collective rights, central to the *UNDRIP*,[94] are neither covered nor envisaged by *ILO Convention 107*.

Notwithstanding this, there are several principles in the *1961 Policy* that provide for the recognition of Orang Asli rights. Principle (d) provides as follows:

> The special position of Aborigines in respect of land usage and land rights shall be recognised…every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically into line with other communities in this country. Aborigines will not be moved from their traditional areas without their full consent.

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[90] *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted 26 June 1957, ILO C 107 (entered into force 2 Jun 1959) ('*ILO Convention 107*').
[91] The 'integration' portion of the *1961 Policy* has subsequently been revised to include integration into wider society. Nonetheless, integration remains the ultimate objective of the *1961 Policy*. See above Chapter 2, 49-51.
[92] See above Chapter 3, 80-2.
[93] *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted 27 June 1989, ILO C 169 (entered into force 5 September 1991).
[94] See above Chapter 3, 88-92.

Principle (d) requires 'full consent' of Orang Asli before they are moved from their traditional areas. Compliance with the 'full consent' requirement is revisited in Section IIIB below. This paragraph recognises the 'special position' of Orang Asli customary land rights and *use* without articulating whether this 'special' position entails *ownership* and *management* of lands and resources.

In construing whether the *1961 Policy* includes the right to 'ownership' and 'management' of Orang Asli lands and resources, principle (d) should not be read in isolation. Principle (a) recommends that special measures should be adopted for the protection of Orang Asli institutions, customs, mode of life, persons and property, and labour. However, it is further clarified that 'such measures of protection should not be used as a means of creating or prolonging a state of segregation and should be continued only so long as there is need for special protection and only to the extent that protection is necessary'. It is noteworthy that the temporary nature of the special measures to protect Orang Asli is similar to art 3 para 2(b) of *ILO Convention 107* which states that special measures 'will be continued only so long as there is need for special protection and only to the extent that such protection is necessary'. This provision arguably is at odds with contemporary views that international Indigenous rights stand independently of temporary 'special measures' under international non-discrimination standards, specifically, the *International Covenant on the Elimination of All forms of Racial Discrimination*.[95]

Principle (b) states that the social, economic and cultural development of the Aborigines should be promoted with the ultimate objective of natural integration as opposed to artificial assimilation. Additionally, principle (c) provides for the retention of Orang Asli customs, political system, laws and institutions when they are not incompatible with the national legal system. Given the assimilationist and protectionist tendencies of the *1961 Policy* reflected in these principles, it is doubtful whether the 'special position' of Orang Asli land rights includes the right to own and manage Orang Asli lands in a manner envisioned by this *UNDRIP* Standard.

[95] See eg. Patrick Thornberry, 'Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 80-2.

Management in this sense includes the right to 'determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.[96] Further, the Policy is also silent on *ownership* of Orang Asli customary lands and resources.

The explanatory notes that accompany the Principles advocate sedentism and expressly discriminate against Orang Asli groups who observe shifting cultivation practices within fixed territories. Paragraph (iii)(b) of the notes of explanation to the *1961 Policy* states that shifting cultivation is to be replaced with some system of permanent agriculture. Nonetheless, the *1961 Policy* urges compassion and a degree of protection for Orang Asli in the process of implementation. Excerpts from the same paragraph are self explanatory in this regard:

> inducing these groups to adopt a more permanent form of agriculture… should be done without disrupting their traditional way of life, and the process may take a considerable amount of time.
>
> The basic requirements for settled agriculture are a sufficiency of food crops and a dependable cash crop, probably rubber, which is the least demanding of crops…Definite plans should therefore be formulated to provide the necessary land for this in place (*sic*) where the Aborigines are willing to settle. Further, although traditions should be observed and enforced settling avoided at all costs, no encouragement should be given to the perpetuation of the present nomadic way of life.'

The gentle persuasion to adopt a settled way of life may also function to reduce large tracts within Orang Asli customary lands left fallow. Given the power wielded by the *DOAD* and the State Authority in the statutory gazettal process, lands previously used for cyclical shifting cultivation may well be regarded as lands abandoned by Orang Asli and accordingly, not part of their customary land. Against this *UNDRIP* Standard, this potential outcome does not afford 'due respect for Orang Asli laws, customs and land tenure systems'.

Although appearing to recognise and, to a degree, protect Orang Asli customary land rights through the requirement of consent before removal from their traditional areas, the *1961 Policy* seems to be qualified by its paternalism and control over

[96] See *UNDRIP*, art 32 para 1.

Orang Asli and its underlying objective of integrating into mainstream society and 'developing' Orang Asli. The Policy also seems to possess an inherent dichotomy between the protection of Orang Asli customary land rights and the ultimate integration of Orang Asli into mainstream and Malay society. As will be observed in Section IIIA4 with regard to the recent proposed Orang Asli titles policy, policies for integrating Orang Asli socio-economically may be used by the Federal Government to indirectly rationalise the dispossession of Orang Asli from their customary lands. Admittedly, there are safeguards to the integration process. Principle (b) excludes the use of force or coercion as a means of promoting integration. The same paragraph provides that due account should be given to cultural, religious and social values of the Orang Asli and recognises the dangers involved in disrupting Orang Asli values and institutions. However, the mitigation of such difficulties does not derogate from the fact that the *1961 Policy* allows guarded intervention into Orang Asli customs, traditions and land tenure systems and the promotion of 'unforced' and 'non-coerced' integration of Orang Asli into mainstream society.

In sum, the *1961 Policy* falls short of the standards of ownership, management and use of Orang Asli lands and resources as envisioned by this *UNDRIP* Standard. Its paternalistic and assimilationist tendencies neglect Orang Asli self-determination over their lands and resources and seem more consistent with the outdated *ILO Convention 107*.[97] This is perhaps understandable considering that the Policy came into effect in 1961, a time when the *ILO Convention 107* was thought to reflect contemporary statist views on Indigenous rights.

4 Respect for Indigenous laws, traditions, customs and institutions

Subsequent Federal Government policies and practice reveal a distinct lack of 'due respect for Orang Asli laws, traditions, customs and institutions', a key component of this *UNDRIP* Standard. Three illustrations are used to support this proposition,

[97] The drawbacks of *ILO Convention 107* in this respect have been discussed in Chapter 3 (at 80-2).

namely: (1) Orang Asli decision making institutions; (2) the *DOAD*'s stand with regard to customary lands; and (3) the 2009 proposed Orang Asli land titles policy.

While there may be some autonomy afforded to *Batin* (the statutorily recognised Orang Asli headman) under s 4 of the *APA* 'in matters of aboriginal custom and belief', extensive power is granted to the Federal Executive to determine Orang Asli decision-making institutions. First of all, s 4 only provides for recognition of a homogenous Orang Asli leadership institution (*Batin*) when other traditional forms of Orang Asli decision-making institutions and processes exist.[98] As will be observed below, the non-recognition of other traditional decision-making institutions has had a damaging effect on Orang Asli representivity in general.

In Section IIA1, it was observed that s 16 of the *APA* confers the ultimate power of appointment, selection and removal of *Batin* upon the Federal Executive. The conferral of this power fails to appreciate and recognise other traditional and communal Orang Asli decision-making institutions and processes.

Additionally, confirmation of the *Batin*'s appointment requires adherence to the *DOA*[99] *Guidelines for the Appointment of Orang Asli Village Heads*.[100] The *DOA* itself has never been headed by an Orang Asli. Non-Orang Asli also make up a majority of *DOA* employees.[101] Under these guidelines, the potential candidate for the position of *Batin* is required to:

- be male and literate in the Malay language;
- live in a community having no fewer than 100 members;
- pass a background character test conducted by the *DOA*; and
- follow directives and orders of the *DOA* upon appointment.

[98] For examples of such institutions, see above, 154.
[99] In January 2011, the *DOA* changed its name to the *DOAD* ('Department of Orang Asli Development').
[100] For commentary, see Nicholas, Engi and Teh, *The Orang Asli and the UNDRIP*, above n 15, 114-5.
[101] *DOA*, *Basic Information Data*, above n 54, 2.

From the above requirements, it is arguable that the power conferred on the Federal Executive to determine the *Batin* discriminates against women and smaller Orang Asli communities (possessing less than 100 members) and excludes illiterate candidates who may be knowledgeable in community laws, traditions and customs. The application of the *APA* and these guidelines have been said to render many *Batin* subservient to the *DOA*.[102]

The *DOA* has also set up Village Development and Safety Committees ('*JKKK*') in Orang Asli villages to manage, among other things, development activities. To complicate matters, the *Batin* and the Chairman of the *JKKK* of one village may not necessarily be the same person.[103] There is also potential for the abuse of such powers. Citing three separate incidents involving different Orang Asli villages, Nicholas has observed that the Government, depending on its agenda, selectively recognised the *Lembaga Adat* (*Temuan* customary council), *JKKK* and *Batin* as legal representatives in order to extract cooperation, consent and compliance from the affected Orang Asli community.[104]

The result of the imposition of these leadership institutions upon Orang Asli has been varied. In some circumstances, customary institutions are retained and decide internal matters while the *Batin* manages external matters.[105] In other circumstances, *Batins* have been accused of exercising control over members of the village in accordance with the wishes of the *DOA* rather than defending the rights of village members and their customs and traditions.[106] These differing situations do not mean that Orang Asli villages no longer observe and practise their laws, traditions and customs. Many villages still do, albeit in a manner that is transformed in accordance

[102] See eg. Nicholas, Engi and Teh, *The Orang Asli and the UNDRIP*, above n 15, 115.
[103] Dato' Yahya Awang (ex-Director-General of the Department of Orang Asli Affairs), '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).
[104] 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).
[105] Bah Tony Williams-Hunt, 'West Semai Customary Laws' (Presentation at SUHAKAM Workshop on Indigenous Legal Systems of the Orang Asli, Kuala Lumpur, 23 March 2011).
[106] Tijah Yok Chopil, 'Pemeliharaan Adat Orang Asli' [Preservation of Orang Asli Customs] (Presentation at SUHAKAM Workshop on Indigenous Legal Systems of the Orang Asli, Kuala Lumpur, 23 March 2011) (translated from the Malay language by the candidate).

with the impact of changes in their external environment. However, the continued operation of Orang Asli customary institutions is difficult due to a number of factors, including the lack of legal recognition and protection of such institutions, Federal Executive intervention in Orang Asli institutions, pro-*DOA Batin*, religious conversion, the influence of modern culture and allegations of divide-and-rule against the *DOA*.[107]

The *DOA* (since 2011, the *DOAD*), the Federal department charged with the responsibility of administering Orang Asli affairs, has shown little indication that it intends to prioritise the recognition and protection of Orang Asli customary lands. Judicial recognition of common law customary rights has not deterred the *DOAD* and State Authorities from maintaining their position that Orang Asli only possess rights to their customary lands that are recognised under statute.[108] The core areas of the recent *DOAD* Plan do not include the recognition of customary land rights,[109] suggesting that such recognition is not a high priority. In terms of Orang Asli lands, the *DOAD* Plan encourages and emphasises individual ownership of land for economic activity through the issuance of individual titles and orderly resettlement.[110] In Chapter 2, the effectiveness of land-related schemes implemented by the state to mainstream Orang Asli socio-economically was questioned.[111] It was suggested that state control and implementation of these land-use policies has not resulted in socio-economic progress for the Orang Asli community. With regard to the *UNDRIP* Standards, these schemes have neither conferred upon Orang Asli ownership, management and use of their customary lands nor afforded adequate protection for these lands from loss to and encroachment by third parties.

The Proposed Orang Asli titles policy passed by the National Land Council[112] on 4 December 2009 ('Proposed Policy'),[113] after Malaysia's votes in favour of the

[107] Ibid.
[108] *DOAD*, *Department of Orang Asli Development Strategic Plan 2011-2015*, above n 54, 56-7. For instances of the Federal Government's position, see above, 174.
[109] *DOAD*, *Department of Orang Asli Development Strategic Plan 2011-2015*, above n 54, 73-133. The core areas have been reproduced in Chapter 2 (see above, 47-8)
[110] *DOAD*, *Department of Orang Asli Development Strategic Plan 2011-2015*, above n 54, 68-9.
[111] See above Chapter 2, 56-64.
[112] The National Land Council includes representatives from all individual States in Peninsular Malaysia. For the composition of the National Land Council, see above Chapter 4, 148.
[113] For Orang Asli objections to this policy, see below, 188-9.

UNDRIP in 2006 and 2007, is inconsistent with the first *UNDRIP* standard of ownership, management and use of customary lands with due respect to Indigenous laws, traditions, customs and institutions. Under the Proposed Policy, each Orang Asli head of household is to be 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.[114] While potentially granting individual ownership to Orang Asli, the Proposed Policy neglects to recognise and respect any form of customary *communal* land arrangements. Furthermore, the provision of Federal Government-appointed external contractors for land development and the limited use of Orang Asli land for residential purposes and selected plantations under the Proposed Policy deny Orang Asli the right to *management* and *use* of their lands, and consequently, their right to self-determination. Further, *management* and *use* of Orang Asli customary lands for limited purposes pre-determined by non-community members do not afford 'due respect' to Orang Asli laws, traditions, customs and institutions.

In addition to contributing to the potential loss of Orang Asli customary lands,[115] the Proposed Policy prohibits Orang Asli receiving benefits under the Policy from making any claim for customary land rights. Such limitations do not acknowledge, let alone respect and recognise Orang Asli laws, customs and traditions.

5 Recognition of Orang Asli customary land rights as a starting point

An examination of the Malaysian statutory regime, state policies and practice reveals a distinct lack of recognition for Orang Asli customary land rights. The *APA* and s 62 of the *NLC* (if used by the State Authority to reserve Orang Asli lands) vest powers relating to Orang Asli lands in the State Authority rather than Orang Asli. In comparison, Indigenous internal autonomy is vital for the effective recognition of their lands and resources under the First *UNDRIP* Standard.

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[114] *DOAD*, *Department of Orang Asli Development Strategic Plan 2011-2015*, above n 54, 57-9.

[115] A conservative estimate based on officially-acknowledged Orang Asli customary lands shows that Orang Asli stand to lose at least 60 per cent of these lands if the Proposed Policy were to be implemented (see above Chapter 2, 62).

Except for rights within Aboriginal reserves and areas that are subject to the overarching power of the State Authority, the only statutory privileges and rights to resources that Orang Asli possess are within the limited confines of the *NFA* and *WCA* discussed in Section IIB1-2 above. Despite providing the strongest semblance of recognition of Orang Asli customary land rights, the *1961 Policy* carries the ultimate objective of integrating, albeit carefully, Orang Asli into mainstream society. This objective can be used to undermine the effective recognition of Orang Asli customary land rights if such recognition is viewed as an obstacle to the integration of Orang Asli into mainstream society. A practical illustration of this view can be gleaned from the Proposed Policy and the *DOAD* Plan that have moved away from the provisions for the protection of Orang Asli customary lands contained in the *1961 Policy* and towards mainstreaming Orang Asli through individualised titles for growing cash crops.

There is little doubt that the predicament faced by Orang Asli is made possible by the legal power that the state possesses over them. The power wielded by the state over Orang Asli and their lands and resources has been adverse to the recognition of Orang Asli customary land rights. Both the *DOAD* and the individual State Authority, given the task of applying for gazettal of Orang Asli lands and gazetting Orang Asli lands respectively, have failed to gazette these lands in a comprehensive manner. Federal and State Government practice has also been to contest the recognition of common law Orang Asli customary land rights.[116] Finally, the Federal Government persists with homogenised land development policies that contribute to the loss of Orang Asli customary lands and do not accord due respect to Orang Asli laws, traditions, customs and institutions. While vesting power over Orang Asli lands in the Federal or State Government may not be necessarily adverse to Orang Asli interests, the low percentage of gazetted Orang Asli lands and the continued frequency of degazettal and encroachment over Orang Asli lands under the current statutory scheme suggests that it may be time to consider empowering Orang Asli over their customary lands through formal recognition of rights to these lands.

[116] A notable exception is the Selangor State Government that: (1) amicably settled the *Sagong* claim recognising common law Orang Asli customary land rights and; (2) established a task force to look into the gazetting of Orang Asli reserves, disputed Orang Asli lands, a new policy on Orang Asli land and reform of legislation relating to Orang Asli and their lands (see Shaila Koshy, 'Armed to help the Orang Asli', *The Star* (Malaysia), 3 May 2009).

In sum, the statutory rights that vest power over Orang Asli and their lands in the Federal Executive and State Authority respectively are at odds with the concepts of ownership, management and use of Indigenous lands and resources in this *UNDRIP* Standard that focus on Indigenous self-determination.

B *Free, Prior and Informed Consent ('FPIC') and Consultation in Matters Affecting Indigenous Lands and Resources*

The limited statutory rights of ownership, management and use possessed by Orang Asli over their lands and resources do not necessarily mean that the state does not consult with Orang Asli on matters affecting their lands and resources in practice.[117] However, the effectiveness of the process of consultation employed merits consideration.

Free, Prior and Informed Consent ('FPIC') and consultation involve informed, timely and objective decision-making by the Indigenous community. It has been demonstrated in Section IIA1 that the Federal Executive is the ultimate decision-making institution for Orang Asli. This legal position implies that Orang Asli lack the capacity to make decisions concerning their affairs, including those relating to their lands. In many ways, Federal policies and practice involving Orang Asli have echoed this sentiment. The *1961 Policy*, while mindful of Orang Asli welfare and the need to protect Orang Asli lands, customs, institutions and languages, nevertheless charts the course for the 'development' and ultimate 'integration' of the Orang Asli into mainstream society. Akin to the paternalistic approach of *ILO Convention 107*,[118] the *1961 Policy* fails to include Orang Asli in decisions about their future and matters that affect them.

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[117] For example, the 2011 *Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest)*, provides for free, prior and informed consent and considers consultation with Orang Asli before Orang Asli delegate control over natural forests within an individual State-designated forest management unit (Malaysian Timber Certification Council, above n 84, 11, 13). For the limitations in the scope and applicabilty of these standards, see above n 84.

[118] For similiarities between *ILO Convention 107* and the *1961 Policy*, see above Section IIIA3, 176-80.

Consistent with 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. As will be observed later in this section, state policies and practice seem to have ignored this part of the Policy. Policies for the Regroupment (for example, *RPS*) and islamisation of Orang Asli have been introduced by the Federal Government but with little or no Orang Asli consultation. As demonstrated in Chapter 2, *RPS* and like schemes have resulted in the loss of Orang Asli customary lands and have not been very successful in propelling Orang Asli into mainstream Malaysian society socio-economically.[119] Islamisation, if implemented without due respect to Orang Asli culture, may result in the eventual discarding and emasculation of Orang Asli traditions and customs and, consequently, the loss of customary lands and identity.[120]

The 10 strategies of the *DOA* outlined in its 1993 Programme Summary[121] and its strategy as displayed on its official web site[122] are silent on FPIC and consultation in matters affecting Orang Asli and their lands and resources. The strategies focus on socio-economic development, welfare, modernisation and Regroupment and include express provision for Orang Asli 'participation'. The subsequent *DOAD* Plan[123] seems to introduce empowerment of Orang Asli through amongst other things, human capital development strategies,[124] economic activities and entrepreneurship,[125] and the preservation of traditional knowledge.[126] Based on the *DOAD*'s strategy to 'foster' development of Orang Asli NGOs and 'identify suitable candidates' for government programs,[127] it would appear that paternalism still pervades what are regarded as 'participative' strategies.

[119] For an evaluation of *RPS*, see above Chapter 2, 57-64.
[120] In respect of Orang Asli islamisation policy, see above Chapter 2, 52-4.
[121] *DOA*, *Ringkasan Program* [Programme Summary] (1993) (translated from the Malay language by the candidate).
[122] Official Portal *DOAD*, *Strategy*, 22 June 2012 <http://www.jakoa.gov.my/web/guest/strategi>.
[123] *DOAD*, *Department of Orang Asli Development Strategic Plan 2011-2015*, above n 54.
[124] Ibid 74-88
[125] Ibid 89-108.
[126] Ibid 122-30.
[127] Official Portal *DOAD*, *Strategy*, 22 June 2012 <http://www.jakoa.gov.my/web/guest/strategi>.

The Orang Asli protest against the Proposed Policy[128] provides an illustration[129] of the complexities involved in implementing FPIC and consultation when the state introduces policies affecting Orang Asli lands. Against the Proposed Policy, Orang Asli delivered a protest memorandum to the Prime Minister on 17 March 2010. The memorandum stated, among other matters, that the Proposed Policy would destroy the communal lifestyle practised by Orang Asli, was in violation of Malaysia's commitments to the *UNDRIP* and the fundamental liberties of Orang Asli under the *Malaysian Constitution*, and was formulated and passed without prior consultation with the Orang Asli community.[130]

Soon after the protest, a workshop held between Federal Government representatives and several Orang Asli groups for the 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.[131] In the meantime, the *DOA* embarked on '*roadshows*' to consult with Orang Asli on the Proposed Policy through community meetings.[132] These '*roadshows*' have been criticised as being more for the purpose of convincing Orang Asli to accept the Proposed Policy.[133] Subsequent discussions for the refinement of the Proposed Policy have mainly involved the *DOAD*, other Government agencies and the respective executive arms of the individual States but included very few Orang Asli participants.

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[128] As for a discussion on the Policy itself and the protest, see above Chapter 2, 61-3, 70-1.

[129] This illustration is originally taken from the candidate's article in Yogeswaran Subramaniam, 'Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia' (2011) 19(2) *Waikato Law Review* 44, 63-4. The illustration has since included more recent developments. For other examples of the state's failure to obtain FPIC and consult with Orang Asli, see eg. Nicholas, Engi and Teh, *The Orang Asli and the UNDRIP*, above n 15, 115-22.

[130] *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*] (17 March 2010) (translated from the Malay language by the candidate), 5.

[131] Bah Tony Williams-Hunt, 'FPIC and Orang Asli Lands in Peninsular Malaysia', above n 55.

[132] The *DOAD* has officially used the term 'roadshow' to describe the consultations conducted with Orang Asli regarding the Proposed Policy between 18 February 2010 and 24 March 2010 (see *DOAD*, *Department of Orang Asli Development Strategic Plan 2011-2015*, above n 54, 58).

[133] Bah Tony Williams-Hunt, 'FPIC and Orang Asli Lands in Peninsular Malaysia', above n 55. This approach clearly goes against the standards of consultation adumbrated in Chapter 3 (see above, 101-3, 107-8).

In August 2011, the Federal Government announced that it was finalising the Orang Asli land titles policy after consulting the relevant stakeholders.[134] The Peninsular Malaysia Orang Asli Network ('*JKOASM*'), among other Orang Asli groups, responded that they had never been consulted since the initial meeting with the Federal Government after the 17 March 2010 protest.[135] In contrast, the Federal Government maintained that it had consulted with Orang Asli NGOs.[136] While this may be true, the response from the Orang Asli suggests that a substantial number of Orang Asli had not been consulted and that there was no FPIC from Orang Asli. Consultations done by way of '*roadshows*' for the purposes of convincing Orang Asli to accept the Proposed Policy and the discussion of selective issues with selected Orang Asli as claimed by Orang Asli fall short of 'effective consultation' by this *UNDRIP* Standard.[137] Without clear articulation of the FPIC and consultation process in a manner acceptable to Orang Asli, conflicts such as this are likely to arise again.

Policies aside, dispossession of Orang Asli from their lands has occurred for a number of reasons.[138] Those reasons include the expansion of public infrastructure such as airports, highways, dams and roads, agricultural development schemes and public and private land development. Despite principle (d) of the *1961 Policy* that requires the full consent of Orang Asli before they are moved from their traditional areas, effective FPIC and consultation with Orang Asli on matters affecting their lands is often cast aside in favour of other interests and agendas.[139] For instance, the

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[134] 'Isu pemberimilikan tanah Orang Asli selesai dibincang' ['Orang Asli land titles issue discusssions completed'], *Utusan Malaysia* (Malaysia), 16 August 2011 (translated from the Malay language by the candidate).

[135] See eg. Shaila Koshy, 'Land policy not well-received', *The Star* (Malaysia), 24 August 2011; Nigel Aw, 'Orang Asli vow to protest if gov't takes land', *Malaysiakini* (Malaysia), 26 August 2011 <http://www.malaysiakini.com/news/174223>.

[136] 'Dakwaan President Majlis Peguam tidak benar – Hassan Malek' ['Allegations of Bar Council President untrue – Hassan Malek'], *Utusan Malaysia* (Malaysia), 26 August 2011 (translated from the Malay language by the candidate).

[137] For elaboration of FPIC and Consultation, see above Chapter 3, 100-8.

[138] For examples and accompanying details, see above Chapter 2, 54-64.

[139] For a more comprehensive account of these occurences, see eg. Nicholas, *The Orang Asli and the Contest for Resources*, above n 56, 113-126; 148-52. More recently, the Chairman of SUHAKAM, the national human rights institution, disclosed that SUHAKAM received 287 complaints of loss and encroachment of land from Orang Asli during the ongoing National Inquiry on Indigenous Land Rights (see Hasmy Agam, 'Opening Address' (Speech delivered at the Public Hearings of the National Inquiry on Indigenous Land Rights, Kuala Lumpur, 27 March 2012).

leading case of *Sagong*, examined in Chapter 6, involved the deprivation of Orang Asli lands without the 'full consent' of the Orang Asli claimants.[140] However, recent Malaysian case law suggests judicial reluctance in implying a legal obligation to engage in prior consultation with Indigenous communities affected by public infrastructure projects unless there is express provision for such rights.[141]

The current statutory regime, policies and practices affecting Orang Asli lands and resources, do not nurture an environment suitable for the development of FPIC and consultation envisaged in the *UNDRIP* Standards. Burger pragmatically observes that the successful implementation of *UNDRIP* rights of Indigenous FPIC and participation requires effective domestic legal and institutional mechanisms and structures to be in place.[142] There do not appear any such mechanisms or structures for FPIC and consultation under the current statutory scheme affecting Orang Asli lands and resources. FPIC and consultation of Orang Asli, seen as a matter of moral obligation at its best, has taken a backseat to different state measures towards perceived Orang Asli advancement and/or for the greater good of the nation. Orang Asli are also largely viewed as being incapable of making decisions affecting their affairs. Compounding matters, the state's management of these affairs has resulted in allegations of impropriety in its conduct of consultations with Orang Asli.

C *Just Redress for Dispossession*

The *UNDRIP* Standard of 'just redress for dispossession' suggests that any dispossession of Indigenous lands should be compensated by: (1) restitution of lands and resources or the option of return of lands, and if this is not possible; (2) compensation by way of land, territories and resources of equal size, quality and legal status; or (3) just, fair and equitable monetary compensation; or (4) other appropriate redress.[143]

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[140] See Sagong 1 [2002] 2 MLJ 591, 597-9. Further, see below Chapter 6, 214.
[141] See eg. *Bato Bagi* [2011] 6 MLJ 297, 306 (Zaki CJ), 336 (Raus FCJ).
[142] See Julian Burger, 'The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 48-51.
[143] See *UNDRIP* arts 10, 28 para 2, and 32 para 3.

Statutory rights of redress for dispossession of Orang Asli lands under the *APA* are meagre in comparison to those contained in the *UNDRIP*.[144] Pursuant to s 11 of the *APA*, mandatory compensation is payable by the State Authority for a claim for loss of fruit or rubber trees established by any Orang Asli residing on State land which is alienated, granted, licensed or disposed. However, this provision is not applicable to reserved land as s 5 of the *NLC* excludes reserved land from the definition of 'State land'. As such, Orang Asli communities residing on Aboriginal reserves, Malay reservations, lands reserved under s 62 of the *NLC* and forest or game reserves would appear to be excluded from s 11 unless they can establish claims to fruit or rubber trees over areas categorised as *State* land. In respect of the deprivation of the rights to remove forest produce and hunting rights, both the *NFA* and *WLC* respectively do not afford compensation.

Section 12 of the *APA* states that the State Authority *may* grant compensation to any Orang Asli or Orang Asli community where any Aboriginal area or Aboriginal reserve is excised or any land within an Aboriginal area is alienated, granted, leased or otherwise disposed of or of any right or privilege in any Aboriginal area or Aboriginal reserve is revoked wholly or in part. Depending on the State Authority, compensation under s 12 *may* be applicable to Aboriginal inhabited places by virtue of ss 10(3) and 10(4) of the *APA*.

The statutory remedies available for loss of Orang Asli lands fail to meet the *UNDRIP* Standards. In addition to the lack of statutory rights to restitution of Orang Asli lands and resources, there are no statutory rights to compensation by way of replacement lands, territories and resources of 'equal size, quality and legal status'.[145] Further, statutory compensation for loss of Orang Asli lands under the *APA* does not provide for 'just, fair and equitable' monetary compensation[146] and fails to provide for 'mandatory' compensation. Against this *UNDRIP* Standard, there are *no* statutory mechanisms for adjudicating disputes relating to loss of Orang Asli lands that give due respect and recognition of Orang Asli laws, traditions, customs

[144] For discussion of these limited rights, see above, 156-7, 158, 159-60.
[145] *UNDRIP*, art 28 para 2.
[146] Ibid art 28 para 1.

and tenure systems.[147] The weak statutory redress available to Orang Asli for dispossession of their lands and resources can be linked to the earlier point that Orang Asli possess statutory interests in land no better than that of a tenant at will.[148] Similar to the legal position of a tenant at will, Orang Asli land interests granted pursuant to the *APA* can potentially be terminated unilaterally by the State Authority (ss 6(3) and 7(3)) and without legal recourse (s 12). The only exceptions would be a successful legal claim for *common law* customary land rights and/or a breach of fiduciary duty. Adequate compensation for loss of Orang Asli lands under the current statutory scheme would therefore be a matter of compassion rather than rights.

In the cases of *Sagong* and *Adong*, the Malaysian courts have sought to remedy the lack of relative redress available to Orang Asli. Consistent with art 13 of the *Malaysian Constitution* that provides for 'adequate compensation' for the 'acquisition or use' of property, the Court of Appeal in *Sagong 2* read s 12 purposively to include mandatory adequate compensation.[149] The Court further extended such compensation to ungazetted Orang Asli lands by virtue of common law Orang Asli customary land rights and the fiduciary duty owed by the state to Orang Asli.[150] In *Adong 1*, the Court held that *Jakun* hunting and foraging lands were property rights within art 13 of the *Malaysian Constitution*.[151] The Court went on to hold that adequate compensation was payable to the claimants pursuant to art 13(2) of the *Malaysian Constitution* and assessed compensation taking into account, among other considerations, loss of livelihood suffered as a result of the expropriation of lands claimed.[152] In this case, the *DOA* proposed a sum of RM560,000 (USD186,667) as compensation for the loss of 53,273 acres of *Jakun* ancestral land.[153] The Court ended up awarding the sum of RM26.5 million

[147] Ibid arts 26 para 3 and 27.
[148] See above nn 20-1 and accompanying text.
[149] *Sagong 2* [2005] 6 MLJ 289, 309-11 314. Art 13 of the *Malaysian Constitution* reads: Rights to property (1) No person shall be deprived of property save in accordance with law. (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.
[150] *Sagong 2* [2005] 6 MLJ 289, 311.
[151] *Adong 1* [1997] 1 MLJ 418, 433-4. For the text of art 13, see above n 149.
[152] *Adong 1* [1997] 1 MLJ 418, 433-4. For an examination of this method of assessment, see below Chapter 6, 255-6 and Chapter 7, 314-5.
[153] Colin Nicholas, *The Orang Asli and the Contest for Resources*, above n 56, 152.

(USD8.83 million) as compensation.[154] Subject to future interpretation of s 12 of the *APA* and the development of common law Orang Asli customary land rights by the Malaysian courts,[155] 'adequate' monetary compensation would appear to be payable for acquisition or use of Orang Asli lands, both under the *APA* and the common law.

In spite of the courts' recognition of Orang Asli rights to adequate compensation for loss of their property rights pursuant to art 13(2) of the *Malaysian Constitution*, there has been no indication of any change in policy regarding compensation for loss of Orang Asli customary lands. The *1961 Policy* and other subsequent *DOA* programmes and strategies also mention nothing about redress for dispossession of lands. This position is consistent with the state's stand that Orang Asli have no proprietary rights to their lands.

In conclusion, 'redress' as envisaged in this *UNDRIP* Standard is beyond the scope of current legislation or policies affecting Orang Asli lands and resources. As far as the state is concerned, compensation for dispossession of Orang Asli lands and resources is confined to the limited circumstances in the *APA* (compulsory only in respect of loss of fruit and rubber trees on State land)[156] unless there is a successful claim in the courts. The courts have observed that the redress for dispossession available under the *APA* is constitutionally flawed.[157] In *Sagong 2*, Gopal Sri Ram JCA held in relation to s 12:

> A statute which confers a (*sic*) discretion on an acquiring authority whether to pay compensation or not enables that authority not to pay any compensation. It is therefore a law that does not provide for the payment of adequate compensation and that is why s 12 will be unconstitutional. Such a consequence is to be avoided, if possible, because a court in its constitutional role always tries to uphold a statute rather than strike it down as violating the Constitution…

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[154] *Adong 1* [1997] 1 MLJ 418, 436.

[155] The doctrine of common law Orang Asli customary land rights is examined in Chapters 6 and 7 below.

[156] With regard to state practice, Alias and Daud observe that '[i]n the negotiation for compensation with state governments, the JHOEA [the *DOA*] is guided by uniform and standard claim (*sic*); however, the success of the claim depends on the generosity of the [*individual*] state government. This is because, compensation for Orang Asli native lands are in principle based solely on an 'ex gratia', due to the absence of laws governing compensation claim (*sic*) by the Orang Asli except, for compensation of productive trees under sections 11 and 12 of the Aboriginal Peoples Act, 1954' (see Anuar Alias and Md Nasir Daud, *Saka: Adequate Compensation for Orang Asli Land* (Universiti Tun Hussein Onn Malaysia, 2011), 87).

[157] See *Sagong 2* [2005] 6 MLJ 289, 309-10, 314; *Adong 1* [1997] 1 MLJ 418, 434.

> How then do you modify s 12 to render it harmonious with Article 13(2)? I think you do that by reading the relevant phrase in section 12 as 'the State Authority shall grant adequate compensation therefor.' By interpreting the word 'may' for 'shall' and by introducing 'adequate' before compensation, the modification is complete.

Despite paying the compensation awarded in *Adong*, there has been no executive or legislative step towards rectifying the statutory position, possibly indicating a lack of political will to do so. Until such time, just compensation for dispossession of Orang Asli lands and resources in the form decided in *Adong* and *Sagong* will likely remain contentious and subject to dispute.

IV CONCLUSION

The existing statutory protection afforded in respect of Orang Asli customary land and resource rights falls well short of the *UNDRIP* Standards and is in need of reform. Constitutionally, there is no impediment to laws for better recognition and protection of Orang Asli customary land rights. However, the evaluation of the existing statutory framework on Orang Asli land and resource rights based on *UNDRIP* Standards reveals that each 'law' (in a broad sense) possesses differing philosophies for Indigeneous well-being,[158] possibly due to their different starting points. On the one hand, existing legislation and policies affecting Orang Asli, driven by outmoded protectionist and integrationist tendencies, envisage an Orang Asli society incapable of making its own decisions while, on the other hand, the *UNDRIP* Standards reflect contemporary views on Indigenous rights that emphasise internal autonomy and equal respect for Indigenous peoples.

Consequently, the *UNDRIP* Standards, with limited exceptions, are beyond the vocabulary of current legislative framework, policies and practice affecting Orang Asli land and resource rights. Should there be the political will to do so, any reform of the statutory regime with regard to the *UNDRIP* would additionally have to overcome policy, practical, institutional and structural obstacles that permeate the administration of Orang Asli.

[158] See Subramaniam, above n 129, 64.

Chapter 6

COMMON LAW ORANG ASLI CUSTOMARY LAND RIGHTS: RATIONALE, CONTENT, PROOF AND VULNERABILITY

I INTRODUCTION

Malaysian courts have recognised the rights of Orang Asli to their ancestral and customary lands through the common law since 1996.[1] These rights are independent of any statutory rights belonging to Orang Asli. The doctrine of common law Orang Asli customary land rights (also referred to as 'the common law doctrine') does not owe its existence to any statute or executive declaration.[2]

This chapter charts the common law doctrine as a precursor to its evaluation against the *UNDRIP* Standards in Chapter 7. Section II introduces the rudiments of the doctrine of common law Indigenous title as recognised in selected jurisdictions before proceeding to examine landmark Malaysian cases on the common law doctrine. After analysing the rationale for the recognition of common law Orang Asli customary land rights, Section III elaborates three key features of the doctrine as developed by the Malaysian courts, namely, its content, method of proof and vulnerability. This categorisation facilitates the comparison between the doctrine and the *UNDRIP* Standards in Chapter 7. However, the common law doctrine is at an early stage of development. In view of the Malaysian courts' heavy reliance on common law jurisprudence on Indigenous title,[3] particularly from Australia and Canada, Section IV argues for the dependence on the relevant laws from these jurisdictions to aid the evaluation process.

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[1] See *Adong 1* [1997] 1 MLJ 418; *Adong 2* [1998] 2 MLJ 158 (Court of Appeal, Malaysia); *Sagong 1* [2002] 2 MLJ 591; *Sagong 2* [2005] 6 MLJ 289 (Court of Appeal, Malaysia).

[2] *Sagong 1* [2002] 2 MLJ 591, 612; *Nor Nyawai 2* [2006] 1 MLJ 256, 270 (Court of Appeal, Malaysia). However, the common law Orang Asli rights to their ancestral and customary lands and the statutory rights of the Orang Asli under the *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*') are complementary in that they can exist in tandem (*Adong 1* [1997] 1 MLJ 418, 431; *Adong 2* [1998] 2 MLJ 158, 163 (Court of Appeal); *Sagong 1* [2002] 2 MLJ 591, 615).

[3] The term 'Indigenous title' is explained in Section IIA below (at 196-7).

II COMMON LAW ORANG ASLI CUSTOMARY LAND RIGHTS

As background to the elaboration of the common law doctrine in Section III, this section outlines the doctrine of Indigenous title before examining the landmark Malaysian decisions impacting upon the development of the common law doctrine. As a starting point, Section IIA clarifies the terminology used in this chapter and Chapter 7. Section IIB provides an overview of the doctrine of Indigenous title, focusing on its basis and basic tenets in selected jurisdictions. Malaysian decisions instrumental to the development of the common law doctrine are examined in Section IIC.

A *Terminology*

'Indigenous title' for the purposes of Chapters 6 and 7 is a generic term referring to the acknowledgment and recognition of Indigenous land rights by national courts through the development of the common law, based upon pre-existing Indigenous rights to land under their customary laws that have survived colonisation or a change in sovereignty. The resultant doctrine has become a legal mechanism for the respect and recognition of Indigenous land rights across a number of jurisdictions including the United States, Canada, Australia, New Zealand, Malaysia, South Africa, Botswana and Kenya. The names used to describe this concept differ from jurisdiction to jurisdiction. Terms used include 'native title' in Australia, 'Aboriginal title' in Canada and 'Indian title' in the United States.

In Malaysia, the states of Sabah and Sarawak use the term common law native customary rights ('NCR')[4] while the courts in Peninsular Malaysia have used

[4] NCR is also recognised by statute in Sabah and Sarawak pursuant to the *Land Ordinance* (Sabah) and the *Land Code 1958* (Sarawak) respectively. For further reading on statutory NCR in Sabah, see eg. Juprin Wong-Adamal, 'Native Customary Law Rights in Sabah' (1998) 25 *Journal of Malaysian and Comparative Law* 233. As for Sarawak, see eg. Ramy Bulan, 'Statutory Recognition of Native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place' (2007) 34 *Journal of Malaysian and Comparative Law* 21.

Aboriginal peoples' (Orang Asli) customary land rights, in respect of Orang Asli. The different terminology is possibly due to the separate definitions and treatment of 'natives' of Sabah and Sarawak and 'aborigines of the Malay peninsula' under the *Malaysian Constitution*.[5] Specific reference to NCR or Orang Asli customary land rights, as the case may be, depends on the context in which they are used. There have been no Indigenous title claims involving Peninsular Malaysia Malays so their customary land rights do not form part of the analysis in Chapters 6 and 7. Specific terminology, for example, 'native title' in Australia, is used when referring to the law of the relevant jurisdiction. The term 'native' refers to native peoples of Sabah and Sarawak unless the context requires otherwise. 'Orang Asli' mean the Aborigines of Peninsular Malaysia. Specific groups of Indigenous peoples are italicised.

Finally, the discussion herein is confined to common law rights. Hence, statutory schemes for the recognition and regulation of Indigenous rights and treaty rights in other jurisdictions will not be the focus of Chapters 6 and 7 unless they are considered pertinent to the development of the common law in Malaysia. 'Common law' when used in a Malaysian context means 'common law of England'[6] 'in so far as it is in operation' in Malaysia.[7]

B *Indigenous Title: An Introduction*

The Malaysian courts have applied the doctrine of Indigenous title in developing their own jurisprudence on NCR and Orang Asli customary rights. For a better understanding of these developments, an introduction to Indigenous title and its basic tenets from selected jurisdictions would be helpful.

[5] See arts 160(2) and arts 161A(6); *Sagong 1* [2002] 2 MLJ 591, 621. For an examination of their distinct constitutional status, see above Chapter 2, 34-8.
[6] *Consolidated Interpretation Acts of 1948 and 1967* (Malaysia), s 66.
[7] See *Malaysian Constitution*, art 160(2). It is also not mere precedent but 'existing law' under art 162 of the *Malaysian Constitution* (see *Madeli 2* [2008] 2 MLJ 677, 690).

1 Common law origins

The origins of the concept of Indigenous title can be found in common law jurisdictions. The three Supreme Court decisions of the United States in the first half of the 19th century, often referred to as the Marshall trilogy, are the most well-known early decisions on Indigenous title. In *Johnson*,[8] a case involving competing interests in land between a title granted by the United States Government and a title purchased from an Indian tribe, Chief Justice Marshall concluded that discovery gave title to European colonisers to the exclusion of all other European nations seeking to assert dominion over the lands that ultimately comprised the United States.[9] Despite diminishing the interest of the Indians, their rights to occupy land, their legal and just claim to retain possession and their rights to use land according to their customs continued to be recognised.[10] When the United States were formed, American states ceded to the Federal Government their territories, 'occupied by numerous and warlike Indians', along with the exclusive right to extinguish Indian title and grant land.[11] On the facts of the case, however, the attempted transfer of title was not recognised due to the United States Government's exclusive right to acquire the Indian title of occupancy.[12]

In *Cherokee Nation v Georgia*,[13] Marshall CJ reiterated that Indian tribes 'hold an unquestioned right to the land they occupy, until that right shall be extinguished by a voluntary cession' to the Government.[14] Notwithstanding this, the action of the *Cherokee* Nation against the State of Georgia challenging the State's attempt to assert jurisdiction over and annex the Nation's reservation failed as the *Cherokee* Nation was not a foreign state within the relevant United States law authorising suits between foreign and domestic states. In concluding that the law of Georgia had no force or effect within the boundaries of the *Cherokee* Nation's reservation, Marshall CJ held in *Worcester v Georgia*[15] that discovery 'could not affect the rights of those

[8] 1823 LEXIS 293.
[9] Ibid 39.
[10] Ibid 40.
[11] Ibid 57.
[12] Ibid 80.
[13] 30 US 1 (1831).
[14] Ibid 17.
[15] 31 US 515 (1832).

already in possession…as Aboriginal occupants'[16] and the Cherokee Indians 'possessed a full right to the lands they occupied until that right should be extinguished by the United States, with their consent'.[17] The Marshall trilogy recognised the continued rights of Indians to enjoy their traditional lands without formal state recognition, until those rights are extinguished with their consent.

2 Basis in the Commonwealth: The doctrine of continuity

With the increased expansion of the British empire in the second half of the 19th century, the Privy Council, as the highest appellate body in the empire, had to grapple with the status of Indigenous land rights post-colonisation. Under British colonial laws, there were two doctrines on the effect of the acquisition of territory on customary land rights, namely, the doctrine of continuity and the doctrine of recognition. The doctrine of continuity presumes that, in the absence of express confiscation or expropriatory legislation, private property rights held under local law would continue after a change in sovereignty.[18] A change in sovereignty by any means would not affect the acquired property rights of the inhabitants.[19] Pre-existing property rights would accordingly survive a change in sovereignty and continue to be valid and enforceable. Conversely, the doctrine of recognition presumes that only rights that the Crown consented to would be recognised and enforceable under the new regime.[20] Therefore, rights to land had to be given formal recognition by the new power as a change in sovereignty abolished all existing rights.

At least in Africa, the early and mid 20th century saw the Privy Council ruling in favour of the doctrine of continuity. In *re Southern Rhodesia*, Lord Sumner held, with respect to rights of private property in a conquered territory, 'it is to be presumed, in the absence of confiscation or of subsequent expropriatory legislation,

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[16] Ibid 544.
[17] Ibid 560.
[18] See eg. *Re Southern Rhodesia* [1919] AC 211, 233; *Amodu* [1921] 2 AC 399, 407, 410; *Bakare Ajakaiye v Lieutenant-Governor, Southern Provinces* [1929] AC 679; *Guerin v The Queen* [1984] 2 SCR 335, 378.
[19] See *United States v Percheman* 7 US 87 (1832) (Supreme Court, United States).
[20] See eg. *Secretary of State for India v Bai Rajbai* (1915) LR 42 IA 229, 237; *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357, 360; *Asrar Ahmed v Durgah Committee* (1947) 34 AIR (PC) 1, 3-4.

that the conqueror has respected them and forborne to diminish or modify them'.[21] In *Amodu*,[22] the Privy Council held that 'a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners' and the 'general terms of a cession (of the settlement of Lagos that subsequently formed part of the colony of Southern Nigeria) are prima facie to be construed accordingly'.[23] It was also held that the title to such land may be communal depending on a 'study of the history of the particular community and its usages in each case'[24] and compensation for loss of such lands was on the basis of full ownership for land occupied.[25] *Amodu* is authority for the proposition that traditional customs and usages rather than English law would be applicable in assessing the nature of rights possessed by an Indigenous community. Compensation for loss would be assessed on the basis of full ownership.

The notion that customs, not English common law concepts of property, must control the determination of rights under Indigenous title was endorsed in the Privy Council case of *Oyekan*.[26] In addition to laying down the principle that the 'British Crown intends that the rights of property of the inhabitants are to be fully respected',[27] Lord Denning held that disputes between inhabitants as to property rights will 'be determined according to native law and custom, without importing English conceptions of property law' except where 'English conceptions of individual ownership have superseded previous conceptions'.[28]

3 Common law recognition of Indigenous title

As will be observed in Sections IIA and IVA below, the recognition of the post-colonial doctrine of Indigenous title in Canada and Australia forms the basis of the recognition of the common law doctrine in Malaysia. This section functions to introduce the basic tenets of the Canadian and Australian doctrines.

[21] In *re Southern Rhodesia* (1919) AC 211, 233.
[22] [1921] 2 AC 399.
[23] Ibid 407.
[24] Ibid 403-4.
[25] Ibid 411.
[26] [1957] 2 All ER 785.
[27] Ibid 788.
[28] Ibid.

In Canada, early recognition of Aboriginal title can be found in the case of *St Catherine*.[29] In acknowledging the 'Indian' interest, the Privy Council, however, described it as a 'personal and usufructuary right, dependent on the goodwill of the Sovereign'.[30] It was not until 1973 when the Supreme Court held that Aboriginal rights could exist through recognition at common law. In this case, the appellants, officers of the *Nishga* Indian Tribal Council, brought an action against the Attorney-General of British Columbia claiming that Aboriginal title to certain lands had never been extinguished. The action failed and the *Nishga* appeal to the Court of Appeal was dismissed. The appeal to the Supreme Court was also dismissed by a majority of 4:3. However, three Supreme Court judges forming the majority did not dismiss the possibility that Aboriginal title may exist at common law.[31] Hall J, on behalf of the three dissenting judges agreed that Aboriginal title continued to exist and the respondent had not proven extinguishment.[32] According to his Honour, such a title did not depend on treaty, executive order or legislative enactment.[33]

In the landmark case of *Delgamuukw*[34] where the claim was for Aboriginal title over tracts of land in British Columbia, Lamer CJ and the majority of the Canadian Supreme Court (Cory, McLachlin and Major JJ concurring) held, amongst other matters, that:

(1) Aboriginal title was of a *sui generis* nature in that its features can only be fully explained by both Aboriginal and common law perspectives.[35]
(2) Aboriginal title was inalienable but this did not render it a non-proprietary interest.[36]
(3) The source of the title was from the prior occupation of Canada pre-British sovereignty and the relationship between common law and pre-existing sources of law.[37]

[29] (1888) 14 AC 46.
[30] Ibid 54-5.
[31] *Calder* (1973) 34 DLR (3d) 145, 156, 167 (Judson J).
[32] Ibid 208-10.
[33] Ibid 200.
[34] [1997] 3 SCR 1010.
[35] Ibid [112]
[36] Ibid [113].
[37] Ibid [114].

(4) Aboriginal title was a collective right and as such, could not be held or managed individually but instead, collectively.[38]

(5) Aboriginal title was a right to exclusive occupation of land for a variety of purposes which need not be limited to Aboriginal practices, customs and traditions integral to distinct Aboriginal culture.[39] However, land held under Aboriginal title could be used for any purpose so long as its use was not 'irreconcilable' with the nature of the particular group's attachment to the land.[40]

(6) Aboriginal *rights* constituted 'practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right' but the conduct of the practice, customs and traditions did not constitute occupation and use of the land sufficient to support a claim for Aboriginal *title*.[41] Aboriginal title at common law was recognised before 1982 and subsequently protected under s 35(1) *Constitutional Act 1982* (Canada).[42] Section 35 provides that '…existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.' Although Aboriginal title was a species of 'Aboriginal rights' recognised by s 35(1), it was distinct from other Aboriginal rights because it arose where the connection of a group with a piece of land 'was of central significance to their distinctive culture'.[43]

(7) Aboriginal title was a right to the land[44] that could be established by proof of continuous occupation of lands at the time the Crown asserted sovereignty over those lands.[45] Aboriginal rights required proof that the activity protected by the right was an element of practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.[46] The need to establish land as centrally significant to the culture of the claimants was unnecessary in a claim for Aboriginal title as this element was implicitly

[38] Ibid [115].
[39] Ibid [117].
[40] Ibid.
[41] Ibid [138].
[42] Ibid [137].
[43] Ibid.
[44] Ibid.
[45] Ibid [144].
[46] Ibid [140].

satisfied by the requirement of continuous occupation and the maintenance of a substantial connection with the land.[47]

(8) Both physical presence of occupation on the land and recognition of rights to the land according to Aboriginal perspectives were relevant to the proof of occupancy.[48] Factors relevant in determining occupation to establish Aboriginal title include the group's size, 'manner of life, material resources, and technological abilities, and the character of lands claimed'.[49] Proof of uninterrupted occupation pre-sovereignty was not required, only that the community maintained its connection with the land.[50]

(9) As a result of the fiduciary duty owed by the Crown to Aboriginal peoples and the constitutional protection afforded to Aboriginal rights under s 35(1) of the *Constitution Act 1982*, the Federal and Provincial governments can only *infringe* existing Aboriginal rights by satisfying the test of justification.[51] Having noted that the fiduciary duty varied depending on the legal and factual context and certain legislative objectives could justify infringement,[52] Lamer CJ observed that participation and consultation of Aboriginal people and compensation may be considered in determining whether the infringement of Aboriginal title is justified.[53] Prior to the enactment of s 35(1) in 1982, the Federal Government could *extinguish* Aboriginal rights by manifesting a clear and plain intent to do so.[54] It was held that Provincial Governments had no jurisdiction to extinguish Aboriginal rights before 1982.[55] However, rights extinguished prior to 1982 were not revived by s 35.[56]

(10) In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is infringed.[57]

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[47] Ibid [150]-[151].
[48] Ibid [148].
[49] Ibid [149].
[50] Ibid [153].
[51] Ibid [160]-[161].
[52] These objectives include the development of agriculture, forestry, mining and hydroelectric power, general economic development, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations (see *Delgamuukw* [1997] 3 SCR 1010, [165]).
[53] *Delgamuukw* [1997] 3 SCR 1010, [167]-[169].
[54] *R v Sparrow* (1990) 1 SCR 1075, 1099.
[55] *Delgamuukw* [1997] 3 SCR 1010, [172]-[183].
[56] Ibid [172].
[57] Ibid [169].

