

**The Rights of the Orang Asli in Forests in
Peninsular Malaysia:
Towards Justice and Equality**

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Abstract

This is an evaluative study of the rights in land and forest resources of the Orang Asli communities who are indigenous and minority peoples of Peninsular Malaysia. It argues that justice, fairness, equality and non-discrimination are the basic principles to be used in generating relevant policies and laws and in their interpretation.

It uses mixed methodologies with a law reform oriented approach. Interviews were conducted to understand the law and practices around it, and the perspectives of the relevant actors.

An examination of the communities' custom and related resource rights reveals significant economic and cultural connections with their environment. Although these have some recognition in Malaysian law, there is a significant gap between the law and the practice. Their recognition in common law has strengthened but is yet to have a significant impact on practice. Conflicts over interpretation adversely affect the exercise of existing rights.

Using comparative law methodology, the study considers measures addressing these rights in international law and in selected jurisdictions. The analysis is structured around the framework established: the recognition of rights to natural resources, restorative measures, and procedural and environmental justice.

Autopoietic theory and its concept of legal irritants are used to analyse the potential development of these rights. The exchange of information between common law and international law has contributed to positive changes in Malaysian law and policy. However, resistance to the common law itself and international human rights law may limit their further development or exercise. Factors in the political, economic and social systems are also hostile to their greater recognition. This perpetuates injustice to the Orang Asli.

The thesis suggests that a rights based approach, focused on the basic principles above, be taken in reforming the law. This will be significant not only to the wellbeing of the Orang Asli but the whole society.

Student Declaration

“I, Izawati Wook, declare that the PhD thesis entitled ‘The Rights of the Orang Asli in Forests in Peninsular Malaysia: Towards Justice and Equality’ is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work”.

Signature

Date 30 April 2015

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List of Publications

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Wook, Izawati, 'Aboriginal Customary Title from Judicial Perspective in Malaysia' (Paper presented at the Diskusi Syariah dan Undang-Undang, Universiti Sains Islam Malaysia, 21 April 2011).

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List of Selected Abbreviations

AL	Ancestral Land
APA	Aboriginal Peoples Act 1954
ACHR	African Commission of Human Rights
ADR	Alternative Dispute Resolution
AD	Ancestral Domain
ADO	Ancestral Domains Office
AHRD	ASEAN Human Rights Declaration
AITPN	Asian Indigenous & Tribal Peoples Network
BN	Barisan Nasional
BEIC	British East India Company
CANZUS	Canada, Australia, New Zealand, United States
CADT	Certificate of Ancestral Domain Title
CALT	Certificate of Ancestral Lands Title
CLA	Civil Law Act 1956
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CMCA	Common Marine and Coastal Area
CEDAW	Convention on the Elimination of all Form of Discrimination against Women
CRC	Convention on the Rights of the Child
CIL	Customary International Law
DLC	District Level Committee
EIA	Environmental Impact Assessments
FAO	Food and Agriculture Organization
FMS	Federated Malay States

FLEGT-VPAs	Forest Law Enforcement Governance and Trade - Voluntary Partnership Agreement
FMU	Forest Management Unit
FRC	Forest Rights Committee
FSC	Forest Stewardship Council
FPIC	Free and Prior Informed Consent
Suhakam	Human Rights Commission of Malaysia [Suruhanjaya Hak Asasi Manusia Malaysia]
HRA	Human Rights Commission of Malaysia Act 1999
ICC	Indian Claim Commission
IPS	Indian Political Service
ILC	Indigenous Land Corporation
ILUA	Indigenous Land Use Agreement
IPRA	Indigenous Peoples Rights Act
IAC	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO Convention	International Labour Organisation's (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries in 1989
ITTO	International Tropical Timber Organization
MRL	Malay Reservation Land
MC&I	Malaysian Criteria and Indicators for Forest Management Certification
PAS	Malaysian Islamic Party [<i>Parti Islam Se-Malaysia</i>]
MTCC	Malaysian Timber Certification Council
NCIP	National Commission on Indigenous Peoples
NNTT	National Native Title Tribunal
NCR	Native Customary Rights
NTA	Native Title Act 1993

REDD+	Reducing Emissions from Deforestation and Forest Degradation
RS	Resettlement Scheme
RRI	Rights and Resources Initiative
FRA	Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006
SDLC	Sub-Divisional Level Committee
TLAS	Timber Legality Assurance System
TWA	Treaty of Waitangi Act 1975
UNDP	United Nation Development Programme
UNEP	United Nation Environment Programme
UMNO	United Malays National Organisation
UNDRIP	United Nation Declaration on the Rights of Indigenous Peoples

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THE RIGHTS OF THE ORANG ASLI IN FORESTS IN PENINSULAR MALAYSIA: TOWARDS JUSTICE AND EQUALITY