> The amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.[58]

As for Australia, the development of native title was equally unique. In *Cooper v Stuart*, the Privy Council concluded that New South Wales (forming part of what is now Australia) was unoccupied and without settled laws at the time it was acquired by Britain through settlement.[59] This legal fiction, which ignored the legal implications of the existence of Aboriginal peoples occupying Australia at the time of acquisition of sovereignty, was perpetuated[60] and used, amongst other reasons, to deny Aboriginal rights to traditional land at common law.[61] In the landmark case of *Mabo No 2*, the denial of Indigenous land rights based on the enlarged notion of *terra nullius*[62] (that covered inhabited territories not matching Western perceptions of civilization) was held to have 'no place in the contemporary law' of Australia.[63] Brennan J, on behalf of a plurality that included Mason CJ and McHugh J, applied Privy Council decisions such as *Amodu* in holding that native title represented a burden on the Crown's title.[64]

Native title was described by Brennan J in the following terms:

> Native title has its origin in and is given its content by traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[65]

His Honour went on to state several general characteristics of native title, the most salient of which were that:

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[58] Ibid.
[59] (1889) 14 AC 286, 291 (Lord Watson).
[60] See eg. *Williams v A-G (NSW)* (1913) 16 CLR 404, 439 (Isaacs J) (High Court, Australia).
[61] See *Millirpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Supreme Court, Northern Territory).
[62] *Terra Nullius* allows acquisition of sovereignty by settlement or occupation as the land is deemed unoccupied. The enlarged notion of *terra nullius* treated Australia as unoccupied despite the presence of Aboriginal peoples in Australia at the time the British arrived in 1788.
[63] *Mabo (No 2)* (1992) 175 CLR 1, 41-2 (Brennan J).
[64] Ibid 52.
[65] Ibid 58.

(1) Native title is not alienable under the common law because it is not derived from the common law.[66]

(2) Native title continues to exist 'where a clan or group has continued to acknowledge the laws and (as far as practicable) observe the customs based on the traditions of that clan or group whereby their traditional connexion with the land has been substantially maintained'.[67]

(3) Native title 'may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by evidence, whether proprietary or personal or usufructuary in nature and possessed by a community, group or an individual'.[68]

(4) Changes in the laws and customs do not affect the entitlement to communal native title so long as an identifiable community continued with members identified by each other as belonging to the community, living under its laws and customs.[69]

(5) Native title could also be extinguished by clear and plain executive or legislative action or the making of Crown grants inconsistent with native title, to the extent of that inconsistency.[70]

In respect of compensation, the High Court held by a majority of 4:3 that native title could be extinguished without consent or compensation and without legislative authority. Mason CJ, McHugh and Brennan JJ disagreed with Deane, Toohey and Gaudron JJ, that in the absence of clear and unambiguous provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages.[71] Dawson J was seen as in agreement with Brennan J since his Honour considered native title, where it exists, as a form of permissive occupancy at the will of the Crown.[72] Deane and Gaudron JJ concluded that inconsistent grants by the executive were effective to extinguish native title but would involve a wrongful infringement by the Crown of the rights of

[66] Ibid 59.
[67] Ibid 59-60.
[68] Ibid 61.
[69] Ibid.
[70] Ibid 64, 68-70.
[71] Ibid 15 (Mason CJ and McHugh J).
[72] Ibid.

native titleholders.[73] Toohey J declared that the power of extinguishment does not mean such a power could be exercised in a manner differently from other interests in land.[74]

In both jurisdictions, the concept of Indigenous title has seen substantial evolution within their respective domestic settings. Aspects of these developments, where relevant to the thesis, will be examined in Chapters 6 and 7. Having said this, it is common ground that Indigenous title consists of *sui generis* Indigenous rights to land that continue to survive by virtue of prior Indigenous occupation of these lands unless extinguished by the state. Malaysia has developed similar jurisprudence in this regard.

C *Landmark Decisions on Common Law Orang Asli Customary Land Rights*

This section examines landmark decisions that have developed the common law doctrine in Malaysia.[75] The decisions have been set out in chronological order so that the development of the doctrine can be observed in logical sequence. This section also functions to highlight the Malaysian courts' repeated reference to Australian and Canadian jurisprudence in developing the doctrine domestically. These observations lend credence to the arguments in Section IV for the reliance on relevant Australian and Canadian laws during the evaluation process in Chapter 7.

[73] Ibid 89-90, 101.
[74] Ibid 193-4.
[75] These cases have also been discussed in other literature. See eg. S Robert Aiken and Colin H Leigh, 'Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia' (2011) 45(4) *Modern Asian Studies* 825, 842-66; Yogeswaran Subramaniam, 'Common Law Native Title in Malaysia: Selected Issues for Forest Stakeholders' [2010] 1 *Malayan Law Journal* xv, xvii-xxvi; Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Rights in Sarawak* (SUHAKAM, 2007), 60-74; Francis Alexander McKeown, *Common Law Native Title in Malaysia: Judicial Constraints upon the Recognition of Proprietary Interests in Indigenous Lands* (Project paper submitted in partial fulfilment of the requirement for the degree of Bachelor of Laws, Griffiths University, 2007/8), 8-61.

1 *Adong bin Kuwau v Kerajaan Negeri Johor ('Adong 1')*

Adong 1[76] was the first decision that recognised common law Orang Asli customary land rights. In *Adong 1*, the State of Johor acquired land for the construction of a dam. Fifty two plaintiffs, heads of the families of the *Jakun* people, commenced action against the Johor State Government and the Director of Land and Mines, Johor seeking declarations and claiming relief for the alienation of their traditional and ancestral lands which they depended on to forage for their livelihood. The defendants did not rebut most allegations except to state that the plaintiffs were no longer staying in the area claimed and that they were not prevented from entering the area. The issue before the High Court[77] was the rights of the plaintiffs to their traditional lands under the common law, statutory law and the *Malaysian Constitution*.

The Court held that the *Jakun* community in the Sungai Linggiu area had common law customary rights over their traditional and ancestral lands which they depended on to forage for their livelihood. Applying established Indigenous title jurisprudence from United States, Canada, Australia, New Zealand and other Commonwealth jurisdictions,[78] Mokhtar Sidin JCA held that common law Orang Asli customary land rights had survived from the time of the Malay sultanates as 'some areas were occupied by the Aboriginal peoples without any disputes as to their occupation of their lands'.[79] The subsequent introduction of the Torrens land registration system by the British colonial administration[80] that vested land in the State did not take away the plaintiffs' freedom 'to roam about these lands and harvest the fruits of the jungle' just like 'their forefathers had done'.[81]

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[76] *Adong 1* [1997] 1 MLJ 418.
[77] In Malaysia, the High Court is the court of first instance in respect of the relief sought in these landmark cases, namely, civil claims including declaratory relief relating to land and judicial review of administrative decisions. The appellate court is the Court of Appeal and the second highest court in the hierarchy below the Federal Court, the apex court. For further reading on the court structure in Malaysia, see eg. Sharifah Suhanah Syed Ahmad, *Malaysian Legal System* (Malayan Law Journal, 2nd edn, 2007), 143-56.
[78] *Adong 1* [1997] 1 MLJ 418, 426-30.
[79] Ibid 429.
[80] For commentary on the domestic application of the South Australian Torrens land registration system in the Malay states in the late 19th century, see eg. J E Sihombing, *National Land Code: A Commentary* (Malayan Law Journal, 2nd edn, 1992), 23-35.
[81] *Adong 1* [1997] 1 MLJ 418, 430.

In respect of the common law rights of Orang Asli to their land, Mokhtar Sidin JCA went on to hold as follows:

> My view is that, and I get support from the decision of *Calder*'s case and *Mabo*'s case, the Aboriginal peoples' *rights over the land* include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, *but not to the land itself* in the modern sense that the Aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in the *Calder* case at p 156 where His Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...'. I would agree with this ratio and rule that in Malaysia the Aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the Aboriginal people would be entitled to this right of their forefathers.[82] *[Emphasis added]*

The Court's decision emphasised that Orang Asli customary rights to their lands at common law were 'rights over the land' as opposed to 'rights to the land'. From the above passage, Mokhtar Sidin JCA appears to have come to this conclusion based on the assumption that the inalienability of native title meant the interest of Orang Asli amounted to no more than a usufructuary right of occupation and use of the land.[83]

This assumption contradicts the three main cases relied upon in the judgment, namely *Mabo No 2*,[84] *Calder* and *Amodu*. In *Mabo No 2*, the notion of inalienability or usufructuary rights as an impediment to the recognition of proprietary rights was

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[82] Ibid 430.

[83] In the subsequent Orang Asli case of *Sagong 2*, submissions before the Court of Appeal were on the basis that *Adong* had to do with usufructuary rights while *Sagong* concerned a 'proprietary interest in what is State Land' (*Sagong 2* [2005] 6 MLJ 289, 302). As will be observed in Sections IIIB and C, the Court of Appeal in *Sagong 2* did not explain the content of the common law doctrine except to say that 'the precise nature of such customary title depends on practices and usages of each individual community'. It therefore becomes necessary to explain the *Adong 1* conceptualisation of common law Orang Asli customary land rights as a 'right over the land' in the light of the Indigenous title jurisprudence applied in the decision.

[84] (1992) 175 CLR 1. See *Adong 1* [1997] 1 MLJ 418, 429, 430. The judgment initially cites *Mabo v Queensland* (1986) 64 ALR 1 where the Australian High Court remitted the *Mabo* claim to the Queensland Supreme Court for the determination of factual issues. However, it is clear from a reading of the judgment that the decision referred to is actually *Mabo No 2* and the citation was a mistake.

rejected by the majority.[85] In the same decision, Toohey J considered an inquiry into whether native title was a proprietary or personal right an unnecessary exercise,[86] and irrelevant to its proof.[87] The final order in *Mabo No 2* issued by the High Court was also consistent with a communal proprietary title in that the *Meriam* people were entitled 'against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'.[88]

The judgment of Judson J in *Calder*[89] was also cited with approval and applied in *Adong 1*.[90] The passage in *Calder* quoted by Mokhtar Sidin JCA expressly states:

> it does not help *one in the solution of this problem to call it [Indian title] a personal or usufructuary right.* What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.[91] *[Emphasis and explanation added]*

Earlier in the same judgment, Judson J explained that the phrase 'personal or usufructuary right' had been taken from the Privy Council decision in *St Catherine*.[92] However, Judson J pointed out that the Privy Council did not express a conclusive view on the precise quality of Indian rights.[93] Hall J in *Calder* held that the Aboriginal plaintiffs had Indigenous concepts of ownership that were capable of recognition by the common law,[94] and criticised the trial judge's attempt to measure them against conventional common law elements of ownership. Subsequent Canadian jurisprudence has clarified that inalienability does not deprive Aboriginal title of its proprietary nature.[95]

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[85] *Mabo No 2* (1992) 175 CLR 1, 51-2 (Brennan J), 89 (Deane and Gaudron JJ).
[86] Ibid 195.
[87] Ibid 187.
[88] Ibid 217.
[89] (1973) 34 DLR (3d) 145.
[90] *Adong 1* [1997] 1 MLJ 418, 428.
[91] *Calder* (1973) 34 DLR (3d) 145, 156.
[92] (1888) 14 AC 46.
[93] *Calder* (1973) 34 DLR (3d) 145, 152.
[94] Ibid 190.
[95] *Delgamuukw* [1997] 3 SCR 1010, [113] (Supreme Court, Canada).

In support of recognising the common law doctrine, Mokhtar Sidin JCA also cited, amongst others, the oft-cited Privy Council decision in *Amodu*.[96] The relevant section of the passage cited by His Lordship is repeated here:

> That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the sovereign to one which only extends to comparatively limited rights of administrative interference.[97]

In *Amodu*, Viscount Haldane cautioned:

> [I]n interpreting the native title to [the] land…[t]here is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.[98]

Mokhtar Sidin JCA appears to have committed the same error by ruling that Orang Asli did not have a right to the land 'in the modern sense that the Aborigines can convey, lease out, rent out the land or any produce'.[99] His Lordship also seems to have compared 'modern' notions of alienability to Orang Asli rights over their land in holding that Orang Asli possess only rights of use and occupation to the land. This approach fails to appreciate the concept of inalienability in the context of Indigenous title. Inalienability is a *sui generis* characteristic of Indigenous title that does not render the interest non-proprietary.[100]

Further, inalienability of Indigenous title has historical underpinnings. The concept of inalienability of Indigenous title does not reflect the limited nature of the interest in land but rather: (1) the lack of such traditions and customs in many Indigenous cultures; and (2) policy reasons for the protection of Indigenous owners from commercial exploitation.[101] Inalienability also functioned to protect Aboriginal lands in North America (and subsequently Canada only) from private purchasers and other

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[96] (1921) 2 AC 399.
[97] Ibid 409-10.
[98] Ibid 403.
[99] *Adong 1* [1997] 1 MLJ 418, 430.
[100] *Delgamuukw* [1997] 3 SCR 1010, [113].
[101] Stephen Gray, 'Skeletal Principles in Malaysia's Common Law Cupboard: The Future of Indigenous Native Title in Malaysian Common Law' [2002] *LAWASIA Journal* 99, 112.

competing Colonial interests until the British Crown purchased those lands from the relevant first nation.[102] Mokhtar Sidin JCA, having applied Commonwealth jurisprudence on Indigenous title, proffered no explanation for departing from *Mabo No 2*, *Calder* and *Amodu* when describing Orang Asli customary rights as a right of use and occupation.

Until this decision, Orang Asli were presumed not to possess any rights over their customary lands except for those limited rights explicitly recognised under the *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*').[103] In this regard, the Court held that the provisions of the *APA* did not extinguish Orang Asli rights at common law as 'their rights under common law and statute have to be looked at conjunctively, for both these rights are complementary'.[104] Despite holding that the plaintiffs' hunting and foraging rights were not 'to the land', the Court held that these rights under both common law and statutory law are rights to property protected under art 13 of the *Malaysian Constitution*,[105] thus entitling the plaintiffs to 'adequate compensation' for loss of such property.[106] His Lordship then assessed compensation for loss of the claimants' lands having regard to deprivations of: (i) heritage land; (ii) freedom of habitation or movement; (iii) forest produce; and (iv) future living of the plaintiffs, immediate family and descendants.[107]

The Court of Appeal in *Adong 2* dismissed the appeal against the decision and fully endorsed the views expressed by Mokhtar Sidin JCA.[108] Gopal Sri Ram JCA, on behalf of the Court added that the learned judge's views accord 'with jurisprudence established by our courts and by decisions of the courts of other jurisdictions that

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[102] 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, 2007), 10-1.
[103] For these rights, see above Chapter 5, 155-60, 166-7.
[104] *Adong 1* [1997] 1 MLJ 418, 431.
[105] Art 13 reads as follows: Rights to property (1) No person shall be deprived of property save in accordance with law. (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation. For an examination of art 13 in relation to contextualised protection for Orang Asli customary land rights, see above Chapter 4, 132-45.
[106] *Adong 1* [1997] 1 MLJ 418, 432-4.
[107] Ibid 436.
[108] See *Adong 2* [1998] 2 MLJ 158, 164.

deserve much respect'.[109] His Lordship went on to cite three decisions from the Malaysian superior courts to hold that a deprivation of livelihood amounted to a deprivation of life under art 5 of the *Malaysian Constitution*.[110] The remedy for deprivation of livelihood by the payment of adequate compensation pursuant to art 13 of the *Malaysian Constitution* was accordingly upheld.[111] Subsequently, the Federal Court dismissed the appeal by the defendants but did chose not to provide written grounds for their decision.[112]

2 *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd ('Nor Nyawai 1')*

Nor Nyawai 1[113] is the first case in which the courts applied the common law doctrine in a case involving natives of East Malaysia.[114] The Sarawak High Court in *Amit bin Salleh v The Superintendent, Land & Survey Department, Bintulu* has subsequently noted similarities of the common law doctrine in respect of Orang Asli and the natives of Sarawak.[115] The Federal Court and other courts have also consistently applied cases on the common law doctrine from Peninsular Malaysia, Sarawak and Sabah interchangeably when adjudicating claims for Indigenous

[109] Ibid.
[110] The decisions were *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 (Federal Court, Malaysia); *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 (Court of Appeal, Malaysia); *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481 (Court of Appeal, Malaysia) (see *Adong 2* [1998] 2 MLJ 158, 164).
[111] *Adong 2* [1998] 2 MLJ 158, 164.
[112] See Gopal Sri Ram JCA's comment in *Sagong 2* [2005] 6 MLJ 289, 302.
[113] [2001] 6 MLJ 241.
[114] It was not, however, the first time that the Indigenous people of East Malaysia had used the courts to protect their rights in land. In 1990, members of the *Kayan* challenged the issue of timber licences and the removal of forest produce from their traditional lands (see *Jok Jau Evang v Marabong Lumber Sdn Bhd* [1990] 3 MLJ 427). In *Kajing bin Tubek v Ekran Bhd* ('*Kajing 1*') [1996] 2 MLJ 388, the plaintiffs, representing native communities in Belaga, Sarawak obtained a declaration that the defendants comply with Federal environmental legislation, the *Environmental Quality Act 1974* (Malaysia), in relation to the Bakun Hydro project and provide a copy of their Environmental Impact Assessment Report and an opportunity to be heard on it. On appeal, the Court of Appeal reversed the decision (see [1997] 3 MLJ 23). For further reading, see eg. Ramy Bulan, 'Native Title as a Proprietary Right Under the Constitution in Peninsular Malaysia: A Step in the Right Direction?' (2001) 9 *Asia Pacific Law Review* 83, 84; Bulan and Locklear, above n 75, 60-74; J C Fong, *Law on Native Customary Land in Sarawak* (Sweet & Maxwell Asia, 2011); Aiken and Leigh, above n 75. Although these cases preceded *Nor Nyawai 1*, none of the successful claims were grounded upon the doctrine of Indigenous title.
[115] [2005] 7 MLJ 10, 22.

title.[116] Despite Sarawak in East Malaysia having its own land regime that explicitly recognises Native Customary Rights ('NCR'),[117] common law principles are applicable for NCR acquired in Sarawak before 1 January 1958.[118] Case law from Sarawak is thus relevant to the development of the common law doctrine.

The High Court decision in *Nor Nyawai 1* applied the decisions in *Adong 1*, *Adong 2* and *Mabo No 2* in holding that 'the common law respects the pre-existing rights under native law or custom though such rights may be taken away by clear and unambiguous words in a (*sic*) legislation'.[119] In this case, *Iban* natives sought a declaration from the High Court that they possessed NCR over the lands in dispute. The first defendant had been issued titles covering those lands that were to be cleared and planted with trees to sustain a paper mill. The second defendant was the sub-lessee of the land while the third defendant was the authority that issued titles to these lands. In determining whether the natives possessed NCR at common law, the Court also had to determine, amongst other issues, whether such rights had been extinguished. Ian Chin J examined Sarawak's history of land orders and legislation and found that the Government did not express a clear intention to extinguish NCR despite increasingly restrictive land use regulation.[120] The Court found that the plaintiffs had proven their claim for NCR and ordered rectification of the register of titles and an injunction restraining the first and second defendants, as titleholder and sub-lessee respectively or their servants or agents from entering the disputed area.[121]

This decision is also significant for its common law recognition of the ownership of village territory, cultivated lands and forest produce. Ian Chin J explained the *Iban* concept of *pemakai menoa* (communal longhouse territory) to include *temuda*

[116] See eg. *Bato Bagi* [2011] 6 MLJ 297; *Madeli 2* [2008] 2 MLJ 677 (Federal Court, Malaysia); *Nor Nyawai 2* [2006] 1 MLJ 256 (Court of Appeal). See also *Mohamad Rambli Bin Kawi v Superintendent of Lands, Kuching* [2010] MLJU 120 (High Court, Kuching); *Agi Anak Bungkong v Ladang Sawit Bintulu Sdn Bhd* [2010] MLJU 121 (High Court, Kuching). In respect of Sabah, see eg. *Andawan bin Ansapi v PP* (Unreported, David Wong Dak Wah J, Kota Kinabalu High Court File K41-128 of 2010, 4 March 2011) (High Court, Kota Kinabalu).
[117] See s 5 *Land Code 1958* (Sarawak).
[118] See Ibid s 5(1), *Nor Nyawai 1* [2001] 6 MLJ 241, 245, 268-9. From 1 January 1958 onwards, s 5(1) of the *Land Code 1958* (Sarawak) prohibits the creation of NCR except by statute. Common law principles are applicable for determining whether NCR had existed over a piece of land before 1 January 1958 and not been extinguished.
[119] *Nor Nyawai 1* [2001] 6 MLJ 241, 245.
[120] Ibid 262-92.
[121] Ibid 299.

(farming lands), *pulau or pulau galau* (rivers and jungle for the gathering of forest produce) and *tanah umai* (individual family cultivated land).[122]

Ian Chin J also cited the Australian case of *Wik*,[123] in observing that the NCR of the *Iban* plaintiffs 'are similar to a native title of the Australian Aboriginals which had been held to be enforceable as common law rights'.[124]

3 *Sagong bin Tasi v Kerajaan Negeri Selangor ('Sagong 1')*

In *Sagong 1*,[125] a *Temuan* (Orang Asli) settlement was given notice by the Selangor State Authority in 1996 to vacate their land (partially gazetted Aboriginal reserve and partially ungazetted) for the construction of a highway. The *Temuan* community was later evicted from their land. They had earlier accepted, under protest, compensation for fruit trees, crops and building structures and filed a suit contending, amongst other things, that they were 'customary owners, the original title holders and the holders of usufructuary rights' in respect of the land based on common law, statutory law and the *Malaysian Constitution*.

There are two important distinguishing factors between *Sagong 1* and *Adong 1*. First, *Sagong 1* concerned settled lands whereas the claim in *Adong 1* was about foraging lands. Second, unlike *Adong 1* where there was little dispute of fact, the claimants in *Sagong 1* had to establish customary rights by way of evidence. Before examining the relevant law, Mohd Noor Ahmad J held as a matter of fact that:

> (a) the Bukit Tampoi lands, including the land, have been occupied by the Temuans, including the plaintiffs, for at least 210 years and the occupation was continuous up to the time of the acquisition;
> (b) the plaintiffs had inherited the land from their ancestors through their own adat;
> (c) the Temuans who are presently occupying the Bukit Tampoi lands including the plaintiffs in respect of the land are the descendants of the Temuans who had resided thereat since early times and that (*sic*) the traditional connection with the Bukit Tampoi lands have (*sic*) been

[122] Ibid 248-249.
[123] (1996) 187 CLR 1, 84.
[124] *Nor Nyawai 1* (2001) 6 MLJ 241, 251.
[125] [2002] 2 MLJ 591.

maintained from generation to generation and the customs in relation to the lands are distinctive to the Temuan culture; and

(d) the Bukit Tampoi lands, including the land, are customary and ancestral lands belonging to the Temuans, including the plaintiffs, and occupied by them for generations.[126]

Mohd Noor Ahmad J also held that the plaintiffs belonged to an Aboriginal society within ss 2 and 3 of the *APA*[127] and accommodated changes that occurred within the plaintiffs' community as a result of outside interaction. His Lordship held that the plaintiffs continued to exist as a society notwithstanding that:

(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') (*Village Development and Security Committee*) was set up by the JHEOA *(Department of Orang Asli Affairs)* to manage their affairs…[128] *[Translation added]*

Having decided on the facts, Mohd Noor Ahmad J followed *Adong 1* but distinguished *Adong 1* based on the fact that *Sagong 1* involved settled lands.[129] His Lordship proceeded to hold that the plaintiffs not only had a right over the gazetted portion of the land but also an interest *in* the land.[130] His Lordship held[131] that the

[126] Ibid 610.
[127] Section 3(1) of *APA* defines an Orang Asli (in English, an aborigine) 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 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. Section 3(2) states that any Aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to Aboriginal beliefs but who continues to follow an Aboriginal way of life and Aboriginal customs or speaks an Aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising that religion. 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.
[128] *Sagong 1* [2002] 2 MLJ 591, 606-7.
[129] Ibid 611.
[130] Ibid 615.

Temuan claimants did not merely have a usufructuary right over the land, as recognised in *Adong 1*, but a proprietary title in the land, following the international jurisprudence expressed in *Amodu*,[132] *Mabo No 2*,[133] *Wik*,[134] *Canadian Pacific Ltd v Paul et al*,[135] *Delgamuukw*[136] and *Johnson*.[137]

His Lordship also set out a number of features of Indigenous title as determined by local and international jurisprudence:

> (a) it is a right acquired in law and not based on any document of title (see the *Calder* case, followed in the *Adong* case at p 428F);
> (b) it does not require any conduct by any person to complete it, nor does it depend upon any legislative, executive or judicial declaration (see Brennan CJ in *The Wik Peoples v The State of Queensland* (1996) 187 CLR 1 ('the *Wik Peoples* case') at p 84, followed in the Malaysian case of *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 2 CLJ 769 at p 780);
> (c) native title is a right enforceable by the courts (see Brennan CJ in the *Wik Peoples* case at p 84);
> (d) native title and interest in Aboriginal land is not lost by colonisation, instead the radical title held by the sovereign becomes encumbered with native rights in respect of the Aboriginal land (see *Mabo No 2,* headnotes at p 2);
> (e) native title can be extinguished by clear and plain legislation or by an executive act authorized by such legislation, but compensation should be paid (see *Mabo No 2,* headnotes at p 3); and
> (f) the Aboriginal people do not become trespassers in their own lands by the establishment of a colony or sovereignty (see *Ward (on behalf of the Miriuwung and Gajerrong People v State of Western Australia* (1998) 159 ALR 483 at p 498, lines 43-45).[138]

While *Sagong 1* recognised that Orang Asli customary land rights to their settlement areas are an interest in the land, the Court distinguished between settled and foraging areas.[139] The Court observed *obiter dicta* that the proprietary interests of Orang Asli did not extend 'to the jungles at large where they roam to forage for their livelihood

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[131] Ibid 611-4.
[132] [1921] 2 AC 399, 403-4.
[133] (1992) 175 CLR 1, 51-2.
[134] (1996) 187 CLR 1, 84.
[135] (1988) 53 DLR (4th) 487, 505.
[136] (1997) 153 DLR (4th) 193, 240.
[137] (1823) 21 US 681, 688.
[138] *Sagong 1* [2002] 2 MLJ 591, 612.
[139] Ibid 615.

in accordance with their tradition'.[140] This limitation has been the subject of criticism and is explored in Section IIIB below.

The plaintiffs' rights under both the common law and the *APA* were held to be proprietary rights protected by art 13 of the *Malaysian Constitution*.[141] The Court held as follows:

(1) The compensation paid by the State was not adequate within the meaning of art 13(2) of the *Malaysian Constitution* and the plaintiffs must be awarded market value compensation pursuant to the national legislation for land acquisition, the *Land Acquisition Act 1960* Act 486 (Malaysia) ('*LAA*').[142]

(2) Orang Asli rights under the common law and the *APA* are complementary and that common law rights are not extinguished by the *APA*.[143]

(3) The second and third defendants (the contractor and highway authority respectively) had committed trespass against the possession of lands by the plaintiffs and were ordered to pay damages for trespass.[144]

Sagong 1 is also significant because the Court held that the first and fourth defendants (the State and Federal Governments respectively) owed a fiduciary duty to the plaintiffs by reason of: (1) art 8(5)(c) and the Ninth sch of the *Malaysian Constitution*;[145] (2) the setting up of the Department of Orang Asli Affairs; (3) the 1961 *Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia* ('*1961 Policy*');[146] and (4) documentary evidence expressly

[140] Ibid.
[141] Ibid 621. Article 13 of the *Malaysian Constitution* states '(1) No person shall be deprived of property save in accordance with the law. (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation'.
[142] *Sagong 1* [2002] 2 MLJ 591, 621.
[143] Ibid 615-7.
[144] Ibid 620-1.
[145] Articles 8(5)(c) of the *Malaysian Constitution* permits legislation for the 'protection, well-being or advancement of the Aboriginal peoples of the Malay peninsula (including reservation of land)' without offending the general 'equality before the law' provision in art 8(1) of the *Malaysian Constitution*. Art 8(1) states 'All persons are equal before the law and entitled to equal protection of the law'. For a discussion of art 8 in the context of recognition and protection of Orang Asli customary land rights, see above Chapter 4, 120-30. The Ninth Schedule Item 16 of the Malaysian constitution empowers the Federal Government to legislate for the 'welfare of the Aborigines'.
[146] Ministry of the Interior, Federation of Malaya (1961). In particular, the Court referred to principle (d) of the *1961 Policy* stating Orang Asli are not to be removed from their lands without their full consent.

declaring the British administration's responsibility for *Temuan* welfare in the disputed area.[147] The Court observed that the content of the fiduciary duty is to protect the welfare of Orang Asli, 'including their lands, not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs'.[148] The remedies for such infringement are by way of 'declaration of rights, injunctions or a claim in damages and compensation'.[149]

On the facts, the Court held that the State and Federal Governments breached their fiduciary duties by depriving the plaintiffs of their proprietary rights without adequate compensation and unlawfully evicting the plaintiffs in breach of the notice periods provided under the *LAA*.[150] Summarising selected findings from *Mabo No 2* and *Wik*, the Court made further observations with regard to the content of the fiduciary duty:

> In *Mabo No 2*, it was said that the obligation on the Crown was to ensure that the traditional title was not impaired or destroyed without the consent of or otherwise contrary to the interests of title holders. And in the *Wik People*'s case, it was reiterated that the fiduciary must act consistent with its duties to protect the welfare of the aboriginal people.[151]

These observations suggest that the fiduciary duty may require the Federal and State Governments to ensure that Orang Asli customary land rights are not extinguished or infringed without their consent or in a manner contrary to the welfare and interests of the Orang Asli concerned. The implications of this fiduciary duty concept for the common law doctrine are examined in Section IIID1 below.

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[147] *Sagong 1* [2002] 2 MLJ 591, 619.
[148] Ibid 618-9.
[149] Ibid. However, damages were not ordered for breach of fiduciary duty to avoid duplication in view of the Court's award of compensation under the *LAA*.
[150] *Sagong 1* [2002] 2 MLJ 591, 620-1.
[151] Ibid 618-9.

4 *Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) v Superintendent of Land & Surveys Miri Division* (*'Madeli 1'*)

This case involved an NCR claim by a native of Sarawak but is nonetheless important to the development of the common law doctrine. The salient facts are that Madeli and his father before him (natives of Sarawak), cleared, cultivated and occupied an area of land in Miri, Sarawak for many years prior to 1958. As NCR can be acquired outside the scope of the *Land Code 1958* (Sarawak) prior to 1 January 1958,[152] the plaintiff claimed he had thereby acquired NCR over the disputed land at common law.[153] In 1921, by Government Order, the disputed lands became a part of land reserved for the operations of Sarawak Oilfields Ltd, known as the 'Shell Concession Area'. Under that Order, all occupation and cultivation of the land was prohibited without a permit until 1954. Dismissing the claim, the Court of first instance held, amongst other matters, as follows:

(1) NCR was first recognized in Sarawak by *s 66 of Order No L-7 (Land Settlement) 1933* (Sarawak).[154]
(2) Once the land was reserved for use by Sarawak Oilfields Ltd by the 1921 Government Order, any NCR on those lands were extinguished.[155]
(3) In any event, the plaintiff had moved out of their house on the disputed land in 1941 after a fire.[156]
(4) As such, the plaintiff failed to prove NCR between 1954 (when the disputed land was excluded from the Shell Concession Area) and 1 January 1958 (the commencement of *Land Code 1958* (Sarawak)).[157]

The Court of Appeal affirmed the finding of the lower court that the disputed land became part of the Shell Concession Area between 1921 and 1954.[158] However, the

[152] See s 5(2)(ii). As for judicial confirmation of the cut-off date being 1 January 1958, see eg. *Hamit bin Matusin v Superintendent of Lands and Surveys* [2001] 3 MLJ 535, 541; *Madeli 1* [2005] 5 MLJ 305, 326.
[153] *Madeli 1* [2005] 5 MLJ 305, 311.
[154] Ibid 319.
[155] Ibid 320.
[156] Ibid 320-1.
[157] Ibid 316-8, 320-1.

Court allowed the appeal, holding that the plaintiff had acquired NCR in the disputed land prior to 1921[159] and between 1954 and 1 January 1958.[160] Accordingly, these pre-1 January 1958 rights had not been extinguished by the Shell Concession Area and survived until the acquisition by the Sarawak Government in 1982.[161] Compensation and costs were accordingly awarded to the plaintiff.[162]

The appeal was allowed on three main grounds. First, the defendants had admitted that the plaintiff had NCR before 1958, and therefore bore the onus of demonstrating that these rights had been extinguished.[163] The defendants relied upon the legal effect of the 1921 Order that created the Shell Concession Area, but failed to demonstrate that the Order remained in place in relation to the disputed land until at least 1 January 1958.[164] Secondly, the lower court had erred in its finding that the plaintiff had not acquired NCR between 1954 and 1958.[165] The lower court based its finding on two reasons.[166] The first reason was that the plaintiff had moved out of the disputed land in 1941, and the second, that the plaintiff had not acquired NCR under the methods specified in the *Land Code 1958* (Sarawak).[167] The Court of Appeal held that the lower court erred in ignoring the plaintiff's testimony of periodic visits and the presence of his fruit trees, holding that the judge equated 'occupation with actual physical presence on the said land when that need not necessarily be so'.[168] As for the second reason, the Court held that the methods for acquiring NCR were only applicable to the acquisition of NCR *after* 1 January 1958, not being the case here.[169] The third ground was based on Indigenous title. Following *Adong 1* and *Nor Nyawai 2* and their respective application of *Calder*, the Court held that the Malaysian courts have affirmed that the common law respects

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[158] Ibid 317.
[159] Ibid 326.
[160] Ibid 325.
[161] Ibid 332.
[162] Ibid 333.
[163] Ibid 324.
[164] Ibid.
[165] *Madeli 1* [2005] 5 MLJ 305, 325.
[166] Ibid.
[167] Ibid.
[168] Ibid. The Court adopted Haidar J's views in *Hamit bin Matusin v Superintendent of Lands and Surveys* [2001] 3 MLJ 535 and applied *Newcastle City Council v Royal Newcastle Hospital* [1959] 1 ALL ER 734, 736 that defines occupation in terms of control, and found that the plaintiff remained in continuous occupation of the disputed lands.
[169] *Madeli 1* [2005] 5 MLJ 305, 326.

pre-existing rights held by natives or aboriginal peoples without the need for express recognition by the new sovereign and unless they are extinguished by clear and unambiguous words expressing that intention.[170] The defendants appealed against the decision in *Madeli 1*.[171]

5 *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai* (*'Nor Nyawai 2'*)

The Court of Appeal in *Nor Nyawai 2* allowed the appeal of the defendants (non-natives) purely due to the lack of evidence.[172] However, the Court endorsed the common law doctrine expressed in *Nor Nyawai 1*.[173] Hashim Yusuff JCA, delivering the judgment of the Court, summarised the doctrine as applied in Sarawak as follows:

> (a) that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a *(sic)* legislation;
> (b) that native customary rights do not owe their existence to statutes… and the legislation is only relevant to determine how much of those native customary rights have been extinguished;
> (c) that the Sarawak Land Code 'does not abrogate whatever native customary rights that exist before the passing of that legislation'… and
> (d) that although the natives may not hold any title to the land and may be termed licencees, such licence cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws *(sic)* and this is after payment of compensation.'[174]

The Court also accepted the finding that *Iban* customs of '*pemakai menoa*', '*temuda*', and '*pulau*', formed part of the laws and customs of the plaintiffs.[175]

Nor Nyawai 2 cited *Adong 1*, *Adong 2* and *Sagong 1* with approval,[176] and described them as 'current judicial views on the meaning or scope of the term 'native

[170] Ibid 332.
[171] See Section IIC7 below.
[172] *Nor Nyawai 2* [2006] 1 MLJ 256, 272-3.
[173] Ibid 270.
[174] Ibid.
[175] *Nor Nyawai 2* [2006] 1 MLJ 256, 263, 272-3.
[176] Ibid 268-9.

customary rights or 'native rights' in land'.[177] Hashim Yusuff JCA concluded that 'the common feature which forms the basis of a claim for native customary rights is the continuous occupation of land',[178] and that this was consistent with international jurisprudence on Indigenous title.[179] Nonetheless, the Court of Appeal agreed with the judge in *Sagong 1*'s limitation of native title to settled areas by explaining that otherwise, 'vast areas of land could be under native customary rights simply through assertions that they and their ancestors had roamed and foraged the areas'.[180]

6 *Kerajaan Negeri Selangor v Sagong bin Tasi ('Sagong 2')*[181]

On appeal, the Court of Appeal unanimously upheld the decision in *Sagong 1* on the proprietary and communal nature of the plaintiffs' interest in the land.[182] Gopal Sri Ram JCA[183] held that under the common law doctrine of Indigenous title, as set out in *Amodu* and more recently by the South African constitutional court in *Alexkor*,[184] the 'plaintiffs had ownership of the lands in question under a customary community title of a permanent nature'.[185]

In addition to affirming the judge's finding on the fiduciary duty owed by the State and Federal Governments to Orang Asli, the Court held that the Federal and State Governments breached their fiduciary duty by failing to gazette the *ungazetted* portion of the Orang Asli land under the *APA* and ordered damages to extend to that

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[177] Ibid 268.
[178] Ibid 269.
[179] In this regard, the Court alluded to the following common law cases without any pinpoint reference or substantial detail: *Mabo No 2*; *Calder*; *WA v Ward* (2002) 191 ALR 1; *R v Van der Peet* (1996) 2 SCR 507, 137 DLR (4th) 289; *Johnson* 21 US (8 Wheat) 543 (1823) and *Worcester v State of Georgia* 31 US (6 Pet) 515 (1832).
[180] *Nor Nyawai 2* [2006] 1 MLJ 256, 269. For criticisms of this limitation, see below, 242-4.
[181] The Court in *Sagong 2* delivered its decision on 19 September 2005, after *Nor Nyawai 2* was decided on 8 July 2005. However, *Nor Nyawai 2* was reported later in the *Malayan Law Journal*.
[182] *Sagong 2* [2005] 6 MLJ 289, 300-2.
[183] Arifin bin Zakaria and Nik Hashim bin Nik Abd Rahman JJCA concurring.
[184] 2003 SACLR LEXIS 79. In *Alexkor*, the Constitutional Court of South Africa held that the Richtersveld community had, prior to annexation by the British, a right of communal ownership to the lands in question under Indigenous law (*Alexkor* 2003 SACLR LEXIS 79, [62]). This right had not been extinguished by annexation (*Alexkor* 2003 SACLR LEXIS 79, [68]). The Court also applied the Privy Council decision of *Oyekan* [1957] 2 ALL ER 785 that these rights must be determined in accordance with Indigenous law 'without importing English conceptions of property law' (*Alexkor* 2003 SACLR LEXIS 79, [50]) and the presumption that the property rights of the Indigenous inhabitants survive and are to be respected upon annexation (*Alexkor* 2003 SACLR LEXIS 79, [68]).
[185] *Sagong 2* [2005] 6 MLJ 289, 308.

portion of the land.[186] The Court further held that those who are repositories of power conferred by Parliament are fiduciaries and whether the fiduciary duty is breached depends on the facts of a particular case.[187] The relevance of this finding is examined in Section IIID below.

The Court then held, based on the findings of the lower court, that the trial judge should have allowed the plaintiffs' claim for customary title to the *ungazetted* portion of the land and went on to order that compensation be paid for this portion in accordance with the *LAA*.[188] The Court also made an order for aggravated damages for trespass against the second (the contractor) and third defendant (the highway authority) on those lands.[189]

The Court in *Sagong 2* also interpreted the word 'may' to mean 'shall' and introduced the word 'adequate' before the word 'compensation' in s 12 of the *APA*.[190] The purposive interpretation of s 12 of the *APA* was to bring the provision in line with art 13(2) of the *Malaysian Constitution* which states that '[n]o law shall provide for compulsory acquisition or use of property without adequate compensation'.[191] In 2006, the Federal Court granted leave to the defendants/appellants (including the Federal Government) to appeal to the Federal Court.[192] In 2008, the new opposition coalition-ruled Selangor State Government withdrew its appeal.[193] After further settlement negotiations, the claim was amicably settled between the parties on 26 May 2010.[194] Under the terms of the settlement:

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[186] Ibid 313-4, 319.
[187] Ibid 312-3.
[188] Ibid 314.
[189] Ibid 319.
[190] Section 12 of the *APA* states 'If any land is excised from any Aboriginal area or Aboriginal reserve or if any land in any Aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any Aboriginal area or Aboriginal reserve granted to any aborigine or Aboriginal community is revoked wholly or in part, the State Authority *may grant compensation* therefor and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Director General to be held by him as a common fund for such persons or for such Aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the Minister'. *[Emphasis added]*
[191] *Sagong 2* [2005] 6 MLJ 289, 309-10.
[192] vide Federal Court Civil Application No 08-154 of 2005 (B).
[193] See Shaila Koshy, 'S'gor withdraws appeal, wants to work with Orang Asli', *The Star* (Malaysia), 23 April 2009.
[194] See M Mageswari, 'Justice at last', *The Star* (Malaysia), 27 May 2010.

(1) the Federal Government and the remaining defendants withdrew their respective appeals; and

(2) the third defendant (the highway authority) agreed to pay a compensation sum of RM6.5 million to the plaintiffs.

The settlement leaves the law after *Sagong 2* intact. It must however be appreciated that the Federal Government and remaining defendants' decision to withdraw the appeal may have been linked to the Selangor Government's earlier withdrawal. Under s 40(1) of the *National Land Code 1965* (Malaysia), the principal statute that governs titles, dealings and interests in land in Peninsular Malaysia, radical title to State land vests in the respective State Authority. Once the State as holder of plenary title withdrew its appeal and conceded to the claimants' rights, the other defendants would have struggled to sustain their appeals against the recognition of common law customary land rights. However, it is remarkable that the Federal Government did not contest those parts of the decisions in *Sagong 1* and *Sagong 2* imposing upon it a fiduciary duty towards the Orang Asli.

7 *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* ('*Madeli 2*')

The Federal Court in *Madeli 2*[195] dismissed the defendants' appeal in *Madeli 1*. The apex court of Malaysia affirmed the common law principles recognising NCR and Orang Asli customary rights over land. One of the questions before the Court was whether the common law principles applied in *Adong 1* and *Nor Nyawai 1* are applicable in determining whether NCR are acquired outside the *Sarawak Land Code*.[196] Before this appeal, the Federal Court had yet to authoritatively decide this point.

The Federal Court, affirming *Nor Nyawai 1* and *Adong 1*, and following *Mabo No 2* and *Oyekan*, unanimously held that the common law as applicable in Malaysia by

[195] [2008] 2 MLJ 677.
[196] Ibid 689.

virtue of ss 3 and 6 of the *Civil Law Act 1956* (Malaysia)[197] respects the pre-existing property rights of inhabitants and their rights to compensation for loss of those rights.[198] Arifin Zakaria FCJ, delivering the decision of the Court, explicitly rejected the contention that the Court below should not have followed *Adong 1* and *Nor Nyawai 1* in recognising common law customary rights because these cases relied on *Mabo No 2*[199] and *Calder*,[200] ruling that the 'two cases reflected the common law position with regard to native titles throughout the Commonwealth'.[201] Applying *Mabo No 2* and the Privy Council case of *Amodu*,[202] the Federal Court held that the Crown may acquire a radical or ultimate title to the land but did not thereby acquire absolute beneficial ownership of the land that displaced any presumptive title of the natives.[203] This decision conclusively determines that Malaysia has adopted the doctrine of continuity, meaning that express recognition of pre-existing land rights of natives and Orang Asli in Malaysia by the sovereign is unnecessary for these rights to survive, though they are subject to extinguishment.

On another question relating to the extinguishment of the plaintiff's rights by the 1921 Government Order creating a concession area, the Court held that the Order had not extinguished the plaintiff's NCR. The Court affirmed the Court of Appeal's reliance on *Sugar Refining Co v Melbourne Harbour Trust Commissioners*[204] for the rule of statutory interpretation that 'a statute should not be held to take away rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms'.[205] Further, the Court held that the reservation of the land in dispute for Sarawak Oilfields Ltd did not extinguish the claimant's NCR as Sarawak

[197] Section 3(1) of the *Civil Law Act 1956* (Malaysia) ('*CLA*') provides for the application of the common law and rules of equity of England as at 7 April 1956 subject so far as local circumstances permit and subject to such qualification as local circumstances render necessary. Section 6 states '[n]othing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any of the law of England relating to the tenure or conveyance or assurance of or succession to any immoveable property or any estate, right or interest'. For further examination of these provisions and their application in the context of the common law doctrine, see below, 232-3.
[198] *Madeli 2* [2008] 2 MLJ 677, 691-2.
[199] (1992) 175 CLR 1. The landmark Australian High Court decision of *Mabo No 2* recognised the concept of native title at common law in Australia.
[200] Though cited in local cases for other propositions of law, the Supreme Court of Canada decision in *Calder* was cited in *Madeli 2* for the proposition that the common law recognises 'native rights over their lands' (see *Madeli 2* [2008] 2 MLJ 677, 691-2).
[201] *Madeli 2* [2008] 2 MLJ 677, 692.
[202] [1921] 2 AC 399.
[203] *Madeli 2* [2008] 2 MLJ 677, 692.
[204] (1927) AC 343.
[205] *Madeli 2* [2008] 2 MLJ 677, 696.

Oilfields Ltd had never taken possession of the lands.[206] In so holding, the Court cited Brennan J's observations in *Mabo No 2* that a reservation or trust of land for a public purpose may not necessarily extinguish native title unless it is inconsistent with the continued enjoyment of native title and that this question is sometimes 'a question of fact, sometimes a question of law and sometimes a mixed question of fact and law'.[207] This ruling suggests that common law NCR or Orang Asli customary land rights may be extinguished by inconsistent grant. Such a proposition accords with the extinguishment doctrine as developed in Australia. A clear and plain intention to extinguish native title in Australia may be manifested by an executive act, for example, the issuance of a freehold grant to a third party.[208] The Court also expressly affirmed the meaning of 'occupation' given by the Court of Appeal in *Madeli 1*, namely, that 'there can be occupation without physical presence on the land provided there exist (*sic*) sufficient measure of control to prevent strangers from interfering'.[209]

Madeli 2 has resolved fundamental issues relating to the common law doctrine as follows. Malaysian law respects the pre-existing rights of Orang Asli and natives of Sabah and Sarawak to their lands without the need for state recognition unless these rights are taken away by the state in plain and obvious terms. In such a case, compensation is payable to the aggrieved parties.

8 Recent Orang Asli cases

In *Yg Dipertua Majlis Daerah Gua Musang v Pedik Bin Busu* ('*Pedik*'),[210] Orang Asli in Kampung Jias, *RPS* Kuala Betis, Kelantan applied for, amongst other declaratory relief, confirmation of their ownership of the land and damages for the demolition of their church. The first defendant, the local authority, objected claiming that the erection of the church was without the necessary approval under the *Street, Drainage and Building Act 1974* (Malaysia) ('*SDBA*'). In a short judgment, the Court held that Orang Asli were owners of the land in question although documents

[206] Ibid 698.
[207] Ibid 697-8.
[208] See *Mabo No 2* (1992) 175 CLR 1, 69 (Brennan J).
[209] *Madeli 2* [2008] 2 MLJ 677, 694-5.
[210] [2010] 5 MLJ 849.

of title were yet to be issued,[211] and entitled to punitive damages for the wrongful demolition of the church. Damages were ordered due to the fact that the local authority demolished the church prior to the 30-day notice period it had given to the Orang Asli community pursuant to s 425 of the *NLC* and s 72 of the *SDBA* respectively.[212] However, the Court also held that *RPS* Regroupment lands were not customary lands[213] and that the constitutional right to freedom of religion must be exercised in accordance with the law.[214] Further, the Court held that the Christian religion is not part of the plaintiffs' ancestral practices.[215]

Although it is a decision of the court of the first instance, the general proposition in *Pedik* that *RPS* is not customary land has adverse implications for Orang Asli customary land claimants who have been regrouped pursuant to *RPS* schemes and the like.[216] These claimants may be regarded as Orang Asli who no longer reside on customary lands. An alternative approach to interpreting *Pedik* would be that *RPS* lands may form part of customary lands depending on the facts of each case.[217] The learned judge also circumvented the non-applicability of the *NLC* to Orang Asli customary lands[218] by holding that the lands in question were not customary lands. Despite its favourable outcome, *Pedik* is a potential setback for Orang Asli in terms of customary land rights.[219]

In *Wet Ket v Pejabat Tanah Daerah Temerloh* ('*Wet Ket*')[220], the *Jah Hut* applicants sought judicial review of the local authority's refusal to grant the supply of water and electricity for a multi-purpose hall constructed on lands resided upon by the applicants and their forefathers since 1920. The ground for the refusal was that the land was not gazetted aboriginal land but State land. The defendant had thereby issued a demolition notice under s 425 of the NLC for trespass.

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[211] Ibid 855.
[212] Ibid 856. Both statutory provisions make it an offence to erect a building without lawful permission.
[213] Ibid 855.
[214] Ibid 856.
[215] Ibid 854.
[216] For a discussion on regroupment schemes generally, see above Chapter 2, 57-64.
[217] See *Sagong 2* [2005] 6 MLJ 289, 301-2.
[218] See s 4(2)(a); See *Sagong 2* [2005] 6 MLJ 289, 307-8.
[219] At the time of writing, the appeal and cross appeal against the decision of the High Court are pending before the Court of Appeal.
[220] [2010] MLJU 314.

The Court held that the land concerned was State land as there was neither approval nor recognition of the land as an 'Aboriginal inhabited place'.[221] The Court dismissed the Orang Asli application with costs. It is noteworthy that there is no express statutory requirement for approval or recognition of 'an Aboriginal inhabited place' in the *APA*. The judge decided the case based on a narrow interpretation of the provisions of the *APA* and *NLC*. The Court also implicitly disregarded the doctrine of continuity affirmed by the apex court in *Madeli 2* by holding that land is State land unless Orang Asli rights are explicitly recognised by the 'State or Federal authority'.[222] On appeal, a consent order was recorded to settle the water and electricity dispute and determine the issue of customary land in separate proceedings.[223]

In another case, the *Orang Laut* (*Seletar*) community in Stulang Laut, Johor were resettled to Kuala Masai in 2003 on the promise that the Johor State Government would gazette their new lands as aboriginal reserves.[224] The new land was approved as an Aboriginal reserve in 2000 but not formally gazetted. The Orang Asli claimants were also given assurances by the *DOA* that they would be allowed to build a Christian chapel on their new lands. In 2005, the State Government issued a demolition notice against the chapel under s 425 of the *NLC*. The State proceeded to demolish the chapel on the basis that the chapel was located on State land and that the requisite State approval for the erection of the chapel structure had not been obtained. The *Orang Laut* filed an application to court for various forms of declaratory relief including a declaration that they are holders of customary title and rights for both the Stulang Laut and Kuala Masai lands.

In 2010, the High Court granted the *Orang Laut* application and ordered, amongst other things, that the demolition of the chapel was unlawful and awarded damages for trespass. The judge further ordered compensation against the State for delay and failure to gazette the Kuala Masai lands[225] and for the loss of the group's original

[221] Ibid 3.
[222] Ibid 2.
[223] See M Mageswari, 'Judge: Give orang asli water', *The Star* (Malaysia), 12 March 2011.
[224] See *Khalip bin Bachik v Pengarah Tanah dan Galian Johor* [2010] Johor Bahru High Court Civil Suit No 24-3675-2008 (Unreported, Zakiah Kassim JC, 21 May 2012), [2.2]-[2.3], [6.8].
[225] Ibid [6.2]-[6.11].

Stulang Laut lands.[226] In so doing, the Court applied the common law doctrine and also held that the State Government's failure to gazette the new Orang Asli lands was a breach of the fiduciary duty owed by the State to the claimants.[227] It is pertinent to note that both the *DOA*'s and the Governments' failure to rebut relevant affidavit evidence played a significant role in the Court's decision,[228] possibly suggesting that the outcome may have been different if the facts had been disputed. All the same, the decision further entrenches the common law doctrine and the fiduciary duty owed by the individual State to gazette Orang Asli lands. The State Government withdrew its appeal to the Court of Appeal on 7 August 2012.[229]

In April 2011, Orang Asli from the *Temuan* and *Che Wong* sub-groups in Raub, Pahang failed in a judicial review application for: (1) an order to quash the decision of the Department of Environment approving an environmental impact assessment ('EIA') report for a water transfer project from Pahang State; (2) a declaration that the decision of the State and Federal Governments to degazette the affected Orang Asli reserves was in breach of their fiduciary duties; and (3) a declaration that the decision of the Federal Government to approve the water project was in breach of their fiduciary duties.[230]

Of particular significance are the findings on the fiduciary duty owed by the Federal and State Governments to Orang Asli. While holding that art 8(5)(c) of the M*alaysian Constitution* 'reflects the implicit intention of the Constitution that a government acts for their (*Orang Asli*) benefit',[231] the Court held that the State and Federal Governments had *not* breached their fiduciary duty towards Orang Asli on the facts of the case. In this regard, the Court concluded that the relocation program involving Orang Asli affected by the water project was for their 'protection, well-

[226] Ibid [5.4]-[5.8].
[227] Ibid.
[228] Ibid [4.5], [4.7], [6.6], [8], [13].
[229] The case is currently before the Johor Bahru High Court for assessment of compensation and damages. The candidate was co-legal counsel for the Orang Asli respondents in the appeal.
[230] *Pendor Banger v Ketua Pengarah Jabatan Alam Sekitar* ('*Pendor*') [2011] Kuala Lumpur High Court Application for Judicial Review R2-25-292-2007 (Unreported, Mohd Zawawi Salleh J, 11 April 2011).
[231] Ibid [36].

being and advancement'.[232] Another factor that influenced the Court's decision was the fact that 85.4 per cent of the Orang Asli households involved had agreed to the relocation program. Finally, the Court also found that the affected Orang Asli had been adequately consulted and that the EIA report included feedback from non-governmental organisations, including an Orang Asli non-governmental organisation, and an expert report prepared on behalf of the applicants.[233] It is pertinent to note the Court's observation that even if a successful claim had been made out, the Court would be bound to consider the public interest involved in the water project, namely, the supply of water to Selangor State and the substantial amount of public funds already expended on the project.[234]

Pendor reaffirms the fiduciary duty owed by the Federal and State Governments to Orang Asli in respect of the deprivation of Orang Asli lands. It further suggests that consultation with and the consent of Orang Asli before deprivation of Orang Asli lands and the interests of the public at large are factors relevant in determining if the respective Governments have discharged their fiduciary duty towards Orang Asli.

III KEY FEATURES OF THE COMMON LAW DOCTRINE

This section identifies the key features of the doctrine of Orang Asli customary land rights as developed by domestic case law. It does not develop a comprehensive common law doctrine by attempting to provide definitive answers to the many legal questions posed by this emerging doctrine. Instead, these key features function to set the stage for the evaluation of the common law doctrine with reference to the *UNDRIP* Standards in Chapter 7.

[232] Ibid [38]-[39]. Amongst other things, the relocation project involved the provision of a bungalow, six acres of land, five acres of planted palm oil, an acre for a fruit orchard, monthly cash allowance for four years and cash compensation for buildings, trees and vegetables to each affected family.
[233] *Pendor* [2011] Kuala Lumpur High Court Application for Judicial Review R2-25-292-2007 (Unreported, Mohd Zawawi Salleh J, 11 April 2011), [42]-[43].
[234] Ibid [44]-[51].

Based on Malaysian case law, this section addresses four features of the common law doctrine that are pertinent to the evaluation of the doctrine. For a better appreciation of these features, they are introduced in the form of questions:

- why was the common law doctrine recognised by the courts in an Orang Asli context? (Rationale);
- what is the content of this form of interest in land? (Content);
- what is necessary to prove this form of interest in land? (Proof); and
- how might this form of interest be extinguished and what recourse is available in such situations? (Vulnerability).

These features are by no means mutually exclusive. However, unpacking the doctrine into component parts facilitates the evaluation process by delineating the rights that Malaysian courts have recognised and protected in respect of Orang Asli customary lands. The key features are discussed in turn.

A *Rationale*

Identifying the rationale for the recognition of common law Orang Asli customary land rights is the most lengthy of the four sections because it is, more so than the other sections, influenced by local circumstances and idiosyncrasies. The rationale for judicial reasoning is a vital component in the ensuing analytical exercise in Chapter 7 as it enables a better understanding of the common law doctrine as developed in Malaysia.

1 Application of common law Indigenous title to Orang Asli

The recognition of common law Orang Asli customary rights comes from a long line of international jurisprudence and common law cases that demand respect for existing private rights in an acquired state where there is an acquisition of

sovereignty by a new state, known as the doctrine of acquired rights.[235] These existing rights are not perpetually protected as they become subject to the new legal regime and may be modified and extinguished subject to the powers of the new sovereign.[236] The assumption, therefore, is that native property rights are intended to be fully respected.[237] These rights continue to exist unless extinguished by clear and plain legislation or an executive act authorised by such legislation.[238]

In Peninsular Malaysia, s 3(1) of the *Civil Law Act 1956* (Malaysia) ('*CLA*') provides for the application of the common law and rules of equity of England as at 7 April 1956, so far as local circumstances permit and subject to such qualifications as local circumstances render necessary. In terms of land law, s 6 of the Act states that nothing is to be taken to introduce into Malaysia 'any part of the law of England relating to the tenure or conveyance or assurance or succession to any immovable property or any estate, rights or interests therein'.[239] Sethu and Fong have suggested that in recognising the common law doctrine, the Malaysian courts did not consider the Privy Council case of *United Malayan Banking Corporation v Pemungut Hasil Tanah, Kota Tinggi*[240] ('*UMBC*').[241] In *UMBC*, the Privy Council held that the *NLC* is a complete and comprehensive code governing land tenure in Peninsular Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rule of English law except in so far as the Code itself may expressly provide for it. In response, it is contended that the Malaysian courts did not depart from the *CLA* or established principles of law in recognising customary title in Peninsular Malaysia for the following reasons:

(1) Section 6 of the *CLA* envisages the English law on immovable property. The English doctrine of tenure of land does not apply to rights and

[235] D P O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press, 1967), vol I, 239-63. See also Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989), 111-2, 162-4, 175-9.
[236] D P O'Connell, *International Law* (Stevens, 1965), 380-1.
[237] *Madeli 2* [2008] 2 MLJ 677, 691.
[238] *Sagong 1* [2002] 2 MLJ 591, 612.
[239] See *CLA*.
[240] [1984] 2 MLJ 87.
[241] See R R Sethu, 'The Orang Asli Cases and Property Rights' in Andrew Harding and H P Lee (eds), *Constitutional Landmarks in Malaysia: The First Fifty Years* (LexisNexis, 2007), 262; J C Fong, above n 114, 151-70.

interests that do not owe their existence to a Crown grant.[242] Native customary title that has its origin in traditional laws and customs does not owe its existence to statutes as it existed long before any legislation.[243]

(2) Section 6 does not extinguish Orang Asli customary rights as there are no clear and unambiguous words that remove aboriginal customary rights.[244]

(3) The Privy Council case of *UMBC*[245] can be distinguished as it did not concern Orang Asli customary land rights. The issue was whether the equitable rule of relief from forfeiture applied in relation to statutory forfeiture of land for non-payment of rent under the *NLC*. Further, s 4(2)(c) of the *NLC* excludes lands held under customary tenure from the *NLC*.

Malaysian courts are at liberty to develop the common law to suit the needs of society.[246] Cases from other common law jurisdictions are of persuasive authority to Malaysian courts.[247] It can therefore be said that the application of the concept of Indigenous title in Malaysia was a matter of discretion. As will be demonstrated in the next section, this discretion was exercised liberally. In recognising Orang Asli customary land rights, Malaysian courts held that the common law and statutory rights of Orang Asli should be looked at conjunctively as they are 'complementary'.[248] The Courts even read art 13(2) of the *Malaysian Constitution* into the *APA* so that adequate compensation could be paid for deprivation of Orang Asli customary lands.[249]

2 Equality and special position of Orang Asli

A perusal of the local cases suggests that the courts chose to exercise their discretion to recognise Indigenous title in respect of Orang Asli customary lands for reasons

[242] *Mabo No 2* (1992) 175 CLR 1, 48-9 (Brennan J).
[243] See *Nor Nyawai 2* [2006] 1 MLJ 256, 269.
[244] Ibid; *Nor Nyawai 1* [2001] 6 MLJ 241, 245, 292.
[245] *United Malayan Banking Corporation v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87.
[246] See *Jamil bin Harun v Yang Kamsiah* [1984] 1 MLJ 217 (Privy Council), 219; *Saad Marwi v Chan Hwan Hua* [2001] 3 CLJ 98, 115.
[247] *Adong 1* [1997] 1 MLJ 418, 427.
[248] Ibid 431; *Sagong 1* [2002] 2 MLJ 591, 615, 620.
[249] *Sagong 2* [2005] 6 MLJ 289, 309-10; *Adong 1* [1997] 1 MLJ 418, 434.

that focus on equality and the special position of Orang Asli. The protection afforded to Orang Asli lands under the *APA* prior to *Adong 1* was inadequate.[250] Accordingly, equal enjoyment of Orang Asli to the constitutional 'right to property' seems to have figured prominently in the recognition of Orang Asli customary land rights. Under art 13 of the *Malaysian Constitution*:

> (1) No person shall be deprived of property save in accordance with law.
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The Courts in both *Adong 1* and *Sagong 1* held that Orang Asli common law and statutory rights were proprietary rights protected under art 13 of the *Malaysian Constitution*.[251] The fact that the plaintiffs in *Sagong* were awarded market value compensation for loss of their customary lands pursuant to the national legislation for land acquisition, the *LAA*,[252] is another manifestation of the Courts' interest in ensuring equal treatment of Orang Asli customary lands with that afforded to other forms of private land ownership. In *Sagong 2*, Gopal Sri Ram JCA held that not to read art 13(2) of the *Malaysian Constitution* into s 12 of the *APA* would render it 'violative of art 13(2) and void' as the provision did not provide for mandatory adequate compensation.[253] Whether market value monetary compensation is indeed 'adequate' in an Orang Asli context is examined further in Section IIID.

In both *Adong* and *Sagong*, the special constitutional position of Orang Asli also seems to have been a key factor in the decision-making process. Item 16 of the Federal list of the *Malaysian Constitution* empowers the Federal Government to legislate for the welfare of Orang Asli.[254] Art 8(5)(c), an elaboration of the constitutional guarantee of equality and non-discrimination contained in art 8(1),[255] permits the Federal Government to legislate 'for the protection, well being or advancement of the Aboriginal peoples of the Malay peninsula (including the

[250] See above, 155-60, 166-7.
[251] *Adong 1* [1997] 1 MLJ 418, 431-4; *Sagong 1* [2002] 2 MLJ 591, 617-8, 621.
[252] *Sagong 1* [2002] 2 MLJ 591, 621.
[253] *Sagong 2* [2005] 6 MLJ 289, 309-10.
[254] See *Malaysian Constitution*, Ninth sch List I - Federal List Item 16.
[255] Article 8(1) of the *Malaysian Constitution* states 'All persons are equal before the law and entitled to equal protection of the law'. For an explanation of whether the circumstances contained in art 8(5) of the *Malaysian Constitution* are an exception to or elaboration of the principle of equality contained in art 8(1), see above Chapter 4, 122-7.

reservation of land) or the reservation to Aborigines of a reasonable proportion of suitable positions in the public service.' As observed in Chapter 4, this provision allows positive discrimination in favour of Orang Asli without offending art 8(1) of the *Malaysian Constitution*. These provisions made room for the Court in *Sagong 2* to interpret legislation liberally in favour of Orang Asli[256] and impose a fiduciary duty upon Federal and State Governments towards Orang Asli.[257]

The *APA* was construed liberally in the light of it being a human rights statute for the protection, welfare and 'upliftment' of the 'first peoples' (Orang Asli).[258] Upon construing extrinsic material relating to the passing of the *APA* and its provisions, the Court of Appeal in *Sagong 2* held that it was the 'undoubted intention of the legislature not to deprive those in the class to whom the plaintiffs belong of the customary title existing at common law'. Otherwise, the *APA* would be a 'wasted piece of legislation action'.[259] In *Sagong 1*, the Court held that art 8(5)(c) of the *Malaysian Constitution* and the *APA* entitled them to the 'right to be protected, and the right to well-being and advancement, in particular to land use'.[260]

3 Limited emphasis on doctrinal theory for application of Indigenous title to Orang Asli

In applying the common law doctrine of Indigenous title to the Orang Asli scenario, Malaysian courts spent little time labouring over the theoretical basis for its application.

An important doctrinal issue stems from the impact of the socio-political relationship between the established Malay sultanates and the various Orang Asli groups prior to British intervention. The common law did not apply then. Malay customary law applied to Malays. As observed in Chapter 2, Orang Asli who did not

[256] For example, the liberal interpretation of 'land occupied under customary right' under the *LAA* by the trial judge in *Sagong 1* was said to give effect to art 8(5)(c) of the *Malaysian Constitution* (see *Sagong 2* [2005] 6 MLJ 289, 310-1).
[257] *Sagong 1* [2002] 2 MLJ 591, 619-20; *Sagong 2* [2005] 6 MLJ 289, 311-4.
[258] *Sagong 2* [2005] 6 MLJ 289, 307.
[259] Ibid 307.
[260] *Sagong 1* [2002] 2 MLJ 591, 622.

assimilate into Malay society were non-Muslim and led distinct lives, usually in the interior parts of the Malay peninsula, with some interaction with the Malays.[261] Despite not being bound by Malay customary law, were these 'tribal' Orang Asli nonetheless under the patronage of a Sultan who held a form of beneficial ownership or trusteeship over Orang Asli customary lands? Put another way, were Orang Asli customary lands under the control of the Malay sultanates before the arrival of the British?

The above perspectives may support the argument that Orang Asli had no 'pre-existing' rights over their lands in order for the doctrine of Indigenous title to apply in the first place. The memorandum prepared by the British administration prior to the introduction of the land registration system in the Malay states ('Maxwell Memorandum') that described Malay customary tenure and the position of a Sultan vis-à-vis lands does not provide a conclusive answer to this question.[262] In coming to the conclusion that all land within a Malay Sultanate vested in the Sultan as paramount owner, the Maxwell Memorandum focused on Malay customary law and precedents from other Islamic jurisdictions as a comparison.[263] This conclusion has since been criticised as inaccurate because there is no evidence to suggest that the imposition of monarchical rule on Malay peasants had resulted in the introduction of a tenurial holding as the ruler and his subject.[264] The colonials were in effect arguing a case for government and private interests and consequently have been criticised for being selective and inconsistent about the type of evidence in their analysis.[265] Prevailing social evolutionary theories that Orang Asli were effectively undeveloped Malays destined on the path to assimilation into the Malay race further fortified

[261] See above, 23-7.
[262] W E Maxwell, *Memorandum on the Introduction of a Land Code in the Native States in the Malay Peninsula* (Straits Settlements: Colonial Secretary, 1894).
[263] Ibid para 79. Malays were said to only possess a usufruct to the ground and not title to the land in Perak (see Frank Swettenham, 'Minute by the British Resident, on a Memorandum of His Excellency the Acting Governor dated 14 September Criticising the Draft Perak Land Code 1893 in Maxwell, above n 262, 99-100.
[264] David Wong, *Tenure and Land Dealings in the Malay States* (Singapore University Press, 1975), 14.
[265] See eg. M B Hooker (ed), *Laws of South-East Asia* (Butterworths, 1986) vol II, 366-7; Patrick Sullivan, 'Orang Asli and the Malays: Equity and Native Title in Malaysia' in Catherine J Iorns Magallanes and Malcolm Hollick (eds), *Land Conflicts in Southeast Asia: Indigenous Peoples, Environment and International Law* (White Lotus Co, 1998).

these views.[266] In the end, the 'paramount ownership' concept facilitated the expansion of British administrative power in the Malay states because the Sultan, as an absolute owner, could grant or otherwise deal with his lands and make new laws.[267] And what the Sultan had power to do, the British resident could do in his name.[268]

In her sociological study on the negotiation and assertion of Orang Asli rights through an examination of the *Sagong* case, Idrus examined the early foundation of the land tenure system in the Malay states, focusing particularly on the work of WE Maxwell, arguably the most influential proponent in the promulgation of the Torrens system in the Malay states.[269] In doing so, she also observed the Maxwell Memorandum's arguably skewed perceptions of Malay tenure that facilitated the convenient inheritance of the Sultan's 'right to the soil'.[270] Vesting paramount ownership in the Sultan facilitated the transfer of concomitant powers to the British and reduced any previous grants to usufructuary rights given by the Sultan.[271] Despite criticisms of these perceptions from fellow administrators like Frank Swettenham,[272] Maxwell's persistent efforts saw the adoption of the Torrens system on this aspect of the Sultan's paramount ownership throughout the Malay states. An alternative view of the position of the Sultan vis-à-vis land ownership has been described by Muhammad Kamil Awang:

> Under Malay customary law the concept of land ownership as understood in English law does not exist. The ownership of land is vested in the corporate entity of a family or a clan and cannot be alienated without the consent of those entitled to it. The Malay ruler is regarded as the residuary power, in the limited sense, of all the land held by a community. He holds the land as a trustee. He possesses no legal right even in theory over the land; 'he only enjoys an administrative right of supervisory oversight of the land for the benefit of the whole of the community.'

[266] See above Chapter 2, 30-2.
[267] Wong, above n 264, 24.
[268] Ibid.
[269] Rusaslina Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia* (PhD thesis, Harvard University, 2008), 105-15.
[270] Ibid 105-8. For example, she observes that Maxwell's use of the payment of tithe and forced labour to deny a Malay private proprietor's allodial right to the soil and to vest ownership of lands in the Sultan were based on analogies drawn from previous Indian Hindu rulers. However, Maxwell's conclusion on the payment of tithe was restricted to one district in the State of Perak. She also notes that there is no mention of the Sultan's ownership in the *Malay Digest*, a political and historical document dating back to the 17th century.
[271] Idrus, above n 269, 110-2.
[272] Ibid 108-9.

> The ruler, being trustee cannot dispose of the land except with the consent of the people expressed through the Council of Chiefs.[273]

What then of Orang Asli? Idrus suggests that Orang Asli residing in the forests may not have been subjects of the Sultan who neither had access nor control over the 'far removed forests'.[274] Maxwell himself had previously acknowledged this lack of access and the distinct 'Aboriginal tribes' in this regard. He said:

> The Sakai and other aboriginal tribes who inhabit the interior of the Peninsula also practice this system of hill cultivation and their clearings may be seen on the sides of the more distant mountains far removed from the districts inhabited by Malays.[275]

In addition to Idrus's conclusions, it is also conceivable that Maxwell may not have considered Orang Asli land tenurial systems. His conclusion that 'there is no such thing as joint ownership by the inhabitants of a village' in primitive Malay rights of tenure[276] omits communal land practices of Orang Asli that still continue today. Also, the *Perak Code* that Maxwell cited for the acquisition of Malay proprietary rights limits such acquisition to Muslims.[277] Orang Asli in the forests were not Muslims, raising further possible questions about the Sultan's jurisdiction over the 'inaccessible' Orang Asli. Maxwell's approach may be explained by colonial ethnocentric prejudices towards 'tribal' civilisations in the late 19th century. Unlike the settled and accessible Malays whose way of life was more familiar to the British, the numerically sparse and geographically remote Orang Asli may have been regarded by the British as not being 'socially organised' or accessible enough to merit further inquiry into their land tenure systems.

These questions raise the issue of whether Orang Asli lands were under the *de jure* ownership and control of the respective sultanate.[278] In *Adong 1*, Mokhtar Sidin JCA addressed this issue, albeit superficially. His Lordship held:

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[273] Muhammad Kamil Awang, *The Sultan and the Constitution* (Dewan Bahasa dan Pustaka, 1998), 22.
[274] Idrus, above n 269, 114.
[275] W E Maxwell, 'The Law and Customs of the Malays with reference to the Tenure of Land' (1884) 13 *Journal of the Straits Branch of the Royal Asiatic Society* 75, 81.
[276] Ibid 80.
[277] Ibid 171.
[278] For Malay-Orang Asli relations prior to independence from the British, see above Chapter 2, 23-33.

> It is not disputed that generally, Peninsular Malaysia was occupied by two groups of peoples; namely, the Malays…and the Aboriginal people…, each group occupying their own areas of spheres and living in harmony. Within the Malay Peninsula were found the Malay Sultanates, some areas were occupied by the Aboriginal peoples without any dispute as to their occupation of lands….
>
> The British introduced the Torrens land system, which introduced alienation and title for the first time. This system brought within it all the people except the Aborigines who continued to live in the jungle and roamed freely and sheltered wherever they wanted…Before the introduction of the Torrens land system, these lands were unclaimed land in the present tense but were *kawasan saka* (*ancestral area*) *(translation added)*. On the introduction of the Torrens land system, all the *kawasan saka* became state land but the Aboriginal people were given the freedom to roam about these lands and harvest the fruits of the jungle. The plaintiffs, however, continue to live and depend upon this unalienated land.[279]

Mokhtar Sidin JCA did not address the historical perception that the Sultan was the paramount owner of all lands. The Malays may have lived in 'harmony' with some Orang Asli[280] but, ownership of all lands including those occupied by Orang Asli ascribed to the Sultan by the British colonial administrators, formed the basis for the application of the Torrens land registration system in the Malay states. Despite appreciating that Orang Asli customary land became State land upon the introduction of the Torrens system, His Lordship did not authoritatively deal with the issue of whether there was paramount ownership of the lands, and if so, its impact on pre-existing Orang Asli rights for the purposes of the recognition of common law Orang Asli customary land rights. Nonetheless, the judgment explicitly acknowledges that the 'Torrens system…brought within it all people except the Aborigines'.[281]

In *Sagong 1*, Mohd Noor Ahmad J had to deal with the submission by the State and Federal Governments that all lands in the Selangor sultanate belonged to the Sultan. To this, his Lordship held:

> In general, the Aboriginal people occupied the lands in the hinterland in an organised society, though some were nomadic. Although the Sultan owned the lands, they were left undisturbed to manage their affairs and way of life thereon in accordance with their practices, customs and traditions, except in those lands which

[279] *Adong 1* [1997] 1 MLJ 418, 429-30.
[280] For contrary views, see above Chapter 2, 28-9.
[281] *Adong 1* [1997] 1 MLJ 418, 429.

> attracted activities to enrich the privy purse, such as tin mining etc. In my view, if the Aboriginal people are now to be denied the recognition of their proprietary interest in their customary and ancestral lands, it would be tantamount to…the situation prevailing in Australia before the last quarter of the 20th century where the laws, practices customs and rules of Indigenous peoples were not given recognition, especially with regard to their strong social and spiritual connection with their traditional lands and waters. The reason being that when a territory was colonized by the Whites, it was regarded as practically unoccupied, without settled inhabitants or settled land, an empty place, desert and uncultivated even though the indigenous peoples had lived there since time immemorial because they were regarded as uncivilized inhabitants who lived in a primitive state of society. However, *Mabo No 2* changed the position, and since then, there had been a flurry of state and federal legislation relating to native titles. Brennan J in his reasoning, referred to international human rights norms….
>
> Therefore, in keeping with the worldwide recognition now being given to Aboriginal rights, I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land.[282]

From the excerpt above, it would seem that the learned judge avoided the doctrinal argument on the Sultan's paramount land ownership by basing his decision on concepts of equality and non-discrimination and the 'worldwide recognition now being given to Aboriginal rights' that were not elaborated upon. The appellate courts in *Adong*, *Sagong* and other landmark decisions affecting Orang Asli customary land rights have gone on to endorse the application of Indigenous title to Orang Asli without addressing the impact of the Sultan's paramount ownership in the Malay states on the common law doctrine.

4 The rationale: Justice for a marginalised Indigenous minority

The rationale for the application of the common law doctrine to the specific case of Orang Asli is unique to the circumstances in Peninsular Malaysia. The numerically and politically dominant ethnic Malays of Peninsular Malaysia, also regarded as 'sons of the soil',[283] have not resorted to claims for Indigenous title over their customary lands. Malay political and numerical strength, supported by strong constitutional protection and affirmative action policies, have secured their relatively successful integration into the mainstream market economy and better protection of

[282] *Sagong 1* [2002] 2 MLJ 591, 614-5.
[283] This term is a literal translation from the Malay word 'Bumiputera' which usually describes Indigenous groups in the context of affirmative action policies provided to them by the Government pursuant to the *Malaysian Constitution*.

their lands in the form of Malay reservation lands and customary lands.[284] On the other hand, the same cannot be said of the politically, socially, economically and numerically inferior Orang Asli. State protection has also not alleviated dispossession of Orang Asli from their lands and resources. Their predicament has driven Orang Asli to the courts and other forms of rights advocacy to seek justice.

Through an unwitting combination of skilled legal advocacy and a sympathetic judiciary, the doctrine of Indigenous title has been applied by Malaysian courts through a melange of available legal provisions and common law principles to address inequalities in the law relating to Orang Asli and their customary lands. As the courts deemed that there was enough leeway within Malaysian law to do so, there appeared little need to theorise and articulate the application of the doctrine of Indigenous title to Orang Asli. Conversely, the lack of theorisation of the doctrine renders it susceptible to a degree of volatility in terms of future development.

B *Content*

The content of common law Orang Asli customary land rights gives an indication of the quality and extent of the interest conferred by the common law doctrine. Content encompasses the main characteristics of the doctrine as developed by case law in Malaysia except those relating to its practicability (proof) and resilience (vulnerability). In this section, the main characteristics of the common law doctrine are identified. The discussion then focuses on the nature of the rights afforded by the doctrine due to the different judicial treatment afforded to settlement areas and non-settlement areas (for example, foraging areas) within customary lands.

One of the main *sui generis* characteristics of common law Orang Asli customary land rights is that it is inalienable.[285] Orang Asli customary land rights can either be held communally or individually[286] and do not owe their existence to any statute or

[284] For the protection afforded in respect of Malay reservation lands, see above Chapter 2, 36 and below Chapter 8, 330-1, 373-4.
[285] *Adong 1* [1997] 1 MLJ 418, 430; *Adong 2* [1998] 2 MLJ 158, 162.
[286] *Sagong 1* [2002] 2 MLJ 591, 613-4; *Madeli 2* [2008] 2 MLJ 677, 692-3 (Federal Court).

executive declaration.[287] In Peninsular Malaysia, Orang Asli statutory rights under the *APA* and under the common law are complementary in that they can co-exist.[288] In *Sagong 2*, the Court of Appeal, citing *Amodu*, held that the precise nature of a communal 'customary title depends on the practices and usages of each individual community'.[289] This dictum suggests that Orang Asli customary interests over land could range from periodic entry for use to rights approximating to full ownership.

The order granted in *Sagong 1* included a claim that the Orang Asli claimants were 'the original *title* holders and the holders of usufructuary rights in respect of the land'.[290] In coming to this conclusion, the Court followed *Adong 1* and *Adong 2* where claims relating to hunting and foraging *rights* were rights over the land protected as a right to property under art 13 of the *Malaysian Constitution*. In addition, the Court held, by reason of the fact of settlement and their culture relating to land and their customs on inheritance, that the claimants not only had the right *over* the land but also an interest *in* the land.[291] Mohd Noor Ahmad J went on to observe *obiter dicta*[292] that the *proprietary interest* does not extend to 'areas where they [Orang Asli] used to roam to forage for their livelihood in accordance with their tradition'.[293]

In *Nor Nyawai 2*, the Court of Appeal applied *Adong 1* and *Sagong 1* but limited claims for NCR to settled areas. The Court held:

> From the above two cases, we note that the common feature which forms the basis of *claim* for native customary rights is the continuous occupation of land. Further, we are inclined to agree with the view of the learned trial judge in Sagong bin Tasi that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such 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 roamed or foraged the areas in search for food.[294] *[Emphasis added]*

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[287] *Sagong 1* [2002] 2 MLJ 591, 612; *Nor Nyawai 2* [2006] 1 MLJ 256, 270; *Bato Bagi* [2011] 6 MLJ 297, 324-5 (Malanjum CJSS).
[288] *Adong 1* [1997] 1 MLJ 418, 431; *Adong 2* [1998] 2 MLJ 158, 163 (Court of Appeal); *Sagong 1* [2002] 2 MLJ 591, 615.
[289] *Sagong 2* [2005] 6 MLJ 289, 301.
[290] *Sagong 1* [2002] 2 MLJ 591, 621.
[291] Ibid 611.
[292] The land in question was within the Orang Asli settlement (see Ibid 615).
[293] *Sagong 1* [2002] 2 MLJ 591, 615.
[294] *Nor Nyawai 2* [2006] 1 MLJ 256, 269.

The Court limited the proprietary interest to settled areas based on its concern that recognising the full extent of Indigenous customary territories would lead to 'vast areas' becoming subject to customary rights 'simply through assertions by some natives'. In *Sagong 2*, the Court of Appeal subsequently held that the precise nature of a communal 'customary title depends on the practices and usages of each individual community'.[295] If this statement were to be followed, it would be doctrinally inconsistent for the Court in *Nor Nyawai 2* to have arbitrarily limited the proprietary interest in NCR to settled areas without determining the precise nature of such rights in accordance with the claimants' laws, customs and traditions beforehand. This inconsistency merits a critical examination of the content of the property right under the common law doctrine.

In respect of settled lands, the Court in *Sagong 1* applied *Delgamuukw* in regarding Orang Asli customary land rights as a right to the land.[296] Consequently, this right is a 'property' right under art 13 of the *Malaysian Constitution* in the sense that compensation available for deprivation of such a right would be in accordance with the *LAA*, the national legislation for the acquisition of private property.[297] The judicial treatment of Orang Asli customary land rights in settled areas, in so as far as compensation for acquisition or use of property is concerned, is no different from other non-Orang Asli private property interests in Peninsular Malaysia.

In the case of areas outside the settlement area, *Adong 1* categorises the right as 'property' for the purposes of art 13 of the *Malaysian Constitution* but compensation for deprivation is assessed based on the loss of use of the land and deprivation of livelihood.[298] The 'adequacy' of these forms of compensation for Orang Asli lands is examined in Section IIID2 and evaluated with regard to the *UNDRIP* Standards in Chapter 7.[299] In *Adong 1*, there was no explanation as to the content of these seemingly 'lesser' rights except that it included 'the right to move freely about their land, without any form of disturbance or interference and also to live from the

[295] *Sagong 2* [2005] 6 MLJ 289, 301.
[296] *Sagong 1* [2002] 2 MLJ 591, 615.
[297] See ibid; *Sagong 2* [2005] 6 MLJ 289, 302 (Court of Appeal, Malaysia).
[298] *Adong 1* [1997] 1 MLJ 418, 436.
[299] See below, 254-6, 312-5.

produce of the land itself, but not to the land itself in the modern sense that the Aborigines can convey, lease out, rent out the land or any produce therein'.[300] The questionable merits of this reasoning have been canvassed above.[301]

Given that *Adong 1* is good law, the Malaysian courts seem to have reached different conclusions as to the nature of the interest under the common law doctrine in respect of Orang Asli settlement areas and areas outside the settlement but within Orang Asli customary land, for example, foraging and hunting areas. Separating settlements from the land from which the settlement and its occupants derive their livelihood could ultimately threaten the continuation of the traditional character of the settlement itself and would impair the ability of Indigenous peoples to respond and adapt to the pressures of modernisation in a manner consistent with their traditions.[302]

Further, the limitation of a proprietary interest to settlement areas poses practical difficulties in determining the extent of Orang Asli customary land rights outside the settlement and the level of protection afforded against outsiders in respect of these rights. For example, if a particular Orang Asli group are holders of usufructuary rights over parts of their customary lands not forming their settlement, would they have the right to exclusive possession (but not ownership) of burial grounds, ceremonial sites or fruit orchards located outside the settlement area? These difficult questions have not been dealt with by the Malaysian courts.

In Peninsular Malaysia, resources are vested in the State by statute.[303] Orang Asli have limited statutory rights and privileges of use in respect of hunting and forest produce.[304] In *Adong 1*, the *Jakun* claimants were compensated for loss of hunting and foraging rights. However, it remains to be seen whether the vesting of resources

[300] *Adong 1* [1997] 1 MLJ 418, 430.
[301] See above, 208-11.
[302] Peter Crook, 'After *Adong*: The Emerging Doctrine of Native Title in Malaysia' (2005) 32 *Journal of Malaysian and Comparative Law* 81, 87.
[303] See above Chapter 5, 161-5.
[304] Ibid 161-4.

in the State extinguishes or impairs rights under the common law doctrine. This issue is examined in Chapter 7.[305]

C *Proof*

Whilst Orang Asli customary land rights have been recognised by the Malaysian courts, they are enforceable solely through the courts.[306] Accordingly, recognition of a particular claim for customary lands and resources is not automatic and subject to its proof in the courts. Failure to establish a claim would carry the inevitable consequence of the denial of such rights. Hence, the degree of proof required to establish a claim for Orang Asli customary land rights provides a useful barometer for the practical utility of the doctrine in delivering land justice to Orang Asli. Too many obstacles in proving a claim for Orang Asli customary rights would substantially reduce the efficacy of the common law doctrine. With this in mind, this section explicates the requirements for proof of common law Orang Asli customary land rights, foreshadowing the ambiguities relating to the establishment of such rights.

In *Sagong 1*, the Court held that the lands in dispute were *Temuan* customary lands by reason of the following findings of fact:

(1) the plaintiffs were an Aboriginal society within the meaning of the *APA*;
(2) their continuous occupation of the land for 'generations';
(3) they were descendants of *Temuan* who had resided on the land since 'early times';
(4) the traditional connection with the land had been maintained from 'generation to generation'; and
(5) the customs in relation to the land were distinctive to *Temuan* culture.[307]

The Court of Appeal chose not to elucidate these requirements further possibly because the respondents did not object to the facts taken into account by the trial

[305] Below, 294-6.
[306] *Sagong 1* [2002] 2 MLJ 591, 612.
[307] Ibid 603-10.

court in adjudicating the claim.[308] This position allows the test applied in *Sagong 1* to be varied or departed from in subsequent cases. In *Adong 1*, the Court took into account the following undisputed facts:

> plaintiffs and their families, and also their ancestors, were the Aboriginal people who lived in the Linggiu valley or, at the very least, were living in the surrounding areas. It is also established that the plaintiffs depend on the produce of the jungle in the Linggiu valley and its surrounding areas for their livelihood.[309]

These factors suggest the need for the claimants and their ancestors to be Aboriginal and to have maintained a traditional connection with the land. In addition, the Court held that Aborigines had common law customary land rights because 'they had been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial'.[310] The lack of guidance from the higher courts on the legal criteria for the proof of Orang Asli customary land rights leaves these requirements reasonably open and subject to a degree of uncertainty. Notwithstanding this, it would be prudent to conclude that proof of aboriginality, continuous occupation and the maintenance of a traditional connection with the land are factors common to proof of Orang Asli customary land rights.

Following *Sagong 1*, the parameters of who is an Orang Asli and what constitutes a community are contained in the *APA*. Mohd Noor Ahmad J examined the relevant provisions of the *APA*[311] and ruled that 'the onus is on the plaintiffs to show that they speak an Aboriginal language, follow an Aboriginal way of life as well as

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[308] *Sagong 2* [2005] 6 MLJ 289, 299, 300, 302.
[309] *Adong 1* [1997] 1 MLJ 418, 425.
[310] Ibid 430.
[311] An aborigine is defined in s 3(1) of the Act 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 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.
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.

Aboriginal customs and beliefs'.[312] The Court concluded that the plaintiffs belonged to an organised society, following an Aboriginal way of life, practising customs and having their own language which they use to the present day.[313] The Court also adopted a liberal interpretation of the term 'aborigine' as contained in the *APA*. The Court accommodated changes that occurred within the plaintiffs in terms of their daily life and practices in holding that the plaintiffs were still practising *Temuan* culture.[314]

The liberal approach taken by the trial judge was not interfered with by the Court of Appeal due to two factors; first, the Court would only do so as a matter of law 'in the rarest of cases', and second, there was 'complete acceptance of the facts' by the defendants.[315] It follows that the liberal approach taken by the Court as to the plaintiffs' 'aboriginality' under the *APA* can also be departed from in future cases. In other words, another court may not be as accommodating as Mohd Noor Ahmad J in respect of changes to the Orang Asli 'way of life' and 'cultures and beliefs'. For instance, the Court in *Pedik* held that *RPS* (Regroupment scheme) lands resided on by the Orang Asli plaintiffs were not customary lands without proffering any reasons.[316]

Based on *Sagong 1*, it would appear that Orang Asli would also have to prove occupation for 'generations'. In *Adong 1*, Orang Asli held common law customary land rights because 'they had been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial'.[317] In recognising that the plaintiffs had been deprived of hunting and foraging rights at common law and statutory law, the Court considered that there was no break 'in the continuous occupation and traditional connection in the lands for their livelihood'.[318] However, the facts in *Adong 1* were not really disputed.[319] There were such disputes in *Sagong 1*. The plaintiffs established that they had been in occupation of the land for at least

[312] *Sagong 1* [2002] 2 MLJ 591, 603-4.
[313] Ibid 606.
[314] See above n 128 and accompanying text.
[315] *Sagong 2* [2005] 6 MLJ 289, 299, 300, 302.
[316] *Pedik* [2010] 5 MLJ 849, 855.
[317] *Adong 1* [1997] 1 MLJ 418, 430.
[318] Ibid 433-4.
[319] Ibid 424.

210 years and 'occupation had been continuous up to the time of the acquisition'.[320] For the purposes of bringing the land within the definition of 'land occupied under customary right' under s 2 of the *LAA*,[321] His Lordship also held that the land was 'occupied and maintained by them to the exclusion of others in pursuance of their culture and inherited by them from generation to generation in accordance with their customs'.[322] In respect of occupation, physical presence on the land is not required 'provided there exists a sufficient measure of control to prevent strangers from entering the land'.[323] Two issues arise from the requirement of continuous occupation from an Orang Asli perspective. The first relates to whether occupation must be unbroken and the second is in respect to the time from which occupation must be shown. These issues are examined further in Chapter 7.[324]

The Court in *Sagong 1* based its findings of customary ownership on the maintenance of a 'traditional connection with the…lands from generation to generation and the customs in relation to the lands are distinctive to the *Temuan* community'.[325] In spite of acknowledging that the precise nature of customary title was a question of fact depending on the practices and usages of each community,[326] the Court of Appeal did not see fit to clarify the requirements for the proof of Orang Asli customary land rights. This was again probably due to the 'complete acceptance by the respondents of the facts as found by the learned judge'.[327] Given the Court of Appeal's acceptance of the factual findings in *Sagong 1*, this requirement would appear to be necessary in a claim for Orang Asli customary land rights. This view is fortified by *Adong 1* where Mokhtar Sidin JCA also highlighted the need for a continuous traditional connection with Orang Asli lands for their livelihood.[328] However, the cases do not lay down the parameters of a 'traditional connection'. Again, these issues are revisited in Chapter 7.[329]

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[320] *Sagong 1* [2002] 2 MLJ 591, 610.
[321] The *Land Acquisition Act 1960* (Malaysia) ('*LAA*') provides compensation for acquisition of land by the state. In *Sagong 1*, Mohd Noor Ahmad JCA awarded market value compensation to the *Temuan* claimants as prescribed in the *LAA*.
[322] *Sagong 1* [2002] 2 MLJ 591, 618.
[323] *Madeli 2* [2008] 2 MLJ 677, 694-5.
[324] See below Chapter 7, 268-72, 280-2.
[325] *Sagong 1* [2002] 2 MLJ 591, 611.
[326] *Sagong 2* [2005] 6 MLJ 289, 301-2.
[327] Ibid 302.
[328] *Adong 1* [1997] 1 MLJ 418, 425, 433-4.
[329] See below Chapter 7, 272-82.

In terms of evidence, Mohd Noor Ahmad J in *Sagong 1*[330] held:

> in Malaysia, the rules of evidence are codified and the reception of the UK common law under s 3 of the Civil Law Act 1956 does not cover the hearsay rule. We have to look only at the four corners of the EA *[Evidence Act]* whether oral histories of Aboriginal societies should be accepted and if so, under what circumstances.[331] *[Explanation added]*

Section 32 of the *Evidence Act 1950* (Malaysia) ('*EA*') enables the admissibility of verbal statements of dead persons in the form of opinions. Based on this provision, His Lordship concluded that the framers of the *EA* 'would have been aware or ought to have been aware' of the fact that Orang Asli did not keep or have written records of their histories.[332] As such, evidentiary difficulties should not be a reason for the courts to create further exceptions to the hearsay rule other than what has been codified.[333]

Section 32(d) of the *EA* was then interpreted by the Court to allow statements by Orang Asli witnesses on their practices, customs and traditions and the relationship of these practices, customs and traditions with their land.[334] The Court went on to hold that the statement must be founded on the concurring opinions of community members who are equally interested in the matter, and which opinions have accumulated and grown through generations.[335] However, the weight to be attached to such statements would depend on the status of the maker in relation to the subject matter of the statement.[336]

Further, Mohd Noor Ahmad JCA held that, in principle:

> oral histories of the Aboriginal societies relating to their practices, customs and traditions and on their relationship with land should be admitted subject to the confines of the EA, in particular s 32(d) and (e), that is to say:
> (i) they must be of public or general nature or of public or general interest;

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[330] *Sagong 1* [2002] 2 MLJ 591, 622-3.
[331] Ibid 623.
[332] Ibid.
[333] Ibid.
[334] Ibid.
[335] Ibid.
[336] Ibid.

> (ii) the statement must be made by a competent person, ie one who 'would have been likely to be aware' of the existence of the right customs or matter; and
> (iii) the statement must be made before the controversy as to the right, customs or matter had arisen.[337]

The Court also noted that these provisions were sufficient because the degree of proof required was only on a balance of probabilities.[338] More importantly, the Court cautioned that this was not a blanket sanction of oral evidence meaning that objections could be taken on a particular piece of evidence on its merits.[339]

Despite its finding that oral histories come within the purview of admissible evidence under the *EA*, *Sagong 1* still defers the admissibility and weight of such evidence to the trial judge. Even if the trial judge were to adopt a liberal interpretation of s 32 of the *EA* in the admission of oral histories, evidential findings may be reversed on appeal. *Nor Nyawai 2* illustrates this point. Having accepted the trial judge's recognition of NCR at common law as a matter of law in Sarawak, the Court of Appeal had to address the issue of whether the judge 'was factually correct based on the evidence adduced'.[340] The Court of Appeal allowed the appeal having found that the judge had erred in fact for a number of reasons.[341] Of particular note was the trial judge's acceptance of 'self-serving testimonies by some of the respondents which should carry little or no weight in the absence of some other credible corroborative evidence'.[342] In a communal title claim, it would not be uncommon for a village or community elder to give evidence of community customs, practices and traditions and their connection with the land while also being an interested claimant. The implications of these evidentiary challenges are examined in Chapter 7.[343]

[337] Ibid 623-4.
[338] Ibid 624.
[339] Ibid.
[340] *Nor Nyawai 2* [2006] 1 MLJ 256, 270-1.
[341] For these reasons, see ibid 271-3.
[342] *Nor Nyawai 2* [2006] 1 MLJ 256, 272.
[343] See below Chapter 7, 282-4.

D *Vulnerability*

The resilience of common law Orang Asli customary land rights in relation to other competing interests is an indicator of the scope of the common law doctrine's application (pre-proof) and its ability to protect Orang Asli lands in the future (post-proof). A customary right to land that can be extinguished by the creation of other interests is relatively weak and limits the scope of the doctrine. A customary right to land that encompasses full ownership of land, resources and internal autonomy would be of relatively less value if the right can be expropriated by the state at will and without just, fair and equitable compensation.

This section introduces the key principles on the manner in which common law Orang Asli customary land rights can be extinguished and the extent of compensation available for loss of these rights.

1 Extinguishment

The primary method by which Orang Asli customary land rights can be extinguished is by clear and unambiguous words in legislation.[344] Orang Asli customary land rights may also be extinguished by an executive act authorised by such clear and plain legislation.[345] In construing whether a 1921 Order (an executive act) reserving lands for the purpose of the operation of Sarawak Oilfields Ltd ('*1921 Order*') had extinguished NCR of the claimant, the Federal Court in *Madeli 2* held, that 'such a drastic measure needs to be expressed in clear language and cannot be derived by mere implication'.[346] Nonetheless, extinguishment of these rights must be adequately compensated.[347] The adequacy of the compensation afforded by the common law doctrine is examined in Section IIID2 below.

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[344] See *Nor Nyawai 2* [2006] 1 MLJ 256, 270; *Madeli 2* [2008] 2 MLJ 677, 690, 696; *Jalang anak Paran v Government of the State of Sarawak* [2007] 1 MLJ 412, 422 (affirmed in *Bato Bagi* [2011] 6 MLJ 297, 324-5 (Malanjum CJSS)). In *Sagong 1*, the Court held that native title can be extinguished by, amongst others, 'clear and plain' legislation (*Sagong 1* [2002] 2 MLJ 591, 612).
[345] *Sagong 1* [2002] 2 MLJ 591, 612.
[346] *Madeli 2* [2008] 2 MLJ 677, 697.
[347] *Sagong 1* [2002] 2 MLJ 591, 621; *Sagong 2* [2005] 6 MLJ 289, 309-10.

In *Nor Nyawai 1*, the Court had to determine whether the regulation of customary land use in Sarawak had extinguished common law NCR. Ian Chin J utilised the 'clear and unambiguous' words test.[348] His Lordship held that a permit system to work and fell timber, while imposing a fine for not obtaining such permit, did not 'abolish' NCR to enter into the jungle to fell and collect timber as there were 'no explicit words to that effect'.[349] In respect of the impact of the regulation of hunting, fishing or forest produce, the learned Judge was inclined to hold that these regulations limited or modified the extent of NCR but did not extinguish them.[350] The position taken by the Court suggests that regulation of activities which impact upon the exercise of NCR may impair the extent of customary rights. A further question would be whether such impairment is temporary or, alternatively, permanently extinguishes those rights.

Another possible circumstance where common law Orang Asli customary rights may be extinguished is by way of reservation of land by the State.[351] In *Madeli 2*, the Federal Court found that the *1921 Order* created a trust or reservation for a public purpose that did not extinguish NCR of the claimant. The facts revealed that during the material time Sarawak Oilfields Ltd never took possession of the land while the claimant maintained occupation of the land. In arriving at its conclusion, the Federal Court relied on Brennan J's views in *Mabo No 2*.[352] Essentially, native title at common law is extinguished by a reservation only where the State has reserved land inconsistent with the continued enjoyment of native title and this is 'sometimes a question of fact, sometimes a question of law and sometimes, a mixed question of fact and law'.[353] This opens the door to the possibility of extinguishment by inconsistent grant in future cases as a grant of a title may be seen to manifest a clear and plain intention to extinguish Orang Asli customary rights. The impact of extinguishment by inconsistent grant is evaluated in Chapter 7.[354]

[348] *Nor Nyawai 1* [2001] 6 MLJ 241, 245.
[349] Ibid 263.
[350] Ibid 264-6.
[351] *Madeli 2* [2008] 2 MLJ 677, 697-8.
[352] Ibid.
[353] *Mabo No 2* (1992) 175 CLR 1, 68.
[354] See below Chapter 7, 298-300.

The potential of the common law doctrine to encompass rights to FPIC and consultation emanates from the fiduciary duty owed by the Federal and State Governments to Orang Asli.[355] In describing the fiduciary duty, Mohd Noor Ahmad JCA in *Sagong 1* held, among other matters, that Orang Asli customary land rights were not to be impaired or destroyed 'without the consent of or otherwise contrary to the interests of title holders'.[356] The Court of Appeal in *Sagong 2* explicitly endorsed this part of the judgment.[357] It went on further to hold that the Federal and State Governments owed a fiduciary duty to protect Orang Asli and their land rights, and that it was more a question of fact whether this duty had been breached.[358] In *Pendor*, the Court considered the fact that the affected Orang Asli had been adequately consulted and consented prior to their relocation in deciding that the Federal and State Governments had not breached their fiduciary duty towards Orang Asli.[359] These decisions suggest that the fiduciary duty concept may be used to protect Orang Asli and their lands and resources through the requirement for effective consent and consultation with Orang Asli prior to any action affecting Orang Asli lands and resources. The potential of this proposition will be evaluated in Chapter 7.[360]

In 2011, the Federal Court had the opportunity of considering whether the natives of Sarawak had a constitutional right to consultation and hearing prior to extinguishment of NCR notwithstanding that there was no such provision in the *Land Code 1958* (Sarawak) but in view of, amongst other reasons, the fiduciary duty owed by the State to the natives.[361] The majority of the Federal Court opined that prior consultation before extinguishment of NCR was desirable, but held that there was no legal requirement for the State to do so unless such consultation was expressly provided in the law.[362] In dissent, Malanjum CJSS observed that such a right could exist if the livelihood of natives were adversely affected but declined to

[355] In respect of the fiduciary duty owed by the Federal and State Governments to Orang Asli, see *Sagong 1* [2002] 2 MLJ 591, 618-620; *Sagong 2* [2005] 6 MLJ 289, 311-4.
[356] *Sagong 1* [2002] 2 MLJ 591, 618-9.
[357] *Sagong 2* [2005] 6 MLJ 289, 312.
[358] Ibid.
[359] *Pendor* [2011] Kuala Lumpur High Court Application for Judicial Review R2-25-292-2007 (Unreported, Mohd Zawawi Salleh J, 11 April 2011), [42]-[43].
[360] See below Chapter 7, 303-8.
[361] *Bato Bagi* [2011] 6 MLJ 297.
[362] Ibid 306 (Zaki CJ), 336 (Raus FCJ).

rule on this point given the facts and circumstances of the appeal.[363] However, His Lordship affirmed *Sagong 2* in respect of the fiduciary duty owed by the state but went on hold that breach of the duty was not 'the main plank of the Appellant's submission' and 'not quite related to the question posed' in the appeal.[364] Chapter 7 examines the implications of the fiduciary duty owed by the state to Orang Asli in respect of extinguishment of common law Orang Asli customary land rights.[365]

Pending the resolution of litigation for customary land rights, Orang Asli claimants would be entitled to apply for interlocutory relief restraining any parties from forcibly relocating Orang Asli from their customary lands. In such an application, Orang Asli applicants would have to demonstrate that: (i) they have a prima facie case (meaning that the claim is not frivolous, vexatious and abuse of the court process; (ii) damages are not an adequate remedy; and (iii) the balance of convenience favours them (meaning they would suffer more harm than other parties in the suit).[366] The challenges of bringing an Orang Asli customary land rights action in the Malaysian civil courts are evaluated in Chapter 7.[367]

2 Compensation

Compensation is payable for extinguishment of common law Orang Asli customary rights.[368] As Orang Asli customary land rights have been regarded as 'property' for the purposes of art 13 of the *Malaysian Constitution*, adequate compensation is payable under that provision.[369] Again, art 13 reads:

> (1) No person shall be deprived of property save in accordance with law.
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

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[363] Ibid 322-3 (Malanjum CJSS). For an examination of *Bato Bagi*, see above Chapter 4, 117-8, 126-7, 131-2, 142.
[364] *Bato Bagi* [2011] 6 MLJ 297, 326 (Malanjum CJSS).
[365] See below Chapter 7, 303-12.
[366] For basic principles governing a grant of an interlocutary injunction in Malaysia, see eg. *Mohamed Zainuddin bin Puteh v Yap Chee Seng* (1978) 1 MLJ 40.
[367] See below Chapter 7, 263-88.
[368] *Adong 1* [1997] 1 MLJ 418, 434; *Adong 2* [1998] 2 MLJ 158, 163-4; *Sagong 1* [2002] 2 MLJ 591, 617; *Sagong 2* [2005] 6 MLJ 289, 309-10; *Nor Nyawai 1* (2001) 6 MLJ 241, 284; *Nor Nyawai 2* [2006] 1 MLJ 256, 269; *Madeli 2* [2008] 2 MLJ 677, 691-2 (Federal Court).
[369] *Adong 1* [1997] 1 MLJ 418, 432-4; *Adong 2* [1998] 2 MLJ 158, 162-4 (affirmed in *Bato Bagi* [2011] 6 MLJ 297, 306-7); *Sagong 1* [2002] 2 MLJ 591, 620-1.

Under the common law, compensation is payable for extinguishment of common law Orang Asli customary land rights.[370] Thus far in Peninsular Malaysia, redress seems to have been awarded in the form of monetary compensation. However, the Court of first instance in *Nor Nyawai 1*, upon holding that the native plaintiffs held NCR over the disputed lands, declared titles granted by the State affecting those lands void and consequently liable to rectification on the land register.[371] These orders suggest restitution or at least, return of lands, as a form of redress. The Court of Appeal allowed the appeal on the grounds of insufficient proof but did not delve into the issue whether restitution is available under the common law NCR.[372] The decision in *Nor Nyawai 1* suggests that it may be open for Malaysian courts to determine non-monetary forms of adequate compensation.

In *Adong 1*, Mokhtar Sidin JCA held that the test for awarding market value compensation for acquisition or use of landed property under the *LAA* could not be applied because customary land 'is a far cry from titled land' in that it cannot be alienated.[373] His Lordship nonetheless considered the degree of attachment that Orang Asli have with their lands and the difficulty in relocating Orang Asli from their lands in assessing compensation.[374] Having held that the plaintiffs had suffered the deprivation of: (1) heritage land; (2) freedom of habitation or movement; (3) forest produce; and (4) future livelihood,[375] Mokhtar Sidin JCA then selected the purchase price per acre paid by the Singapore Government (RM6000 (USD2000)) to the Johor State Government for the land in question and multiplied it by two, saying that RM12000 (USD4000) per acre would be the maximum that his Lordship would award in the circumstances.[376] After considering all the deprivations suffered by the claimants, His Lordship awarded RM500 (USD166) an acre totalling RM26.5

[370] *Adong 1* [1997] 1 MLJ 418, 434; *Adong 2* [1998] 2 MLJ 158, 163-4; *Sagong 1* [2002] 2 MLJ 591, 617; *Sagong 2* [2005] 6 MLJ 289, 309-10; *Nor Nyawai 1* [2001] 6 MLJ 241, 284; *Nor Nyawai 2* [2006] 1 MLJ 256, 269; *Madeli 2* [2008] 2 MLJ 677, 691-2 (Federal Court).
[371] *Nor Nyawai 1* [2001] 6 MLJ 241, 299.
[372] See *Nor Nyawai 2* [2006] 1 MLJ 256, 269.
[373] *Adong 1* [1997] 1 MLJ 418, 435.
[374] Ibid. Citing *Adong*, the Federal Court recently observed that compensation for natives' loss of livelihood from their lands is now well established (see *Bato Bagi* [2011] 6 MLJ 297, 305-6 (Zaki CJ)).
[375] *Adong 1* [1997] 1 MLJ 418, 436.
[376] Ibid.

million (USD8.83 million) (53,000 acres).[377] Alternatively, the same amount was arrived at by another method of computing based on loss of future income. His Lordship assessed the monthly loss of income based on the poverty level at the time of acquisition (rounded to RM300 (USD100)) and multiplied it by 25 years and the 424 *Jakun* in the area.

The 'loss of income' or livelihood method employed in *Adong* 1 fails to consider the special connection that Orang Asli have with their customary lands. Having said this, Mokhtar Sidin JCA arguably acknowledged the 'special connection' when he ruled that the *Jakun* claimants suffered deprivation of 'heritage land', future livelihood and the 'freedom of habitation or movement' as a result of the loss of their ancestral lands. In *Sagong 1* where the interest of the *Temuan* claimants to their customary lands were held to be rights to the land, compensation for loss of Orang Asli lands were awarded based on the market value of the land.[378] Once again, the special connection between Orang Asli and their customary lands was not considered. 'Market-value' monetary compensation fails to appreciate that customary rights are imbued with cultural, spiritual, communal and economic dimensions far beyond mere market value.[379] Further, properties in remote areas have a relatively lower market value in comparison to prime urban areas. These issues are revisited in Chapter 7.[380]

IV RELEVANCE OF AUSTRALIAN AND CANADIAN LAWS

An evaluation of the common law doctrine requires an appreciation of the core issues affecting the application of the doctrine. However, Section IIC reveals that

[377] Ibid.
[378] *Sagong 1* [2002] 2 MLJ 591, 618; *Sagong 2* [2005] 6 MLJ 289, 310-1, 313. In *Sagong 2*, the Court found that the second defendant (the contractor) and the third defendant (the highway authority) were liable for aggravated damages for trespass (see *Sagong 2* [2005] 6 MLJ 289, 318-9).
[379] See eg. Anuar Alias and Md Nasir Daud, *Saka: Adequate Compensation for Orang Asli Land* (Universiti Tun Hussein Onn Malaysia, 2011), 69; Cheah Wui Ling, 'Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestone or False Start' (2004) 2 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/cheah>. See also observations of Malanjum CJSS in *Bato Bagi* [2011] 6 MLJ 297, 326.
[380] See below Chapter 7, 312-5.

there have only been eight landmark decisions in Malaysia concerning this doctrine. The doctrine is less developed relative to other comparable common law jurisdictions. Since 1992, the common law of Australia has recognised a form of native title, which in cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants in accordance with their laws and customs.[381] Despite its relatively new existence, native title in Australia has seen 187 determinations as at June 2012 of which 25 were litigated.[382] There have also been eight major High Court decisions directly concerning native title.[383] Australia has also had 35 years of dealing with State and Territory Aboriginal land rights legislation. Canada has seen close to 40 years of common law Aboriginal rights development since its initial recognition in 1973[384] and the constitutionalisation of Aboriginal rights in 1982.[385] In order to illuminate the core issues surrounding the doctrine, Australian and Canadian laws are argued to be the most relevant to the analysis in Chapter 7.

A *Reliance on Australian and Canadian Cases by the Malaysian Courts*

As can be observed from the discussion of the cases impacting the common law doctrine in Section IIC, the Malaysian courts have extensively relied upon Australian and Canadian cases in developing its jurisprudence on the subject.[386] Such was the reliance of Malaysian courts on landmark Australian and Canadian jurisprudence that the apex court of the land had to decide the following question of law in *Madeli 2*:

> 5. Whether having regard to the provisions of s 3(1) and 6 of the Civil Law Act 1956 (Act 67), and the relevant Federal, State and customary laws in

[381] *Mabo No 2* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J). Native title in Australia is now regulated by statute, namely the *Native Title Act 1993* (Cth).
[382] See National Native Tribunal, *Search determinations*, 22 June 2012 <http://www.nntt.gov.au/applications-and-determinations/search-determinations/Pages/Search.aspx>.
[383] For a commentary on these cases, see Lisa Strelein, *Compromised Jurisprudence: Native title cases since Mabo* (Aboriginal Studies Press, 2nd edn, 2009), chs 1-8.
[384] See *Calder* (1973) 34 DLR (3d) 145 (Supreme Court, Canada).
[385] See s 35 *Constitution Act 1982* (Canada).
[386] In essence, the Malaysian courts applied the doctrine of Indigenous title as developed by the Australian and Canadian cases. This reliance has been highlighted throughout the examination of landmark Malaysian cases on the common law doctrine in Section IIC above (at 206-30).

> Malaysia, and particularly in Sarawak, which regulate the creation, exercise, loss, abandonment and extinguishment of native rights over land; the Court of Appeal in this instant case, and indeed, the Courts in Malaysia generally, could rely on:
> (i) *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418
> (ii) *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241
> which were decisions based upon:
> (i) the Australian case of *Mabo (No 2)* which is 'an authority for the proposition that the common law of Australia recognizes a form of native titles'; and
> (ii) the Canadian case of *Calder v AV* (*sic*) *of British Columbia* which held that 'common law categorically recognized native rights over land'…[387]

In answering the question in the affirmative, the Federal Court held that *Calder* and *Mabo No 2* 'reflected the common law position with regard to native titles throughout the Commonwealth'.[388]

Decisions from common law jurisdictions, including those after 7 April 1956, are of persuasive value to the domestic courts but not considered binding on them.[389] Malaysian courts are at liberty to follow these decisions if local circumstances allow them to do so. In view of the fact that *Mabo No 2*, *Calder* and other Australian and Canadian cases have played a major role in the domestic common law doctrine, they are relevant in illuminating possible issues and challenges faced by Orang Asli if this doctrine were to be used as the sole avenue for the recognition and protection of Orang Asli customary lands and resources.

B *Role and Limitation of Australian and Canadian Laws on Indigenous Title*

The purpose of considering Australian and Canadian laws on Indigenous title is to assist the evaluation of the common law doctrine in Chapter 7. Experiences from these jurisdictions may be instructive in elucidating core issues encountered by Indigenous communities who utilise the doctrine of Indigenous title for the recognition and protection of their lands. However, the discussion and analysis of

[387] *Madeli 2* [2008] 2 MLJ 677, 689.
[388] Ibid 698.
[389] *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd* [1990] 1 MLJ 475 (Supreme Court, Malaysia). On the application of the doctrine of Indigenous title through the common law in Malaysia, see above, 232-3.

these issues will be tailored by reference to the *UNDRIP* Standards and features of the doctrine of common law Orang Asli customary rights identified in Section III. This method is employed to ensure that the analysis in Chapter 7 is focused on the task at hand, the evaluation of the common law doctrine as an effective mechanism for the recognition and protection of Orang Asli lands and resources, when measured against the *UNDRIP* Standards.

Whereas Canada and Malaysia govern Indigenous title by way of the common law, statute has intervened in Australia, in the form of the *Native Title Act 1993* (Cth) ('*NTA*'). The *NTA* and its subsequent amendments have contributed to a divergence between 'common law' and 'statutory' native title.[390] For example, the High Court in *Ward v WA* ('*Ward*') determined that the only relevance of Australian common law decisions 'is for whatever light they cast on the *NTA*'.[391] However, the same majority judgment determined that the definition of native title under s 223(1)(a) and (b) of the *NTA* is 'based on what was said by Brennan J' in *Mabo No 2*.[392] While it must be acknowledged that post-*NTA* cases have interpreted native title concepts in the light of the *NTA*, it is equally undeniable that many aspects of 'statutory' native title, for example, the definition of native title, emanate from common law decisions like *Mabo No 2*. There are also aspects of the common law that have been retained in the *NTA* system, for example, common law extinguishment of native title.[393]

As such, context-specific use of post-*NTA* cases, can be of persuasive value to the Malaysian courts[394] and such cases are consequently relevant to the analysis in Chapter 7. For the purposes of the analysis in Chapter 7, pre-*NTA* or 'pure' common law jurisprudence draws inspiration from the Australian High Court decisions of

[390] See for example, Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and the Native Title Act', 27 *Melbourne University Law Review* 523, 524-5, 556, 561-4.
[391] (2002) 213 CLR 1, [25].
[392] Ibid [16].
[393] See *Ward* (2002) 213 CLR 1, [588] (Kirby J); [635] (Callinan J). See also Sean Brennan, 'Native Title and the 'Acquisition of Property' under the Australian Constitution' (2004) 28 *Melbourne University Law Review* 26, 44-7.
[394] See above n 389 and accompanying text. See also *Director-General of Inland Revenue v Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214, 216.

Mabo No 2[395] and *Wik*[396] that have been cited with approval by the Malaysian courts.

At any rate, the *NTA* has not prevented the Malaysian courts from applying post-*NTA* cases in two instances when describing general principles of the common law doctrine.[397] Neither two Malaysian decisions considered the impact of the *NTA* on Australian native title law when applying these post-*NTA* decisions. *Nor Nyawai 2* serves as an example of the inherent doctrinal complexities involved in applying post-*NTA* cases to the Malaysian common law without appreciating the context of these cases. For example, the Court of Appeal in *Nor Nyawai 2* referred to the Australian High Court decision of *Ward*[398] as an illustration of the legal proposition that 'aboriginal title and rights arise from the existence of distinctive aboriginal communities *occupying* the land as their forefathers had done for centuries'.[399] The reference to *Ward* failed to consider the observation of the majority in the same decision that *occupation* of land in a statutory native title claim says 'nothing of what traditional laws and customs provided'.[400] Consequently, occupation of land is not necessarily determinative of the existence of statutory native title. While the application of foreign jurisprudence out of its local context may indeed lead the theoretical basis of the common law doctrine astray, the practical possibility of such an application to achieve the desired outcome in a legal dispute exists and indeed, cannot be overemphasised.

Post-*NTA* cases function to demonstrate the potential impact of solely relying on judicial interpretation of native title concepts and terms. For clarity, post-*NTA* cases in Chapter 7 are not meant to express a statement of binding common law aboriginal or native title for the Malaysian courts. The use of post-*NTA* cases in Chapter 7 will also be: (1) limited to those considered relevant to the comparative analysis; and (2) with necessary contextual qualifications.

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[395] (1992) 175 CLR 1.
[396] (1996) 187 CLR 1.
[397] See above nn 138 and 179 and accompanying text.
[398] (2002) 213 CLR 1.
[399] *Nor Nyawai 2* [2006] 1 MLJ 256, 269-70.
[400] *Ward* (2002) 213 CLR 1, [93] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (High Court, Australia).

In summary, Australian and Canadian cases are used to highlight plausible legal options available to the Malaysian courts to develop their own doctrine of Orang Asli customary land rights at common law. The examination of these cases neither functions to articulate a coherent common law doctrine in Malaysia nor evaluate the doctrine of Indigenous title in the comparative jurisdictions. Such matters would involve different enquiries that are beyond the scope of this thesis.

Chapter 7

COMMON LAW ORANG ASLI CUSTOMARY LAND RIGHTS: AN EVALUATION BY *UNDRIP* STANDARDS

I INTRODUCTION

As discussed in Chapter 6, the doctrine of common law Orang Asli customary land rights is a mechanism that enables Malaysian courts to recognise Orang Asli customary land rights without the need for an express legislative or executive act. This chapter analyses and determines the extent to which this doctrine meets the *UNDRIP* Standards, namely:

- Ownership, management and use of lands and resources with due respect for Indigenous laws, traditions, customs and institutions;
- Free, Prior and Informed Consent ('FPIC') and consultation in matters affecting Indigenous lands and resources;
- Just redress for dispossession.[1]

II OWNERSHIP, MANAGEMENT AND USE OF LANDS AND RESOURCES WITH DUE RESPECT FOR INDIGENOUS LAWS, TRADITIONS, CUSTOMS AND INSTITUTIONS

The common law doctrine potentially falls short of the first *UNDRIP* Standard. In Sections IIA1-5, it is suggested that the existing civil court process for the recognition of Orang Asli customary land rights may not necessarily cater for cross-cultural perspectives and the practical difficulties faced by Orang Asli claimants. In the event that these claims are successful, Section IIB demonstrates that the content

[1] See below Appendix 2, 401.

of rights available under the common law doctrine may limit Orang Asli ownership, management and use over their lands. The common law doctrine's inherent potential to subordinate Indigenous customs, traditions, interests to non-Indigenous law and interests is explored in Section IIC. Recurrent themes throughout this section are: (1) the uncertain dimensions of the common law doctrine in Malaysia; and (2) the challenges faced in relying on the courts to effectively recognise Orang Asli customary land and resource rights through ordinary development of the common law.

A *Proof of Indigenous Title: An Onerous Burden*

Recognition of Orang Asli customary land rights over a particular tract of land is subject to the successful establishment of such a claim in the civil courts. The degree of proof required for the establishment of these claims is therefore linked to the extent to which the doctrine provides for recognition and protection of Orang Asli customary lands. From a perusal of the Malaysian cases, proof of aboriginality, continuous occupation and the maintenance of a traditional connection with the land are requirements common to the proof of Orang Asli customary land rights.[2] In Sections IIA1-5, it will be argued that these requirements may pose obstacles to the 'recognition' of Orang Asli customary land rights. The first *UNDRIP* Standard calls for the recognition of Indigenous lands, territories and resources with due respect to customs, traditions and land tenure systems.[3] The term 'due respect' should be interpreted consistently with, amongst other principles, principles of equality and non-discrimination.[4] Further, the *process* for such recognition should give due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, and afford Indigenous peoples the right of participation.[5]

Compared to this form of 'recognition', the requirements for proof of Indigenous title under the common law doctrine are not far different than in ordinary civil claims, and consequently, may prove onerous for Orang Asli claimants. The civil

[2] See above Chapter 6, 245-50.
[3] See *UNDRIP*, art 26 para 2.
[4] Ibid art 46 para 3.
[5] Ibid art 27.

court process by which claims under the common law doctrine are adjudicated may be unsuitable for Orang Asli customary land rights claims and, perhaps more importantly, falls short of the *process* standard envisioned in the first *UNDRIP* Standard.

1 Who is an Orang Asli?

The requirement for 'aboriginality' poses a particular challenge to those seeking to establish Orang Asli customary land claims. The *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*') determines the boundaries of who constitute 'Orang Asli'. Fulfilling the definitions of an 'Aborigine' and an 'Aboriginal ethnic group' under the *APA*[6] is the first hurdle that Orang Asli claimants must overcome in order to establish a common law customary land rights claim.[7] Section 3(3) vests the ultimate power of deciding who is an Orang Asli and whether a community is practising an 'aboriginal way of life'[8] in the Federal Minister having charge of Orang Asli affairs. Other than curtailing Orang Asli rights to self-determination of their identity, this power potentially facilitates executive interference in the judicial determination of whether the customary land rights claimants are Orang Asli. Admittedly, this power is subject to judicial review but can nonetheless prove to be an additional hurdle to a successful Orang Asli customary land rights claim.

In arriving at the finding that the claimants were an 'Aboriginal society' within the meaning of the *APA*, the trial court in *Sagong 1* found that the plaintiffs, based on detailed evidence, belonged to an 'organised society, following an aboriginal way of

[6] An aborigine is defined in s 3(1) of the *APA* 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 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.
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.
[7] *Sagong 1* [2002] 2 MLJ 591, 606.
[8] See *APA,* s 3(1).

life, practising customs and beliefs and having their own *Temuan* language which they use to the present day'.[9] However, the trial court also took a liberal view in deciding that the various changes in the lifestyle and practices of the *Temuan* claimants as a result of interaction with outside society did not affect claimants' aboriginality.[10] There is no guarantee that the courts will follow this approach. In *Pedik*, the Court held that land subject to the Federal Government Regroupment schemes ('*RPS*') was not Orang Asli customary land.[11]

The requirement in *Sagong 1* for the observation of an Aboriginal way of life and Aboriginal customs and the habitual use of an Aboriginal language comes from the definition of an Orang Asli contained in s 3(1) of the *APA*.[12] In respect of the requirement for an 'organised society', the rationale is less clear. The words 'social organisation' in the definition of an 'Aboriginal ethnic group' in s 2 of the *APA*[13] may have influenced the trial judge's mind but this definition refers to an ethnic sub-group rather than an individual community within a sub-group as the case was in *Sagong 1*. The lack of clarity for the rationale behind the 'organised society' requirement in a communal customary land claim merits further consideration from a comparative perspective.

After featuring in earlier jurisprudence,[14] Canadian law has since deemphasised the need for claimants to prove an 'organised society' in a claim for Aboriginal title, choosing to place importance on prior and continuous occupation and use of the land claimed.[15] Traditional laws and the 'traditional way of life' and not proof of a pre-existing 'organised society' have been stressed as relevant to establishing occupation and use of land in an aboriginal title claim.[16] In Australia, the requirement for proof of the continuance of an organised society can be said to have its roots in *Mabo No 2*

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[9] *Sagong 1* [2002] 2 MLJ 591, 606.
[10] Ibid 606-7.
[11] *Pedik* [2010] 5 MLJ 849, 855.
[12] See above n 6.
[13] Ibid.
[14] See for example, *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513, 542.
[15] *Delgamuukw* [1997] 3 SCR 1010, [144]-[154] (Lamer CJ) (Supreme Court, Canada). See also Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008), 150-1, 329.
[16] *Delgamuukw* [148] (Lamer CJ); [194] (La Forest J).

where Toohey J expressed the 'need for a society sufficiently organised to create and sustain rights and duties'.[17]

However, the requirement for the continuance of a 'society' as laid down in the High Court in *Yorta Yorta* is derived from the majority view that there is a need to show a substantial continuance of the acknowledgment and observance of 'traditional' laws and customs from Crown acquisition of sovereignty for the purposes of fulfilling the statutory definition of native title under s 223(1)(a) and(b) of *NTA*.[18] Section 223(1) of the *NTA* defines native title as:

> the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

According to the majority, 'traditional' laws and customs under s 223(1)(a) of the *NTA* 'arise out of and, in important respects, go to define a particular society', meaning those 'laws and customs do not exist in vacuum'.[19] While the judgment in *Sagong 1* seemed to have focused more on the claimants' current existence as an 'organised society', the requirement for an 'organised society' has yet to be authoritatively articulated by the Malaysian superior courts. It is therefore useful to examine the requirement for the continuance of a society in an Australian native title context. An important caveat here is that the Australian common law did not specifically impose a separate requirement to prove an 'organised society' for native title in *Mabo No 2*.

In Australia, the material consideration is whether the Aboriginal claimants continued to exist as a body united by its acknowledgment and observance of laws and customs from the acquisition of British Crown sovereignty and whether by these

[17] (1992) 175 CLR 1, 187. See also *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*') (2002) 214 CLR 422, 445 (Gleeson CJ, Gummow and Hayne JJ) 464 (Kirby and Gaudron JJ).
[18] For a criticism of this part of the decision, see Young, above n 15, 321-34.
[19] *Yorta Yorta* (2002) 214 CLR 422, 444-5.

laws and customs there is a connection to the land. A society here refers to 'a body of persons united in and by its acknowledgment and observance of a body of laws and customs'[20] suggesting coherence in the form of the society in question. In the High Court decision of *Yorta Yorta*, Gleeson, Gummow and Hayne JJ held:

> acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty…
>
> In the proposition that acknowledgment and observance must have continued substantially uninterrupted, the qualification 'substantially' is not unimportant. It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end, it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs.[21]

The majority of the High Court was equally clear that 'some change to, adaptation of, traditional law or custom or some interruption of enjoyment or exercise' of native title rights or interests between the acquisition of sovereignty and the present 'will not necessarily be fatal to native title claim'.[22] Thus, the test for the acknowledgment of laws and customs is whether the level of 'interruption' is such so as not to render the Aboriginal society different from that existing at the time of the acquisition of sovereignty.[23] The full Federal Court of Australia has subsequently ruled in *Bodney v Bennell*, applying *Yorta Yorta*, that the cause for non-observance in Aboriginal society, in particular, the effect of white settlement, is not relevant to an inquiry whether there has been substantial interruption of the observance of laws and customs.[24]

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[20] Ibid 445.
[21] Ibid 456-7.
[22] Ibid 455.
[23] Ibid 456-7.
[24] (2008) 167 FCR 84, [74], [81], [97], [109].

If Malaysian courts follow the Australian approach in determining whether a group of customary land rights claimants collectively constitute an 'Aboriginal society' pursuant to the *APA*, the result would be antithetical to the liberal findings in *Sagong 1*. For instance, those Orang Asli groups or villagers who have adapted to the pressures of national development and government policies of Regroupment involving cash crop agriculture,[25] may no longer be seen as an 'Aboriginal society' under the *APA*. Unless a flexible approach to 'aboriginality' is maintained by the superior courts, the definition of an Orang Asli may possibly exclude Orang Asli claimants in a manner less accommodating of social change. In the event that the Minister makes a determination that Orang Asli claimants are not Orang Asli pursuant to s 3(3) of the *APA*, the only avenue open to Orang Asli claimants would be by way of judicial review. Given the issues faced by Orang Asli in maintaining their distinct identity vis-a-vis the state,[26] both the common law and *APA* may work to the disadvantage of Orang Asli claimants in this regard.

2 Continuous occupation

In Chapter 6, it was observed that the requirement of continuous occupation raises issues of whether occupation of the lands claimed by Orang Asli must be unbroken and regarding the time from which such occupation must be demonstrated.[27]

In *Adong 1*, the Court used the word 'unbroken' in addition to continuous occupation of the lands claimed by Orang Asli.[28] The cases of *Calder* and *Mabo No 2* which Mokhtar Sidin JCA expressly relied upon in recognising Orang Asli customary rights[29] do not refer to 'unbroken' occupation. The Court in *Sagong 1* did little to clarify matters. It highlighted the importance of continuous occupation for seven generations (estimated to be 210 years by expert evidence) and the maintenance of a traditional connection to the land from generation to generation in

[25] See above Chapter 2, 46-9, 54-64.
[26] See above Chapter 2, 42-6, 63-4.
[27] See above Chapter 6, 245-8.
[28] *Adong 1* [1997] 1 MLJ 418, 430.
[29] Ibid.

determining whether the claim had been proven.[30] In *Delgamuukw*, the test for proof of Aboriginal title in Canada was summarised as follows by Lamer CJ:

> In order to make out a claim for Aboriginal title, the Aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[31]

Despite the requirement for continuous occupation in defined circumstances, the Supreme Court was explicit in holding that there was no need to establish 'an unbroken chain of continuity' between present and prior occupation.[32] Although the nature of the occupation may have changed, a 'substantial connection' between the people and the land must be maintained.[33]

In *Mabo No 2*, the majority of the Australian High Court emphasised the maintenance of a connection with the land by Indigenous laws and customs in a native title claim rather than continuous occupation of the land claimed.[34] Only Toohey J ruled that it is a 'presence amounting to occupancy' from the acquisition of Crown sovereignty which must be proved to establish native title.[35] It must nonetheless be acknowledged that the rest of the majority considered the prior and continuous occupation of the *Meriam* claimants in *Mabo No 2* as a relevant factor in determining that the claimants had a connection with the land, and accordingly, native title to the land.[36]

By s 223(1) of the *Native Title Act 1993* (Cth) ('*NTA*'), a provision that has been said to adopt Brennan J's definition of native title in *Mabo No 2*,[37] the rights and interests under native title must possess three characteristics:

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[30] *Sagong 1* [2002] 2 MLJ 591, 610.
[31] *Delgamuukw* [1997] 3 SCR 1010, [143] (Supreme Court, Canada).
[32] Ibid [153].
[33] Ibid [154].
[34] (1992) 175 CLR 1, 59-60, 70 (Brennan J); 85-6 (Deane and Gaudron JJ).
[35] Ibid 188.
[36] Ibid 18, 51, 61 (Brennan J); 110 (Deane and Gaudron JJ)
[37] See eg. Richard Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2nd edn, 2004), 100.

> (a) they are rights and interests which are 'possessed under the traditional laws acknowledged, and the traditional customs observed', by the relevant peoples; (b) by those traditional laws and customs, the peoples 'have a connection with' the land or waters in question; and (c) the rights and interests must be 'recognised by the common law of Australia'.[38]

However, occupation of the land itself under the *NTA* has been held to say 'nothing of what traditional laws and customs provided'.[39] Section 223 and its interpretation has drawn criticisms for not appreciating the context in which Brennan J arrived at the finding of native title in *Mabo No 2*,[40] including his consideration of the prior and continuous occupation of the lands claimed by the *Meriam* people.

Under the *NTA*, it would not only be necessary to identify the laws and customs said to be traditional but also to identify the rights and interests in relation to land which are possessed under those laws and customs.[41] Thus, the nature of the inquiry in a native title claim in Australia does not emphasise 'occupation' but the maintenance of a connection to the land by particularised traditional laws acknowledged and customs observed by Aboriginal peoples.[42] The 'maintenance of a connection to the land' in an Australian context is explored when this aspect of proof is evaluated in Section IIA3(b) below. The comparative position is not very helpful to the Orang Asli scenario as it remains unclear whether occupation of the land claimed must be unbroken from time immemorial. Such a requirement could burden many Orang Asli claimants who may not have access to genealogical or historical records of continuous occupation since time immemorial or as in the case of *Sagong 1*, seven generations. Despite the possibility of the courts drawing evidential inferences to overcome the difficulties of proof of occupation,[43] the *requirement* for continuous occupation does not seem to afford 'due respect' to Orang Asli customs, traditions and land tenure systems. In this regard, Orang Asli oral traditions and laws and the historical impact of outside influence on Orang Asli society may not be given due weight and consideration by the civil courts.

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[38] *Ward* (2002) 213 CLR 1, [17] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[39] *Ward* (2002) 213 CLR 1, [93] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (High Court, Australia).
[40] See Young, above n 15, 270-1.
[41] *Ward* (2002) 213 CLR 1, [18]; Section 225 *NTA*.
[42] For what is meant by 'traditional' in Australia, see below Section IIA3(a), 272-6.
[43] See *Nor Nyawai 1* [2001] 6 MLJ 241, 259.

In respect of the time from which occupation must be shown, *Adong 1* uses the term 'time immemorial'[44] while the courts in *Sagong 1* and *Madeli 2* found in favour of the plaintiffs based on their respective facts. In *Sagong 1*, the Court found that the *Temuan* had continuously occupied the land for at least 210 years while in *Madeli*, continuous occupation from before the creation of an interest by the State was sufficient to create NCR.[45] The time from which occupation must be shown for an Aboriginal title claim in Canada is before British sovereignty.[46] Such a time frame is of little assistance to Peninsular Malaysia as the Malay states were *de jure* British protectorates with internal sovereignty.[47] This constitutional status prevailed through the formation of Malaya right until its independence in 1957.[48] In protectorates, private property rights are to be respected unless negated by Crown actions.[49]

Consistent with the 'justice' based rationale for the recognition of Orang Asli customary land rights, the Malaysian courts have thus far been relatively flexible in respect of the time from which continuous occupation must be proved in a customary land rights claim choosing to look at the facts rather than set time frames based on legal history. It must however be acknowledged that the superior courts in Malaysia have yet to authoritatively determine whether such a set time frame is necessary for 'continuous' occupation, leaving the issue open to contention. A time frame based on the acquisition of sovereignty would adversely affect potential

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[44] *Adong 1* [1997] 1 MLJ 418, 430.
[45] See *Madeli 1* [2005] 5 MLJ 305, 326.
[46] *Delgamuukw* [1997] 3 SCR 1010, [143].
[47] See W G Maxwell and W S Gibson (eds), *Treaties and Engagements Affecting the Malay States and Borneo* (1924), 28-136. For further reading and commentary, see eg. Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens, 1966), 715-7; Roland Braddell, *The Legal Status of the Malay States* (Malaya Publishing House, 1931); Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore* (Dewan Bahasa dan Pustaka, 1992), 69-75; Muhammad Kamil Awang, *The Sultan and the Constitution* (Dewan Bahasa dan Pustaka, 1998), 27-64. In respect of the internal sovereignty of Malay states, see *Pahang Consolidated Company Ltd v Pahang* (1933) 2 MLJ 247, 247-8 (Privy Council) (this case involved the sovereignty of the Sultan of Pahang which is of application to the other Federated Malay States of Perak, Selangor and Negeri Sembilan due to similar methods of British intervention); *Duff Development Company v Kelantan* [1924] AC 797, 807-8 (Privy Council) (this case involved the sovereignty of the Sultan of Kelantan which is of application to the other northern Unfederated States of Perlis, Kedah and Terengganu due to similar methods of British intervention); *Sultan of Johor v Tengku Abubakar* (1952) 18 MLJ 115, 119 (this case concerned the Sultan of Johor's sovereign immunity); *Mighell v Sultan of Johor* [1894] 1 QB 149, 158, 162 (in this case, the Sultan of Johor was regarded as an independent sovereign as confirmed by the Colonial Secretary).
[48] See the *Federation of Malaya Act 1957* (United Kingdom).
[49] See *Re Southern Rhodesia* (1919) AC 211 (Privy Council); *Secretary of State v Sardar Rustam Khan* (1941) 68 LR Ind App 109.

Orang Asli claimants that have moved or been relocated from their original locations due to the pressures of land use and development.

3 Maintenance of a traditional connection with the land

Malaysian cases suggest a requirement for Orang Asli to maintain a traditional connection with their lands in order to prove a customary land rights claim.[50] However, these cases do not articulate with sufficient clarity, the parameters of what would amount to a 'traditional connection'. Accordingly, it would be useful to analyse the 'traditional' and 'connection' criteria with reference to issues arising from such requirements in Indigenous title claims from Australia and Canada. This examination sheds some light on the requirement to demonstrate a 'traditional connection' in Orang Asli customary land rights claims.

(a) Traditional

According to *Sagong 1*, the Orang Asli connection with their lands must be traditional in the sense that it must be in accordance with customs 'distinctive' to that culture.[51] The main issue arising from this requirement is the degree to which customs, or for that matter, culture can change before it is no longer regarded as 'traditional'. As observed earlier, the Court in *Sagong 1* held that the *Temuan* claimants were an Aboriginal society practising 'an Aboriginal way of life' despite numerous changes they had made to their traditional lifestyle due to interaction with outside society and Government policies foisted upon them.[52] Another judge may take a different view based on the facts before the court.[53]

In Australia, where the inquiry focuses on Aboriginal claimants having a connection to the land by *traditional* laws acknowledged and customs observed from the acquisition of British sovereignty, *continuity* plays a large role in determining a claim. In *Mabo No 2*, Brennan J held that native title at common law exists where

[50] See *Sagong 1* [2002] 2 MLJ 591, 611; *Adong 1* [1997] 1 MLJ 418, 425, 433-4.
[51] *Sagong 1* [2002] 2 MLJ 591, 611.
[52] Ibid 606-7.
[53] See eg. *Pedik* [2010] 5 MLJ 849, 855.

Indigenous claimants, amongst other things, have 'continued to acknowledge the laws and (*so far as practicable*) to observe the customs, whereby their traditional connexion with the land has been substantially maintained'.[54] There was also some flexibility in the High Court's approach to continuity, with Brennan J acknowledging that the 'laws and customs of any people will change and the rights and interests of the members of the people will change too'.[55] In dismissing the argument that the *Meriam* peoples did not have native title because they no longer exercised 'traditional' rights and duties, Toohey J accepted modifications and changes to *Meriam* society by the introduction of a school, a hospital, the Island Court, the Island Council, government agencies, Christianity and the cash economy to the *Meriam* peoples.[56] As will be observed below, the High Court's flexibility equally meant a lack of precision as to the scope of the terms 'traditional' and 'continuity'. It can be said that this lack of precision contrasts with a stricter approach in defining these terms under the *NTA*.

Continuity under s 223 of the *NTA* refers to continuity of an Aboriginal society, its observance of laws and customs and the content of such laws and customs.[57] Giving primacy to the *NTA*, the majority of the Court in *Yorta Yorta* suggested that the word 'tradition' under s 223 required, amongst other matters, the existence and continuance of a normative system of laws and customs acknowledged and observed by the *group who has bound itself to it* (namely, a society).[58] Aboriginal claimants must prove a coherent and continuous society which has observed laws and customs that originate from a pre-sovereignty society having a normative system of rules governing behaviour.[59] These rules must have 'normative content' meaning that mere observable patterns of behaviour may not amount to rights and interests in land and water for the purposes of a native title claim.[60] Some change to, or adaptation of,

[54] (1992) 175 CLR 1, 59-60, 70 (Brennan J)
[55] Ibid 61. Deane and Gaudron JJ also cautioned that traditional law and custom is not 'frozen'at the moment of the stablishment of the colony and can change provided such changes do not diminish or extinguish the connection between the Indigenous claimants and the land (at 110).
[56] (1992) 175 CLR 1, 192.
[57] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009), 348.
[58] *Yorta Yorta* (2002) 214 CLR 422, 444-6. See also Lisa Strelein, 'Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples: From Mabo to Yorta Yorta' (2005) *Washington University Journal of Law and Policy* 225, 253-4.
[59] Ibid 455-7.
[60] Ibid 443.

traditional law or custom or some interruption of the enjoyment or exercise of native title rights or interests may be acceptable provided the laws and customs are still seen as traditional.[61] The reason for any change, adaptation or interruption has been considered irrelevant to the inquiry of whether the acknowledgment and observance of law and custom has been changed, adapted or substantially interrupted.[62] If the change, adaptation or interruption is seen as the creation of a new right, duty or interest post-acquisition of British sovereignty by the trier of fact, they would not be recognised because the Aboriginal law-making system could not create such interests once the British had taken over the legal order of the territory concerned.[63]

This requirement leaves largely non-Indigenous judges, carrying their own perceptions of the relationship between present traditional and pre-colonial Aboriginal society, with the assistance of expert witnesses, largely comprising non-Indigenous peoples, to decide whether laws and customs are 'traditional' for the purposes of a native title claim. This approach has also been said to impose a heavy evidential burden on Aboriginal claimants and restrict the scope of successful Aboriginal claims.[64] Consequently, native title claimants in remote areas will find proof of native title difficult, and in heavily populated areas where there are large populations and a high degree of historical interaction between settlers and Aboriginal communities, like much of southern Australia, impossible.[65] The civil court process, that may not afford due weight to oral histories from Indigenous claimants by requiring such evidence to be corroborated,[66] limits effective

[61] Ibid 455.
[62] Ibid; *Bodney v Bennell* (2008) 167 FCR 84, [81], [97].
[63] *Yorta Yorta* (2002) 214 CLR 422, 443.
[64] See eg. Richard Bartlett, *Native Title in Australia*, above n 37, ch 16; Young, above n 15, 375-6; Sky Mykata, 'Losing Sight of the Big Picture: The Narrowing of Native Title in Australia' (2004) 36 *Ottawa Law Review* 93; Kirsten Anker, 'Law in the Present Tense: Traditional and Cultural Continuity in Members of Yorta Yorta Community v Victoria' (2004) 28 *Melbourne University Law Review* 1; Strelein, 'Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples', above n 58. For further reading, see Lisa Strelein, *Compromised Jurisprudence: Native title cases since Mabo* (Aboriginal Studies Press, 2nd edn, 2009), ch 6; Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and the Native Title Act', 27 *Melbourne University Law Review* 523; Sean Brennan, 'Native Title in the High Court of Australia a Decade After Mabo' (2003) 14 *Public Law Review* 209; Janice Gray, 'The Lost Promise of Mabo: An Update on the Legal Struggle for Land Rights in Australia with Particular Reference to the Ward and Yorta Yorta Decisions' (2003) 23 (2) *Canadian Journal of Native Studies* 305.
[65] See Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31 *University of Western Australian Law Review* 35.
[66] See eg. *Nor Nyawai 2* [2006] 1 MLJ 256, 272.

Indigenous participation in the adjudication of Indigenous claims to lands, territories and resources. Such a limitation arguably goes against the first *UNDRIP* Standard that calls for Indigenous participation in the process.[67]

The level of 'continuity' required and change, adaptation and interruption allowable by the Australians courts has worked to defeat native title claims.[68] In *Risk v Northern Territory*, a native title claim involving the *Larrakia* people over areas in and around Darwin, failed because the *Larrakia* peoples did not observe traditional law and custom for a few decades prior to the 1970s. This failure was mainly attributable to the attempted assimilation of Aboriginal people into European communities and other government policies which led to a 'breakdown' in *Larrakia* people's observance of traditional laws and customs.[69] The Full Federal Court upheld this decision.[70] Around the same period, a claim by the *Noongar* people as native title holders of the Perth Metropolitan area was allowed.[71] However, on appeal it was held that the trial judge erred in the application of the *Yorta Yorta* test by asking whether the community that existed at sovereignty continued to exist over subsequent years with its members continuing to observe some of the traditional laws and customs relating to land.[72] Instead, the proper enquiry was whether the laws and customs continued to be acknowledged and observed substantially uninterrupted by *each generation* since sovereignty.[73] This view would seem consistent with the finding in *Sagong 1* that the *Temuan* peoples' traditional connection with the lands had been maintained from 'generation to generation'.[74]

The *NTA*-based continuity test, if applied in the context of an Orang Asli customary land claim, would allow such claims to be defeated by a strict interpretation or ethnocentric views of what is regarded as 'traditional'. As the common law doctrine stands in Malaysia, it is likely that the Malaysian courts will *not* adopt the strict approach to 'continuity'. The flexible approach appears more likely considering that

[67] See above Chapter 3, 98-9.
[68] For further examination of these cases, see eg. McRae et al, above n 57, 348-51.
[69] *Risk v Northern Territory* [2006] FCA 404, [839].
[70] *Risk v Northern Territory* (2007) 240 ALR 75.
[71] *Bennell v Western Australia* (2006) 153 FCR 120.
[72] *Bodney v Bennell* (2008) 167 FCR 84, [73].
[73] Ibid [70]-[73].
[74] *Sagong 1* [2002] 2 MLJ 591, 610-1.

the finding of the court in *Sagong 1* with regard to changes within the claimants' society is more consistent with that taken in *Mabo No 2*, a decision expressly approved by the apex court of Malaysia in *Madeli 2*.[75] Further, the strict approach gives primacy to the *NTA* rather than the common law as laid down in *Mabo No 2*. For present purposes, however, the *UNDRIP* provides for the right of *Indigenous peoples* to 'develop' manifestations of their culture (art 11 para 1) and 'spiritual and religious traditions, customs and ceremonies (art 13). These provisions suggest that it is Indigenous peoples who should determine their laws, traditions, customs and such concepts are not static but evolutionary. The potentially strict interpretation of the term 'traditional' by the courts and the failure of the judicial process to give due recognition of Indigenous laws, traditions, customs and tenure systems fall short of the first *UNDRIP* Standard.

In *Sagong 1*, the Court based its findings of customary land ownership on, amongst other things, the maintenance of a 'traditional connection with the…lands from generation to generation and the *customs in relation to the lands are distinctive to the Temuan community*'.[76] This finding seems to partially adopt the test for the recognition of Aboriginal *rights* in Canada. In *Delgamuukw*, Lamer CJ explained the relationship between Aboriginal rights and Aboriginal title as follows:

> At the one end, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, the 'occupation and use of the land where the activity is taking place is not' sufficient to support a claim of title to the land. Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an Aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. I put the point this way in *Adams*, at para. 30:
>
> Even where an Aboriginal right exists on a tract of land to which the Aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an Aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the Aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land.

[75] [2008] 2 MLJ 677, 689.
[76] Ibid 611.

> At the other end of the spectrum, there is Aboriginal title itself. As *Adams* makes clear, *Aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive Aboriginal cultures. Site-specific rights can be made out even if title cannot. What Aboriginal title confers is the right to the land itself.*[77] *[Parenthesis removed and emphasis added]*

Aboriginal rights were protected by the common law and subsequently affirmed by the introduction of s 35(1) of the *Constitution Act 1982*.[78] In order to be an Aboriginal right within the meaning of s 35(1), an activity must be an element of a practice, custom or tradition integral to the *distinctive* pre-contact culture of the Aboriginal group claiming the right.[79]

The first part of the test is to characterise the right being claimed by reference to the specific action involved, the nature of the impugned government law, regulation or action and the tradition, custom or practice relied upon to establish the right.[80] These activities must be considered at a general rather than specific level and the Court must bear in mind that the specific action may be the exercise in a 'modern' form of a pre-contact practice, tradition or custom.[81] As for the second part, namely 'the integral to the distinctive culture test', it must be shown that the claimed right is a central and significant part of the society's distinctive culture[82] but need not 'go to the core of a people's culture'.[83]

In *R v Van Der Peet*, the Court observed that the practice, custom or tradition should be 'one of the things which made the culture of the society distinctive - that it was *one of the things* that truly made the society what it was'.[84] In terms of proof, this test would not only include particularisation of pre-European contact practices, customs and traditions that are 'central' or 'integral' aspects of a group's culture but

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[77] *Delgamuukw* [1997] 3 SCR 1010, [138].
[78] *R v Van der Peet* (1996) 2 SCR 507, [28] (Lamer CJ) (Supreme Court, Canada).
[79] Ibid [46] (Lamer CJ).
[80] Ibid [51]-[53].
[81] Ibid [54].
[82] Ibid [55].
[83] *R v Sappier; R v Gray* ('*R v Sappier*') [2006] 2 SCR 686, [46]. In this case, the Canadian Supreme Court held that harvesting wood for domestic uses undertaken for survival purposes was sufficient to meet the 'integral to a distinctive culture' threshold.
[84] *R v Van der Peet* (1996) 2 SCR 507, [55].

the demonstration of continuity between these rights and the rights claimed.[85] An unbroken chain between current practices, customs and tradition and those which existed prior to contact is not required and there should be flexibility in the establishment of continuity so as to allow evolution over time.[86] The Courts should also interpret the rules of evidence in the light of evidentiary difficulties inherent in adjudicating Aboriginal claims.[87] However, the Court's interpretation of these principles in *R v Van der Peet* itself revealed the difficulties involved in the recognition of what constitutes recognisable Aboriginal rights. The majority of the Supreme Court did not consider the pre-European contact exchange pattern of the *Sto:lo*, that had evolved from the barter exchange of surplus salmon to the exchange of salmon for money for sustenance and a moderate livelihood, an Aboriginal right 'integral to the distinctive' culture of the *Sto:lo*. In *R v Sappier*, the Canadian Supreme Court held that the *Maliseet* and *Mi'kmaq* respondents had Aboriginal rights to harvest wood for personal uses and the practice of these rights could evolve into the right to harvest wood by modern means to be used in the construction of a modern dwelling.[88] However, the right did not include the right to commercial use of the wood as the pre-contact practice was limited to 'domestic' harvest of timber.[89]

The need for the practices, customs or traditions to pre-date European contact limits the utility and practicability of this test, at least, from an Aboriginal point of view.[90] Whether the Malaysian courts adopt the *R v Van Der Peet* majority test for what is 'distinctive' to Aboriginal culture or the relatively liberal views in *R v Sappier*, there

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[85] Ibid [63]-[65].
[86] Ibid [64]-[65].
[87] Ibid [68].
[88] *R v Sappier* [2006] 2 SCR 686, [48]. In this sense, the Court seemed to favour the minority view in *R v Van Der Peet* that emphasised the need for Aboriginal rights that originate pre-contact to maintain contemporary relevance. If these rights are not permitted to evolve and take modern forms, 'then they will become utterly useless' (see *R v Sappier* [2006] 2 SCR 686, [49]).
[89] *R v Sappier* [2006] 2 SCR 686, [25]. Binnie J, while in agreement with the majority, was in favour of the Aboriginal right being extended to sale of wood but *within* the reserve or local Aboriginal community (*R v Sappier* [2006] 2 SCR 686, [75]).
[90] The 'integral to the distinctive culture' test has been the subject of severe criticism. For further reading on the various perspectives, see eg. the dissenting judgments of L'Heareaux Dube and McLachlan JJ in *R v Van der Peet* itself; John Borrows, 'The Trickster: Integral to a Distinctive Culture' (1997) 8 *Constitutional Forum* 27; L I Rotman, 'Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van der Peet' (1997) 8 *Constitutional Forum* 40; Kent McNeil, 'Reduction by Definition: The Supreme Court's Treatment of Aboriginal Rights in 1996' (1997) 5 (3 & 4) *Canada Watch* 60; Janice Gray, 'O Canada! – Van der Peet as Guidance on the Construction of Native Title Rights' (1997) 2(1) *Australian Indigenous Law Reporter* 18.

is scope to interpret the term in a manner that is intolerant of change to Orang Asli society.

The potential limitation of Aboriginal rights to those originating before European contact, curtails the rights of *ownership*, *management* (development and control) and *use* of Indigenous lands, territories and resources envisaged in the first *UNDRIP* Standard. Such rights of ownership, management and use are governed by the courts' determination of whether pre-European contact practices, customs and tradition that are integral to the distinctive Aboriginal culture still exist in substance rather than by the autonomous capacity of Aboriginal groups to progressively evolve with the changing environment. Moreover, the Canadian courts' conservative application of the 'Aboriginal rights' test further supports the main contention in Section IIA, namely, the relative unsuitability of the civil court process in adjudicating and recognising Orang Asli customary land rights.

(b) Connection

The requirement for Aboriginal claimants to substantially maintain a traditional connection with the land comes from *Mabo No 2*.[91] In this regard, Brennan J explained that the connection with the land need only be of a 'general nature' without further elaborating the term.[92] Again, the imprecision of terms in *Mabo No 2* allows manoeuvrability in future cases, and indeed the development of the common law doctrine in Malaysia. Under the *NTA* regime, the substantial maintenance of a connection in Australia 'requires first, an identification of the content of traditional laws and customs and secondly, the characterisation of the effect of those laws and customs as constituting a 'connection' of the peoples with the lands and waters in question'.[93] This 'connection' is not proven solely through the observance of traditional laws and is an independent inquiry that requires the identification of the laws and customs for this purpose. However, a physical connection to the land is not essential in proving native title in Australia but alternatively, a connection needs to

[91] See (1992) 175 CLR 1, 59-60, 70 (Brennan J); 86 (Deane and Gaudron JJ), 188 (Toohey J).
[92] Ibid 70.
[93] *Ward* (2002) 213 CLR 1, [17] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

subsist at a spiritual or cultural level.[94] Despite giving primacy to the *NTA* in formulating the 'connection' requirement, the Australian courts' approach nonetheless exemplifies how the conservative interpretation of terms by the ordinary civil courts, whether embodied in statute or the common law, can potentially function to narrow the scope of the common law doctrine.

In Canada, Aboriginal rights may be placed on a spectrum with regard to their degree of connection with the land. Aboriginal rights vary with the degree of such connection where Aboriginal title reflects the highest degree of connection giving rise to a right to the land itself.[95] The requirement of pre-Crown sovereignty occupation of the land for proof of Aboriginal title subsumes the requirement for the land to be 'integral to the distinctive culture' of the Aboriginal claimants.[96] In *Delgamuukw*, Lamer CJ held, in the case of Aboriginal title, 'it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants'.[97] The precise nature of the occupation may have changed as long as a substantial connection between the people and the land is maintained.[98] Proof of occupation that gives rise to Aboriginal title can be established by physical occupation or Aboriginal law or a combination of the two.[99]

The fact that Aboriginal law and perspectives must be regarded and given due weight in a claim for Aboriginal title particularly on issues of occupation and evidence[100] may mean that proving the maintenance of substantial connection should pose less of a challenge particularly in cases where a claim of pre-sovereignty Aboriginal occupation can be made out. However, establishing occupation in a claim

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[94] *Western Australia v Ward* (2000) 99 FCR 316, 382-3 (Full Federal Court, Australia); *Bodney v Bennell* (2008) 167 FCR 84, [172]; *De Rose v South Australia* (2003) 133 FCR 325, 418; *Sampi v Western Australia* (2005) FCA 777, [1075]-[1079].
[95] *Delgamuukw* [1997] 3 SCR 1010, [138].
[96] Ibid [142].
[97] Ibid [151]. Lamer CJ also explicitly referred to *Mabo No 2* in respect of a 'substantial maintenance of a connection' with the land (*Delgamuukw* [1997] 3 SCR 1010, [153]).
[98] *Delgamuukw* [1997] 3 SCR 1010, [154].
[99] Ibid [147]-[149]. Further, see Kent McNeil, 'Aboriginal Title and the Supreme Court: What's Happening?' (2006) 69 *Saskatchewan Law Review* 281.
[100] *Delgamuukw* [1997] 3 SCR 1010, [84], [148], [156].

for Aboriginal title in Canada has not proven to be unproblematic. In *R v Marshall; R v Bernard*, the majority of the Supreme Court emphasised the importance of physical occupation by *common law* standards in deciding that seasonal use of land by Aboriginal claimants did not amount to 'exclusive occupation'. Aboriginal law and perspectives were of little relevance with McLachlin CJ requiring the translation of pre-sovereignty Aboriginal customs as to exclusive occupation and use into a modern common law right.[101]

In Malaysia, the requirement for continuous occupation of the land for generations suggests that a physical *connection* with the land (as opposed to a spiritual or cultural connection) is necessary. In this context, Malaysia, from an Orang Asli perspective, may potentially inherit the worst of both Australian and Canadian positions. The requirement of a traditional connection from generation to generation by customs that are distinctive to Orang Asli claimants opens up the possibility of the onerous continuity requirements as seen in Australia. Second, the prerequisite of continuous occupation for the proof of Orang Asli customary land rights may include the need to demonstrate, as a matter of fact, continuous physical connection with the land from generation to generation. Orang Asli claimants, who largely depend on oral evidence from village elders and may not be able to afford the costs of hiring independent expert witnesses to provide corroborating evidence, may find satisfying this form of historical inquiry difficult.

The requirements of 'continuous occupation' and the 'maintenance of a connection with the land' are more onerous than that which is required under the first *UNDRIP* Standard. The Standard provides for rights of ownership, development, control and use over lands *currently* possessed by Indigenous peoples[102] in accordance with a recognition process that affords due recognition of Indigenous laws, traditions,

[101] [2005] 2 SCR 220, [45]-[60], [69], [70], [72]. For a critique of this decision, see eg. McNeil, 'Aboriginal Title and the Supreme Court', above n 99; J Bruce McKinnon, 'Aboriginal Title - After Marshall and Bernard: Part II' (2007) (65)(5) *The Advocate* 611.

[102] See eg. 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), 297-300; Matthias Ahren, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009), 209-10.

customs and land tenure systems. Following this standard, historical occupation and connection to the land through distinctive customs, while relevant, would not be necessary in respect of lands currently 'possessed' by Orang Asli.

'Possession' in the recognition process should also pay due regard to Orang Asli perspectives of the term.[103] In this sense, the 'traditional' concept under the first *UNDRIP* Standard gives effect to Indigenous conceptions of ownership, occupation and use of lands, territories and resources. The role of traditions under this *UNDRIP* Standard differs markedly from the common law doctrine where traditions function as a barometer to adjudicate whether there is indeed a 'traditional connection' between the Indigenous claimants and their lands. Such an approach may not appreciate profound changes in Orang Asli traditions due to external factors, and accordingly limit the scope of the common law doctrine in effectively recognising Orang Asli land and resource rights.

4 Evidentiary difficulties

Proof of common law Orang Asli customary land rights claims is in the civil courts, and consequently, in accordance with an established body of rules of evidence that generally favours oral testimony supported by documentary evidence over stand-alone oral evidence. As traditional laws and customs are handed down verbally from generation to generation, evidence of oral tradition from Orang Asli witnesses may not be placed on an equal footing in Malaysian law. As observed in Chapter 6, the admissibility of evidence in an Orang Asli customary land rights claim is governed by the general law of evidence contained in the *Evidence Act 1950* (Malaysia).[104]

Rules of evidence in Australian native title claims are governed by specific statutory provisions[105] and, as such, will not be discussed further. In Canada, the courts have

[103] See above, Chapter 3, 97.
[104] *Sagong 1* [2002] 2 MLJ 591, 623-4.
[105] In Australia, the *Evidence Act 1995* (Cth) applies by default due to the 1998 amendment to the *Native Title Act 1993* (Cth) ('*NTA*'). Section 82(a) of the *NTA* states that the Federal Court of Australia, the court having jurisdiction to try native title claims, is bound to apply the rules of evidence, except to the extent that the Court otherwise orders. However, 1 January 2009 amendments to the *Evidence Act 1995* (Cth), the statute governing the rules of evidence, have created statutory exceptions to the hearsay rule (s 72) and the opinion rule (s 78) so that oral evidence of the traditional

prescribed a special approach to the rules of evidence on claims for Aboriginal rights. In this respect, Lamer CJ in *R v Van Der Peet* held:

> In determining whether an Aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive Aboriginal culture a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.[106]

Delgamuukw reaffirmed the two principles from *R v Van Der Peet*, namely, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims, and second, that trial courts must interpret that evidence against this background.[107]

To require corroborating evidence for the oral testimony from Orang Asli in every situation is to substantially reduce the potential success of Orang Asli customary land claims. Even in jurisdictions like Canada where interpretive difficulties have been acknowledged by the courts and where Aboriginal perspectives are a consideration, much remains to be done to address the issues of structural bias and cultural difference and control that Indigenous peoples encounter in bringing their cases to the courts.[108] The *UN Committee on the Elimination of Racial Discrimination* has also expressed concern about the potential difficulties encountered by Aboriginal peoples in establishing Aboriginal title before the Canadian courts and recommended that Canada 'examine ways and means to facilitate' the establishment of Aboriginal title.[109] In short, the current law of evidence in Malaysia simply does not cater for contextualised reception of local

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laws and customs of an Aboriginal Torres Strait Islander group is no longer treated as prima facie inadmissible where laws and customs are maintained in this form.

[106] (1996) 2 SCR 507, [68].

[107] *Delgamuukw* [1997] 3 SCR 1010, [82].

[108] For these perspectives in a Canadian context, see eg. John Borrows, 'Listening for Change: The Courts and Oral Tradition' (2001) *Osgoode Hall Law Journal* 1.

[109] Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Canada*, 1 November 2002, UN Doc CERD A/57/18 (2002), para 330.

Orang Asli laws, customs and traditions that are traditionally passed down by word of mouth from generation to generation.

5 The civil courts: A suitable forum?

In addition to the cultural barriers highlighted in Chapter 2,[110] Orang Asli face other significant challenges in bringing customary land claims to the civil courts.[111] 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. There are also difficulties in securing expert witnesses for Orang Asli customary land claims in Malaysia, as many of these witnesses are employed with the state.[112] Orang Asli also 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 *DOAD* (for example, *Batin*)[113] may feel obliged not to act against the interests of the state. Further, such claims usually encounter strenuous opposition from the state which possesses more power and resources at its disposal.

It has also been said that non-Aboriginal judges are poorly placed to interpret Aboriginal law.[114] The common law as developed in Malaysia requires civil courts to inquire into the customs and usages of each community in determining whether Orang Asli possess customary land rights.[115] Civil court judges, trained and exposed to the traditions of the common law may be ill-equipped to adjudicate on issues arising from customary land rights. A manifestation of this lack of understanding is

[110] See above Chapter 2, 68-9.
[111] Yogeswaran Subramaniam, 'Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia' (2011) 19(2) *Waikato Law Review* 44, 61-2.
[112] For the challenges faced by Orang Asli in securing expert witnesses for an Orang Asli customary land rights claim compared to Australia, see Frank McKeown, 'Expert Evidence and Proof of Native Title Claims: The Role of the Anthropologist' (Paper presented at 'A Conference on Customary Lands, Territories and Resources: Bridging the Implementation Gap', Kuala Lumpur, 25-26 January 2011).
[113] For the possible influence that the state may have over the *Batin,* see above Chapter 5, 181-3.
[114] 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, 2007), 12.
[115] *Sagong 2* [2005] 6 MLJ 289, 301-2 (Court of Appeal).

the arbitrary limitation of Orang Asli customary land title to 'settled areas'[116] when there exist Orang Asli laws and customs to the contrary.[117] The limitation arguably strikes at the very basis of customary title, which 'depends on the practices and usages of each individual community'.[118]

The Canadian Supreme Court has expressly recognised the 'complex and competing interests at stake' in Aboriginal land claims and emphasised the need to resolve these claims through negotiated settlement rather than by way of civil litigation.[119] In *Ward*, McHugh J summed up the problems with Australian native title litigation in delivering justice to Aboriginal people and the need for reform as follows:

> The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear - to me, at all events - that redress cannot be achieved by a system that depends on evaluating the competing legal rights of landholders and native-title holders. The deck is stacked against the native-title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict. And it is a system that is costly and time-consuming. At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits. A better system may be an arbitral system that declares what the rights of the parties *ought to be* according to the justice and circumstances of the individual case. Implementing such a system in the federal sphere may have constitutional difficulties but may not be impossible. At all events, it is worth considering.[120]

The disproportionate cost of litigation to Aboriginal claimants in establishing Indigenous title was noted by McHugh J and has also been a concern of the UN Committee on the Elimination of Racial Discrimination in its concluding

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[116] See *Sagong 1* [2002] 2 MLJ 591, 615; *Nor Nyawai 2* [2006] 1 MLJ 256, 269.
[117] See below Section IIB1, 289 (see below nn 138-41 and accompanying text).
[118] *Sagong 2* [2005] 6 MLJ 289, 301-2.
[119] *Delgamuukw* [1997] 3 SCR 1010, [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 Peoples* 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), 22 June 2012 <http://www.collectionscanada.gc.ca/webarchives/20071124125812/http://www.ainc-inac.gc.ca/ch/rcap/sg/shm4_e.html>, vol 2, Part 2, ch 4 ss 1 and 6.2).
[120] *Ward* (2002) 213 CLR 1, [561] (High Court, Australia). For further criticisms of the native title system in Australia, see eg. *Wilson v Anderson* (2002) 213 CLR 401, 453-4 (Kirby J) (High Court, Australia); *Ward* (2002) 213 CLR 1, [969]-[970] (Callinan J); Robert French, 'Lifting the Burden of Native Title: Some modest proposals for improvement' (2009) 93 *Reform* 10.

observations on Canada.[121] The complexity of Indigenous title claims is illustrated by *Delgamuukw*.[122] In the *Delgamuukw* trial, there were 318 days of testimony, 61 witnesses, 23,503 pages of evidence transcripts, 5,898 pages of transcripts of arguments and 9,200 exhibits. An average litigated native title claim in Australia takes seven years.[123] In Malaysia, where Orang Asli do not have the financial means, costs and delay in the litigation process could prove to be a formidable hurdle in pursuing rights over their customary lands in the courts.

The highly legalistic, adversarial and non-participatory nature of native title litigation also reduces the prospect of negotiated outcomes which generate benefits for both Aboriginal and non-Aboriginal claimants.[124] In this respect, the Canadian Royal Commission on Aboriginal Peoples has pointed out that continued resort to the courts is not only expensive but risks outcomes (because of the all-or-nothing nature of the process) that may be unacceptable to all sides.[125] Recently, senior members of the Malaysian judiciary have publicly acknowledged the unsuitability of the civil court process in adjudicating Indigenous land claims, calling for alternative methods of resolving such claims.[126]

To solely depend on the civil courts to develop the common law doctrine in a manner that delivers a satisfactory outcome to Orang Asli claimants may reflect a misplaced confidence. Thus far, the Malaysian courts have generally favoured Orang Asli in customary land rights claims. But the pendulum may well swing against Orang Asli in the future. In Australia, the change in the composition of High Court judges and their respective backgrounds have been said to play a role in determining the level of judicial conservatism in assessing native title claims.[127]

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[121] Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Canada*, 25 May 2007, UN Doc CERD/C/CAN/CO/18 (2007), para 22.
[122] *Delgamuukw* [1997] 3 SCR 1010, [89].
[123] McRae et al, above n 57, 360.
[124] Sean Brennan et al, *Treaty* (Federation Press, 2005), 114-6.
[125] Royal Commission on Aboriginal Peoples, above n 119, vol 2, Part 2, ch 4 s 1.
[126] See eg. Malanjum CJSS's views as reported in 'Call for other ways to resolve native land disputes', *The Star* (Malaysia), 31 January 2012. His Lordship observed that 'natives who took their land disputes to court faced the vexed question (*sic*) of evidence and the burden of proof'.
[127] Peter H Russell, *Recognizing Aboriginal Title: The* Mabo *Case and Indigenous Resistance to English-Settler Colonialism* (University of Toronto Press, 2005), 378-80. In respect of the political

Russell argues that the judges' sense of a change in the political climate may also impact on judicial activism. He asserts that the political row over the *Mabo No 2* and *Wik* decisions, in which the court's alleged activism was targeted, had given most members of the prevailing High Court a sense that their political mandate to be pacemakers on the rights of Indigenous peoples had run out.[128] While the majority in *Mabo No 2* recognised native title rights of Indigenous Australians and framed the decision in emotive terms, *Yorta Yorta* has been seen as narrowing those rights, with the majority decision being framed in ultra-clinical and under-emotional terms.[129]

The nature of judicial decision-making, particularly in cases involving the protection of a minority group or individual is complex, difficult and controversial[130] and thus to an extent, unpredictable.[131] The pressure of majoritarian democracy, the prevailing political climate and judges' backgrounds and pre-conceptions may play a role in the development path of the common law doctrine. Such issues may be amplified in the case of Malaysia. Allegations of pro-executive bias and political appointment of judges continue to plague the Malaysian judiciary,[132] despite it being more than 20 years since the Malaysian judicial crisis, in which Executive intervention resulted in the sacking of the Lord President and two other judges of the apex court.[133] A constitutional crisis ensued during this intervention, culminating in constitutional amendments that have been said to erode the independence of the judiciary.[134] Value judgments on the part of judges are also not unheard of in

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row after *Mabo No 2*, see also eg. Janice Gray, 'The Mabo Case: Radical Decision?' (1997) 17(1) *Canadian Native Studies Journal*, 33.

[128] Russell, above n 127, 380-1.

[129] See Hayley Bennett and G A (Tony) Broe, 'The neurobiology of judicial decision-making: Indigenous Australians, Native title and the Australian High Court' (2009) 20 *Public Law Review* 112.

[130] Ibid 128.

[131] For example, the sharp divisions within the Canadian Supreme Court in the 1990s on how reconciliation between Aboriginal peoples' prior occupation in Canada and the Crown's assertion of sovereignty is to be achieved demonstrates the unpredictability that can result from common law development of Indigenous title (See Kent McNeil, 'Reconciliation and the Supreme Court: the Opposing Views of Justice Lamer and McLachlin' (2003) 2 *Indigenous Law Journal* 1).

[132] See eg. Martin Jalleh, 'A compromised judiciary' (2011) 31(1) *Aliran Monthly* 40.

[133] For an insight into these events, see eg. Mohamed Salleh Abas, *May Day for Justice: The Lord President's Version: Aspects of the Rule of Law: The Destruction of Judicial Independence: Critical Facts behind the Panic Removal of the Head of Judiciary in Malaysia* (Magnus Books, 1989); Lawyers Committee for Human Rights, *Malaysia: Assault on the Judiciary* (Lawyers Committee for Human Rights, 1990).

[134] See Wu Min Aun, 'The Malaysian Judiciary: Erosion of Confidence' (1999) 1(2) *Australian Journal of Asian Law* 124.

Malaysian Indigenous land litigation. In *Bato Bagi*,[135] Zaki Tun Azmi, then Chief Justice of Malaysia, commented in open court on the need for natives to be taken out of the jungle to enjoy the fruits of development like other Malaysians.[136]

In respect of the future of judicial actions to secure Indigenous land rights, Daes, in her capacity of UN Special Rapporteur preparing a working paper on Indigenous people and their relationship to land, aptly observed, 'it is safe to say that the use of judicial mechanisms may be risky because of the problem of different interpretive tools, the subjective and highly political nature of these state-chartered forums, and continuing cultural biases demonstrated by Governments'.[137] Similarly, the risks of the litigation process for the recognition and adjudication of common law Orang Asli customary land rights also potentially falls short of the first *UNDRIP* Standard.

The uncertain dimensions surrounding the future development of the common law doctrine through the civil courts provide limited assurance that the common law will develop in a way consistent with the *UNDRIP* Standards.

B *Ownership, Management and Use of Lands and Resources*

This section examines the potential of common law Orang Asli customary land rights to recognise Orang Asli ownership, management and use of land and resources with due respect to Orang Asli customs, laws and land tenure systems.

1 Indigenous title: A limited form of ownership, management and use of land

The common law doctrine potentially limits Orang Asli rights to own, manage and use Orang Asli lands. First, the limited common law rights of occupation and use of

[135] *Bato Bagi* [2011] 6 MLJ 297.
[136] Joseph Sipalan, 'Only NGOs want natives in jungles, says CJ', *Malaysiakini* (Malaysia), 12 August 2011 <http://www.malaysiakini.com/news/172790>.
[137] Erica-Irene A Daes, *Indigenous Peoples and their Relationship to Land: Final Working Paper Presented by the Special Rapporteur*, UN Doc E/CN.4/Sub. 2/2001/21 (2001), para 93.

land and resources for areas *outside* Orang Asli settlements fall short of ownership, management and use of lands and resources and do not afford respect for Orang Asli laws and customs. Secondly, the common law doctrine, while possibly catering for rights approximating to full ownership *within* Orang Asli settlement areas, may equally function to curtail Orang Asli from enjoying the full extent of land ownership, management and use rights. Thirdly, the content of common law Orang Asli customary land rights may be defined by the courts in a way that only recognises specific land use and activities that have been proven and not extinguished. These limitations are examined in turn.

The lesser treatment for areas outside Orang Asli settlement areas under the common law doctrine[138] falls short of the First *UNDRIP* Standard. *Adong 1* recognised Orang Asli rights to occupation of the land and use of its resources. However, there is nothing in the judgment to suggest that Orang Asli possess rights to *own* and develop (a component of *management* under the First *UNDRIP* Standard)[139] resources located within their customary lands. Further, the lesser treatment for areas outside the 'settlement' does not respect Orang Asli laws and customs. Many Orang Asli laws and customs do not limit communal territories to settlement areas. For example, a particular *Semai* community's customary country or territory (*Ngenriik* or *Lenrii*') consists of many areas within the defined territory, including areas for communal foraging (*jeres* if it is virgin forest; *pabel* for secondary forest, which normally are old swidden[140] sites), historical sites, cemeteries (*peneb/hol*), places of worship (*keramat*), swiddens (*selai*), orchards (*cetnet*) (in some places rubber/oil palm small holdings), and settlement (*genuui*).[141] 'Due respect' for law and customs means the recognition of communal ownership, management and use of *all* areas within the territory as designated by the relevant laws and customs. Lesser rights for select parts of traditional territories possessed by Orang Asli deny *ownership* of the full spatial extent of Orang Asli customary lands.

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[138] See above Chapter 6, 242-5.
[139] See above Chapter 3, 97-8.
[140] Swidden sites refer to locations within an Orang Asli's community where shifting cultivation has been practiced.
[141] See eg. Tijah Yok Chopil and Bah Tony Williams-Hunt, 'Orang Asli dan Alam Sekitar' [Orang Asli and the Environment] (Paper presented at Environment Seminar, Open University, Ipoh, 6-7 July 2009) (translated from the Malay language by the candidate).

In respect of settled areas, the doctrine of common law Orang Asli land rights affords an interest approximating to full ownership on the basis of 'market value' compensation[142] awarded for expropriation and the order in *Sagong 1* that the *Temuan* claimants were 'the original *title* holders and the holders of usufructuary rights in respect of the land'.[143] However, this form of title differs substantially from other private property interests because it is inalienable[144] and can be held communally.[145] However, it remains unclear whether Orang Asli communities holding this form of title can create sub-interests over their lands, for example, licences, provided they retain their communal title and their *current* customs, laws and Indigenous tenure systems allows them to do so. Ownership and management of lands envisaged by the first *UNDRIP* Standard includes the ability to do so.[146] The first *UNDRIP* Standard encompasses the right to determine and develop priorities for the development or use of Indigenous lands, territories and resources.[147]

'Ownership' as envisaged in this *UNDRIP* Standard includes the capacity to alienate and create sub-interests over lands that may result in the loss of control of lands. While important for the realisation of Orang Asli self-determination over their lands, these rights may not be desirable in view of domestic Indigenous customs, laws and tenure systems and the historical effects of alienability of Indigenous lands. These dilemmas are analysed when the land tenure aspect of the alternative legal framework for the recognition and protection of Orang Asli lands and resources is explored in Chapter 8.[148] Accordingly, the inalienability of customary land under the common law doctrine is not regarded as a weakness for the purposes of the evaluation conducted in this Chapter.

In Canada, there is an inherent limit to the *management* and *use* of lands held under Aboriginal title. Although Aboriginal title confers the right to use land for a variety of activities that need not be aspects of practices, customs and traditions integral to

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[142] The adequacy of market value compensation in the context of Orang Asli customary title is dealt with in Section IV below (at 312-5).
[143] *Sagong 1* [2002] 2 MLJ 597, 621.
[144] *Adong 1* [1997] 1 MLJ 418, 430; *Adong 2* [1998] 2 MLJ 158, 162.
[145] *Sagong 1* [2002] 2 MLJ 591, 613-4; *Madeli 2* [2008] 2 MLJ 677, 692-3 (Federal Court).
[146] See above Chapter 3, 94-6.
[147] See *UNDRIP*, art 32 para 1.
[148] See below Chapter 8, 336-44.

the distinctive cultures of Aboriginal societies, the range of uses are subject to the limitation that 'they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's Aboriginal title'.[149] An example of land use irreconcilable with the attachment of the land would be to convert land having a ceremonial or cultural significance into a parking lot.[150] Developing the land into a parking lot would destroy the special bond with the land. The limitation of such uses impedes the right to Indigenous development and control over their lands. McNeil has argued that this limit, while well intentioned, is paternalistic, and reveals a lack of trust in the capacity and willingness of the Aboriginal nations to preserve their lands of their own accord.[151] The limitation has also been observed as a benign form of the 'frozen in time' approach to the evolution of traditional laws and customs.[152] In terms of the first *UNDRIP* Standard, this limitation, if applied in an Orang Asli context, may function to restrict the *management* and *use* of Orang Asli land[153] and curb their right 'to determine and develop strategies for the development or use'[154] of their lands and resources.

The inquiry into proof of statutory native title in Australia necessitates an aggregation of atomistic activities over the land to define its content, known as the bundle of rights approach. In *Ward*, the majority of the High Court favoured identifying and aggregating individual rights under laws and customs before determining whether there is a plenary communal 'title' over a particular piece of land:

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[149] *Delgamuukw* [1997] 3 SCR 1010, [111].
[150] Ibid [128].
[151] Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, University of Saskatchewan, 2001), 116-22. For further criticisms of the inherent limit and its perceived paternalistic control, see also Richard Bartlett, 'The Judicial Treatment of Native Title: Equal or Sui Generis? Using Traditional Laws and Customs as a Barrier, Limitation and Weakness' in Richard H Bartlett and Jill Milroy, *Native Title Claims in Canada and Australia: Delgamuukw and Miriuwung Gajerrong: Papers and Proceedings of a Public Forum Considering the Delgamuukw decision of the Supreme Court of Canada and implications for and comparisons to Australia* (Centre for Aboriginal Programmes and Centre for Commercial and Resources Law, University of Western Australia, 1999), 40-2.
[152] The 'frozen in time' approach to Indigenous laws and customs looks at these rights as being rooted in the past and is accordingly less tolerant of evolution, development and change to these laws and customs (see eg. Richard Bartlett, 'The Judicial Treatment of Native Title: Equal or Sui Generis?', above n 151, 42).
[153] *UNDRIP*, art 26.
[154] Ibid art 32 para 1.

> The Ward claimants submitted that, although the content of native title may vary according to the extent of the pre-existing interests of the relevant applicant, native title will ordinarily be a 'communal native title' or 'community title' which is practically equivalent to full ownership. They further submitted that where a community at sovereignty held rights and interests in relation to land recognised by the common law as a 'community title' the ownership of the land within the territory concerned is 'vested in' the community or 'people'.
>
> The first of the steps in this argument, that native title will ordinarily be practically equivalent to full ownership, is a statement about the frequency with which rights will be found to exist. Whether it is right or wrong depends on what is meant by 'ordinarily'. But whatever is meant by it, the proposition is not a useful commencing point for any consideration of the issues that now arise. It is not useful because it assumes, rather than demonstrates, the nature of the rights and interests that are possessed under traditional law and custom…
> *The reasons for judgment of the primary judge say little about the nature or content of the rights and interests possessed under traditional law and custom which were either alleged by the claimants or found to have been established.*[155] *[Emphasis added]*

To compound matters from an Aboriginal standpoint, the extent of native title rights is also dependent on their extinguishment and impairment by non-Aboriginal interests.[156] The impact of extinguishment limits the utility of native title and subordinates this form of title to other property rights.[157] Particular native title rights and interests are liable to be removed from the 'bundle of rights' bit-by-bit through the concept of partial extinguishment, recognised as permissible under the *NTA* by the High Court.[158] Nonetheless, native title may amount to 'possession, occupation, use and enjoyment' of Aboriginal lands to the exclusions of others.[159] Incidents of this 'strong-form' of title are, however, limited to relatively uncommon types of

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[155] *Ward* (2002) 213 CLR 1, [83]-[86] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). This approach has been severely criticised by, amongst others, Australian Aboriginal lawyer, Noel Pearson. Essentially, he argues that native title is a communal title to exclusive possession, the content of which is a right to possession. It is a uniform concept from the outside. The exercise of rights and interests in accordance with the traditional laws and customs is a separate and internal dimension. The variability in native title is a result of extinguishment and derogation, not because the titles were originally diverse (see eg. Noel Pearson, 'Land is Susceptible of Ownership' in M Langton et al (eds), *Honour Among Nations: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004), ch 4).

[156] Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 108.

[157] See Lisa Strelein, 'Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples: From Mabo to Yorta Yorta', above n 58, 262-5.

[158] *Ward* (2002) 213 CLR 1, [9], [26]-[29], [76], [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[159] See eg. *Mabo No 2* (1992) 175 CLR 1, 217.

land, first, where there has been no previous grant of a significant interest by the Crown and second, where limited statutory exceptions under the *NTA* apply.[160]

Applying *Delgamuukw*, *Sagong 1* explicitly rejects the bundle of rights approach to Orang Asli customary lands forming part of their settlement.[161] Notwithstanding this, the superior courts in Malaysia may depart from this decision of first instance. Despite there being no *NTA* in Malaysia, there is room for the Malaysian courts to depart from *Sagong 1*. In *Sagong 2*, it was held that the precise nature of Orang Asli customary title depends on the practices and usages of each individual community.[162] The bundle of rights approach may be adopted if the Malaysian courts interpret this statement to mean that the content of customary land rights is defined by the particularisation and proof of individual land 'practices and usages'. Further, the applicability of the bundle of rights approach to claims outside 'settled areas' has not been clarified in Malaysia. If the Malaysian courts were to adopt the Australian approach in this regard, the utility of the doctrine of common law customary land rights to deliver ownership, management and use of land to Orang Asli would be restricted by the atomistic way in which these rights are given recognition by the Courts and the ease by which these rights can be extinguished part-by-part.

2 Ownership, management and use of resources

In addition to the issues with regard to proof discussed in Section IIA1 above, the utility of the doctrine of common law Orang Asli customary land rights in securing ownership, management and use of Orang Asli *resources* is potentially curtailed by two further limitations. They relate to the nature of the inquiry as to proof of a claim for resource rights and questions of extinguishment by specific legislation concerning resources. They are discussed in turn.

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[160] See eg. ss 47, 47A and 47B of the *NTA*. For a brief account of these provisions, see McRae et al, above n 57, 368.
[161] *Sagong 1* [2002] 2 MLJ 591, 614-5. Cited with approval in *Nor Nyawai 2* [2006] 1 MLJ 256, 268-9 (Court of Appeal).
[162] [2005] 6 MLJ 289, 301 (Court of Appeal)

The requirement for the maintenance of a traditional connection with the lands and the customs in relation to the lands that are distinctive to the Temuan community in *Sagong 1*[163] raises the issue of whether Orang Asli customary land rights extend to those resources that may be seen as non-traditional in nature. The High Court in *Mabo No 2* did not specifically tackle the issue of ownership of resources. In *Ward*, the majority of the High Court rejected the finding of the lower court that the content of native title included the right to use and enjoy, 'to trade in', and 'to receive a portion of any resources taken by others'[164] on the basis that there was no evidence of any traditional Aboriginal law or custom or use relating to minerals or petroleum, other than ochre.[165] Accordingly, native title was not established in respect of minerals and petroleum except for ochre. However, the decision in *Ward* is based on the strict interpretation of 'traditional' in s 223(1).[166] In Canada, Aboriginal title was held in *Delgamuukw* to include minerals, in oil and gas particularly.[167] However, the Court also relied upon provisions in the *Indian Act* RSC 1985 (Canada) and *Indian Oil and Gas Act* RSC 1985 (Canada) that provides for commercial exploitation of minerals by Indians in coming to its conclusion. There are no equivalent statutory provisions in Malaysia. Again, it remains to be seen how Malaysian courts will interpret the inquiry as to the existence of customary rights to subsoil resources.

The second limitation relates to the possible extinguishment of Orang Asli customary rights to resources by statutory provisions that vest resources in the State Authority.[168] The main issue arising from these provisions would be whether they confer beneficial ownership of the relevant resource on the State and consequently,

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[163] *Sagong 1* [2002] 2 MLJ 591, 611.
[164] For order of the lower court, see *Ward v WA* (1998) 159 ALR 483 (Lee J).
[165] *Ward* (2002) 213 CLR 1, [382] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[166] See above Section IIA3(a) (above, 272-6 and nn 54-75 and accompanying text).
[167] *Delgamuukw* [1997] 3 SCR 1010, [118]-[122].
[168] For instance, s 40 of the *NLC* states '[t]here is and shall be vested solely in the State Authority the entire property in- (a) all State land within the territories of the State; (b) all minerals and rock material within or upon any land in the State the rights to which have not been specifically disposed of by the State Authority'. In respect of forest produce, s 14(1) of the *NFA* states: 'All forest produce situate, lying, growing or having its origin within a permanent reserve forest or State land shall be the property of the State Authority except where the rights to such produce have been specifically disposed of in accordance with the provisions of this Act or any other written law'. For other examples, see above Chapter 5, 165.

extinguish Orang Asli common law rights.[169] A conferment of beneficial ownership in the State may be construed to be inconsistent with the continued enjoyment of Orang Asli customary land rights. The principles of common law extinguishment (as modified by the *NTA* in particular instances) still apply in Australia.[170] In the case of *Yanner v Eaton*,[171] the High Court of Australia held that a provision in the *Fauna Conservation Act 1974* (Qld)[172] declaring all fauna as 'property of the Crown' did not constitute full and beneficial ownership of the Crown.[173] Accordingly, Crown rights in this case were not inconsistent with the continued enjoyment of native title rights.[174] On the other hand, the High Court in *Ward* held that 'property of the Crown' used in s 117 of the *Mining Act 1904* and s 9 of the *Petroleum Act 1936* (WA) extinguished native title rights to minerals.[175] In both decisions, it was unnecessary to consider the statutory extinguishment provisions contained in the *NTA*. These two cases highlight the potentially different outcomes of inquiries made into individual legislative schemes in determining whether there has been extinguishment of native title.[176]

A conservative examination of the particular statutory regime purporting to create resource rights by the Malaysian courts poses the risk of an adverse result to Orang Asli claimants. On the other hand, the doctrine of common law customary land rights may possibly deliver better results to Orang Asli in terms of sub-soil resource rights, which are excluded from the first *UNDRIP* Standard.[177] If, for example, s 40(b) of the *NLC* that vests the entire property in all minerals and rock material 'within or upon any land in the State' is construed not to confer full and beneficial

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[169] In Australia, laws by which the Crown acquires full beneficial ownership of land previously subject to native title extinguishes native title (see *Wik* (1996) 187 CLR 1, 84-5 (High Court, Australia)).
[170] See *Ward* (2002) 213 CLR 1, [588] (Kirby J); [635] (Callinan J). See also Sean Brennan, 'Native Title and the 'Acquisition of Property' under the Australian Constitution' (2004) 28 *Melbourne University Law Review* 26, 44-7.
[171] (1999) 166 ALR 258.
[172] Section 7(1).
[173] (1999) 166 ALR 258, 264.
[174] Ibid 264-5.
[175] *Ward* (2002) 213 CLR 1, [377]-[385] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); [572] (Kirby J).
[176] For further analysis of this issue from an Australian perspective, see eg. U Secher and H A Amankwah, 'Native Title, Crown Property and Resources: Post-Mabo Judicial Interpretations of Statutory Declarations and Statutory Vesting Provisions' (2002) *James Cook University Law Review* 109.
[177] For reasons for such exclusion, see above Chapter 3, 97-8.

ownership upon the State, there is a possibility that common law Orang Asli customary rights may be extended to rights over sub-soil resources.

C *Due Respect for Orang Asli Laws, Traditions, Customs and Institutions*

The first *UNDRIP* Standard provides for recognition of Indigenous lands, territories and resources with due respect for and recognition of Indigenous laws, traditions, customs and land tenure systems of the Indigenous persons concerned. The common law doctrine may apply Orang Asli laws and customs in a manner that subordinates these rights to other non-Orang Asli laws, rights and interests to the level of a remaindered version of land rights. Further, the possibility of the Malaysian civil courts adopting a strict view of defining what are traditional laws and customs denies due respect and recognition for Orang Asli laws and customs.

1 Non-recognition of Orang Asli laws and customs as law

In *Sagong 2*, Gopal Sri Ram JCA summarised the relationship between Orang Asli laws and customs and a customary land rights claim:

> The precise nature of such a customary title depends on the practices and usages of each individual community. And this brings me to the second important point. It is this. What the individual practices and usages (*sic*) in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words it is a question of fact to be decided (as it was decided in this case) by the primary trier of fact based on his or her belief of where, on the totality of the evidence, the truth of the claim made lies.[178]

From the above passage, Orang Asli laws and customs are not recognised or 'respected' as a source of law as such but function to define a particular customary title and set the parameters of proof for such claims as a matter of fact. In other words, the recognition of these rights is a restricted form of legal pluralism that informs a common law inquiry into such rights by the civil courts.

[178] *Sagong 2* [2005] 6 MLJ 289, 301-2.

This view is supported by two reasons. First, art 160(2) of the *Malaysian Constitution* defines 'law' to include only customs that have been given the 'force of law' by the courts or by written law.[179] Despite the constitutional potential to recognise Orang Asli laws and customs, none of the landmark decisions on Orang Asli customary land rights have cited this provision. The absence of judicial reference to this provision suggests that Orang Asli laws and customs are yet to be adequately given 'the force of law'. Second, the common law doctrine in Malaysia does not afford Orang Asli laws and customs the same level of recognition as other formal sources of law in art 160(2) including, 'written law' and 'the common law is so far as it is in operation in the Federation'. The approach taken by Gopal Sri Ram JCA in *Sagong 2* accords with Brennan J's reasoning in *Mabo No 2* where His Honour held:

> Native title has its origin in and is given its content by traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[180]

Kirby J in *Wik* explained that *Mabo No 2* did not create a dual system of law in Australia and that native title 'was enforceable in Australian courts because the common law of Australia said so'.[181] The purpose of native title was to leave room for the 'continued operation of some local laws and customs among native title people and even the incorporation of some of those laws and customs as part of the common law'.[182] In other words, native title is not Aboriginal law, rather it is the recognition of elements of Aboriginal laws and customs by the Australian legal system within the space or intersection between the common law and Aboriginal law.[183] As observed by Strelein:

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[179] Art 160(2) of the *Malaysian Constitution* defines 'law' to include 'written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof'.

[180] *Mabo No 2* (1992) 175 CLR 1, 58. The principle from this passage has been cited with approval and applied by the Malaysian courts (see *Adong 1* [1997] 1 MLJ 418, 428-9; *Nor Nyawai 1* (2001) 6 MLJ 241, 268-9).

[181] *Wik* (1996) 187 CLR 1, 214 (Kirby J). The denial of a parallel Aboriginal law-making system for the purposes of native title was subsequently upheld by the majority of the High Court (see *Yorta Yorta* (2002) 214 CLR 422, 443).

[182] *Mabo No 2* (1992)175 CLR 1, 79.

[183] See Craig Jones, 'Apples and oranges: The intersection of Aboriginal law and native title mediation' (Seminar given at Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 11 April 2005) 22 June 2012 <http://www.aiatsis.gov.au/research/docs/pdfs2005/Jones-

> The problem with the 'recognition space' idea, and indeed with Brennan J's initial characterisation, is that native title is essentially a creature of the common law. It is not simply the incorporation of Aboriginal law into the common law system. It does not approach Indigenous law as an equal partner in negotiating recognition and producing space in which both laws can operate. Indigenous peoples' rights are recognised by the common law on its terms and that recognition has been limited in significant ways. Moreover, these limitations have become the elements of native title that have been developed and expanded.[184]

Unless Orang Asli customs and usages are given the 'force of law' in respect of Orang Asli lands and resources, these customs and usages will remain ancillary within the context of the Malaysian legal system and accordingly, not be accorded equal respect compared to other recognised laws. As observed in Section IIA1-4 above,[185] the limited role of Orang Asli customs in a customary land claim does not afford due respect for and recognition of Orang Asli laws, traditions, customs and tenure systems in the manner envisioned by the first *UNDRIP* Standard.

2 Inherent vulnerability

The Federal Court in *Madeli 2* opened the possibility of extinguishment by inconsistent grant by applying Brennan J's observation in *Mabo No 2* that reservations that are inconsistent with the continued enjoyment of native title may extinguish native title.[186] This section uses the doctrine of extinguishment by inconsistent grant to demonstrate that titles and rights derived from the doctrine of common law Orang Asli customary land rights are vulnerable when pitted against other forms of property interests. Accordingly, Orang Asli laws, traditions, customs and tenure systems, appear to be denied equal respect and recognition and are subordinate to other property laws in Malaysia.

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paper.pdf>, 4. Noel Pearson has also explained that native title is 'for want of a better formulation, the recognition space between the common law and Aboriginal law which [is] now afforded recognition in particular circumstances' (see Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land is Our Life: Land Rights – Past, Present and Future* (University of Queensland Press, 1997), 154).

[184] Lisa Strelein, 'Conceptualising Native Title', above n 156, 115.

[185] Above, 263-84.

[186] See above Chapter 6, 252.

Experience in Australia regarding the doctrine demonstrates the susceptibility of native title to extinguishment by means of inconsistent grant. The statutory provisions for the extinguishment of native title under the *NTA* will not be examined in this section as they are not considered relevant to the evaluation of the common law doctrine. It must however be acknowledged that the common law retains a role in the extinguishment of native title but may require modification in particular instances due to the *NTA*.[187]

In *Mabo No 2*, all members of the majority of the High Court held that an interest in land validly granted by the Crown which is inconsistent with the continued enjoyment of native title would extinguish native title.[188] In *Fejo v Northern Territory*, the Australian High Court held that native title is extinguished by a grant in fee simple because an interest amounting to full ownership granted over a piece of land is simply inconsistent with the continued enjoyment of native title over the same piece of land.[189] *Fejo* is a post-*NTA* case. In respect of the Australian position at common law, Brennan J was explicit in *Mabo No 2* when His Honour held that 'native title has been extinguished by grants of estates of freehold'.[190] Brennan J also observed that '[a] Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title'.[191] Land reserved for a public purpose may also extinguish native title if the rights created by the reservation or later asserted by the executive are inconsistent with the continued enjoyment of native title.[192]

In *Wik*, a post-*NTA* High Court of Australia decision which raised the issue of extinguishment at common law, the grant of leases may also extinguish native title rights by the same method.[193] Exacerbating matters from an Aboriginal perspective, the majority of the High Court held that 'inconsistency' would be decided based on

[187] See above n 170.
[188] *Mabo No 2* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J); 68, 69 (Brennan J); 89, 110, 112 (Deane and Gaudron JJ); 196 (Toohey J).
[189] *Fejo v Northern Territory* (1998) 195 CLR 96, [43].
[190] (1992) 175 CLR 1, 69.
[191] Ibid 68; 90 (Deane and Gaudron JJ).
[192] Ibid 68.
[193] See *Wik* (1996) 187 CLR 1.

the *legal* rights created by the grant rather than whether the rights were exercised in fact (for example, by taking physical possession of the land).[194] Once a Crown grant of a lease is held to be inconsistent with the continued enjoyment of native title, native title is permanently extinguished and cannot be revived after the expiry of the lease.[195] However, the rejection of the temporary suspension of native title was partly based on the language of the *NTA* suggesting that the pre-*NTA* position may be more helpful in evaluating the common law doctrine in Malaysia. In *Wik*, the minority of the High Court rejected the possibility of the temporary suspension of native title[196] while the majority chose not to decide the question.[197] It is therefore open for the Malaysian courts to decide whether and to what extent Malaysian law accommodates the temporary suspension of common law Orang Asli customary land rights.

The prevalence of other interests over native title has been said to be discriminatory as the Crown cannot derogate from existing rights notwithstanding that such interests do not derive from the Crown.[198] Nonetheless, the application of the doctrine of extinguishment by inconsistent grant may potentially subordinate Orang Asli customary land rights to interests granted by the State Authority under existing domestic property legislation. The vulnerability of common law Orang Asli customary land rights to extinguishment is further examined in Section IIIB.

3 Orang Asli laws and customs as a barrier to recognition

Earlier in this Chapter, it was suggested that leaving non-Orang Asli civil courts to decide what is 'traditional' and 'integral to a distinctive Indigenous culture' or 'irreconcilable' with the Indigenous attachment to land in a customary land rights claim may produce unfavourable results for Orang Asli claimants.[199] These terms, if construed narrowly, may function to subordinate and, consequently, disrespect

[194] Ibid 133 (Toohey J); 135 (Gaudron J); 185 (Gummow J); 238 (Kirby J).
[195] See *Ward* (2002) 213 CLR 1, [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); [527]-[528] (McHugh J); [619], [625]-[627] (Callinan J) (High Court, Australia).
[196] (1996) 187 CLR 1, 94, (Brennan J); 100 (Dawson J); 167 (McHugh J).
[197] Ibid 133 (Toohey J).
[198] Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia*, above n 151, 368, 374.
[199] See above, Sections IIA3-5 (at 272-88).

Orang Asli 'laws, customs, traditions and institutions', part of the first *UNDRIP* Standard.

Pre-existing perceptions of non-Indigenous judges in interpreting traditional laws and customs in an Indigenous title claim may subordinate this title to other rights. Malaysian judges, mostly unfamiliar with the workings of Orang Asli customary law and customs, may be inclined to adjudicate claims based on their own perspectives thus reducing Orang Asli laws and customs to a factual inquiry that needs to fit into the realms of the common law. There are aspects of the doctrine of Indigenous title as developed in Canada and Australia that may function to exacerbate these potential problems in Malaysia. In Canada, the majority decisions of the Supreme Court in *R v Van Der Peet*[200] and *R v Marshall; R v Bernard*[201] demonstrate that having regard to 'Aboriginal perspectives' in a claim for Aboriginal rights or title does not necessarily translate into equal respect for Aboriginal laws and customs or the evolution of such laws and customs. The limitation of land held under Aboriginal title to uses not irreconcilable with the Aboriginal attachment to land[202] by Lamer CJ in *Delgamuukw* may run contrary to Aboriginal laws and customs on an 'attachment to the land' that may evolve and change over time. The limitation not only questions Aboriginal self-determination over their lands, territories and resources but challenges the credibility of their laws, traditions, customs and tenure systems.

The Australian courts have applied traditional laws and customs in a native title claim in a way that undermines the status of Indigenous laws and customs.[203] Indigenous laws and customs are necessary but, in many ways, not enough to establish native title. The lack of tolerance for change in Aboriginal society, laws and customs in *Yorta Yorta*[204] arguably reduces the claim process to a complex and

[200] See above Section IIA3(a) (above, 277-9 and nn 78-90 and accompanying text).
[201] See above Section IIA3(b) (above, 280-1 and nn 100-1 and accompanying text).
[202] See above, 290-1 (above nn 149-54 and accompanying text).
[203] For further reading on these issues, see eg. Lisa Strelein, 'Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples: From Mabo to Yorta Yorta', above n 58; Richard Bartlett, 'The Judicial Treatment of Native Title: Equal or Sui Generis?', above n 151; Richard Bartlett, 'Humpies not Houses or the Denial of Native Title: A Comparative Assessment of Australia's Museum Mentality' (2003) 10 *Australian Property Law Journal* 1, 17; Luke McNamara and Scott Grattan, 'The Recognition of Indigenous Land Rights as 'Native Title': Continuity and Transformation' (1999) 3 *Flinders Journal of Law Reform* 137.
[204] See above Section IIA3(a) (above 273-4 and nn 57-65 and accompanying text).

technical inquiry that pays little attention to the realities of Indigenous societal and cultural evolution as a result of changes in the external environment. While these difficulties may be attributable to the Australian courts' interpretation of native title in the light of the *NTA*, the use of terms like 'traditional' and 'connection' without sufficient precision in *Mabo No 2*[205] provides ample leeway for the Malaysian courts to interpret these terms in a manner that subordinates Indigenous laws and customs. Further, the adversarial method of inquiry for a native claim is such that the authenticity of the Indigenous claimants is constantly on trial.[206] This method may produce culturally damaging results for communities that have to endure this process. Consequently, claimants may not wish to bring claims to the civil courts. Also, the tendency of civil courts to require corroborative historical documentary evidence to support oral evidence from Indigenous witnesses conversant with Indigenous laws and customs[207] challenges the legitimacy of these laws and customs and may be seen as an affront to Indigenous society and culture.

III FREE, PRIOR AND INFORMED CONSENT ('FPIC') AND CONSULTATION IN MATTERS AFFECTING INDIGENOUS LANDS AND RESOURCES

This section assesses the potential for the realisation of the *UNDRIP* Standard for FPIC and consultation through the doctrine of common law Orang Asli customary land rights. The section then goes on to consider the extent to which the existing common law doctrine offers Orang Asli protection from dispossession through FPIC and consultation. The standard for FPIC and consultation has been explained in Chapter 3[208] and is repeated to the extent necessary for this section.

[205] See above Section IIA3 (a) (above, 272-6 and nn 54-75 and accompanying text) and Section IIA3(b) (above, 279-80 and nn 91-4 and accompanying text).
[206] Mykata, above n 64, 125.
[207] See above Section IIA4, 282-4.
[208] See above Chapter 3, 100-8.

A *Development of FPIC and Consultation through the Common Law*

Sagong recognised the common law fiduciary duty of the Federal and State Governments not to act in a manner inconsistent with the protection of Orang Asli land rights.[209] In Australia, statute, namely the *NTA*, and not common law development creates and governs the rights of consultation and participation afforded to Aboriginal native title claimants or holders.[210] As such, these rights provide little assistance to the Malaysian common law position. Further, the Australian courts have not supported the idea of a freestanding common law fiduciary duty obligation upon the Crown in respect of the power to unilaterally extinguish native title.[211] The Canadian position differs from that of Australia in that rights of consultation in respect of Aboriginal title and rights have developed through the common law. The theoretical basis for the Government duty to consult was articulated in *Haida*.[212] The Supreme Court held that the duty was grounded in the honour of the Crown that is at stake in its dealings with the Aboriginal peoples.[213] In the Canadian context, the duty of consultation effects reconciliation between the Crown and Aboriginal peoples with respect to interests at stake, a corollary of s 35(1) of the *Constitution Act 1982* (Canada) ('*Constitution Act*

[209] See *Sagong 1* [2002] 2 MLJ 591, 618-9 (Affimed, *Sagong 2* [2005] 6 MLJ 289, 311-2).
[210] In respect of future acts affecting native title, see eg. Indigenous land use agreements (*NTA*, Pt 2 Subdiv 3B-E) and the right to negotiate (*NTA,* Pt 2 Subdiv 3P). For further reading and commentary on the statutory regime governing these rights, see eg. Richard Bartlett, *Native Title in Australia*, above n 37, chs 20-22; Garth Nettheim, 'The Search for Certainty and the *Native Title Amendment Act 1998*' (1999) 22(2) *University of New South Wales Law Journal* 564; McRae et al, above n 57, 379-86; Daniel Guttman, 'Australian and Canadian Approaches to Native Title Pre-Proof' (2005) 9(3) *Australian Indigenous Reporter* 1.
[211] See Lisa Strelein, *Compromised Jurisprudence: Native title cases since Mabo*, above n 64, 117. In order for such a duty to arise, Brennan J held there must be a particular action or function to be exercised that gave rise to a fiduciary duty, or a discretionary power, whether statutory or otherwise, that required the executive or legislature to act on behalf of, or in the interests of, another (see *Wik* (1996) 187 CLR 1, 95-6). The idea of a 'freestanding' fiduciary duty in respect of native title emanates from Toohey J in *Mabo No 2*. His Honour held that the fiduciary obligation of the Crown would encompass acting for the benefit of the native title holders, and as such the Crown could not make any decisions affecting native title lands and contrary to the interests of titleholders without their consent. The Crown's extraordinary power to extinguish traditional title gives rise to a fiduciary obligation on the part of the Crown to ensure that the power is not abused. The nature of such an obligation would render the Crown a constructive trustee (see *Mabo No 2* (1992) 175 CLR 1, 203-4).
[212] *Haida Nation v British Columbia (Minister of Forests)* ('*Haida*') [2004] 3 SCR 511.
[213] Ibid [16].

1982').[214] Section 35 constitutionalised Aboriginal rights in Canada. Prior to 1982, the Canadian courts have held, in relation to treaties, that the honour of the Crown is always at stake in its dealings with Aboriginal peoples.[215]

Malaysia has no equivalent provision in its constitution. In ruling that the Federal and State Governments had not breached their fiduciary duty towards the Orang Asli, the Court in *Pendor* considered whether the Orang Asli applicants had been adequately consulted before relocation from their lands.[216] However, the majority of the Malaysian Federal Court has subsequently ruled that there is no right to a pre-extinguishment hearing or consultation for native customary rights in Sarawak unless provided by written law.[217] However, the dissenting judgment of Malanjum CJSS opens avenues for the Malaysian common law to develop its own notion of the 'honour of the Crown' particularly where the taking of native lands adversely affects the 'livelihood' of natives.[218] In this regard, the following legal factors unique to the Orang Asli situation may be of assistance:

(1) Item 16 sch 9 List 1 of the *Malaysian Constitution* that empowers the Federal Government to legislate for the welfare of Orang Asli;
(2) Art 8(5)(c) of the *Malaysian Constitution* that does not invalidate any provision for the protection, well being or advancement of the Aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to Aborigines of a reasonable proportion of suitable positions in the public service;
(3) The *APA* that is essentially a statute for the protection, welfare and advancement of Orang Asli;

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[214] Ibid [35],[45].
[215] See J Timothy S McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (LexisNexis, 2008) 1-37. For pre-1982 cases on the honour of the Crown in its treaty dealings with Aboriginal peoples, see eg. *R v Marshall* [1999] 3 SCR 456, [49]-[51] (Supreme Court, Canada); *R v Badger* [1996] 1 SCR 771, [41].
[216] [2011] Kuala Lumpur High Court Application for Judicial Review R2-25-292-2007 (Unreported, Mohd Zawawi Salleh J, 11 April 2011), [34]-[43]. The Court also observed that 'the exact content or application' of the fiduciary duty is uncertain (at [34]). For commentary on the *Pendor* case, see above Chapter 6, 229-30.
[217] *Bato Bagi* [2011] 6 MLJ 297, 306 (Zaki CJ), 336 (Raus FCJ).
[218] Malanjum CJSS affirmed the fiduciary duty owed by the state to natives and observed *obiter dicta* that a right to pre-consultation exists if the livelihood of natives are adversely affected (*Bato Bagi* [2011] 6 MLJ 297, 322, 326 (Malanjum CJSS)).

(4) The *1961 Policy* that provides for Orang Asli not to be removed from their lands without their full consent;[219] and

(5) The common law fiduciary duty owed by the Federal and State Governments to Orang Asli as developed in *Sagong*.[220]

The fiduciary duty owed by the Government to Orang Asli and the distinct statutory and constitutional position of Orang Asli above necessitates an examination of a duty of consultation as developed in Canada.

In *Delgamuukw*, it was decided that there is always a duty to consult Aboriginal people in good faith but the nature and scope of the duty will vary with the circumstances.[221] In the context of whether an infringement of Aboriginal title or rights is justified, the duty could range from mere consultation to full consent, depending on the seriousness of the infringement.[222] In *Haida*, the Supreme Court explicated the duty to consult and accommodate as follows:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. '[C]onsultation' in its least technical definition is talking together for mutual understanding'.
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and

[219] See para (d) of the *1961 Policy*.
[220] However, it is 'a question of fact in each particular case' whether the Government has breached this duty (*Sagong 2* [2005] 6 MLJ 289, 312-3). Bulan and Locklear have argued that a freestanding fiduciary obligation, as defined by Toohey J in *Mabo No 2* has and should inform the development of the equal standard under Malaysian law (Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Rights in Sarawak* (SUHAKAM, 2007), 113-24). Toohey J held that the fiduciary obligation of the Crown would encompass acting for the benefit of the native title holders, and as such the Crown could not make any decisions affecting native title lands and contrary to the interests of titleholders without their consent (see *Mabo No 2* (1992) 175 CLR 1, 204). However, the effect of a freestanding government fiduciary obligation in delivering definite and positive outcomes in relation to the recognition and protection of Orang Asli customary lands and resources is questionable due to the case-by-case approach to a *breach* of fiduciary duty adopted in *Sagong 2* and the minority of the Federal Court in *Bato Bagi* ([2011] 6 MLJ 297, 326 (Malanjum CJSS)).
[221] *Delgamuukw* [1997] 3 SCR 1010, [168].
[222] Ibid.

> provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.[223] *[References omitted]*

Even at the lower end of the spectrum, the duty of consultation has both informational and response components,[224] implying the possible participatory nature of the duty in Canada.

The duty to consult also extends to situations where rights have not yet been established but must be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title.[225] Other aspects of the duty to consult are that it should be:

(i) consistent with the honour of the Crown and the need to effect reconciliation;[226]

(ii) conducted in good faith with the intention of substantially addressing the concerns of Aboriginal peoples and a mutual obligation on both the Crown and Aboriginal claimants;[227]

(iii) meaningful[228] in that it must be responsive;[229] and

(iv) reasonable. [230]

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[223] *Haida* [2004] 3 SCR 511, [43]-[45]. See also *Taku River Tingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, [32] (Supreme Court, Canada); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (‘*Mikisew Cree*’) [2005] 3 SCR 388, [34] (Supreme Court, Canada).

[224] *Mikisew Cree* [2005] 3 SCR 388, [55], [64]-[65]. The informational component refers to the provision of all necessary information in a timely way. The response component refers to affording the opportunity for Aboriginal peoples to express their interests and concerns, and to ensure their interests are seriously considered, and wherever possible, integrated into the proposed plan of action.

[225] *Haida* [2004] 3 SCR 511, [39].

[226] See Ibid [38], [41], [45]; *Mikisew Cree* [2005] 3 SCR 388, [33], [62].

[227] See eg. *Delgamuukw* [1997] 3 SCR 1010, [168]. In respect of reciprocity, see *Haida* [2004] 3 SCR 511, [42].

[228] See eg. *Haida* [2004] 3 SCR 511, [41]; *Taku River Tingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, [2], [29]; *Mikisew Cree* [2005] 3 SCR 388, [54], [67].

[229] *Taku River Tingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, [25].

The performance of this duty is subject to judicial review.[231]

Despite its comprehensive nature, there are limits to the context-specific common law duty of consultation in Canada both in terms of its extent and process. The existence and extent of the duty to consult (including whether consent is necessary) is determined by a judge's assessment of the strength of the Aboriginal claim and the significance of 'the potential infringement' to Aboriginal peoples. The views of an individual judge may not fully consider Aboriginal perspectives when making an assessment of the level of consultation required.[232] The right to judicial review of the duty of consultation carries with it a similar limitation. The positive obligation of the Crown to act 'reasonably' in the process of consultation effectively moderates the duty to an objective inquiry by the civil courts that may, in turn, not adequately consider Aboriginal perspectives.[233] Further, the lower end of the spectrum of consultation may merely be to 'disclose information, and discuss any issues raised in response to the notice'. Lower end consultations fall short of the *UNDRIP* Standard for consultation as the process for a *consultation* in any matter affecting Indigenous lands and resources should necessarily involve the timely provision of full and comprehensible information on the likely impact of the proposed measure on Indigenous peoples[234] and, perhaps more importantly, allow Indigenous peoples to genuinely 'influence the decision-making process' affecting their lands and resources.[235] In *Haida*, the Supreme Court clarified that the Aboriginal 'consent' spoke of in *Delgamuukw* only applies in cases of established rights and by no means in every case.[236] The 'give and take' approach in relation to Aboriginal consent

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[230] The obligation of the Crown is to reasonably ensure that Aboriginal peoples are provided all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure their interests are seriously considered, and wherever possible, integrated into the proposed plan of action (see *Mikisew Cree* [2005] 3 SCR 388, [64]. What is required is not perfection, but reasonableness (see *Haida* [2004] 3 SCR 511, [62])).

[231] See eg. *Haida* [2004] 3 SCR 511, [60].

[232] For examples of problems relating to judicial practice of having regard to Aboriginal perspectives in Canada, see above, 277-9 (nn 78-90) and 280-1 (nn 100-1) and Section IIA4 respectively (above 282-4).

[233] For a recent application of the standard of review for consultation in Canada, see *Beckman v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103 (Supreme Court, Canada).

[234] See further, *EMRIP*, *Final study of the Expert Mechanism on the Rights of indigenous peoples on the indigenous peoples and the right to participate in decision-making*, UNGA Doc A/HRC/18/42 (2011), Annex, paras 8-16.

[235] Ibid.

[236] *Haida* [2004] 3 SCR 511, [48]

suggested in *Haida*[237] may function to compromise Aboriginal interests particularly if there is no further clarification of the threshold for Aboriginal consent. On the other hand, the Second *UNDRIP* Standard provides some clarity to this issue. FPIC and consultation applies when a proposed measure has 'a significant, direct impact on indigenous peoples' lives or territories' and prescribes that such FPIC and consultation mechanisms should be developed in consultation with Indigenous peoples.[238] Further, the threshold for FPIC should: (1) pay due recognition to Indigenous peoples' laws, traditions, and customs and land tenure; and (2) provide rights of Indigenous participation.[239]

Thus, clearer standards for FPIC,[240] 'prior consultation' and 'effective consultation' and their scope of application[241] should be developed by the state in consultation with Indigenous peoples. Once expressly incorporated into domestic law, these standards could serve as guidance for any adjudication body in its deliberations on whether there has been effective prior consultation of Orang Asli. Leaving the development of such standards in the sole hands of the judiciary involves a level of unpredictability.

Thus far, the Malaysian courts have not extended the boundaries of common law Orang Asli customary land rights to cover effective consultation and participation in matters affecting Orang Asli lands in the manner done by the Canadian courts. Future cases may well do so by which time it may be too late for many Orang Asli communities. As observed in Chapter 5, the lack of clear and enforceable parameters for FPIC and consultation and State practice exacerbates matters. Notwithstanding the requirement of consent before Orang Asli are to be removed from their lands contained in the *1961 Policy*, Orang Asli lands continue to be encroached upon with a lack of effective consultation, let alone FPIC.[242]

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[237] Ibid
[238] See *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc A/HRC/12/34 (2009), para 67. For an explanation of this threshold in respect of the Second *UNDRIP* Standard, see above Chapter 3, 106-7.
[239] See above Chapter 3, 106.
[240] For suggested FPIC standards, see above Chapter 3, 106-7.
[241] See above Chapter 3, 100-8.
[242] For examples, see above Chapter 5, 186-90.

B *FPIC and Consultation for Dispossession of Land*

Protection from dispossession refers to preventative safeguards prior to any measures that may result in the dispossession of Orang Asli from their lands. This section determines whether the common law doctrine *requires* Orang Asli consent in matters affecting their lands and resources. A negative answer would obviate the necessity to compare the common law with this *UNDRIP* Standard.

As a preventative measure, Orang Asli are at liberty to apply for an interlocutory injunction pending resolution of a land rights claim.[243] Once again, Orang Asli applicants cannot assume that the judiciary will always give full effect to or necessarily favour the legal position of the Orang Asli. Further, interlocutory injunctive relief may not capture the full obligation of the state towards the Indigenous peoples and reduce incentives for the successful party to work towards a negotiated outcome.[244] The balance of convenience in applications for injunctive relief may often tilt towards protecting government jobs and revenues resulting in the outright 'loss' of Aboriginal interests pending resolution of the case.[245] It also remains to be seen whether the Canadian courts' approach in determining issues relating to the state's duty to consult and accommodate at the interlocutory stage of an Aboriginal title or rights claim will be adopted in Malaysia.[246] More importantly, litigation must be instituted before any such claims are entertained. The challenges faced by Orang Asli in instituting civil action further reduce the effectiveness of this method in protecting Orang Asli from dispossession.[247]

In the event of a positive determination of customary land rights by the Malaysian courts, Orang Asli customary land rights are still liable to unilateral extinguishment by clear and plain legislation, an executive act authorised by such legislation and

[243] See above Chapter 6, 254.
[244] See *Haida* [2004] 3 SCR 511, [14].
[245] Ibid.
[246] The Court's ability to determine the duty to consult and accommodate at the interlocutary stage is grounded on the fiduciary duty owed by the Crown (see eg. *Haida* [2004] 3 SCR 511).
[247] For practical barriers faced by Orang Asli in successfully bringing civil claims for their customary right, see above Section IIA5 (at 284-88).

possibly, inconsistent grant.[248] The Malaysian courts are yet to authoritatively determine that the common law fiduciary duty owed by the state to Orang Asli *requires* the consent of Orang Asli before the extinguishment of any Orang Asli customary land rights.[249] The current approach of the Malaysian courts seems to favour the case-by-case basis approach to the breach of such a fiduciary duty.[250] The inherent fragility of native title in Australia due to the doctrine of extinguishment by inconsistent grant has been discussed in Section IIC2.[251] The doctrine of extinguishment without consent may be used to facilitate the forcible removal of Orang Asli from their lands by unilateral legislative or executive acts that: (1) manifest a plain and obvious intention to extinguish Orang Asli customary land rights; and/or (2) grant an interest in land inconsistent with the continued enjoyment of Orang Asli customary land rights. In these circumstances, Orang Asli customary land rights are susceptible to unilateral compulsory acquisition under the *Land Acquisition Act 1960* (Malaysia) ('*LAA*').[252] Short of return of lands, the only redress available under the *LAA* is market value monetary compensation. Assessment based on monetary compensation is first, limited to 'settled areas' and secondly, may neither be adequate nor appropriate from an Orang Asli perspective.[253] Moreover, the protection afforded under the *LAA* where Orang Asli customary land rights are regarded as no different from other property titles, fails to appreciate the specific 'historical, cultural and social circumstances'[254] of the Orang Asli and their special relationship with their lands.

In Canada, Aboriginal rights, including Aboriginal title, are constitutionally protected against all forms of legislative and executive action under s 35(1) of the *Constitution Act 1982*. Prior to 1982, Aboriginal rights could be extinguished by a

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[248] *Sagong 1* [2002] 2 MLJ 591, 612; *Madeli 2* [2008] 2 MLJ 677, 697-8 (Federal Court).
[249] The judgment in *Pendor*, where the Court considered whether the Orang Asli claimants had been adequately consulted prior to their relocation in determining that the Federal and State Governments had fulfilled their fiduciary duty, is a decision of first instance. The Court also observed that the exact content or application of the fiduciary duty owed to Indigenous peoples is 'uncertain' (see [2011] Kuala Lumpur High Court Application for Judicial Review R2-25-292-2007 (Unreported, Mohd Zawawi Salleh J, 11 April 2011), [34]-[43]).
[250] See *Sagong 1* [2002] 2 MLJ 591, 618-620; *Sagong 2* [2005] 6 MLJ 289, 311-4.
[251] See above, 298-300.
[252] See *Sagong 1* [2002] 2 MLJ 591, 621; *Sagong 2* [2005] 6 MLJ 289, 310-1 (Court of Appeal).
[253] For the adequacy of monetary compensation, see above Chapter 6, 254-6 and below, 312-5.
[254] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, *S James Anaya*, *UN* GA Doc A/HRC/9/9 (2008), paras 85-6.

clear and plain intention by the Sovereign to do so.[255] After the constitutionalisation of Aboriginal rights in 1982, Aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test in *R v Sparrow*.[256] The *Sparrow* test for justification has two parts. The first part of the test is whether there is a valid legislative objective for the infringement.[257] '[O]bjectives purporting to prevent the exercise of s 35(1) rights that would cause harm to the general populace or to Aboriginal peoples themselves, or other objectives found to be compelling or substantial' would be valid.[258] The second part of the test requires an assessment whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.[259] The Crown must show that it respected the fiduciary obligations to the Aboriginal peoples in question, meaning that the rights of Aboriginal peoples have been given priority over other rights and interests.[260] In *Sparrow*, for example, where the valid legislative needs of conservation of fishery have been met, the Aboriginal food fishery would have to be given 'top priority' over non-Indian commercial and sports fishing.[261] The subsequent application of the justificatory test is not without its problems and has been said to enable the Crown, for all intents and purposes, to unilaterally convey a portion of an Aboriginal right to others without the consent of Aboriginal peoples.[262]

The common law doctrine is yet to adopt the justificatory test in a manner effective for the protection of Orang Asli customary land rights. In *Pendor*, a first instance decision, the Court applied the justificatory test in determining that: (1) a Federal and State project for the supply of water to Selangor State that would displace the Orang Asli applicants from their lands was a 'legitimate' objective; and (2) the Federal and State Governments had fulfilled their fiduciary duty by adequately consulting with affected Orang Asli and providing adequate alternative lands and

[255] See eg. *R v Sparrow* (1990) 1 SCR 1075, 1099 (Supreme Court, Canada).
[256] *R v Van der Peet* (1996) 2 SCR 507, [28].
[257] *R v Sparrow* (1990) 1 SCR 1075, 1113.
[258] Ibid.
[259] *Delgamuukw* [1997] 3 SCR 1010, [162].
[260] See *R v Sparrow* (1990) 1 SCR 1075, 1114-9.
[261] Ibid 1116.
[262] For a critique, see the work of McNeil in eg. Kent McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42 *Osgoode Hall Law Journal* 271, 291; Kent McNeil, 'How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?' (1997) 8(2) *Constitutional Forum* 33.

compensation to Orang Asli.[263] The Court also observed that an additional 'public interest' requirement would be relevant in determining actions affecting Orang Asli lands, perhaps suggesting a lower threshold for the 'infringement' of Orang Asli customary land rights if compared to Canada.[264]

Aboriginal rights cannot be extinguished in Canada after 1982. In Malaysia, common law Orang Asli land rights remain susceptible to unilateral extinguishment by clear and plain legislative or executive intent to do so.[265] The requirement for *consent* of Orang Asli is not entrenched in the law on extinguishment of common law Orang Asli customary land rights. Subject to further clarification by the Malaysian courts, the *Pendor* decision also creates a potentially disadvantageous situation for Orang Asli customary land rights where such rights may be vulnerable to both extinguishment and infringement by justification, depending on the particular facts of a case.

IV JUST REDRESS FOR DISPOSSESSION

'Just redress' concerns curative action in the event of dispossession. This section examines whether the doctrine affords just redress if Orang Asli are dispossessed of their customary lands and resources.

Just redress under the third *UNDRIP* Standard involves: (1) restitution of lands and resources or the option of return of lands, and if this is not possible; (2) just, fair and equitable compensation by way of land, territories and resources of equal size, quality and legal status; (3) just, fair and equitable monetary compensation; and (4) other appropriate redress. Monetary compensation should only be paid as a final alternative where restitution of lands, territories and resources or land-based compensation is not possible.[266] The mechanisms for adjudicating redress should be fair, independent, impartial, open and transparent with due recognition of Indigenous

[263] [2011] Kuala Lumpur High Court Application for Judicial Review R2-25-292-2007 (Unreported, Mohd Zawawi Salleh J, 11 April 2011), [34]-[43].
[264] Ibid [44]-[51].
[265] See eg. *Sagong 1* [2002] 2 MLJ 591, 612, *Madeli 2* [2008] 2 MLJ 677, 697-8 (Federal Court).
[266] See *UNDRIP* arts 10, 28 para 2, and 32 para 3.

peoples' laws, traditions, customs and land tenure and with the right of Indigenous participation in the process.[267]

Although it may be possible for the grant of freehold title or other interests inconsistent with the continued enjoyment of Orang Asli customary land rights[268] to extinguish these rights, Malaysian courts have not authoritatively determined whether previous extinguishment of Orang Asli customary land rights entitles Orang Asli to rights of redress or compensation. Following the common law doctrine in Malaysia, such claims would encounter challenges. These claims would be subject to the establishment of Orang Asli customary land rights and consequently, all its concomitant requirements. Further, the state may use s 2(a) of the *Public Authorities Protections Act 1948* (Malaysia) that limits claims against any public authority to 36 months from the date of the act, default or neglect complained of by the claimant.

In any event, the Malaysian courts are yet to interpret 'adequate' compensation for loss of Orang Asli land under art 13 of the *Malaysian Constitution* to include redress other than monetary compensation. In *Mabo No 2*, the majority of the Australian High Court ruled that native title was subject to unilateral extinguishment without compensation.[269] In line with s 51 (xxxi) of the *Australian Constitution* that provides for acquisition of private property on just terms and the *Racial Discrimination Act 1975* (Cth), compensation for loss of native title is now governed by div 5 of the *NTA*. For the purposes of the analysis in this section, it is generally accepted that at common law, no compensation is *necessarily* payable upon extinguishment of native title in Australia.[270] In Canada, 'fair compensation will ordinarily be required when Aboriginal title is infringed'.[271] The amount of compensation payable varies with the

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[267] Ibid art 27.
[268] See *Madeli 2* [2008] 2 MLJ 677, 697-8 (Federal Court).
[269] *Mabo No 2* (1992) 175 CLR 1, 15-6. Deane and Gaudron JJ and Toohey J had differing views on compensation. Deane and Gaudron JJ accepted that native title can be extinguished but compensation would be payable unless there was clear and plain legislation to the contrary (*Mabo No 2* (1992) 175 CLR 1, 111-2). Toohey J went further to hold, based on his determination of a fiduciary duty owed by the Crown, that extinguishment of native title would involve a breach of that duty and liability to compensation (*Mabo No 2* (1992) 175 CLR 1, 204-5). However, the majority in *Wik* consisting of Toohey, Gaudron, Gummow and Kirby JJ suggested that extinguishment without compensation could occur if there is clear and plain authority for such result (see *Wik* (1996) 187 CLR 1, 155, 250).
[270] See Richard Bartlett, *Native Title in Australia*, above n 37, 249-50, 291, 546-8.
[271] *Delgamuukw* [1997] 3 SCR 1010, [169]; *R v Sparrow* (1990) 1 SCR 1075, 1119 (Supreme Court, Canada).

nature of the particular Aboriginal title affected and the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.[272] While it is apparent that 'compensation' is limited to a monetary 'amount', there is little guidance on the method by which such compensation is assessed.

The 'loss of income' method of assessment for compensation devised in *Adong 1* fails take into account the special connection that Orang Asli have with their customary lands.[273] Alternatively, 'market value compensation' assessed in *Sagong 1*[274] does not consider the special connection between Orang Asli and their customary lands as well. This form of compensation fails to appreciate that customary rights are imbued with cultural, spiritual, communal and economic dimensions far beyond mere market value.[275] Perhaps more importantly, these two cases also illustrate the inadequacy of the civil court process in assessing adequate monetary compensation for loss of Indigenous lands without executive or legislative intervention.

Having identified the shortfalls of awarding market value compensation for loss of Orang Asli customary lands, assessing 'adequate compensation' in an Indigenous context poses a significant challenge given the incompatibility of Indigenous ownership and mainstream conceptions of property value.[276] Alias's work on

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[272] *Delgamuukw* [1997] 3 SCR 1010, [169].
[273] For an examination of this method, see above Chapter 6, 255-6.
[274] *Sagong 1* [2002] 2 MLJ 591, 618; *Sagong 2* [2005] 6 MLJ 289, 310-1, 313 (Court of Appeal, Malaysia).
[275] See eg. Anuar Alias and Md Nasir Daud, *Saka: Adequate Compensation for Orang Asli Land* (Universiti Tun Hussein Onn Malaysia, 2011), 68-9; Cheah Wui Ling, 'Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestone or False Start' (2004) 2 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/cheah>.
[276] See eg. Anuar Alias, *Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands* (PhD Thesis, University of Malaya, 2009); D Smith, *Valuing Native Title: Aboriginal, Statutory and Policy Discourse About Compensation* (Discussion Paper No 222/2001, Centre for Aboriginal Economic Policy Research, Australian National University, 2005); Raewyn Fortes, 'Is There a Compensation Model for Native Title?' (2005) 38(6) *Australian Property Journal* 458; David Campbell, 'Economic Issues in Valuation of and Compensation for Loss of Native Title' (Native Title Research Unit, Land, Rights, Laws: Issues of Native Title (2000) Vol 2, Issues Paper No 8); R T M Whipple, 'Assessing Compensation Under the Provisions of Native Title Act Part 1' (1997) 3(3) *Native Title News* 30; R T M Whipple, 'Assessing Compensation Under the Provisions of Native Title Act Part 2' (1997) 3(4) *Native Title News* 49; Daniel C H Mah, 'The National Native Title Tribunal: Compensation Issues – A Discussion Paper' (Paper presented at the Symposium on Compensation under the Commonwealth *Native Title Act*, Curtin University, Perth, 3 November 1994); Garrick Small and John Sheehan, 'The Metaphysics of Indigenous Ownership; Why Indigenous Ownership is Incomparable to Western Conceptions of Property Value' in Robert A

compensation for the acquisition of Orang Asli lands reveals the complexities in valuing Orang Asli lands by orthodox valuation methods for purposes of compensation and the need for reform of existing laws to recognise and articulate the special and multi-dimensional relationship between Orang Asli and their lands to enable a contextualised and effective valuation process.[277] Further, the civil courts may not be adequately equipped or may be reluctant to determine suitable valuation methods for assessing compensation for loss of Orang Asli customary lands. As observed by Zaki CJ in *Bato Bagi*, guidelines for awarding compensation to Sarawak natives for loss of customary rights 'are issues for the Government to decide and not the courts'.[278] Effective Indigenous participation in adjudicating redress as suggested under the third *UNDRIP* Standard and effective consultation with Indigenous peoples prior to the introduction of any redress mechanisms and standards may alleviate these problems.

In sum, the redress available for dispossession of Orang Asli customary lands under the common law falls short of the standards contained in the *UNDRIP* because first, it appears to be limited to monetary compensation and secondly, fails to consider Indigenous perspectives in assessing such compensation.

V CONCLUSION

The recognition of Orang Asli customary land rights by the Malaysian courts through the application of the common law doctrine of Indigenous title is an encouraging development for Orang Asli. From possessing statutory rights that are dependent on the will of the individual State Authority, Orang Asli now have a potential legal claim to full ownership of customary lands that form part of their settlement. They also prospectively possess common law rights of occupation and use in other parts of their customary lands that are compensable as property rights under art 13 of the *Malaysian Constitution*. The common law fiduciary duty owed by the Federal and State Governments to Orang Asli potentially provides a degree of

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Simons, Rachel Malmgren and Garrick Small (eds), *Indigenous Peoples and Real Estate Valuation* (Springer, 2008).

[277] See Alias, above n 276; Alias and Daud, above n 275, 64-85, 99-110, 150-2.

[278] [2011] 6 MLJ 297, 305.

protection from the infringement of Orang Asli customary land rights. However, these rights only crystallise upon their successful enforcement in the civil courts and provided they are not extinguished or impaired by any legislative and executive act beforehand.

It is doubtful whether the doctrine of common law Orang Asli customary land rights provides effective recognition and protection of Orang Asli lands and resources in the manner advocated in this thesis. The doctrine provides limited guarantees of ownership, management and use of both lands and resources. This limitation is partly due to the requirements for the proof of customary land rights that, if interpreted narrowly, may not be appropriate to the cross-cultural issues surrounding these claims. More importantly, the civil courts, where claims for customary land rights are made, lack the contextualised approach to Indigenous lands, territories and resources dispute resolution broadly advanced in art 27 of the *UNDRIP*. Further, the common law doctrine in Malaysia opens up possibilities for the narrowing of the scope of the doctrine in future cases. In this regard, judicial conservatism may function to stunt the development of the common law. These challenges may not provide equitable outcomes for Orang Asli claimants. The content and vulnerability of the interest in land afforded by the doctrine seem to fall short of the *UNDRIP* Standards. In the comparative jurisdictions, the doctrine of extinguishment and the justificatory test have been applied by the courts in a manner that subordinates Indigenous title to other interests in land. Rights to FPIC and consultation in matters affecting Orang Asli are yet to see any cohesive development by the Malaysian courts. Against the *UNDRIP* Standard for just redress for dispossession of lands, the limited form of redress available under the common law doctrine, namely monetary compensation, does not factor Orang Asli connections to their customary lands.

The development of the common law is dependent on cases being brought before the courts. In Malaysia, the last fourteen years has only seen a handful of major decisions involving Orang Asli customary land rights claims. Even if the common law doctrine were to develop into a coherent and reasonably predictable body of law that effectively recognises and protects Orang Asli customary land rights, the evolutionary process through litigated disputes may take too long and do too little.

In the meantime, encroachment and the taking of Orang Asli lands and resources continue to erode Orang Asli lands and resources.

Leaving the fate of Orang Asli customary lands solely in the hands of the judiciary may not be the answer. As noted by the Canadian Royal Commission on Aboriginal Peoples in its report on Aboriginal peoples, 'the courts can be only one part of a larger political process of negotiation and reconciliation'.[279] To expect the courts to achieve what the legislature and executive can do in a comprehensive and inclusive programme of law reform is to place an inordinate burden on one branch of the government, and risks it encroaching into the powers of the other two branches of government.

[279] Royal Commission on Aboriginal Peoples, above n 119, vol 2, Part 2, ch 4 s 6.2.

Chapter 8

A CONCLUSION FOR A POSSIBLE NEW BEGINNING: KEY PRINCIPLES OF ORANG ASLI COMMUNAL TITLE

I INTRODUCTION

In evaluating the laws governing Orang Asli customary lands and resources:

- Chapter 5 suggested that the 'protectionist' statutory laws governing Orang Asli confer excessive powers on the state and are arguably inconsistent with the *UNDRIP* Standards; and

- Chapter 7 argued that the significant challenges posed in litigating for recognition and protection of Orang Asli customary land rights via the common law doctrine could result in outcomes that fall short of the *UNDRIP* Standards.

Drawing from the *UNDRIP* Standards, this chapter concludes the thesis by setting out key aspects of an alternative legal framework for the effective recognition and protection of Orang Asli land rights. It does so by way of demonstrating that the grant of a nuanced and flexible form of statutory communal title, with changes to existing domestic laws, may create the opportunity for compatibility with the *UNDRIP* Standards. While the principles surrounding the proposed form of communal title may inform a holistic approach to the reform of Orang Asli rights, this chapter does not function to prescribe a detailed legislative framework or blueprint for Orang Asli customary land and resource rights. Instead, the focus of this chapter will be on key issues surrounding the proposed alternative framework rather than the necessary and consequential amendments to existing law for the realisation of the framework.

Too prescriptive an approach towards reform would be presumptuous of Orang Asli needs and aspirations. Orang Asli are yet to articulate a legal framework that attempts to bridge the gap between domestic laws on lands and resources and the *UNDRIP*. Therefore, assuming what Orang Asli desire in terms of specific rights to lands and resources without empirical research would be misconceived. 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'. Prior to adopting and implementing legislative or administrative measures that may affect Indigenous peoples, states shall, in good faith, obtain the free, prior and informed consent ('FPIC') of the Indigenous peoples through their own representative institutions (art 19).

Any legal reform process consistent with the *UNDRIP* should therefore pay due regard to these provisions. In reality, the consultation process prior to such legal reform would inescapably involve a degree of compromise between Orang Asli and other interests. While acknowledging the inevitability of compromise in any future reform efforts, the proposed framework concentrates more on accommodating Orang Asli interests to the fullest extent legally possible rather than engaging in unsupported speculation on the nature and extent of any compromises that may take place during the consultation process.

Consultations on law reform concerning Orang Asli land which is consistent with the *UNDRIP* are yet to take place in Malaysia. In this context, it is helpful to note that the Malaysian Human Rights Commission ('SUHAKAM'), commenced a national inquiry into Indigenous land rights in early 2011, including those of Orang Asli, with a view to highlighting problems and making recommendations.[1] Findings of the inquiry are expected to be published by the end of 2012.

Accordingly, it is more useful to explore key areas of the proposed communal title leaving the details of choice for future consultations and negotiations. The

[1] See 'Land rights to be discussed: SUHAKAM to hold inquiry with natives', *The Star* (Malaysia), 11 May 2011. For further information on the Inquiry, see SUHAKAM, *The Official Website of the National Inquiry into the Land Rights of Indigenous Peoples*, 22 June 2012 <http://www.suhakam.org.my/ni_microsite>.

recommendations crafted in this chapter will unavoidably involve a certain level of specificity and 'fixing' of existing legal structures but without necessarily inhibiting the flexibility which would enable their practical use to future reform endeavours. After establishing a positive link between the overarching *UNDRIP* concept of self-determination and land rights-based reform for Orang Asli, Section II sets out some important considerations in crafting the proposed legal framework. Section III examines, with reference to experiences from other jurisdictions and the *UNDRIP* Standards, key land tenure systems, institutions, processes and protection that could form the basis of an alternative form of statutory communal ownership of lands and resources. The effectiveness of statutory reform is appraised in Section IV prior to the conclusion of the chapter, which outlines 'legitimacy' and 'internalisation' challenges to the successful reform of Orang Asli customary land and resource rights in line with the *UNDRIP*.

II THE *UNDRIP* STANDARDS AND LAND RIGHTS REFORM

As previously stated, the *UNDRIP* Standards for the effective recognition and protection of Indigenous land and resource rights are:

- Ownership, management and use of Indigenous lands and resources with due respect for Indigenous laws, traditions, customs and institutions;
- FPIC and consultation in matters affecting Indigenous lands and resources;
- Just redress for dispossession.[2]

The nexus between the *UNDRIP* Standards and the reform proposals is highlighted throughout Section III. In Section II, the overarching concept of self-determination in the *UNDRIP*,[3] that necessarily includes collective rights to lands and resources, is used:

[2] See below, Appendix 2, 401.
[3] In this regard, see above Chapter 3, 88-90.

- to introduce the role of a statutory framework in realising the effective recognition and protection of Orang Asli land and resource rights; and
- as the basis for the considerations in crafting the recommendations in Section III.

A *Land Reform Recommendations: A Statutory Rights Framework*

A land rights regime may be an appropriate form to give effect to the overarching concept of self-determination by creating 'a legal and geographical space' in which Indigenous law and custom has effect and contributes to self-directed development into the future.[4] As argued by Tom Calma, in his capacity as Aboriginal and Torres Strait Islander Social Justice Commissioner:

> Land rights can provide a means for social development through creating a legal and geographical space for the exercise of Indigenous law, culture and self-governance. The practice of Indigenous law and culture strengthens individual autonomy, social norms of responsibility and social capital. Land rights also encourages the establishment of Indigenous organisations to hold and manage land, providing governance structures, employment, and the development of knowledge, capacity and institutions for engagement with the broader economy and polity. Further, land rights can provide a means for economic development through restoring Indigenous rights to land and natural resources, including minerals, which can be exploited where desired. It may also give Indigenous owners a financially valuable seat at the negotiating table with government and third parties through statutory control over what happens on their lands.[5]

In contrast, land rights in the form of legislation are 'a product of distinctive political systems that operate in each jurisdiction and can be hostage to significant shifts in the political landscape'.[6] The politically, economically and demographically weak Orang Asli[7] are particularly susceptible to such changes thus undermining the potential security and clarity offered by land rights legislation. As part of the caveat to effective reform to Orang Asli land and resource rights, Section IV revisits

[4] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005* (Human Rights and Equal Opportunity Commission, 2005), 30.
[5] Ibid 20-21.
[6] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009), 222.
[7] See above Chapter 2, 16-20.

constitutional, political and social challenges faced in implementing such reform. The remaining Sections IIB-C set out additional considerations for the reforms proposed in this chapter.

B *Scope and the Need for Flexibility*

The recommendations in this chapter do not seek to formulate a concurrent Orang Asli legal system that works equally and in tandem with the existing Malaysian legal system. Instead, they seek to identify parameters for the creation of a rights-based statutory framework that effectively recognises and protects Orang Asli customary land and resources, as far as possible, within the confines of the *Malaysian Constitution*. Effective recognition and protection of Orang Asli customary land and resource rights for the purposes of this chapter would have regard to the *UNDRIP* Standards.

Self-determination is closely related to internal autonomy of the Indigenous community. In Australia, self-determination of Indigenous communities in the form of internal autonomy has been emphasised for almost forty years. In a report that culminated in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA 1976* (NT)'), the first Aboriginal land rights legislation in Australia ('*Woodward Report*'), Commissioner Woodward concluded that:

> 48. The Aboriginal people themselves must be fully consulted about all steps proposed to be taken. They must be given every opportunity to consider and criticise proposals and to negotiate with the Government for changes in these proposals.
>
> 58. It is important that Aboriginal communities should have as much autonomy as possible in running their own affairs...
>
> 59. Aborigines should be free to follow their own traditional methods of decision-making.[8]

[8] Aboriginal Land Rights Commission, *Second Report April 1974* (Australian Government Publishing Service, 1974), 9-11 ('*Woodward Report*'). The *Woodward Report*, ahead of its time in many ways, has been cited in parts of this Chapter as a domestic illustration of a model conceptual approach towards the formulation of land rights.

Self-determination in the context of 'ownership' of Indigenous lands and resources (forming part of the first *UNDRIP* Standard) includes the option for Orang Asli to transact with their lands and resources in a non-traditional or non-customary way. However, such transactions should, as far as possible, have regard to the *UNDRIP* Standards while avoiding the risk of loss of control over lands and resources.

A corollary to this line of reasoning would be the appropriate approach towards statutory recognition and protection of Orang Asli customary land rights. Fitzpatrick has tentatively discussed 'best option' practices for the recognition of customary tenure using an interdisciplinary law and economics approach.[9] Having acknowledged that there is no single 'best practice' model for recognising customary tenure, he argues that it is the cause and nature of tenure insecurity which dictate the appropriate legal policy response.[10] He distinguishes between four scenarios.[11] First, if land access is relatively secure and equitable and the customary system functions well, there is little need for state intervention. Second, if customary structures function well but are under the pressure of outsider encroachment, the state might intervene by recognising and protecting group rights. Third, if the group wishes to engage in dealings with outside investors, some sort of regulation may be needed in order to manage conflict among group members. Fourth, when customary tenure systems break down, a range of intervention options and issues should be considered rather than imposing formalised titles on fluid interests.

The four scenarios identified by Fitzpatrick are useful in highlighting the varied circumstances facing policy makers should there be the will to recognise and protect Orang Asli customary land rights. Practically, however, it would be impossible to fit the circumstances of every individual Orang Asli community neatly into one of the four scenarios. Instead, a nuanced and multidisciplinary approach[12] that accepts

[9] Daniel Fitzpatrick, ''Best Practice' Options for the Legal Recognition of Customary Tenure' (2005) (36)(3) *Development and Change* 449.
[10] Ibid 471.
[11] Ibid 471-2.
[12] Narrow economic assumptions for advocating legislative and policy reforms that affect Indigenous lands and livelihoods in Peru and Ecuador have been criticised. Instead, an interdisciplinary effort involving, among others, topographers and other land specialists, lawyers, anthropologists, ecologists and historians has been recommended in Latin America (see Roger Plant and Soren Hvalkof, *Land Titling and Indigenous Peoples* (Inter-American Development Bank Sustainable Development Department Technical Papers Series, 2001), 73).

decentralised normative orders may be a preferable approach to reform. The diverse and overlapping nature of these scenarios underscore the need for a flexible legal framework governing the recognition and protection of Orang Asli land and resource rights. In the *Woodward Report* covering Aboriginal Australians in Northern Territory, it was concluded:

> 50. Any scheme for the recognition of Aboriginal rights to land must be sufficiently flexible to allow for changing ideas and changing needs amongst Aboriginal people for a period of years...the needs and aspirations of the community may alter as the result of increasing contacts with the outside word...future generations should not be committed by this generation's ideas any more than necessary.[13]

Thus, flexibility in the legislative scheme governing the recognition of Orang Asli lands and resources forms an important consideration in the proposals for reform.

C *Permissive and Prudential Regulation and Constitutional Limitations*

While the autonomy of Orang Asli to transact in a non-traditional way constitutes part of self-determination, it is equally important that the risk of loss of control over their lands and resources is avoided, or at least substantially reduced. To facilitate the possibility of 'safe' transactions involving Orang Asli lands and resources, the proposed reforms take into account two considerations. The first relates to the need for certainty in transactions involving lands and resources. For example, it would be helpful if Orang Asli institutions operate in a regular and predictable way, with a capacity for legal enforcement (for example, rules allocating liability). The second consideration relates to safeguards for the protection of Orang Asli rights. Regulating these safeguards is not a straightforward task. If self-determination is of core importance, it would be pertinent to achieve an acceptable balance between permissive and prudential regulation of Orang Asli land and resource rights.

In this context, permissive regulation may be understood as regulation directed towards maximising the autonomy of group members while prudential regulation

[13] *Woodward Report*, above n 8, 9-11.

may be understood as regulation directed towards protecting group members from destructive instrumental action by fellow group members and outsiders.[14] For instance, too few safeguards may leave Orang Asli owners unprotected from action taken by their representatives, resulting in the disposal and loss of lands.[15] Too many safeguards may be seen as intrusive and an affront to Orang Asli laws, traditions, customs and institutions. Intrusive legislation can also result in a lack of allegiance of Orang Asli communities to newly introduced laws.[16] In addition to these considerations, the constitutional limitations of implementing any of the recommendations are highlighted where these issues arise. Based on these considerations, Section III explores an alternative framework for statutory reform of Orang Asli land and resource rights.

III AN ALTERNATIVE FORM OF STATUTORY COMMUNAL TITLE: KEY AREAS

The proposed land rights framework addresses the following areas:

- Identification of land tenure suitable for effective recognition and protection (Land tenure);
- Possible Orang Asli institutions to facilitate the effective ownership, management and control (Orang Asli institutions);
- The recognition process;
- Dispute resolution institutions; and
- Funding challenges.

In terms of the *UNDRIP* Standards, the proposals in Section III confer upon Orang Asli, having regard to constitutional limitations, ownership, management and use of

[14] These two approaches to regulation were adapted from Christos Mantziaris and David Martin, *Native Title Corporations: a legal and anthropological analysis* (Federation Press, 2000), 135-6.
[15] Criticisms in this regard have been levied against the *Aboriginal Land Rights Act 1983* (NSW) that provides for regulated disposal of Aboriginal lands. See eg. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 93-7, 158.
[16] See eg. Fitzpatrick, above n 9, 462; J S Fingleton, 'Legal Recognition of Indigenous Groups' (FAO Legal Papers Online, 1998), 22 June 2012 <http://www.fao.org/Legal/prs-ol/lpo1.pdf>, 34-5; Mantziaris and Martin, above n 14, 322-3.

lands and resources (see Section IIIA) through a recognition process designed to deliver positive outcomes for Orang Asli claimants and that has due regard for Orang Asli laws, traditions, customs and institutions (see Sections IIIB, C and D). Consistent with the overarching concept of self-determination, Orang Asli customary owners would be granted the necessary internal autonomy to determine their own priorities over lands and resources post-recognition of these rights. The second *UNDRIP* Standard of FPIC and consultation in matters affecting Indigenous land is imported into proposals to ensure that Orang Asli possess rights of self-determination over their lands and resources and that such rights are, as far as legally possible, not impaired or extinguished unilaterally and arbitrarily. Additional forms of redress suitable to Orang Asli are included in the proposals to ensure that the level of protection afforded to Orang Asli is, as far as constitutionally possible, consistent with, the third *UNDRIP* Standard, namely, just redress for dispossession.

A *Land Tenure*

This section proposes an alternative type of land tenure that could form the basis for the effective statutory recognition and protection of Orang Asli land and resource rights. As observed in Chapter 2, Orang Asli continue to face encroachment and excision of their customary lands.[17] Other than lands gazetted under the *Aboriginal Peoples Act 1954* (Malaysia) ('*APA*'), there is no statutory requirement to determine beforehand whether lands disposed of, excised or utilised include Orang Asli customary lands. The common law fiduciary duty to gazette and protect Orang Asli lands imposed upon the Federal and State Governments[18] has not alleviated encroachment and the taking of Orang Asli customary lands. The justification given by Government agencies for allowing such encroachment and excision is that Orang Asli have no rights over lands falling outside gazetted Orang Asli lands. However, gazetted lands only account for less than 15 per cent of officially-recognised Orang Asli lands.[19] Further, the gazettal status can be revoked by gazette notification

[17] See above Chapter 2, 54-64 and further Chapter 5, 173-5.
[18] See eg. *Sagong* 1 [2002] 2 MLJ 591, 619; *Sagong 2* [2005] 6 MLJ 289, 313-4, 319 (Court of Appeal, Malaysia).
[19] See Jabatan Hal Ehwal Orang Asli [Department of Orang Asli Affairs] ('*DOA*'), *Data Maklumat Asas* [*Basic Information Data*] (Planning and Research Section, Department of Orang Asli Affairs, 2008) (translated from the Malay language by the candidate), 18.

pursuant to ss 6(3) and 7(3) of the *APA* respectively or s 64 of the *National Land Code* (*NLC*), as the case may be. As concluded in Chapter 5, the only redress available to Orang Asli in such circumstances would be to commence litigation for common law recognition of their customary lands or, possibly, breach of fiduciary duty for failure to gazette their customary lands.[20]

A possible method to overcome the lack of security of tenure would be to grant registrable freehold communal titles over Orang Asli customary lands. In Australia, Moran et al have acknowledged that concerns about control and security would need to be addressed beforehand in any reform process and such reforms should not adversely impact on Indigenous land rights.[21] Control and security over lands can take the form of a legally registrable title. In this sense, registered communal title addresses the lack of security of tenure possessed by Orang Asli over their lands, the main reason for continued encroachment. If compared to common law customary land rights, the proposed communal title envisaged in this chapter would provide the necessary certainty of rights and interests that would ensure that, as far as possible, Orang Asli have a say or recourse over their lands and resources.[22]

In addition to the considerations discussed in Section II above,[23] the trade-off between certainty of title and flexibility to cater for diverse forms of customary 'ownership'[24] will be minimised to the extent possible when proposing an appropriate form of communal title. This approach enables Orang Asli communities to continue functioning as autonomous self-sustaining groups possessing the ability to transact securely with other sections of society. The following sections explore where such title would sit with Orang Asli and the basic tenurial principles governing such title.

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[20] For the challenges faced by Orang Asli in succeeding in litigation, see above Chapter 2, 68-9, Chapter 5, 153 and Chapter 7, 284-8.
[21] Mark Moran et al, 'Home Ownership for Indigenous People Living on Community Title Land in Queensland: Preliminary Community Survey' (Aboriginal Environments Research Centre, University of Queensland, 2001), 2, 4.
[22] The weaknesses of the doctrine of common law Orang Asli customary land rights if compared to the *UNDRIP* Standards have been examined in Chapter 7 above.
[23] See above, 320-5.
[24] See eg. J S Fingleton (ed), 'Privatising Land in the Pacific: A defence of customary tenures' (The Australia Institute, Discussion Paper No 80, 2005), 35.

1 Communal title and Orang Asli aspirations

Communal interests in land would appear to be a viable alternative for Orang Asli, as evidenced in a memorandum of protest signed by close to 12,000 Orang Asli and delivered to the Federal Government on 17 March 2010. Representatives of the *Persatuan Orang Asli Semenanjung Malaysia* (Peninsular Malaysia Orang Asli Association, translated by the candidate) ('*POASM*'), the largest Orang Asli organisation numerically that boasts around 30,000[25] Orang Asli members, also signed this memorandum. In opposing the Proposed Policy approved by the National Land Council on 4 December 2009,[26] the memorandum states that the Proposed Policy would destroy the communal lifestyle practised by Orang Asli and demands recognition of their customary lands having regard, among other matters, to the *UNDRIP*.[27] Previous memoranda from *POASM* have demanded, amongst other things, stronger rights and protection of communal lands through reservations[28] and the issuance of titles within reservation lands.[29]

[25] This figure was confirmed by the *POASM* President, Majid Suhut (see Simon Khoo, 'Emergency fund for Orang Asli', *The Star* (Malaysia), 5 September 2011).

[26] This Proposed Policy is discussed at above Chapter 2, 61-4 and Chapter 5, 183-4.

[27] *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*] (17 March 2010) (translated from the Malay language by the candidate), 5, 6. In this regard, *JKOASM*, the Peninsular Malaysia Orang Asli Village Network, has also urged SUHAKAM to consider communal rights to lands and resources in a manner consistent with the *UNDRIP* in the ongoing National Land Rights Inquiry (see *JKOASM*, Letter bearing subject 'Syor SUHAKAM kepada kerajaan untuk perlindungan tanah adat Orang Asli Semenanjung Malaysia: Tuntutan dan Aspirasi Jaringan Kampung Orang Asli Semenanjung Malaysia (JKOASM)' [*SUHAKAM recommendations to the government regarding the protection of customary lands of Peninsular Malaysia Orang Asli: Demands and Aspirations of the Peninsular Malaysia Orang Asli Village Network*], 1 November 2011 (Copy of the letter with the candidate) (translated from the Malay language by the candidate).

[28] See eg. *POASM*, *Memorandum kepada YB Dato Seri Abdul Aziz bin Shamsuddin, Menteri Pembangunan Luarbandar dan Wilayah, Malaysia* [*Memorandum to the Right Honourable Dato Seri Abdul Aziz bin Shamsuddin, Minister for Rural and Regional Development, Malaysia*] (7 August 2005) (translated from the Malay language by the candidate).

[29] For a copy of the Draft Orang Asli Reservation Act presented to the Prime Minister's Office on 30 April 2000, see eg. *POASM* and Peninsular Malaysia Orang Asli NGO Network, above n 27, Annexure 3.

(a) Self-determination and the Draft Orang Asli Reservation Act ('Draft OARA')

Orang Asli have stated that they are not anti-development and progress.[30] Orang Asli today are asserting their right to develop and progress as individuals and as a people based on a social order that they themselves determine.[31] In other words, they are claiming self-determination. None of the previous draft legislative proposals submitted to the Government by Orang Asli emphasise the *UNDRIP* and how it would be implemented in the context of Orang Asli. Even the Draft Orang Asli Reservation Act ('Draft OARA') submitted to the Prime Minister's Department on 30 April 2000, the most comprehensive of Orang Asli proposals submitted to the government in terms of land[32] falls short of the *UNDRIP* Standards.

The preamble to the Draft OARA states that it is an Act concerning the reservation of land for Orang Asli and the protection of their rights, holdings and interests over their lands. Essentially, the Draft OARA provides for the recognition of Orang Asli lands as land reserves through State gazettal of these lands (s 3) and a tribunal claims process (s 25). Section 2(1) states that Orang Asli customary rights are presumed in six circumstances, including lands planted with a minimum number of fruit trees per acre; lands with forest produce provided Orang Asli claimants prove exclusivity or joint use; grazing lands; lands continuously cultivated by Orang Asli for three years; graves and other ceremonial lands and rights of way to any of these lands. Section 2(1) also provides that customary lands are those lands used for both fixed and shifting cultivation.

Orang Asli are allowed to hold individual or joint titles on Orang Asli reservations subject to an administrative process set out in s 8 of the Draft OARA. Added protections for Orang Asli reservations and titled-holdings include:

[30] For an example of the Orang Asli position, see above Chapter 2, n 177.
[31] See above Chapter 2, 67-72.
[32] See *POASM* and Peninsular Malaysia Orang Asli NGO Network, above n 27, Annexure 3.

- the payment of adequate cash compensation for past loss of lands (s 4(3));

- the prohibition of the transfer, lease or disposal of any State land forming part of an Orang Asli reservation to non-Orang Asli unless such transfer, lease or disposal is to statutorily designated parties or other parties as notified by the Minister having charge of Orang Asli affairs (s 10);

- the prohibition of the transfer, charge and lease or disposal of any Orang Asli titled-holdings to non-Orang Asli unless such titles are transferred, charged, leased or disposed to statutorily designated parties or other parties as notified by the Minister having charge of Orang Asli affairs (see s 12; ss 21 to 22); and

- the prohibition of other forms of dealing with Orang Asli titled-holdings including trust arrangements, lien holder's caveats, vesting of property as a result of bankruptcy and execution proceedings (see ss 13 to 18).

Land within Orang Asli reservations remain State land (s 10) unless titled out to Orang Asli. Orang Asli reservations can be cancelled or varied subject to Ministerial agreement that such an act is in the public interest or for a public purpose after consultation with the affected Orang Asli community (s 6(1)). In these circumstances, the State Authority shall, with the consent of the Minister, declare other lands of equal status and size as an Orang Asli reservation (s 6(3)).

The 'protection' provisions of the Draft OARA are largely drawn from State Malay reservation laws.[33] However, the Malay land reservation scheme has not proved to be unproblematic. The protectionist inclinations of the scheme have been said to

[33] See eg. *Malay Reservations Enactment* 1933 FMS Cap 142 (Perak, Pahang, Selangor and Negeri Sembilan); *Malay Reservations Enactment* 1353 No 7 of 1353 (Perlis); *Malay Reservations Enactment* 1931 (No 63) No 6 of 1349 (Kedah); *Malay Reservation Enactment* 1930 Enactment No 18 of 1930 (Kelantan); *Malay Reservations Enactment* 1941 (No 17 of 1360) (Terengganu); *Malay Reservations Enactment* 1936 No 1 of 1936 (Johor).

'preserve the Malay race as permanent peasants'[34] due to its inability 'to adjust to the needs of modern social, economic and political conditions'.[35] Further, Malay reservation laws that limit dealing (such as sale and transfer, leases or charges) to non-Malays have not prevented the loss of Malay reservations through the State's 'convenient machinery of land acquisition'.[36]

The Draft OARA does not meet the *UNDRIP* Standards. Despite providing for land titles to Orang Asli and a measure of protection for Orang Asli customary lands, it is clear from ss 6(3), 10, 12, 21-22 of the Draft OARA discussed above that power is still vested in the Minister having charge of Orang Asli Affairs. These powers and the restrictions in respect of Orang Asli titles (ss 10 and 12) neglect the internal autonomy of Orang Asli to make decisions concerning their land, and consequently, self-determination. Further, lands forming part of Orang Asli customary lands remain State land unless alienated to Orang Asli by way of a grant of title. Communal *ownership*, *management* and *use* of Orang Asli lands are notably absent from the Draft OARA. Furthermore, ownership of resources on Orang Asli customary lands, an important component of the first *UNDRIP* Standard, has been omitted. Orang Asli rights to FPIC and consultation (the second *UNDRIP* Standard) in the case of revocation or variation of an Orang Asli reservation seem curbed by the overriding 'public purpose' or 'public interest' provision (s 6(1)), another decision left in the hands of the Minister albeit with provision for consultation. Also, the definitions of 'customary lands' in s 2(1) seem to be limited to a list of activities on the land rather than with 'due respect' to Orang Asli laws, traditions, customs and institutions, a component of the first *UNDRIP* Standard.

(b) State control over Orang Asli lands and resources and the UNDRIP

Communal title is preferable to land subject to a reservation by way of a State-designed trust because it would confer ownership and control of customary land and resources upon Orang Asli. Unlike the State of Sabah in East Malaysia where

[34] Bashiran Begum Mobarak Ali, 'The Federal Constitution – A Shield for the Protection of Malay Reservation Policy' (2008) *The Law Review* 53, 56.
[35] Ibid 68.
[36] See eg. Salleh Buang, *Malaysian Torrens System* (Dewan Bahasa dan Pustaka, 2nd edn, 2007), 251-3.

statutory communal title is held by the State on trust for a particular native village or community,[37] the suggested form of title to the land would be in the name of the Orang Asli community itself. Further, communal title provides a possible middle ground between current discourses on Orang Asli land that seem focused on two mutually exclusive extremes. They are, on the one end, gazettal of Orang Asli lands by the State for protection, and on the other end, individual alienable titles for economic progress. Neither alternative appears to cultivate Orang Asli self-determination and autonomy over their lands in a manner that enables their progress as a collective Indigenous group.

In line with preambular para 24 of the *UNDRIP*, communal ownership in the manner envisaged would facilitate the transition of the state-Orang Asli relationship from that of 'protector' to that of partners with mutual respect. Nonetheless, such a transition should not be imposed and instead, form a part of an on-going and effective engagement process between the state and Orang Asli. Safeguards, particularly in respect of Orang Asli customary lands and resources, should remain as long as deemed necessary by Orang Asli.

2 Communal title: Basic principles

This section characterises the basic principles of communal title notwithstanding that it has yet to be expressed by Orang Asli as the preferred option. The proposed form of title is a statutory *sui generis* communal freehold title with special conditions and flexibility. Rather than undoing the State Authority's[38] radical title to land[39] and embarking on the thorny issue of Indigenous sovereignty, it is proposed that new legislation be introduced and existing land and resource administration

[37] For a critical analysis of statutory communal title in Sabah, see Kang Hong Ming, 'Challenges to NCR Claims in Sabah' (Paper presented at 'A Conference on Customary Lands, Territories and Resources: Bridging the Implementation Gap', Kuala Lumpur, 25-26 January 2011).
[38] Ruler or Governor of the individual State of the Federation of Malaysia, as the case may be (*NLC*, s 5). In executive matters relating to land, the Ruler or Governor of the State is generally obliged to act in accordance with the advice of the relevant State Executive Council. The State Executive Council is appointed by the Ruler or the Governor and consists of members of the State Legislative Assembly.
[39] *NLC*, s 40.

legislation[40] be reviewed and amended, where necessary, to cater for the recognition and protection of Orang Asli customary land rights through the conferral of ownership by the issuance of communal titles.

In line with the *UNDRIP* Standards, it is proposed that this form of communal title additionally:

- confer ownership of resources in Orang Asli lands;
- empower the individual community or village, as the case may be, to determine the type of permissible dealings over land and resources and impose any conditions it deems fit in relation to such dealings;[41] and
- enjoy special redress for dispossession.

In order to avoid duplication and additional administrative costs, the existing land registration system under the *NLC* may be amended to cater for the granting of underlying communal titles to the relevant Orang Asli community and any dealings affecting them.

The above conditions of the proposed form of title, placed under the headings of 'Ownership of resources', 'Dealings in land' and 'Redress for dispossession', are discussed in Sections IIIA2(a)-(c) respectively.

(a) Ownership of resources

In Chapters 5 and 7, it was concluded that Orang Asli rights to ownership of resources fall short of the *UNDRIP* Standards.[42] Other than for the reason that rights

[40] These laws have been evaluated in Chapter 5 above (at 150-94). The main resource-based legislation would include those relating to land (*NLC*), forest produce (*National Forestry Act 1984* (Malaysia) ('*NFA*'), wildlife (*Wildlife Conservation Act 2010* (Malaysia)), rock material and minerals, (*NLC*, s 40(b)), fishing rights (*Fisheries Act 1960* (Malaysia)), lands and resources within parks (see eg. *National Parks Act 1980* (Malaysia)) and water (see eg. *Waters Act 1920* (Malaysia)) and various State enactments in relation to those resources. In respect of process-based legislation affecting lands and resources, 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 State Mining and Water Enactments.

[41] The proposed Orang Asli ownership institutions are discussed in Section IIIB below (at 350-61).

to ownership, management and control of resources on Orang Asli lands form part of the *UNDRIP* Standards, effective statutory recognition of these rights serves additional purposes. First, such recognition has the potential, through statutory control over what happens to resources on Orang Asli lands, to enhance Orang Asli self-determination. Hence, recognition would give Orang Asli a crucial seat at the negotiating table with the Government and third parties. Secondly, rights to natural resources, including minerals, exploitable where desired, can provide a means of economic progress for Orang Asli.

Accordingly, effective security of livelihood, internal autonomy and the ultimate economic independence of Orang Asli would be enhanced and accelerated with the ownership of resources. In line with the first *UNDRIP* Standard, it is proposed that ownership of resources include ownership of all forest produce and rock materials excluding subsoil resources. To provide a social safety net for Orang Asli, exclusive customary water, fishing and hunting rights (excluding endangered species) should be granted over areas covered by the proposed communal title. Consistent with art 25 of the *UNDRIP* which includes the Indigenous right to maintain a distinctive spiritual relationship with traditional 'coastal seas', water resources should also extend to cover Orang Asli customary rights in relation to coastal seas and the sea bed.[43] It would follow that consequential amendments be made to harmonise existing resource laws.[44] An appropriate licensing, permit and fee system for future outside access and use of communal land should also be developed based on the relevant Orang Asli laws, traditions, customs and land tenure systems. Under this arrangement, rights to receive royalties or benefits for resources on Orang Asli customary lands under existing licences and permits granted by the State, more particularly through the individual State Authority, would also be transferred to the Orang Asli owners.[45] As a possible compromise, previous monies paid under such

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[42] See above Chapter 5, 194 and below Chapter 7, 288-96.

[43] *Orang Seletar*, for example, derive their traditional livelihood from the sea surrounding their settlements. The extent and exclusivity of Orang Asli rights to the sea must be examined carefully in the light of the state's obligations under international law, for example, the right of innocent passage (see eg. *Commonwealth v Yarmirr* (2001) 208 CLR 1 (High Court, Australia) and *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 234 (High Court, Australia) (in respect of land rights jurisdiction in Northern Territory)).

[44] These laws have been examined above in Chapter 5. For examples, see above n 40.

[45] The ownership institution proposed in this Chapter is the Communal Ownership Body ('COB'), discussed in Section IIIB1 below (at 352-61).

licences and grants could remain with the individual State. In respect of traditional hunting, fishing or gathering rights outside Orang Asli land, the individual State could establish a permit system by agreement as done in New South Wales, Australia.[46]

Though not forming part of the *UNDRIP* Standard, the ownership by Orang Asli of subsoil resources in their lands would nonetheless be desirable. Article 43 of the *UNDRIP* states that it contains the minimum standards for the 'survival, dignity and well-being' of Indigenous peoples. As pragmatically observed by the Aboriginal and Torres Strait Islander Social Justice Commissioner, '[i]ndeed, if economic development was the single or even primary aim of land rights, valuable mineral rights should have accompanied the return of all land'.[47] Similar to other countries, the granting of Orang Asli ownership of minerals may well prove contentious. For example, ownership of all rights, liberties and privileges relating to petroleum in Malaysia is vested in the national petroleum corporation,[48] *Petronas*, whose objectives include the 'well-being of the people of Malaysia'. Dismantling such an arrangement in favour of Orang Asli may prove unpopular and problematic for many Malaysians. As for other minerals, they are vested in the individual State[49] and any change of status should also encounter resistance. Further, other Indigenous groups, namely, natives of Sabah and natives of Sarawak[50] do not possess rights to ownership of minerals. If not applied equitably to all Indigenous groups, the granting of mineral rights to Orang Asli alone is likely to face strenuous objections. To alleviate these objections, it may be worth considering reforms on the ownership of resources in customary land that involve all Indigenous minority groups in Malaysia.[51]

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[46] *Aboriginal Land Rights Act* (1983) (NSW), s 48.
[47] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 32.
[48] *Petroleum Development Act 1974* (Malaysia), s 2.
[49] *NLC*, s 40(b).
[50] These groups who are Indigenous to East Malaysia are defined separately and possess a special position distinct from that of Orang Asli under the *Malaysian Constitution*. See above Chapter 2, 34-8.
[51] As for the varying perceptions of indigeneity of these groups, see above Chapter 2, 34-46 and below Section IV, 381-3.

Despite stating that Aboriginal ownership of minerals was not justified,[52] the *Woodward Report* nonetheless says 'to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights'.[53] The report goes on to state:

> Aborigines should have the right to prevent exploration for minerals and petroleum on their lands unless the national interest requires it. Matters to be negotiated if the Aborigines concerned are prepared to consider or their veto-power is overridden, would include payment for exploration rights, royalty payments and perhaps an equity interest in the venture.[54]

The above paragraph of the *Woodward Report* may be a useful starting point to Orang Asli land reform particularly if States retain ownership of subsoil resources and minerals. A possible way forward in such a scenario may be:

- the requirement of FPIC or prior effective consultation[55] before the exploration or exploitation of subsoil resources on Orang Asli lands; and
- the payment of an equitable share of the royalties and adequate compensation for loss of lands and, wherever possible, meaningful participation in such activities and their benefits.[56]

(b) Dealings with land

There are two important issues that impact upon dealings with the proposed form of title. The first issue relates to whether the title should be inalienable. The second relates to the potential of leases and charges over the land instead of free alienability. Both issues involve the interplay between the liberty to pursue commercial transactions with non-Orang Asli and the need for safeguards against further loss of Orang Asli lands.

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[52] *Woodward Report*, above n 8, 115 [616].
[53] Ibid 108 [568].
[54] Ibid 127-8 [708].
[55] These concepts are elaborated in Chapter 3 above (at 100-8).
[56] For guidance on these standards, see eg. *UNPFII*, *Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility*, UN Doc E/C.19/2009/CRP.8 (2009); *Report of the Special Rapporteur on the Rights of Indigenous Peoples, S James Anaya: Extractive industries operating within or near indigenous territories*, UN Doc A/HRC/18/35 (2011).

(i) Alienability

Consistent with the *UNDRIP* Standard for FPIC and consultation in matters affecting Indigenous lands and resources, the issue of inalienability of Orang Asli communal title as a reform must be decided by the state in consultation and with the FPIC of the Orang Asli community. Nonetheless, this section proposes that the communal title granted to Orang Asli be inalienable meaning incapable of disposal or sale. Possible exceptions, with the FPIC of the individual Orang Asli village or settlement, may be where the sale and disposal accords with the particular Orang Asli ethnic group's laws, traditions and customs or is within the broader Orang Asli community. The starting point of this proposal would be to appreciate the importance of the concept of inalienability to Indigenous title.

There are three broad rationales for the inalienability of Indigenous title in land rights legislation. First, inalienability of land is intended to respect and recognise the non-economic importance of land to Indigenous peoples.[57] Secondly, Indigenous laws, traditions and customs may not allow the sale of land. Thirdly, inalienability preserves 'Indigenous land for future generations, by preventing its dissipation for short term gain and by keeping unscrupulous commercial operators at bay'.[58] These motivations are consistent with the first *UNDRIP* Standard that includes 'due respect for Indigenous laws, traditions, customs and institutions'.

On the other hand, inalienability of Indigenous lands may be seen as paternalism and a denial of self-determination. For instance, Aboriginal title at common law in Canada should not be used in a manner 'irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's Aboriginal title'.[59] This restriction, if imposed on Orang Asli, may be seen to limit the achievement of socio-economic objectives through the use of valuable assets in a market economy. Mere security of tenure over lands and resources in the form of an

[57] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 11-2.
[58] McRae et al, above n 6, 254-5.
[59] *Delgamuukw* [1997] 3 SCR 1010, [111].

inalienable communal title may be insufficient for the achievement of economic independence. As argued in Australia, inalienability of Aboriginal communal title will 'lock up' land in that it cannot be sold for profit or mortgaged for the creation of wealth.[60]

There are two main responses to this argument. The first relates to the correlation between the capacity to alienate and the creation of wealth for Indigenous communities. The former does not necessarily result in the latter. In his international bestseller, *The Mystery of Capital*, Peruvian economist Hernando De Soto attributed the main cause of poverty to the continuing lack of access to formal property rights among poor people.[61] In essence, if the poor are to gain the assets of capitalism, their assets must be formalised in national and unified property systems. Without this formalisation, the assets that they own would be 'dead capital', incapable of being leveraged for the creation of wealth, for example, collateral for a loan. The fungibility of these assets or their capability to be divided, combined or mobilized to suit any transaction[62] would transform 'dead' capital into 'living' capital thus facilitating the productive use of assets.

A critique of the application of De Soto's theory to Indigenous property regimes is beyond the scope of this chapter.[63] However, it must be said that extending a universal fungible formal title to all kinds of property claims can act as an invasion and a revolutionary challenge to closed or semi-closed traditional property regimes and may not be appropriate in all contexts.[64] Consequently, to apply De Soto's one-size-fit-all solution to an Indigenous community with local communal arrangements like Orang Asli is flawed. The imposition of Western-style property systems would

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[60] See eg. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 11.
[61] Hernando De Soto, *The Mystery of Capital: Why Capitalism triumphs in the West and Fails Everywhere Else* (Random House, 2000).
[62] Ibid 157.
[63] For various critiques, see eg. Carol M Rose, 'Invasions, Innovation and Environment' in Benjamin D Barros (ed), *Hernando De Soto and Property in a Market Economy* (Ashgate, 2010), 21; Christopher Woodruff, 'Review of De Soto's *The Mystery of Capital*' (2001) 39 *Journal of Economic Literature* (2001) 1215; Maureen Tehan, 'Customary land tenure, communal titles and sustainability: the allure of individual title and property rights in Australia' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Cavendish Pub, 2010); Ana Palacio, *Legal Empowerment of the Poor: An Agenda for the World Bank* (revised draft, 2006).
[64] Carol M Rose, above n 63, 21, 24, 30-5.

disregard and undermine the complexity of Indigenous local arrangements, their social embeddedness and the complex constellation of these rights.[65] Further, the gains from formal titling are contingent upon the successful transformation of property into collateral, collateral into credit, and credit into income.[66] On the other hand, registrable communal title as proposed in this chapter envisages autonomous ownership, management and control of lands and particularly resources. While allowing Orang Asli land owners the option of maintaining local communal arrangements, the ownership of resources and the power and autonomy to enter into leasing arrangements in the proposed form of title would enable Orang Asli to transcend traditional methods of wealth generation through collateralisation of property without necessarily losing control over their lands.

There are many challenges in achieving the successful transformation of real property into income for Orang Asli. Many Orang Asli villages are located in fringe and interior areas of Peninsular Malaysia.[67] Low land value and high costs of construction due to the remote location of Orang Asli villages may function as barriers to the successful access of financial services. The limited skills, resources and financial capacity of Orang Asli households to manage financial processes related to the gaining and use of capital through disposal and collateralisation of lands arguably risk further indebtedness, loss of land and increased poverty. Experiences from other jurisdictions have shown that the major problems associated with transferable Indigenous freehold or leasehold titles have been:

- loss of Indigenous lands;[68]

[65] William Assies, 'Land tenure, land law and development: Some thoughts on recent debates' (2009) 36(3) *Journal of Peasant Studies* 573, 579.
[66] See eg. Palacio, above n 63, 18-9.
[67] According to the most recently available Government figures (December 2008), 519 and 327 of the total 852 Orang Asli villages were located in the fringe and interior areas respectively (see *DOA*, *Basic Information Data*, above n 19, 11).
[68] For example, in relation to New Zealand, Guatemala and United States, see eg. Richard Boast, 'Individualization – an idea whose time came, and went: the New Zealand experience' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Cavendish Pub, 2010), 147-149, 152-4; United States, see also Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under US Policies of Self-Determination* (Oxford University Press, 2008), 96-7; Peru, see eg. Lila Barrera-Hernandez, 'One step forward, two steps back: Peru's approach to Indigenous land and resources and the law' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Cavendish Pub, 2010), 175; Kenya, see eg. Albert Kwokwo Barume, *Land Rights of Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa* (IWGIA, 2010), 117; Tanzania, see eg. See Albert

- internal conflict due to rights of inheritance;[69]
- fragmentation and fractionalisation as the land is divided amongst each successive generation;[70] and
- loss of cultural identity.[71]

Issues of loss of land and cultural identity highlighted above may be avoided by an inalienable title. Additionally, the proposed form of communal title, governed internally in accordance with the FPIC of members of the individual Orang Asli community, may be better-placed to reduce internal conflict through the process of prior participation and consensus between members of the community.

The second response relates to the attribution of Indigenous disadvantage solely to tenure, including inalienability. In Australia, there have been intense debates over the merits of communal land ownership and the role played by tenure in Indigenous disadvantage.[72] The focus on the communal and inalienable tenure of Indigenous land has been severely criticised for obscuring the real factors for Indigenous poverty in remote areas – such as illiteracy, poor health, inadequate housing and basic infrastructure like sewerage, roads and communications.[73] As proposed in Section IIIA2(b)(ii) below, there are other alternatives besides alienability that may

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Kwokwo Barume, *Land Rights of Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa* (IWGIA, 2010), 146-7.

[69] See eg. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 103.

[70] For example, in relation to the United States, see eg. Harvard Project on American Indian Economic Development, above n 68, 104; New Zealand, see Boast, above n 68, 156.

[71] For example, in relation to the United States, see Margaret Stephenson, 'You can't always get what you want – economic development on indigenous individual and collective titles in North America: Which land tenure models are relevant to Australia?' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Cavendish Pub, 2010), 108; Kenya, see eg. Barume, above n 68, 117.

[72] For legal commentary on these debates, see eg. Stephenson, 'You can't always get what you want', above n 71, 111; Lee Godden and Maureen Tehan, 'Translating Native Title to Individual 'Title' in Australia: Are Real Property Forms and Indigenous Interest Reconcilable?' in Elizabeth Cooke (ed), *Modern Studies in Property Law* (Hart Publishing, 2007) vol 4, 264; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4; Mick Dodson and Diana McCarthy, 'Communal land and the amendments to the Aboriginal Land Rights (NT)' (Native Title Research Unit, Research Paper No 19, 2006); J C Altman, C Linkhorn and J Clarke, *Land Rights and Development Reform in Remote Australia* (Discussion Paper No 276/2005, Centre for Aboriginal Economic Policy Research, Australian National University, 2005); Sean Brennan, 'Economic Development and Land Council Power: Modernising the Land Rights Act or Same Old Same Old?' (2006) 10(4) *Australian Indigenous Law Reporter* 1.

[73] See eg. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 8; Dodson and McCarthy, above n 72, 10.

enable Orang Asli to own, manage and control their lands and resources in a manner that is beneficial to them.

In the United States, the alienability of individually allotted native American land (after the 25-year 'trust' period where allotted lands were inalienable) and tribal surplus lands pursuant to the *Dawes (General Allotment) Act 1887* contributed to the loss of close to 2/3rd of the total 138 million acres of native American reserve land.[74] In 1934, the *Indian Reorganisation Act* prohibited new allotments and provided for the trust status to continue indefinitely. Inalienable freehold title is thus the form of title that is likely to protect current and future Orang Asli interests in their traditional lands. This form of title would ensure that, whenever possible, the underlying communal title is preserved.[75]

(ii) The potential of leasing arrangements

In addition to maintaining underlying communal title, or rather, its proposed manifestation as suggested in this chapter, the option for Orang Asli to utilise and develop these lands and resources is crucial. According to the United Nations Permanent Forum on Indigenous Issues ('*UNPFII*'), Indigenous peoples should be free to determine their own notions of development, as well as help reconstruct current institutions, to improve their situation and that of humanity as a whole.[76] Article 32 of the *UNDRIP* captures the essence of development with identity. Paragraph 1 of the article states that 'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'. However, does the concept of inalienable communal title as proposed in this chapter have the potential to allow Orang Asli to use their land as capital in a manner they deem fit?

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[74] D H Getches, C F Wilkinson and R Williams, *Cases and Materials on Federal Indian Law* (West Group, 5th edn, 2005), 140-85.

[75] For the desirability of this position from an Indigenous perspective, see Stephenson, 'You can't always get what you want', above n 71, 111.

[76] *UNPFII*, *Indigenous Peoples: Development with Culture and Identity: Articles 3 and 32 of the UN Declaration on the Rights of Indigenous Peoples*, Ninth Session of the United Nations Permanent Forum on Indigenous Issues, 19-30 April 2010, UN Headquarters, New York, 22 June 2012 <http://www.un.org/esa/socdev/unpfii/documents/Development%20with%20Culture%20and%20Identity.pdf>.

Besides ownership of resources and related income-earning activities and arrangements,[77] lease or rental markets, if respectful of the individual Orang Asli community's connection to their lands and right to self-determination, have the potential for wealth production and economic gain.[78] However, there must be adequate safeguards to ensure that the creation of such interests does not result in the arbitrary exclusion of Orang Asli from the management and control of their lands. In Australia, statutory township leasing arrangements following amendments to the *ALRA 1976* (NT) in 2006, partially intended to increase Indigenous home ownership by way of sub-leases, removed traditional owners from direct involvement in planning and development processes.[79] Such a loss of control could result in the backdoor proliferation of forced development policies for Orang Asli development. A potential safeguard may be, first, to incorporate a statutory right to FPIC for the grant of each lease and, secondly, Orang Asli Rights Commission ('OARC')[80] oversight of the due exercise and non-violation of these rights. To ensure that FPIC is not a slow and burdensome process,[81] appropriate statutory timeframes for consent may be considered.

In Peninsular Malaysia, the *NLC* provides that leases and sub-leases of more than three years are registrable[82] and indefeasible.[83] From an intra-communal perspective, individual interests over communal title can be created in favour of Orang Asli individuals without having to sub-divide the title. According to s 221(3) of the *NLC*, a registrable lease relating to part of alienated land may be for a maximum of 30

[77] See above Section IIIA2(a), 333-6.
[78] For early literature, see eg. Klaus Deininger and Hans Binswanger, 'The Evolution of the World Bank's Land Policy: Principles, Experience and Future Challenges' (1999) 14(2) *The World Bank Research Observer* 248, 263-5, 269.
[79] For a critique of these amendments, see eg. Leon Terrill, 'Indigenous Land Reform: An Economic or Bureaucratic Reform' 2010 7(17) *Indigenous Law Bulletin* 3; Leon Terrill, 'The Days of the Failed Collective: Communal Ownership, Individual Ownership and Township Leasing' (2009) 32(3) *University of New South Wales Law Journal* 814; Margaret Stephenson, 'To lease or not to lease? The leasing of indigenous statutory lands in Australia: lessons in Canada' in (2009) 35(3) *Commonwealth Law Bulletin* 545; Tehan, above n 63, 353; Brennan, above n 72.
[80] The OARC is discussed at Section IIIB2 below.
[81] In Australia, transactions involving communal title (for example, leasing) have been criticised as too slow and cumbersome, resulting in a reluctance in housing, infrastructure and enterprise investment (see eg. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 12). See also the *Native Title (Amendment) Act 2010* (Cth) that effectively suspends and diminishes native title in order to speed-up the delivery of housing to remote Aboriginal communities.
[82] See Part Fifteen (ss 221-240).
[83] Section 340.

years. This limitation could be amended to increase the maximum term for leases over Orang Asli communal title to Orang Asli individuals if the lease mechanism finds popularity during any pre-reform consultation process.

These interests can also be charged to external parties for the repayment of any debt, or the repayment of any sum other than a debt, or the payment of any annuity or other periodic sum.[84] Although the creation of charges over leasehold interests in Orang Asli communal title is theoretically possible, there are distinct challenges in tapping this potential both on the part of lenders and the Orang Asli community. Lenders may be reluctant to grant loans where the value of the security (for example, a lease over a plot of vacant land) is not commensurate with the risk undertaken (for example, a housing loan). The right to sell a lease held over Orang Asli communal title may not attract the best yields due to its remote and surrounding location and generally lower value if compared to freehold land. In this regard, the state, lenders and Orang Asli landowners may wish to explore alternative methods of financing and micro-credit models. In Australia, Moran has proposed a number of financial models that take into consideration the unique circumstances of communities based on communally owned lands. [85]

In the United States, the *Housing Community Development Act of 1992* and the Indian Housing Block Grant Scheme provide for US Government guarantees to facilitate lending to individuals or tribal groups.[86] This guarantee opens up private sector capital to Indigenous communities where it is not otherwise available. The New Market Tax Credit Program run by the US Treasury allows taxpayers to receive a credit against federal income taxes for making qualified equity investments in designated Community Development Entities (CDE). The CDE is a domestic corporation or partnership that is an intermediary vehicle for the provision of loans, investments and financial counselling to low-income communities. CDEs provide

[84] *NLC*, s 241(1). The power also includes the power to create second and subsequent charges (s 241(2)).
[85] See Mark Moran, *Home Ownership for Indigenous People Living on Community Title Land In Queensland: Scoping Study Report* (Aboriginal Environments Research Centre, Aboriginal Coordinating Council and Queensland Department of Housing, Aboriginal & Torres Strait Islander Housing, 1999).
[86] For these examples, see Aden Ridgeway, 'Addressing the economic exclusion of Indigenous Australians through native title' in Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010), 287, 298.

small infusions of capital for low-income individuals and distressed communities, first-home buyers and financing community facilities. They also provide financial, support for starting or expanding small businesses and loans to rehabilitate rental housing.

The *Navajo* Partnership for Housing runs a home-buyer education course, financial literacy programs and a program where they purchase, rehabilitate and on-sell properties on *Navajo* lands. From 1998-2005, they packaged or financed 210 loans and grants totalling USD7.7 million.[87] The disadvantages Orang Asli face in successfully converting collateralised capital into sustainable income[88] pose a significant challenge to successful outcomes from the financing of internal lease interests. Notwithstanding the existence of alternative financing models, it must be acknowledged that further analysis on the suitability of these alternatives to the Orang Asli scenario would be required prior to adopting any of these models. In the long-term, income generation and capacity building from resource ownership would play a crucial role in ensuring the success of this proposed form of title.

In order to allow Orang Asli to determine their own priorities and control decisions affecting their communal land, safeguards to leasing and related arrangements as determined by their respective communities on the advice of the OARC[89] may include:

- limitations of the area that can be transacted (spatial limits);
- limitations of the types of leases over customary land and resources (for example, long term leases);
- the requirement of FPIC for transactions and OARC oversight;
- a review period which would allow for the renegotiation of conditions under which leases can be granted; and
- standard documentation to ensure that the granting of interests over communal title protects the interests of Orang Asli owners.

[87] Ibid 299.
[88] See above, nn 84-5 and accompanying text and below Section IIIE, 377-9.
[89] Discussed at Section IIIB2 (below, 362-5).

(c) Special protection and redress for dispossession of land and resources

This section proposes FPIC and consultation (the second *UNDRIP* Standard) as a mechanism for protection from dispossession of Orang Asli lands and resources. It further proposes a framework for just redress for dispossession of lands and resources having regard to the third *UNDRIP* Standard.

Thus far, Orang Asli continue to possess limited rights to participate in domestic decision-making processes and institutions, particularly in matters affecting them as a distinct Indigenous group.[90] From a state perspective, the right to participate is not viewed as a 'right' but more a matter of state discretion and benevolence. FPIC and consultation are consistent with the right to self-determination. It is a manifestation of self-determination through the informed right to participate effectively and in particular circumstances, to say no. It provides an opportunity for the Orang Asli community to understand the impact of intended actions and outcomes over their lands and resources so that an informed decision can be made for the benefit of the community. Ineffective implementation of FPIC is not only inconsistent with the second *UNDRIP* Standard, but risks failure of a proposed action where it is not embraced by Indigenous peoples.[91]

Article 13(1) of the *Malaysian Constitution* provides that no person shall be deprived of property save in accordance with the law. In *Kulasingam*, the Federal Court held that the legislature can by clear words exclude the principles of natural justice in relation to art 13.[92] Applying the Latin maxim *expressio unius est exclusion alterius* (the expression of one thing is the exclusion of the other), the Court held that the express provision for a process of land acquisition under the *Land Acquisition Act 1960* (Malaysia) that was silent on rights to a pre-acquisition hearing effectively excluded the common law right to due process prior to acquisition. Despite criticisms against this part of the decision, it remains good

[90] See above Chapter 5, 153-67, 186-90 and Chapter 7, 302-12.
[91] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 158-9.
[92] [1982] 1 MLJ 204, 211.

law.[93] Equally, *Kulasingam* indirectly enables express and special statutory protection of the right to FPIC and consultation. This position is fortified by the positive discrimination provision in favour of Orang Asli under art 8(5)(c) of the *Malaysian Constitution*. Such protection is constitutional unless it violates the fundamental liberties available to non-Orang Asli under Part II of the *Malaysian Constitution*.[94]

(i) Free, prior and informed consent ('FPIC') and consultation

This section functions to define the possible scope of FPIC and consultation in relation to protection of Orang Asli lands and resources. The scope of FPIC and consultation is further discussed in various contexts throughout this chapter.

The main differentiating factors for the protection of Orang Asli lands and resources under the *UNDRIP* and other existing land tenures in Malaysia lie in the requirements of FPIC and consultation. The standards for FPIC and consultation have been examined in Chapter 3 above[95] and should be developed by the state in consultation with Orang Asli in accordance with these standards. Consistent with art 44 of the *UNDRIP* that provides for equality between male and female individuals, it is further proposed that Orang Asli women be allowed to participate fully in any FPIC or consultation process.

Appropriate laws, guidelines and procedures should be developed in accordance with the above FPIC and consultation standards when dealing with matters affecting Orang Asli lands and resources.[96] Following the second *UNDRIP* Standard, FPIC would be required prior to: (1) any relocation of Orang Asli from their customary land; (2) storage or disposal of toxic waste on Orang Asli lands; and (3) more

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[93] For criticisms of *Kulasingam*, see eg. Mohd Ariff Yusoff, 'Saving "Save in Accordance with the Law": A critique of Kulasingam v Commissioner of Lands, Federal Territory' (1982) 9 *Journal of Malaysian and Comparative Law* 155. In *Bato Bagi*, the majority of the Federal Court recently affirmed *Kulasingam* in holding there is no right to consultation or hearing pre-extinguishment of native customary rights unless provided for by written law (see [2011] 6 MLJ 297, 306 (Zaki CJ), 336 (Raus FCJ)).

[94] For an examination of Part II of the Malaysian Constitution, see above Chapter 4, 114-45.

[95] See above Chapter 3, 100-8.

[96] It is proposed that the responsibility for the development, formulation and review of these laws, guidelines and procedures be placed with the OARC (see below Section IIIB2(b), 364).

generally, all proposed measure having a 'significant' and 'direct' impact on Orang Asli lives or lands'.[97] For example, a proposed dam that results in the flooding of a part of Orang Asli lands would be a measure that has a significant and direct impact on Orang Asli lands and consequently, would require FPIC. A less obvious example may be a proposed industrial plant close to Orang Asli lands that could potentially pollute a river running through Orang Asli land. In such a case, effective consultation, meaning the full provision of timely and comprehensible information to the affected Orang Asli and the ability of Orang Asli to influence the decision-making process,[98] may suffice. To ensure that the right to FPIC and consultation is adequately protected with regard to Orang Asli lands and resources, it is proposed that these rights be expressed and included in the statutory framework with an additional right to appropriate legal redress through the dispute resolution institution discussed in Section IIID below.

Additionally, it might be worth considering a two-tier consent requirement, through the FPIC of the local Orang Asli owners and a written endorsement by the OARC,[99] in respect of land and resource transactions involving non-Orang Asli owners. The inclusion of the OARC in the decision-making process may not be in accordance with Orang Asli laws, traditions and customs but could confer the necessary economies of scale and bargaining strength to the Orang Asli village concerned. Appropriate statutory timeframes for consent may also be considered to ensure the timely completion of the FPIC process.

From a state perspective, what would happen if FPIC, where applicable, were to be withheld in an extreme case, for example, where the project or activity is proven to be vital for the protection of national security?

Instead of creating a labyrinth of legal exceptions for the state-override of FPIC, a possible alternative may lie in granting similar protection to Orang Asli lands to that afforded in respect of Malay reservations under *Malaysian Constitution*. Article 89(1) of the *Malaysian Constitution* provides that lands reserved for ethnic Malays

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[97] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc A/HRC/12/34 (2009), para 47.
[98] See above Chapter 3, 107-8.
[99] Discussed below Section IIIB2, 362-5.

immediately before the independence of Peninsular Malaysia (31 August 1957) shall continue unless a State enactment is passed to the contrary by a two-thirds majority by the relevant State legislative assembly and both houses of Parliament. In respect of Orang Asli, this additional constitutional protection could apply in respect of any encroachment, use, taking, acquisition or deprivation of Orang Asli customary lands and resources covered under the proposed legislative framework. To avoid wholesale acquisition of Orang Asli lands by legislative process, it is further proposed that this constitutional process can only be resorted to in respect of an unreasonable refusal to grant FPIC or other exceptional circumstances, for example, an imminent threat to national security. The justification for the additional protection if compared to Malays lies in the fact of the small population of Orang Asli and their weak political and economic position.

(ii) Redress for deprivation

Just redress under the *UNDRIP* Standards would include: (1) restitution of lands and resources or the option of return of lands and if this is not possible; (2) just, fair and equitable compensation by way of land, territories and resources of equal size, quality and legal status; (3) just, fair and equitable monetary compensation; and (4) other appropriate redress.[100] Monetary compensation would be the last alternative.[101] 'Adequate compensation' for acquisition or use of property under art 13(2) of the *Malaysian Constitution* is not expressly limited to monetary compensation.[102] As for temporary deprivation, for example, temporary rights of use or access, it is proposed that Orang Asli should, in addition to any benefit-sharing, rent or financial arrangements, be entitled to redress for any loss or damage to land and resources beyond the normal course of such use and access.

In the event monetary compensation is the only alternative, assessment of such compensation should go beyond mere market value. It has been observed that Orang Asli have a special connection to their customary land.[103] To Orang Asli, their

[100] See *UNDRIP* arts 10, 28 para 2, and 32 para 3.
[101] See above Chapter 3, 109.
[102] See above Chapter 4, 144-5.
[103] See above Chapter 2, 65-7.

customary land is a living entity, with a spirituality and sacredness. It is land, above anything else which gives life and meaning to Orang Asli existence.[104] Laws relating to the deprivation of Orang Asli customary land rights should thus reflect these values. Cash compensation is no answer to the legitimate land claims of a people with a distinct past who want to maintain their separate identity in the future.[105] Further, market value assessment of compensation may not provide 'adequate' economic compensation for those customary lands not generally perceived as economically viable or located in areas where access and infrastructure is limited.

Market value monetary compensation also fails to appreciate the very nature of customary lands and their value to Indigenous people. These lands are imbued with cultural, spiritual, communal and economic dimensions far beyond mere market value. Not far from this viewpoint, an empirical study has suggested that Orang Asli generally require, amongst other things, that loss of ancestral land be factored into the assessment of compensation for acquisition of their lands and compensation should include both monetary and non-monetary forms of compensation.[106] However, the study limited the options of non-monetary compensation to economic matters including housing, amenities and job security.[107] A useful alternative to consider would be to include, as a first choice, replacement land of equal size, quality and legal status that is acceptable to the particular Orang Asli community. If this is not possible given the circumstances of the particular case and after reasonable diligence on the part of the state, adequate monetary compensation that takes into account the various dimensions of Orang Asli customary land should be paid to the affected Orang Asli communal ownership body.[108] Adequate and

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[104] Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: from Rhetoric to Recognition* (Center for Orang Asli Concerns, 2010), 21-4.
[105] *Woodward Report*, above n 8, 10 [53].
[106] See Anuar Alias and Md Nasir Daud, *Saka: Adequate Compensation for Orang Asli Land* (Universiti Tun Hussein Onn Malaysia, 2011), 79-85, 137-8; Anuar Alias, S N Kamaruzzaman and Md Nasir Daud, 'Traditional lands acquisition and compensation: The perceptions of the affected Aborigin (*sic*) in Malaysia' (2010) 5(11) *International Journal of the Physical Sciences* 1696.
[107] Ibid 1704.
[108] For some guidance on the difficult question of compensation for loss of native title rights, see eg. Anuar Alias, *Developing a Compensation Framework for Land Acquisition Affecting Orang Asli Native Lands* (PhD Thesis, University of Malaya, 2009); D Smith, *Valuing Native Title: Aboriginal, Statutory and Policy Discourse About Compensation* (Discussion Paper No 222/2001, Centre for Aboriginal Economic Policy Research, Australian National University, 2005); R T M Whipple, 'Assessing Compensation Under the Provisions of Native Title Act Part 1' (1997) 3(3) *Native Title News* 30; R T M Whipple, 'Assessing Compensation Under the Provisions of Native Title Act Part

effective prior notice of such proceedings should be given to affected Orang Asli with due regard to the difficulties involved in bringing matters to the attention to those living in less accessible areas. Dispute resolution processes and institutions for proceedings involving Orang Asli lands and resources are discussed in Section IIIC1-2 and IIID below respectively.

B *Orang Asli Institutions*

Another aspect of the reform proposals is the type of institutions that could facilitate the effective recognition and protection of the land tenure system proposed in Section IIIA. For all communities, incentives for productive and unproductive activity emanate from institutions, both formal and informal.[109] The importance of Indigenous institutions (or informal systems) for the realisation of the first *UNDRIP* Standard is exemplified by the number of provisions relating to their protection, functions and powers.[110]

Self-determination in terms of Indigenous governance and institutions is not novel and can potentially deliver positive outcomes for Indigenous communities. Many native American nations in the United States that have taken control of their own development have been rewarded with remarkable economic and non-economic benefits.[111] While autonomy in the structure, membership and powers of Orang Asli institutions is important, previous experience has shown that safeguards and accountability are equally important for Indigenous communities. In Fiji, the National Land Trust Board ('NLTB'), consisting of the Governor-General as President, the Minister as Chairman, five Fijian members appointed by the Great Council of Chiefs, three Fijian members appointed by the Fijian Affairs Board from

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2' (1997) 3(4) *Native Title News* 49; Daniel C H Mah, 'The National Native Title Tribunal: Compensation Issues – A Discussion Paper' (Paper presented at the Symposium on Compensation under the Commonwealth *Native Title Act*, Curtin University, Perth, 3 November 1994); Robert A Simons, Rachel Malmgren and Garrick Small (eds), *Indigenous Peoples and Real Estate Valuation* (Springer, 2008); Paul Burke, 'How Can Judges Calculate Native Title Compensation?' (Native Title Research Unit, Discussion Paper, 2002).

[109] Harvard Project on American Indian Economic Development, above n 68, 122.

[110] See *UNDRIP* arts 5, 14 para 1, 18, 19, 20, 23, 30 para 2, 32 para 2, 34.

[111] For empirical analysis in the United States, see the Harvard Project on American Indian Economic Development, above n 68, 111-130. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2004* (Human Rights and Equal Opportunity Commission, 2004), 24-30.

a list of nominees submitted by provincial councils to the Fijian Affairs Board, and not more than two members of any race, appointed by the Governor-General,[112] is vested with all the power to manage native land for Fijian owners.[113] However, the legislation does not expressly provide for the election or answerability of the members of the NLTB to the Fijian owners. This has resulted in complaints of excessive administrative costs, low returns to native owners and 'over-leasing' of native lands without adequate recourse.[114]

Addressing issues of accountability and self-determination from a land rights perspective bring to the fore the interplay between two factors. The first relates to the desirability of credible Orang Asli institutions while the second is the need to have regard to self-determination of and respect for Orang Asli customary institutions.

In order to increase the chances of the Orang Asli institution's long-term success within both Orang Asli society and the broader Malaysian political and economic system, the institution should possess minimum legal facilities necessary to enable it to function effectively. Notwithstanding calls for the recognition of Indigenous laws, traditions, customs and institutions, domestic experiences suggest that acknowledgment of these institutions without state intervention may not necessarily alleviate problems relating to loss and grabbing of Indigenous lands and resources.

In Niger, the land tenure reform process in the 1980s and 1990s to formalise customary land rights was uncertain in terms of what rights to secure and register and unprepared as to institutional structures.[115] This uncertainty brought about an undesirable situation where formalisation was used as an instrument for opportunistic *chef de cantons* and power holders to exclude at will those regarded as having lesser claims to lands, namely women, transhumant cattle herders or those

[112] *Native Land Trust Act 1940* (Fiji), s 3(1).
[113] Ibid s 4.
[114] Joseph D Foukona, 'Management of customary land as a form of communal property in the Solomon Islands, Vanuatu and Fiji' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Cavendish Pub, 2010), 276-81.
[115] Tor A Benjaminsen et al, 'Formalisation of land rights: Some empirical evidence from Mali, Niger and South Africa' (2008) 26 *Land Use Policy* 28, 31-2.

'late-comers' to the land.[116] The resultant inequality and discrimination is objectionable as the right to promote, develop and maintain Indigenous institutional structures and their distinctive customs, spirituality, traditions, procedures and practices in the *UNDRIP* should be *in accordance with international human rights standards*.[117] In Ghana, frequent close ties between traditional authorities and national elites have been said to allow the chieftaincy to 'operate as a conduit for the expropriation of land from peasant cultivators to the capitalist sector'.[118]

Formalisation of these institutions may thus involve the incorporation of attributes not necessarily 'traditional' by nature.[119] This brings into play the two considerations introduced in Section II. They relate to the need for legal certainty of transactions involving Orang Asli communal title and safeguarding traditional landowners' rights. In the light of the possible tension between the full application of Indigenous laws, traditions, customs and institutions and the need to protect the individual rights of Indigenous peoples as citizens of the nation-state, achieving the correct balance would necessitate the importation of some institutional concepts that may be alien to Indigenous culture. To avoid internal conflict and facilitate dealings with outsiders, options may include using democratic-based concepts in the formulation of these institutions where the individual community is unable to agree on a customary form or organisation. However, intrusive regulation of the Orang Asli controlling body in respect of internal management of land and resource matters should be avoided wherever possible unless it addresses matters involving the violation of constitutional fundamental liberties of its members, for example, gender equality.[120]

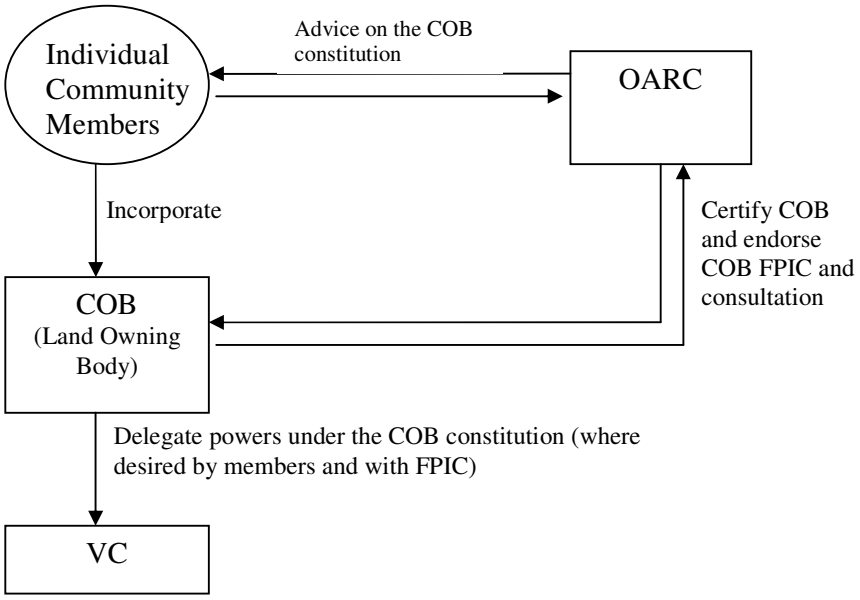
With these considerations in mind, Section IIIB1-2 suggests institutions that may facilitate the effective working of communal title. In summary, it is proposed that the communal title be vested in a land-owning body, whose members consist of members of the relevant Orang Asli community. This body could be known

[116] Ibid 33.
[117] See *UNDRIP*, art 34.
[118] Julian Quan, Su Fei Tan and Camilla Toulmin (eds), *Land in Africa: Market Asset or Secure Livelyhood? Proceedings and summary of conclusions from the Land in Africa Conference held in London November 8-9, 2004* (2004), 110-1.
[119] See Mantziaris and Martin, above n 14, 42-3.
[120] For a discussion of these fundamental liberties, see above Chapter 4, 114-45.

generically as the Communal Ownership Body ('COB'). Depending on the particular constitution or rules of the COB, drafted with the FPIC of members of the COB and on the advice of the Orang Asli Rights Council (OARC),[121] the powers to manage lands and resources, enter into agreements for their use and distribute any products or profits from such use may be delegated to a Village Council (VC).[122] Generally, the VCs would reflect traditional Orang Asli institutions. Examples in this regard include the *Mairaknak* (Elders consultation group) in the case of the *West Semai* sub-group, *Lemaga Adat* (Customary Council) in the case of the *Jah Hut* and *Lembaga Adat* (Customary Council) in the case of the *Temuan*. The other proposed institution namely, the OARC, is a central body that would not regulate and control but facilitate, represent and certify Orang Asli interests with the FPIC of the individual COB. It should be made clear that the OARC is not an apex governing body. Ownership, management and control of lands and resources would remain with the COB, or the VC in cases where management and control is delegated to the VC. In summary, the power relationship between the proposed Orang Asli institutions would appear as follows:

[121] The OARC is discussed in Section IIIB2 (at 355-8).
[122] For examples of other such powers, see below n 136.

Figure 8.1: Proposed Power Relationship Between Orang Asli Institutions



Key to acronyms in Figure 8.1:

COB = Communal Ownership Body

VC = Village Council

OARC = Orang Asli Rights Commission

FPIC = Free, Prior and Informed Consent

These institutions are discussed in turn.

1 Communal Ownership Body ('COB')

This section suggests that a decentralised land-owning body possessing the minimum requirements for legal capacity would be suitable to the Orang Asli scenario. 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.[123] In view of the 18 distinct Orang Asli ethnic groups and their

[123] Colin Nicholas, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia* (IWGIA, Center for Orang Asli Concerns, 2000), 12; Colin Nicholas, 'Background on the Orang Asli and their Customs on Native Land' (Paper presented for In-

attachment to a specific ecological niche, a centralised council, like the Council of Chiefs in Fiji and Vanuatu, having a say in all matters concerning Orang Asli land may not be appropriate. Due to an absence of centralised leadership and control in the past, this form of prescription may well find resistance from Orang Asli.

Accordingly, a decentralised approach that confers power upon the particular village which acts communally or through its appointed representatives may prove more suitable. Fingleton has argued that the *Land Groups Incorporation Act 1974* (Papua New Guinea) ('*LGIA*') gives groups considerable flexibility to incorporate Indigenous institutions, concepts and practices into their formal structure.[124] In Africa, it has been observed that a high level of state intervention and prescription has little practical impact, because of resistance from traditional leaders and disassociation from local practices.[125] In addition to respecting Orang Asli institutions in accordance with the First *UNDRIP* Standard, some of the flexible incorporation methods utilised in the *LGIA* may enable groups to function effectively vis-a-vis mainstream society. The name, membership and how the ownership body functions could be determined by the community in accordance with particular customs and traditions, including those not related to lands. Of importance to the recognition of Orang Asli institutions are their external dimension (the manner in which outsiders relate to the group) and internal dimension (the manner in which members of the group relate to each other).

The *LGIA* uses a 'constitution' to provide for matters fundamental to the group's existence or in other words, group incorporation. Instead of state intervention in group incorporation (which could become excessive), it is recommended that better internal application of Orang Asli laws and customs may be facilitated by a

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Depth Discussion on Native Customary Land Rights of the Orang Asli in Peninsular Malaysia, SUHAKAM, Kuala Lumpur, 13 June 2009), 5.

[124] J S Fingleton, *Legal Recognition of Indigenous Groups*, above n 16, 33.

[125] See eg. C Toulmin and J Quan, 'Registering Customary Rights' in C Toulmin and J Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (International Institute for Environment and Development, 2000), 224-5; T Cousins and D Hornby, 'Leaping the Fissures: Bridging the Gap between Paper and Real Practice in Setting Up Common Property Institutions in Land Reform in South Africa' (Legal Entity Assessment Project, n.d.), 22 June 2012 <http://www.cbnrm.net/pdf/cousins_001.pdf>, 3, 5. Similar observations have been made in Australia (see eg. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, above n 4, 158-9).

constitution or set of rules *not* seeking to 'codify' the community's laws and customs. Instead, the constitution would have the minimum information necessary to afford the COB legal capacity to hold, manage and deal with its lands and resources. 'Codification' of laws and customs may adversely impact Orang Asli laws, traditions, customs and institutions. Orang Asli laws, traditions and customs are oral and traditionally passed from generation to generation by word of mouth. Codification involves the translation of terms between 'systems of meaning' that raise incommensurability problems by the transformation of practices and values generated through direct interaction with people, to practices and values generated from the exegesis and interpretation of written texts.[126] The resulting text may be accepted as an authoritative declaration of the law or custom and be interpreted as conventional legal materials.[127] Hermeneutical conflicts between Indigenous and mainstream interpretative assumptions would function to distort and, in certain circumstances, change Indigenous laws and customs.

Martin and Mantziaris argue that the reduction of Indigenous laws and customs to writing may transform the community's social values in different ways.[128] First, textual declaration may encourage stasis in the system of traditional law and custom by fixing the content of the law at a particular time. The textual incorporation of the law may, in time, be incorporated into the evolving system of traditional laws and customs that the text itself has partially transformed. The process of textual interpretation may result in the loss of control of the relevant Indigenous people over the interpretation and content of their traditional laws and customs, since the interpretation will often be conducted by specialists such as lawyers and anthropologists who stand outside the group.

Legal techniques that allow processes under traditional laws and customs to operate within the legal system by establishing transparent 'windows' between the two systems are to be preferred to those attempting to define the content of the relevant

[126] For further elucidation of these problems, see eg. I Keen, 'Norman Tindale and me: Anthropology, Genealogy and Authenticity' in J D Finlayson, B Rigsby and H J Bek (eds), *Connections in Native Title: Genealogies, Kinships and Groups* (Centre for Aboriginal Economic Policy and Research, Australian National University, Monograph No 13, 1999), 99.
[127] Mantziaris and Martin, above n 14, 42.
[128] Ibid 43. The challenges and difficulties of translating the spiritual into the legal in Australian native title law has been acknowledged by the High Court (see *Ward* (2002) 213 CLR 1, 64-5).

law and custom.[129] A flexible constitution enables a customary group to incorporate a formal legal entity with the capacity to hold, manage and deal with land in its own right. Codifying the basic requirements for the constitution, including, qualifications for membership, the nature of its controlling body, the way the group acts and the manner in which those acts will be evidenced and the conditions on the exercise of its powers,[130] reduces the risks of excessive codification by allowing oral traditions and customs to dictate the internal management of the Indigenous community.

The following sections propose alternatives for key characteristics of the COB, namely its membership requirements, legal status, decision-making processes and representative arrangements.

(a) Membership

Article 33 of the *UNDRIP* provides for the rights of Indigenous people to determine their own identity, membership and structures in accordance with their own customs and traditions. Unlike the current law where the Minister having charge of Orang Asli affairs has a final say whether a person is Orang Asli,[131] individual Orang Asli communities should ideally determine their membership in accordance with their own customs and traditions. Membership lists are a good starting point but might provide a false sense of 'certainty', potentially resulting in far greater uncertainty caused by chronic disputation over group membership.[132] More importantly, there should also be clear criteria for membership stated in the constitution.

The legislature could establish broad legislative criteria for membership of COB based on principles of self-identification and non-discrimination. For example, a member of a COB could be a person who is a person of full age who identifies his or herself as belonging to one or more of 18 ethnic officially classified Orang Asli ethnic sub-groups and is accepted by the COB or VC, as the case may be, as a member in accordance with the applicable Orang Asli laws, traditions and customs.

[129] Mantziaris and Martin, above n 14, 309.
[130] Drawn from *LGIA*, s 8(1).
[131] See *APA*, s 3(3).
[132] Mantziaris and Martin, above n 14, 308.

Care must be nonetheless taken to guarantee that women are not discriminated against and are allowed equal membership of and participation[133] in the COB. The impact of death and divorce on membership should be determined by particular Orang Asli customary laws unless the individual COB opts out of this method by FPIC and chooses alternative methods based on ordinary civil law. Muslim Orang Asli[134] would have to adhere to *Syariah* law in respect of personal laws. For example, *Syariah* laws on the distribution of assets on intestacy (*faraid*) that prescribe specific distribution of shares in the estate to family members may not necessarily be consistent with Orang Asli customary laws. If reforms are to be pursued as recommended in this Chapter, prior consultation between Orang Asli and all relevant government agencies including those involved in the administration of *Syariah* law would be necessary to resolve conflict of laws issues.

(b) Legal Status

Adopting standard forms of corporatisation, for example, limited liability companies or cooperative societies without any change to cater for the specific circumstances of individual Orang Asli landowners may pose challenges to self-determination and Orang Asli laws, traditions and customs. As observed in Australia, corporate structures initially designed for the management of native title may be drawn into the management of a broader set of Indigenous relations.[135] If the corporation were to be placed in this position, it may start to compete with other sources for authority within the native title group. In addition, the dissonance between corporate processes (for example, democratic meetings) and processes operating within the Orang Asli domain may pose challenges to the effective management of the institution and possibly result in a lack of allegiance to the institution.

Alternatively, it may be worth considering affording the COB the status of a statutory corporation with the necessary legal capacity to transact with external

[133] Studies have shown that within certain customary systems, women do not enjoy equal rights to men (for example, in relation to Mozambique, see Christopher Tanner, 'Law-making in an African Context: The 1997 Mozambican Land Law' (FAO Legal Papers Online, 2002), 22).
[134] Latest publicly available Government figures show that 5,610 of the 27,841 Orang Asli households were of the Muslim faith as at December 2008 (see *DOA*, *Basic Information Data*, above n 19, 15).
[135] Mantziaris and Martin, above n 14, 166.

parties on its own or through the VC.[136] As foreshadowed earlier, Orang Asli communal land owners would determine through the process of FPIC the extent to which the VC can enter into transactions on behalf of the COB. Except for disputes relating to commercial land and resource transactions and the protection of fundamental liberties under the *Malaysian Constitution*, it is proposed that internal matters are dealt with in accordance with the particular Orang Asli communities' laws, traditions and customs.

In terms of the procedure for incorporation, the Papua New Guinea *LGIA* may be a helpful starting point. After considering comments and objections, a certificate of recognition is issued by the Registrar, upon which the group becomes incorporated, gaining legal status as a corporation with perpetual succession and the capacity to sue and be sued and do other acts a corporation may do. In Malaysia, a similar administrative process for incorporation of the proposed statutory corporation could be conducted through an independent, transparent and accountable commission for Orang Asli rights, namely, the proposed OARC.[137]

(c) Decision making

In the *LGIA*, the landowning group is allowed the flexibility to identify the title, composition, membership and manner of appointment of the group's controlling body. Applying these principles generally, these powers and processes could be in accordance with the particular Orang Asli community's laws, traditions and customs or if they opt-out of such arrangements, in accordance with a democratic-process. Hybrid and flexible alternatives for institutional power structures and processes are important in an Orang Asli context due to evolving conceptions of traditional Orang Asli communal leadership, representation and accountability.[138] Where power is

[136] The legal capacity of the statutory corporation may include: (a) the power to sue and be sued; (b) the power to grant a lease or licence; (c) the power to acquire by agreement, hold, deal in, or dispose of, land outside the lands; (d) the power to enter into contracts; (e) the power to appoint and dismiss staff; (f) the power to receive and disburse moneys; (g) the power to obtain advice from persons who are expert in matters with which Orang Asli are concerned; (h) the power to establish offices; and (i) the power to enter into co-management agreements in relation to land. (Adopted partly from s 5 (2) of the *Maralinga Tjarutja Land Rights Act 1984* (SA)).

[137] The OARC is discussed in Section IIIB2 below (at 362-5).

[138] See above Chapter 5, 154, 180-3.

delegated by the COB to the VC, members of the VC should preferably be active and knowledgeable in community laws, traditions, customs and institutions. Notwithstanding laws and customs to the contrary, all members of the COB (including women) should be allowed to participate in the appointment and removal of members of the VC. Such participation would be consistent with art 34 of the *UNDRIP* that calls for recognition of Indigenous institutions in accordance with human rights standards.[139]

Decisions made by the COB may range from long-term policy decisions (for example, changes in the COB constitution) and day-to-day operational decisions (for example, the collection and payment of communal monies). Convening communal meetings for the purpose of day-to-day running of the COB may be seen as slow and burdensome by some Orang Asli communities. Accordingly, members of the COB, with advice from the OARC, should determine, by consensus through the process of FPIC, its decision-making powers and processes. For example, the powers of the COB[140] for all external transactions (except its legal capacity that would remain with the COB) could be delegated to VC under its constitution or rules. In this scenario, other decisions could be made in accordance with the applicable laws and customs not necessarily explicit in its constitution.

However, it is pertinent to consider protection for land and resource transactions, particularly those involving non-community members. In order to avoid conflict and possible abuse of power, it is suggested, alternatively, that the relevant constitution or rules provide that FPIC of a majority or supermajority of the community be obtained before the entry into these transactions. Once FPIC is endorsed by the OARC, the transaction would be legally binding on the COB. In this regard, a deeming statutory provision would need to be included. However, efforts to impose different and non-Indigenous rules may also provoke non-compliance by its demands that may be inappropriate to Indigenous culture. Such limitations should only be allowed if they are voluntarily agreed to by the COB. The community could

[139] Malaysia is signatory to the UN *Convention on the Elimination of All Forms of Discrimination Against Women*, Adopted 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). Further, art 8(2) of the *Malaysian Constitution* prohibits gender discrimination except as expressly provided in the Constitution.

[140] For examples of some of these transactional powers, see above n 136.

also determine through its constitution or rules various thresholds for transactions in land and resources that would require FPIC of the community, for example the creation of a lease of more than three years.[141]

(d) Leadership, representation and accountability

Interaction with non-Orang Asli society and the effect of state-imposed Orang Asli decision-making institutions has materially affected traditional Orang Asli institutions. The weaknesses of and challenges faced by Orang Asli decision-making institutions have been evaluated in Chapter 5.[142] The autonomous selection of representatives by members of the COB in the manner it deems fit may alleviate these problems. Further, the imposition of a statutory fiduciary duty upon members of the VC vis-a-vis members of the COB can be considered. Although this proposal may serve to curb the abuse of powers by VC members, the fiduciary principle[143] is informed by the particular set of cultural experiences and socio-economic conditions that strengthen those experiences. The fiduciary principle may well be alien to traditional Orang Asli culture and the VC may encounter substantial challenges in appreciating the precise nature of their fiduciary obligations. Mantziaris and Martin argue that the assessment of internal accountability from Indigenous perspectives is a formidable task, particularly in determining to whom precisely the decision-making body is accountable, and for what in given circumstances pursuant to community laws and customs.[144] Unless these issues are explored in an Orang Asli context, a possible compromise may be to place VC members as statutory fiduciaries and COB members as beneficiaries in relation to *external* transactions relating to communal lands and resources.

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[141] For other examples of these transactions, see above Section IIIA2(b)(ii), 344 (in particular, n 89 and accompanying text).
[142] See above Chapter 5, 154, 180-3.
[143] Unless freely consented to by the beneficiary or authorised by law, the fiduciary principle requires an office-holder not to derive a possible advantage (including advantage to a third party) from misuse of office and not place himself (or herself) in a position where the duties or interests of the office conflict with his or her personal interests or duties (For further reading, see eg. P D Finn, 'Fiduciary Law and the Modern Commercial World' in Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford University Press, 1992), 9).
[144] Mantziaris and Martin, above n 14, 320-1.

2 Orang Asli Rights Commission ('OARC')

To expect individual COBs to function and develop requisite management skills without sufficient expertise and administrative and financial resources would be unrealistic.[145] To this end, it is proposed that the Department of Orang Asli Affairs (since 2011, the Department of Orang Asli Development) be abolished and, in its place, an independent, transparent and central body under the auspices of the Federal Government, namely the OARC, be established with the FPIC of the Orang Asli communities. The OARC would be a statutory body accountable to Orang Asli. The OARC would function to facilitate and monitor the gradual transition of state-Orang Asli relations from that of protectionism to partners with mutual respect by designing and recommending appropriate policies in consultation and with the FPIC of Orang Asli communities.

In upholding self-determination and internal autonomy of individual Orang Asli communities, care must be exercised to ensure that the suggested OARC does not have far-reaching powers to represent Orang Asli. In the past, state-established Indigenous institutions[146] have not gained the confidence of Indigenous communities. A pertinent observation by the UN Expert Mechanism on the Rights of Indigenous Peoples is that these institutions:

> have been used historically by Governments to convey a semblance of engagement with communities, while serving the purpose of silencing indigenous dissent to Government policies and practices. Indigenous representatives are often appointed to State-controlled committees on the basis of their appeal to Government, while the procedure for appointment itself has often been non-transparent. Moreover, these appointees do not necessarily reflect the position of communities, may have limited knowledge of the subject matter and are inaccessible to the community they purport

[145] For an illustration of the adverse impact of resource challenges faced by a Prescribed Body Corporate, the title holders under the native title regime in Australia, see eg. Michelle Riley, 'Winning Native Title: The Experience of Nharnuwanga, Wajjari and Ngarla People' (Native Title Research Unit Land, Rights, Laws: Issues of Native Title, Vol, 2, Issues Paper No 19), 2. For funding challenges and outcomes for native title corporations in Australia, see eg. Toni Bauman and Tran Tran, 'First Prescribed Bodies Corporate Meeting: Issues and Outcomes; Issues and Outcomes 11-13 October 2007' (AIATSIS Native Title Research Report No 3/ 2007, 2007). Funding challenges in the context of reforms proposed are discussed in Section IIIE (at 370-2).

[146] For the Orang Asli experience, see above Chapter 5, 154, 180-3.

> to represent. Since the Government often pays the salary of appointees, they may be afraid to alienate their employer by criticizing government policy.[147]

Orang Asli possess several layers of common identity, ranging from a personal level (for example, individual, family etc) to a wider geographical level (for example, an ecological niche) or other levels of abstraction (for example, by virtue of being a member of an Orang Asli ethnic sub-group or an Orang Asli generally) that are set in motion depending on the context. There is, therefore, room for the establishment of a centrally-based OARC to represent Orang Asli where deemed appropriate by the individual COB. The recommendations in this section explore a central body model that may achieve the right balance between centralisation and decentralisation of powers, including representation, in order to reduce the unequal power-relationship between individual COB, large non-Indigenous entities and the state. If supported by Orang Asli and appropriately designed, the OARC would have the necessary economies of scale and resources to oversee any action involving COB lands and resources to ensure compliance of FPIC and consultation requirements. Bearing in mind these considerations, the Sections IIIB2(a)-(e) explore possible alternatives and concerns for the composition and functions of the OARC.

(a) Composition

Consistent with the concept of self-determination, the OARC should consist of at least a majority of Orang Asli and be representative of all 18 Orang Asli sub-groups. All members should be independent, experienced and knowledgeable in Orang Asli matters. To ensure independence and effectiveness of the OARC, the appointment process should be transparent and possess all necessary qualitative and quantitative criteria to achieve this end. This may include the establishment of an independent and transparent appointments committee. Additional safeguards in relation to the appointment of OARC members may be the requirement of a prior recommendation from an Orang Asli non-governmental organisation, the right of any Orang Asli non-governmental organisation to object to the appointment on the grounds of

[147] Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, 17 May 2010, UNGA Doc A/HRC/EMRIP/2010/2 (2010), para 86.

unsuitability of character or bias, the requirement for a fair gender balance, provisions for removal, liability for removal and a maximum term of service.

(b) Laws and policies

It is proposed that the OARC should be actively involved in the development, recommendation and implementation of all laws and policies affecting Orang Asli. Further, it is suggested that such policies be developed in consultation with all COBs and with regard to the *UNDRIP* Standards. As a safeguard and an exercise of their right to self-determination, it is recommended that effective prior consultation of the individual COB be required for any Orang Asli land and resource utilisation and development policies. In order to streamline the implementation of laws and policies and empower Orang Asli, Government budget allocations for Orang Asli should be channelled through the OARC for their execution and coordination in cooperation with other Government agencies.

(c) FPIC and consultation

It is recommended that the OARC develop and formulate clear and detailed explanatory notes to the proposed statutory requirements for FPIC and consultation consistent with the Second *UNDRIP* Standard.[148] It is further proposed that the OARC oversee the implementation of FPIC and consultation in actions affecting Orang Asli lands and resources. To add the necessary bite to these powers of oversight, it is proposed that prior endorsement on the compliance of FPIC and consultation requirements by the OARC be necessary for all proposed actions affecting COB land and resources. This requirement would encompass any proposed transaction or action affecting COB lands and resources that involve any non-members of the COB. A statutory time frame for such endorsement may function to speed up the endorsement process.

[148] For guidance on these standards, see above Chapter 3, 100-8.

(d) Technical assistance

Subject to OARC compliance with the requirements of FPIC and consultation, it is proposed that the OARC provide advice to the COB in respect of their constitutions, lands and resources including matters relating to the preparation and settling of documents. In this connection, the OARC could also function as the body that maintains a register of COB constitutions. Further, it could assist the COB in the preparation and implementation of community, land and business plans. At a 'soft' level, it is proposed that the OARC develop capacity-building and knowledge building for Orang Asli and create awareness and promote the implementation of the *UNDRIP* to the public at large.

(e) Other functions

Until the land and resource claims process is completed, the OARC would also perform all necessary administrative functions to facilitate the issuance of communal titles to Orang Asli. To increase accountability and credibility of Orang Asli institutions, improvement to the existing information disclosure levels on Orang Asli would be desirable. Currently, accurate information on Orang Asli and their lands is difficult to obtain and when made publicly-available, is often relatively outdated. Visits to the *DOAD* library and Orang Asli villages for research purposes require the *DOAD*'s prior written approval. In the light of the current position, it is recommended that the OARC produce publicly-available annual reports in English and the Malay language disclosing all relevant information on the OARC, Orang Asli and their lands and resources and all OARC activities. Additionally, it may be worth considering the timely presentation of the report at both houses of Parliament for deliberation and debate. As far as possible, the OARC should also ensure that timely and accurate information on Orang Asli and their lands and resources are available to the public.

C *Recognition Process*

This section proposes alternative processes by which Orang Asli communal title may be established and methods of dealing with successful claims that overlap with other interests in land. The institution for adjudicating these claims is discussed separately in Section IIID. For ease of reference, the most recent breakdown of Orang Asli lands in Peninsular Malaysia made publicly-available by the *DOA* is reproduced again:[149]

Table 8.1: Orang Asli Land Status as at December 2008

	Land Status	Area (hectares)
1	Gazetted land	19,713.65
2	Approved for gazetting but not gazetted yet	30,849.86
3	Applications for gazettal	81,535.24
4	Orang Asli-owned lands (Housing lots/areas) (Individual titles)	1,148.40
5	Orang Asli-owned lands (Agricultural lands)	1,270.51
6	Occupied lands without formal application	6,642.63
7	Lands approved for Department of Orang Asli Affairs Use (Federal land)	121.50
8	Total	141, 481.88

Source: Department of Orang Asli Affairs (2008)[150]

Item 1 refers to gazetted Orang Asli lands under statute. Item 2 covers lands where applications for gazetting have been approved by the relevant State Authority but have not been gazetted while item 3 encompasses pending applications for gazettal. Item 4 refers to individually-owned Orang Asli housing lots or areas and item 5 are titled agricultural lands. Finally, item 6 includes Orang Asli-occupied lands where no application has been made while item 7 refers to Federal land used by the

[149] For an explanation on the availability of these figures, see above Chapter 5, 168 (in particular, n 54 and accompanying text).
[150] *DOA*, *Basic Information Data*, above n 19, 18. Further, see above n 149.

Department of Orang Asli Affairs. Excluding titled lands (items 4 and 5) and Federal land (item 7), the above figures suggest that officially-recognised Orang Asli customary land amounts to 138,941.38 hectares or around 1.05 per cent of the total land mass of Peninsular Malaysia. This figure could well increase if customary land and resource rights are recognised in accordance with Orang Asli laws and customs and extended to cover other reserved lands.[151]

1 Process for obtaining communal title

It is proposed that the two mechanisms by which Orang Asli may obtain communal title are by way of *alienation* and *claim*. Similar to the *ALRA 1976* (NT) and *Aboriginal Land Rights Act 1983* (NSW), it is proposed that all gazetted Orang Asli lands and those approved (but not yet gazetted) lands, namely items 1 and 2 in Table 1 above, be degazetted as reserves and issued with communal titles by way of alienation to the respective COB. Except for Malay reservations that are dealt with in Section IIIC2, any interests previously created over these lands should be revoked with adequate compensation payable by the State Authority to aggrieved parties. Where such restitution is not possible, particularly where such lands overlap with Malay reservations or freehold lands,[152] replacement lands of equal quality, size and legal status should be made available to the Orang Asli community concerned as a first alternative. The final alternative should be adequate monetary compensation to Orang Asli that takes into account the special connection that Orang Asli have with their lands and resources. Further, it is proposed that Orang Asli communities be allowed to lodge additional claims for customary lands and resources subject to the process suggested in Sections IIIC2, C3 and D below. In the event of boundary and ownership disputes over item 1 and 2 lands, the alienation process should be postponed pending the resolution of the claims process between the disputing parties.

[151] See 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). Further, see above Chapter 5, 169.
[152] For the manner in which overlapping interests are dealt with, see below Section IIIC3 (at 372-4).

Lands falling under item 3 (where applications for Orang Asli reserves are pending) or item 6 (where applications have not been made) would have to undergo the claims process. The applicant in the claims process would consist of an Orang Asli village or cluster of villages as determined by the community concerned. The COB may lodge a claim if it has been incorporated or included as a party to the claim post-incorporation. If requested by the Orang Asli registered proprietor, item 4 and 5 lands may be acquired by the individual State for the purposes of the communal title *provided* it is found to lie within an Orang Asli communal boundary. Otherwise, these lands would be excluded from the communal title of the particular COB.

It is proposed that the claim be made to the Orang Asli Land Tribunal ('OALT'). The claim should include:

- a description of the land claimed and a map clearly showing the location of the land; and
- a statement of the grounds on which the claim is made; and
- a description of the group of Orang Asli making the claim.[153]

Upon the making of a positive determination, the OALT should promptly direct the relevant land registry to demarcate and grant the communal title in the name of the relevant COB. To expedite the claims process, the OALT should be given a set timeframe to resolve claims. Pending resolution of a claim, the State Authority should, by a general moratorium, be prohibited in law from alienating, or declaring a reserve or creating an interest over any land once it has constructive or actual notice that such land may be subject to an Orang Asli land claim or is occupied by Orang Asli. The law should also provide that any interest granted by the State in these circumstances is void and liable to be set aside.

2 Proof of claims

Historical factors such as resettlement during the Malayan communist insurgency, Orang Asli Regroupment, integration and modernisation policies, the national development agenda and the expansion of private enterprise have resulted in the

[153] Adopted from s 47(c) of the *Aboriginal Land Act 1991* (Qld).

encroachment and loss of Orang Asli lands and dispossession of Orang Asli communities.[154] Common law requirements for the proof of Orang Asli customary land rights, namely, continuous occupation from time immemorial and the maintenance of a traditional connection to a particular ecological niche may prove difficult, and consequently unsatisfactory.[155] In terms of proof, the impact of the Regroupment or relocation of Orang Asli communities on their common law customary land rights has yet to be authoritatively decided by the higher courts. The issue remains whether Orang Asli who have been relocated or moved due to external pressure in more recent times would still be considered to be in continuous occupation and maintaining a traditional connection with the land that they occupy currently.

In *Sagong 1*, the plaintiffs were able to prove that they had been in continuous occupation of the land in dispute for seven generations, proven in evidence to be 210 years.[156] Due to historical factors mentioned at the commencement of this section, many Orang Asli villages, particularly in the urban and fringe areas (totalling 525 of the 852 Federal Government-classified Orang Asli villages/settlements),[157] may not be in occupation of the precise tract of land they were 210 years ago. Having said this, it is not proposed to preclude Orang Asli from pursuing common law customary land rights in the courts. Instead, they can elect between pursuing claims in the courts or utilising the alternative claim process suggested in this section.

Rather than determining Orang Asli communal title claims by reference to historical occupation and the maintenance of a traditional connection with a particular tract of land, a possible alternative for a making claim may be through *communal occupation of land for a fixed period* and *ethnicity*. This method may be criticised by purists as artificial because the claim does not relate to a particular historical ecological niche. However, it would be better suited to the altered circumstances of present-day Orang Asli in terms of producing equitable outcomes for a larger number of Orang Asli. In any event, an orientation to a place deriving from spiritual

[154] See above Chapter 2, 30-64.
[155] These matters have been examined in above Chapter 7, 263-88.
[156] [2002] 2 MLJ 591, 610.
[157] *DOA*, *Basic Information Data*, above n 19, 11.

connections or living on and using traditional country, may transform itself into a system in which connections to a place are more secular, diffuse and general in nature even though such connections remain central to social identity.[158] As observed earlier, limiting successful claims to communities that can establish common law Orang Asli customary land rights may produce unjust results for Orang Asli communities who continue to observe customs in a new or altered ecological niche. The object of this method of establishment is to reduce the threshold for proof while maintaining the rationale for recognition of Orang Asli customary lands.

In addition to complying with the *Madeli 2* test on occupation,[159] 'occupation' of a tract of land should take into account Orang Asli perspectives.[160] An alternative for establishing occupation in the context of a land claim may be by way of introducing a statutory presumption of occupation where Orang Asli claimants have an association with the land claimed based on them or their ancestors having, for a substantial period, lived on or used the land or land in the region in which the claimed land is located.[161] Historical occupation may be established whether or not all or a majority of the claimant group have themselves lived on or used such land. This method may enable Orang Asli from a particular ethnic group to lodge a claim in areas known to be traditionally resided on by the group (for example, in the case of the *Jah Hut*, Central Pahang).[162]

In respect of the requirement for a fixed period of occupation, it would be prudent if the length of such occupation is determined by further inquiry into the particular

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[158] In relation to the circumstances in Australia, see eg. F Merlan, *Caging the Rainbow: Places, Politics and Aborigines in a Northern Australian Town* (University of Hawai'i Press, 1998); D Trigger, *Whitefella Comin': Aboriginal Responses to Colonialism in Northern Australia* (Cambridge University Press, 1992).

[159] In *Madeli 2*, the Federal Court held 'there can be occupation without physical presence on the land provided there exist (*sic*) sufficient measure of control to prevent strangers from interfering' (see [2008] 2 MLJ 677, 694-5).

[160] For proposals on the admissibility of evidence that take into account Orang Asli perspectives, see below, 377.

[161] Adopted from s 54 of the *Aboriginal Land Act 1991* (Qld).

[162] A map similar to the Tindale Aboriginal tribal lands map in Australia is available in Peninsular Malaysia (for a copy of the map, see eg. Iskandar Carey, *Orang Asli: The Aboriginal Tribes of Peninsular Malaysia* (Oxford University Press, 1976); Razha Rashid and Wazir Jahan Karim (eds), *Minority Cultures of Peninsular Malaysia: Survival of Indigenous Heritage* (AKASS, 2001), xii). While functioning more as an Orang Asli linguistic and cultural map than a territorial map, the map could serve as a guide to areas traditionally occupied by 18 Orang Asli sub-groups. It must however be acknowledged that the map may not be conclusive as to actual sub-group boundaries.

circumstances of dispossession suffered by Orang Asli. If the prescribed period of occupation is too short, it may defeat the purpose of having the requirement for occupation. Conversely, too long a period may function to defeat Orang Asli claims. The requirements of customary tenure in the East Malaysian State of Sabah may be more equitable and remedial in this regard. Section 65 of the *Land Ordinance* (Sabah) defines customary tenure to include 'lawful possession of land by natives either by continuous occupation or cultivation for *more than three years*.[163]

In terms of ethnicity, Orang Asli claimants would have to establish by self-identification that they are Orang Asli. The definition of who is an Orang Asli can be adopted from the broad statutory membership requirements of the COB proposed above.[164] Accordingly, the proposed land rights legislation should therefore include the principle of self-identification[165] and verification by the COB and the OARC. In cases where the COB is pending incorporation, the extensive records that the Federal Government possesses on Orang Asli villages and settlements can be of assistance for identification purposes but should not be regarded as conclusive. In order to avoid claims by non-Orang Asli, those identified and categorised as ethnic Malays, Indians, Chinese[166] and other races under the national registration system could be presumed to be non-Orang Asli for the purposes of claims unless demonstrated otherwise. Claimants born outside the country should also be presumed to be non-Orang Asli unless proven otherwise.

Once these two requirements are satisfied, the sole question left to be decided would be the *extent* of the communal title. In accordance with the first *UNDRIP* Standard, these boundaries may be determined in accordance with the relevant Orang Asli laws, traditions and customs as presently practised by the respective Orang Asli claimants. In other words, the sole question would be the *extent* of the title rather than its *existence*. If there are overlapping interests, the OALT would be empowered

[163] On the other hand, s 57 of the Tanzanian *Village Land Act 1999* requires an uninterrupted period of occupation of not less than twelve years.
[164] See above Section IIIB1(a), 357-8.
[165] See *UNDRIP*, art 33 para 1.
[166] Those categorised as Malays, Indians and Chinese account for more than 95 per cent of citizens in Peninsular Malaysia.

to grant consequential orders in the manner proposed below.[167] Any party dissatisfied with the decision may apply for judicial review.[168] Appropriate steps should be taken by the relevant State Authority to ensure that no further interests are granted over Orang Asli occupied or disputed lands pending the resolution of Orang Asli claims.

3 Overlapping interests

Just redress under the *UNDRIP* Standards includes the restitution of lands and resources.[169] However, unbridled restitution may conflict with the constitutional rights of other Malaysians to property and ethnic Malays to their land reservations.

Article 13 of the *Malaysian Constitution* states:

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

If all Orang Asli lands were to be returned, the state would inevitably have to compulsorily acquire and adequately compensate Orang Asli lands held by non-Orang Asli. In addition to diminishing state funds, restitution may adversely affect the legitimacy of the idea of recognition and protection of Orang Asli lands among the Malaysian populace. Additionally, strong constitutional protection for ethnic Malays[170] and their demographic and political dominance may render any legislative action to return Orang Asli customary lands located within Malay reservations both unlikely and arduous. Consequently, restitution of Orang Asli lands and the payment of compensation to Orang Asli for lands no longer occupied by Orang Asli may prove problematic, and perhaps more importantly, unpopular.

Successful Orang Asli claims for communal title may cover State land and/or overlap with the following interests in land:

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[167] See below Section IIIC3, 372-4.
[168] See below n 191.
[169] See above Chapter 3, 109-11.
[170] See above Chapter 2, 34-8.

- Malay reservations, alienated freehold and leasehold land;
- Reserves (for example, Forest reserves, Wildlife reserves etc);
- Licences and permits granted over State land;
- National and State parks.

The following remedies are limited to successful claims, namely where land has been occupied by the Orang Asli claimants for the predetermined statutory period.[171] In respect of Malay reservations, alienated freehold land and leasehold land, it is proposed that the State Authority compensate successful Orang Asli claimants by way of alternative lands and resources equal in quality, size and legal status of the land deprived. If available, such lands should be acceptable to the claimants in accordance with the relevant laws, traditions and customs,[172] particularly those Orang Asli customs relating to the clearing and pioneering of customary land.[173]

However, such remedies pose a particular problem in respect of States where a large proportion of State land has been declared Malay reservations.[174] In Kelantan, where statistics show 10,807 Orang Asli occupying 118 villages,[175] 99 per cent of the State land which has not been developed or cultivated has been said to be Malay reservation land.[176] Although it may be legally possible for the Ruler in Council (the Sultan of Kelantan) to revoke or alter Malay reservations created in Kelantan after independence (31 August 1957)[177] without going through the onerous constitutional process for the discontinuance of Malay reservations,[178] further empirical

[171] See above, 368-72.
[172] See *UNDRIP*, art 28 para 2.
[173] For example, the *Jah Hut* sub-group possess the custom of *tetau usul* when opening new land for occupation and use where they are required under customary law to follow detailed customs and rituals in appeasing and seeking the permission of various *jin* (male spirits), *jemalang* (female spirits) and *ibu bumi* (the creator/mother earth). Such land can only be opened with the prior consent of these spirits and mother earth. (see eg. Shafie Dris, 'Asal-usul Tadrifan Tanah Adat Jah Hut: Ringkasan Sejarah' [The Origins of Jah Hut Customary Land Recognition: A Historical Summary] (Presentation at SUHAKAM Workshop on Indigenous Legal Systems of the Orang Asli, Kuala Lumpur, 23 March 2011) (translated from the Malay language by the candidate). Other Orang Asli sub-groups possess their own laws, traditions and customs in relation to the clearing and pioneering of customary land.
[174] Recent statistics suggest that the affected States include Kelantan (99 per cent) and Kedah (89 per cent) (see Mobarak Ali, above n 34, 61).
[175] *DOA*, *Basic Information Data*, above n 19, 11.
[176] Mobarak Ali, above n 34, 57.
[177] *Malay Reservation Enactment 1930* Enactment No 18 of 1930 (Kelantan), s 4(iii).
[178] *Malaysian Constitution*, art 89(2).

examination of public and private land usage in such States and their impact on recognition of Orang Asli customary lands would be desirable before this provision is utilised. Possible alternatives may be to procure the revocation or alteration of other forms of reserved lands in the State if they are found to be suitable or to explore the possibility of alternative sites in neighbouring States, particularly for Orang Asli in occupation of lands close to the State border. If this form of compensation is not possible due to non-availability of land, adequate monetary compensation should be paid to the COB in a manner that takes into account the special relationship between Orang Asli and their customary lands.[179] Compensation matters should be referred back to the OALT that determined the successful claim, for consequential orders.

In respect of leasehold lands, an option could be the amendment of the relevant provisions of the *NLC* so that leasehold lands located where there have been successful Orang Asli claims are titled out to the COB upon expiry. As for other reserves, it is proposed that any portion of a reserve forming part of a successful claim also be degazetted and titled out to the COBs. However, existing legislation would have to be amended to cater for the smooth revocation or alteration of such reserves in respect of successful Orang Asli claims. Generally, the State Authority can revoke or alter reserves at its discretion.[180] However, current criteria for excision or revocation of reserves such as requirements 'for economic use higher than that for which' a permanent forest reserve is being utilised[181] and the consideration of a report by the State Director of Land and Mines 'setting out the nature of any objections to the proposal'[182] are open to interpretation and consequently require amendments. Successful Orang Asli claimants should also be granted communal title over lands subject to any temporary permit or licence. In such cases, the COB, as owner of the relevant resources, will possess the rights to resources proposed in Section IIIA2(a). Finally, parks legislation, for example, *National Parks Act 1980* (Malaysia) should be amended to cater for the registration of Orang Asli communal title over any area forming part of a national park.

[179] See above Section IIIA2(c)(ii), 348-50.
[180] See eg. *NLC*, s 64 (reservations for public purpose), *NFA*, s 11 (permanent forest reserves).
[181] *NFA*, s11(1)(b).
[182] *NLC*, s 64(2)(a).

D *Dispute Resolution Institution*

This section explores an alternative dispute resolution mechanism that would adjudicate the claims process and all other disputes involving Orang Asli communal title, land and resources. In the event of holistic reform to Orang Asli land and resource rights, an issue to be considered is whether conventional civil litigation is the best method for recognising and adjudicating these disputes. Laws can be amended to recognise Orang Asli laws, traditions, customs and tenures. But leaving the sole responsibility of adjudication to the civil courts may not be the best alternative for resolving Orang Asli land disputes. The challenges of resolving Orang Asli land issues by way of litigation have been canvassed in Chapter 7.[183]

The proposed Draft OARA[184] contains a provision for an OALT.[185] Section 25 of the Draft OARA provides for the establishment of the OALT presided over by a judge of the High Court[186] who would have conferred upon him or her all the powers of a High Court judge in the exercise of his or her civil jurisdiction. The proposed OALT would have jurisdiction over all disputes involving customary land and be given additional powers to:

- direct the relevant district land administrator to undertake a survey of the land subject to the claim and present such survey plans;
- call for the assistance of one or more experts;
- make interim orders prohibiting the State Authority from dealing or creating an interest pending the resolution of the question to be determined by the OALT; and
- generally direct and do all things necessary to expedite the resolution of matters before it.[187]

[183] See above Chapter 7, 263-88.
[184] For an evaluation of the Draft OARA, see above Section IIIA1(a), 329-31.
[185] For a copy, see *POASM* and Peninsular Malaysia Orang Asli NGO Network, above n 27, Annexure 3.
[186] The court of first instance with the highest jurisdiction in Malaysia.
[187] Draft OARA, s 26(3).

Section 25(4) of the Draft OARA proposes that the OALT arrives at a decision based on equity, good faith and merits rather than technicalities and strict rules of evidence. Other proposed provisions in relation to the OALT include a time limit of ninety days for the resolution of claims.[188] Similar proposals form part of the claims process recommended in this Chapter.

The proposed OALT can provide the basis for a suitable alternative dispute resolution institution. In addition, it is recommended that the OALT have jurisdiction over both the claims process discussed in Section IIIC above and all other disputes and proposed action affecting Orang Asli communal title, lands and resources. Further, it may be worth considering the inclusion of two expert assessors suitably qualified in Orang Asli laws and customs (and preferably Orang Asli) to aid the OALT in its deliberations. They would be appointed by the OALT, on the advice and in consultation, with the OARC. The assessors would not function to adjudicate the proceedings but enable the adjudicator to appreciate Orang Asli laws, traditions and customs more effectively during proceedings.[189] The notion of having assessors to aid adjudication is not unknown to Malaysia.[190] To ensure that the opinions of the assessors are considered by the OALT in its deliberations, it is recommended that the OALT be obliged to record reasons in the event it dissents from the opinion of assessors. Any decision of the OALT would be subject to judicial review.[191]

Ideally, the OALT would also supervise and encourage the resolution of claims through negotiation, mediation and facilitation of disputes. If this fails, the OALT

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[188] The right 'to access to and prompt decision through just and fair procedures' for dispute resolution is contained in art 40 of the *UNDRIP*.

[189] This proposal is drawn from Aboriginal land rights proceedings before the Land and Environment Court of New South Wales (see s 37 of the *Land and Environment Court Act* 1979 (NSW)).

[190] Before 1995, Chapter XXI of the *Criminal Procedure Code* (Malaysia) provided for trial by judges with the aid of assessors where assessors helped the courts whose opinions the Court may use to confirm in its final judgment (*PP v Fong Ah Tong* [1940] 1 MLJ 190). Trials with assessors were previously conducted for offences of kidnapping for ransom and those kidnapping offences with an element of intent to murder or murder (for further reading, see Mimi Kamariah Majid, *Criminal Procedure in Malaysia* (University of Malaya, 1987), 218-23).

[191] For principles of judicial review in Malaysia, see generally eg. Wan Azlan Ahmad and Aidham bin Ahmad Badri, *MLJ Handbook Series: Judicial Review* (LexisNexis, 2nd edn, 2007); M P Jain, *Administrative Law in Malaysia and Singapore* (Malayan Law Journal, 3rd edn, 1997), chs XIX and XX; For a critical analysis of judicial review in Malaysia, see eg. Sridevi Thambapillay, 'Recent developments in judicial review of administrative action in Malaysia: a shift from common law based principles to the Federal Constitution' in Anisah Che Ngah and Ramalinggam Rajamanickam (eds), *Persidangan Undang-undang Tunku Jaafar 2007* (Faculty of Law, Universiti Kebangsaan Malaysia, 2007), 275-88.

would adjudicate the dispute in a manner that pays due 'respect to Orang Asli laws, customs, traditions and institutions', part of the first *UNDRIP* Standard. As proposed in the Draft OARA, laws would include a less adversarial and informal procedure and relaxed rules of evidence. Perhaps more importantly, it is recommended that this process gives due recognition to Orang Asli 'laws, traditions, customs and land tenure systems'.[192] Informal procedures could include the conduct of proceedings on Orang Asli lands and improvisation of procedures to respect Orang Asli laws, traditions and customs.[193] For example, rules of evidence may be relaxed so that due admissibility and weight is afforded in respect of evidence:

- from Orang Asli who are knowledgeable in local laws and customs;
- from Orang Asli occupying the land in question; and
- of Orang Asli laws, traditions, customs and institutions.

E *Funding Challenges*

The purpose of this brief but important section is not to provide alternative financial mechanisms for the funding of the proposed Orang Asli communal title scheme. It is certainly beyond the scope of this thesis to do so at any meaningful level. Nonetheless, this section highlights the crucial significance of funding to the proposed scheme.

Art 39 of the *UNDRIP* provides for the right of Indigenous peoples to have access to financial and technical assistance from the state and through international cooperation, for the enjoyment of the rights contained in the Declaration. As suggested by the *International Labour Organisation* ('ILO') in its guide to *ILO Convention 169*, it is of crucial importance that states support the development of Indigenous peoples' own institutions and initiatives, and when appropriate, provide

[192] *UNDRIP*, art 27.
[193] In Australia, Behrendt and Kelly have proposed a preferred model for intra-cultural dispute that has taken into account Aboriginal perspectives (see Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008), ch 6). The model provides useful alternatives and examples that may supplement procedures of the OALT in a way that respects Orang Asli laws, traditions and customs.

the *necessary resources*.[194] In the *Woodward Report*, it was observed 'there is little point in recognising Aboriginal claims to land unless the Aboriginal people concerned are also provided with the necessary funds to make use of that land in any sensible way that they wish'.[195] Viable long-term management of communal title requires adequate funding due to capacity limitations within the Orang Asli population, including restricted access to capital, low education and skill levels, and the adverse effects of poverty and long-term dependency on the Government.

The significance of adequate funding for the application of successful Indigenous land rights models within a domestic context cannot be overemphasised. In Canada, the *First Nations Land Management Act* SC 1999, c 24 ('*FNLMA*') enables First Nations to comprehensively manage their lands without the need for governmental approval. Similar to the proposals here, the *FNLMA* allows an Indian band to draft its own land code and regulations, and administer leasing on reserves.[196] In examining the *FNLMA* in an Australian context, Stephenson observed that the adoption of Indigenous community administered land management systems and land codes under the *FNLMA*, without significant Federal Government funding, would only be viable for those few Australian Aboriginal communities with sufficient financial resources.[197]

Providing such resources in a Malaysian context is not unrealistic. For the year 2011 alone, the Malaysian Government allocated RM100million (USD33.3 million) towards implementing various programmes, including resolving Orang Asli land rights and border settlement issues as well as formulating a new development model for Orang Asli.[198] For the period 2011-2015, the DOAD Plan has budgeted a total of RM1.521 billion (USD507 million) towards Orang Asli well-being and

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[194] ILO, *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No 169* (International Labour Organisation, 2009), ch V.
[195] *Woodward Report*, above n 8, 10 [56].
[196] For further reading, see C Alcantara, 'Certificates of Possession and First Nations Housing: A Case Study of the Six Nations Housing Program' (2005) 20(2) *Canadian Journal of Law and Society* 183.
[197] See eg. Stephenson, 'To lease or not to lease?', above n 79, 565.
[198] Najib Tun Razak, Prime Minister and Minister of Finance, Malaysia, 'The Budget 2011 Speech: Transformation Towards a Developed and High-Income Nation', 15 September 2011, 22 June 2012 <http://www.1malaysia.com.my/speeches/budget-2011-speech/>, para 96.

development.[199] To reduce the cost and resource burden of the COB, it may be worth considering the proposal that it pay nominal quit rent[200] and reduced rates. With the ownership of resources as proposed in this model, Government funding would gradually reduce with the increased economic independence of COB. This approach would be consistent with the gradual transformation of Orang Asli into partners of the state on their own terms. After initial funding of the Government, a possible alternative could be the allocation of a percentage of the sums payable to the COB for ownership of lands and resources to the OARC for advancing the interests of Orang Asli having regard to the *UNDRIP*. In the Northern Territory of Australia, the land rights system under the *ALRA 1976* (NT) is financed by the allocation of sums equivalent to the royalties paid to the Government for mining on Aboriginal land to a separate fund, now known as the Aboriginal Benefits Account.[201] It is thus essential that the state, in seeking to implement changes to Orang Asli land rights regimes, with the FPIC of Orang Asli, ensures that adequate financial resources are allocated so that Orang Asli landowners are able to effectively engage and act on issues relating to the complex political, legal, economic, cultural and social issues surrounding Orang Asli lands.

However, the biggest funding challenge lies in the claims process rather than in the operation of the proposed Orang Asli institutions. Where alternative suitable land is not available, compensation payments to successful Orang Asli claimants and other affected parties could be substantial. Further examination of these matters would be necessary should the proposals in this chapter be considered.

IV STATUTORY LAND RIGHTS REFORM: THE ULTIMATE SOLUTION?

There is little doubt that Malaysia has the constitutional potential to legislate for the recognition and protection of Orang Asli customary lands and resources in a manner

[199] *DOAD*, *Pelan Strategik Jabatan Kemajuan Orang Asli 2011-2015* [*Department of Orang Asli Development Strategic Plan 2011-2015*] (Planning and Research Section, Department of Orang Asli Development, 2011) (translated from the Malay language by the candidate), 75.
[200] Quit rent refers to the annual sum payable to the State Authority in respect of any alienated land as consideration for alienation of title by the State (see *NLC*, s 76(b)).
[201] See s 64(1).

consistent with the obligations it has undertaken under the *UNDRIP*.[202] Ahead of many countries, there are explicit constitutional provisions that refer to the special status of Orang Asli (art 8(5)(c) and Item 16 Ninth sch) and the potential recognition of customary law (art 160(2)).

Any statutory reforms involving the implementation of the key principles advanced in this chapter would require the introduction of new laws and amendments to existing laws affecting Orang Asli lands and resources. To bolster the strength of the new laws and as an aid to interpretation, the preamble to the land rights legislation could include acknowledgments that:

- Orang Asli are the Indigenous minority ethnic group of Peninsular Malaysia;
- land is of special social, cultural, historical and economic importance to Orang Asli;
- Orang Asli have been dispossessed of their lands and resources;
- Malaysia voted in favour of the *UNDRIP*; and
- there is a need for the contextualised recognition of Orang Asli lands and resources having regard to the spirit and intent of the *UNDRIP*.

Further, an express provision could be included for a 'beneficial and remedial interpretation'[203] when construing the laws affecting Orang Asli.

Despite these additional safeguards, statutory amendments can always be rolled back by the Government of the day. A good example is the *Native Title Act 1993* (Cth) and the subsequent *Native Title Amendment Act 1998* (Cth) that wound back the protections of native title offered by the *Mabo* decision of the High Court of

[202] See above Chapter 4. Further, see Yogeswaran Subramaniam, 'The *UNDRIP* and the *Malaysian Constitution*: Is Special Recognition and Protection of Orang Asli Customary Lands Permissible?' [2011] 2 *Malayan Law Journal* cxxvi.

[203] Adopted from Kirby J's dictum in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2008] HCA 48, [17]-[18], [21]. This approach is not dissimilar to what the Malaysian Court of Appeal had to say in *Sagong 2* when Gopal Sri Ram JC ruled in respect of the *APA*, '...the extrinsic material to which I have referred makes it abundantly clear that the purpose of the 1954 Act was to protect and uplift the First Peoples of this country. It is therefore fundamentally a human rights statute. It acquires a quasi-constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation.' ([2005] 6 MLJ 289, 304).

Australia.[204] The United Nations Committee on the Elimination of Racial Discrimination ('CERD') held that provisions in the amendment legislation relating to the validation of past and immediate acts, 'confirmation of extinguishment', primary production upgrade and the 'right to negotiate' discriminated against Indigenous title holders.[205] Yet, little has been done by the Australian legislature to amend these provisions. In view of the challenges faced by Orang Asli in maintaining their identity as a distinct Indigenous community vis-a-vis the state,[206] the state's constitutional power over Orang Asli[207] and the Orang Asli's relatively low political, demographical and economic position in Malaysia,[208] the possibility of statutory reforms being rolled back should not be discounted.

Consequently, it would be preferable that any statutory land rights reform were preceded by amendments to the *Malaysian Constitution* that ensure that recognition of Orang Asli and their customary land and resources rights are, as far as possible, constitutionally entrenched. Constitutional recognition of these rights in a manner consistent with the basic principles of the *UNDRIP* may reduce the risk of the rolling-back of statutory gains in Orang Asli customary land and resource rights. Further, constitutional recognition may assuage concerns on the incompatibility of national laws, decrees and concessions, relating to mining, the environment and resource development that contradict legislation[209] recognising Orang Asli lands and resources.

A major challenge to constitutional reform of this type would be the distinct categorisation and treatment of Malays, natives of Sabah and Sarawak and Orang Asli under the *Malaysian Constitution* and their varying perceptions of indigeneity.[210] Malays, while ascribed special rights under the *Malaysian*

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[204] (1992) 175 CLR 1.
[205] CERD, *Decision 2(54) on Australia, 18/03/1999, UN Doc A/54/18, para 21(2)* (1999), paras 7-8.
[206] See above Chapter 2, 42-6.
[207] See above Chapter 2, 36-8.
[208] See above Chapter 2, 16-20.
[209] For such concerns and their relationship with constitutional reform for the domestic implementation of the *UNDRIP*, see Julian Burger, 'The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 57-8.
[210] See above Chapter 2, 34-46.

Constitution and considered politically to be *Bumiputera* (translated from Malay, 'princes of the soil'), may not satisfy the international criterion to qualify as 'Indigenous' and, in any event, have not identified themselves as 'Indigenous' at international fora relating to Indigenous rights.[211]

Constitutional recognition of Orang Asli land rights by virtue of Orang Asli being acknowledged as 'first peoples' may be viewed as a challenge to the constitutional and political status of the Malays.[212] On the other hand, affording special constitutional status to both Orang Asli and Malays is not a mutually exclusive exercise. Maintaining Malay special privileges under the *Malaysian Constitution*, for example, under art 153 (reservation of quotas) and art 89 (Malay reservation lands) is not incompatible with the constitutional recognition and protection of Orang Asli rights as 'Indigenous peoples'. The bigger question is whether Orang Asli would be rightfully accepted by the Malaysian populace as a distinct 'Indigenous group'. Achieving this result would necessarily involve undoing misconceptions that justification for Malay special privileges under the *Malaysian Constitution* lies in the sole fact that they were the only 'definitive' peoples of the Malay peninsula at the time of European arrival. On the contrary, there exists factual justification for Malay constitutional privileges, including the Malays' informal co-existence with Orang Asli as the perceived 'dominant and organised natives' of the Malay peninsula at the time of European contact and their continued socio-economic marginalisation.

But constitutional change in respect of Indigenous land and resource rights solely in favour of Orang Asli may also not sit comfortably with the natives of Sabah and Sarawak. They have identified themselves as Indigenous to their respective ecological niches in Borneo and have actively pursued rights by virtue of being 'Indigenous peoples', more so and for longer than Orang Asli. On the assumption that Malays continue not to seek 'Indigenous' rights but wish to maintain their special position under the *Malaysian Constitution*, any constitutional amendment based on Indigenous rights would ideally have to encompass all Indigenous minorities in Malaysia, including those from Sabah and Sarawak. The complexities

[211] See above Chapter 2, 43-4.
[212] See above Chapter 2, 44-6.

of Malaysian ethnic mix and political power balance in this form of constitutional reform should not be underplayed.

To speculate on the most suitable form of constitutional safeguard for Indigenous rights that appeases all competing interests is largely a matter of compromise. Whether these legal possibilities come to fruition is a question best determined in the political arena.

V CONCLUSION

Orang Asli need not sacrifice their culture, identity and affiliation to their customary lands in exchange for economic progress or to enjoy the fruits of national development. As advocated by *UNPFII* during its 9th session in 2010, development should go together with Indigenous culture and identity, even in the context of Orang Asli. This concept is a manifestation of the Indigenous right to self-determination, the cornerstone of the *UNDRIP*. The key areas for reform advanced in this chapter, based on a nuanced form of statutory communal title, provide the basis for an alternative legal framework that may assist Orang Asli and the state in fulfilling the aspirations contained in the *UNDRIP*. From a culture and identity perspective, the flexible nature of the proposed form of title functions to enhance the possibility of Orang Asli maintaining and developing their laws, traditions, customs, institutions and identity. From a development perspective, this form of title would include ownership of resources and empower Orang Asli, with limited safeguards, to determine their own priorities in terms of internal and external utilisation and development of lands and resources.

However, there is little point having a law without any intention to enforce or implement its objectives. Successful reform will require a vision of an overall goal, a country-specific prioritisation of issues, and a long-term commitment that is part of a national consensus.[213] Commitments would not only encompass the conferral of rights but investment in funding, capacity building and knowledge creation programs for the Orang Asli community. In addition, successful reforms would have

[213] Quan, Tan and Toulmin (eds), above n 118, 57.

to overcome 'structural impediments' relating to conflicts between the rights established for Orang Asli and existing laws and state institutions on other matters such as mines, environment, water and forest management.[214] Such successful outcomes are not solely reliant on political will. It would be simplistic to think so.[215]

In reality however, Orang Asli land rights reform in Malaysia is more likely to be a product of political expediency rather than a 'national consensus'. The want of political impetus for statutory or constitutional recognition of Orang Asli customary land, despite the Malaysian courts' recognition of these rights over the past 15 years bears testimony to this observation. Unfortunately for Orang Asli, Malaysia's vote for the *UNDRIP* and the plethora of developments internationally on Indigenous rights has not embedded legitimacy and internalisation of *UNDRIP* rights in the soul of the state or its policy makers. Castellino has observed that general trends in the framing of national policies suggests that policy makers only become concerned with international standards when these standards 'have reached the threshold of becoming legally binding, and even then the concern can be inconsistent'.[216] The recent *DOAD* Plan, the Federal Government blueprint for Orang Asli development and poverty reduction over the next five years until 2015, is consistent with this observation. Against the *UNDRIP*, the state continues to chart the course for development of Orang Asli amidst allegations of the lack of FPIC and consultation. In respect of land, the *DOAD* Plan prioritises a shift from existing Orang Asli communal arrangements to individual ownership and agricultural development for economically productive use. While the *DOAD* Plan may be intended for the socio-economic development of Orang Asli, its content equally suggests that Orang Asli self-determination and internal autonomy over their lands and destiny, matters explicitly envisaged in the *UNDRIP*, remain an aspiration solely for non-state reform advocates.

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[214] For a discussion of these 'structural impediments', see Burger, above n 209, 50.

[215] Rodolfo Stavenhagen, 'Making the Declaration Work' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009), 367.

[216] Joshua Castellino, 'Indigenous Rights and the Right to Development: Emerging Synergies or Collusion' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), 384.

For these advocates, legitimacy and internalisation of Orang Asli rights within Malaysian society are a crucial starting point. Legitimacy of the standards contained in the *UNDRIP* in the eyes of the general populace and the state would bring about an environment conducive to 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 desire to voluntarily and habitually obey these norms.[217]

In addition to the acceptance of the *UNDRIP* as a guide to the interpretation of Orang Asli customary land rights, a distinct legitimacy challenge in Peninsular Malaysia would be ethnic Malay perceptions of Orang Asli indigeneity and its supposed impact on the privileged position of Malays under the *Malaysian Constitution*. As highlighted in Section IV, constitutional reforms in this regard involve a complex web of competing and differing notions of domestic and international indigeneity between ethnic Malays, natives of Sabah and Sarawak and Orang Asli, distinct constitutional privileges afforded to these groups and their unequal political power. These difficulties may prove to be insurmountable 'non-legal' barriers to constitutional and legal reform favouring solely Orang Asli.[218] Provided there is legitimacy and internalisation of Orang Asli rights as envisaged in the *UNDRIP* in Malaysia and the consequent political will, *UNDRIP*-based constitutional and legal reforms in favour of all Indigenous minority groups, namely, natives of Sabah and Sarawak and Orang Asli, while maintaining the special constitutional position of ethnic Malays, may well prove the best way forward.

[217] See Claire Charters, 'The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009), 280.
[218] See above, 381-3.

APPENDICES

Appendix 1

United Nations Declaration on the Rights of Indigenous Peoples

Adopted by General Assembly Resolution 61/295 on 13 September 2007

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from

their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional

particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

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

Article 4

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

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

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

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

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

(d) Any form of forced assimilation or integration;

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

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

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

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

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

Article 15

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

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

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

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

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and

develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Appendix 2

UNDRIP Standards

- Ownership, management and use of lands and resources with due respect for Indigenous laws, traditions, customs and institutions;
- Free, prior and informed consent and consultation in matters affecting Indigenous lands and resources; and
- Just redress for dispossession.

Appendix 3

Political Map of Malaysia

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