PART 1: INTRODUCTION AND RESEARCH METHODOLOGY

CHAPTER 1: OVERVIEW OF RESEARCH

I INTRODUCTION

The thesis evaluates the rights in land and forest resources of the Orang Asli communities who are indigenous and minority peoples of Peninsular Malaysia. It argues that justice, fairness, equality and non-discrimination are the basic principles that influenced the development of the laws relating to access to resources including by the Orang Asli. It thus advocates that the present laws should be interpreted and their reform should be considered in the context of these principles. These principles are derived from multiple perspectives: historical, legal and philosophical. They are used to develop a framework to propose reform of the laws affecting access to land and resources by the Orang Asli. The framework consists of aspects of fairness in the allocation of resources; fairness in restitution for, or reparation of, wrongs; and fairness in processes and procedures. From this framework, the position of the laws in Malaysia relevant to the rights to the rights of the Orang Asli is analysed. The framework is also employed in a law reform approach in assessing the international law position as well as the approach in other selected jurisdictions.

However, taking such a principled approach reveals the gap in the law and practice; as well as 'what is' aspect of the law and 'what it ought to be'. This reality is acknowledged and considered in assessing the future of justice and equality for the Orang Asli. The approach is based on:

The past can be reconstructed, the present can be interpreted and the future can be imagined with justice.¹

¹ Neil Andrews, 'Book Review: One Land, One Nation: Mabo – Towards 2000 by Frank Brennan (1995)' (1997) 21 *Aboriginal History* 242.

II CONTEXTUAL BACKGROUND

A The Orang Asli Communities as Indigenous Peoples

Orang Asli is a Malay phrase for 'original peoples' or 'first peoples'. They are minorities and indigenous peoples of Peninsular Malaysia and represent 18 different groups of religion, social organisation and physical characteristics.² They number 178 197 as at 2010 and constitute less than 0.5% of the Malaysian population.³

In various statutes in Malaysia, the Orang Asli communities are referred to as the 'aboriginal peoples'. These laws include the Federal Constitution,⁴ the Aboriginal Peoples Act 1954, the National Forestry Act 1984⁵ and the Wildlife Conservation Act 2010.⁶ Specifically, under the Aboriginal Peoples Act 1954, the aboriginal peoples are defined by characteristics including language, way of life, custom and belief as well as lineage or blood relation to the aborigines.⁷ An aboriginal ethnic group is defined as 'a distinct tribal division of aborigines as characterized by culture, language or social organization ...'. It may also include any group that is declared by the state authority as such.⁸ An aboriginal community is defined as the 'members of one aboriginal ethnic group living together in one place'.⁹

The Federal Constitution differentiates between the Malays, the aboriginal peoples and the natives. The word 'Malay' refers to the majority Malays loosely defined as a 'person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay customs'.¹⁰ The word 'aborigines' refers to an 'aborigine of the Malay Peninsula'. The word 'native' specifically refers to a person belonging to the ethnic communities in Sabah and Sarawak specified under Art 161A(6). This research uses the term Orang Asli to refer to the communities characterised as the aboriginal peoples

² The communities are classified for administrative purpose into three groups: Negrito, Sen'oi and Proto-Malay. For a detailed account on the population, see, eg, Iskandar Carey, *Orang Asli: The Aboriginal Tribes of Peninsular Malaysia* (Oxford University Press, 1976); 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).

³ Human Rights Commission of Malaysia (Suhakam), 'Report of the National Inquiry into the Land Rights of Indigenous Peoples' (Suhakam, 2013) <<http://www.suhakam.org.my/documents/10124/1326477/SUHAKAM+BI+FINAL.CD.pdf> <<http://sarawakreport.org/suhakam/suhakam-chapter8.html>>, 16.

⁴ Article 8(5)(c); Article 45(2); Ninth Schedule Federal List Item 16.

⁵ Ss 40(3), 62(2)(b).

⁶ S 51(1).

⁷ S 3 Aboriginal Peoples Act 1954.

⁸ S 2 Aboriginal Peoples Act 1954.

⁹ S 2 Aboriginal Peoples Act 1954.

¹⁰ Federal Constitution, Art 160(2).

under these laws. The term Orang Asli is widely used in policy statements since 1980s and has gained acceptance amongst the communities.

The Orang Asli are generally believed to be the earliest of the contemporary inhabitants of Peninsular Malaysia. They may have inhabited the peninsula for over 50 000 years.¹¹ The Negritoes are believed to have arrived in Southeast Asia between the end of the Last Glacial Maximum and the Neolithic expansion of the Holocene, ie, between 44 000 and 63 000 years ago.¹² The group known as Sen'oi are Mongoloid people who are descendants of both the Hoabinhians and the Neolithic cultivators who arrived in the Malay Peninsula around 4000 years ago from the north. They speak Austro-Asiatic languages of the Mon-Khmer subgroup, which illustrates their ancient connection with mainland Southeast Asia.¹³ The Proto Malay groups are generally believed to have inhabited the southern areas of the peninsula for between 2000 and 3000 years. Orang Kuala, a subgroup of the Proto-Malay, migrated from Sumatra about 500 years ago.¹⁴

The migration of various groups to the peninsula in later centuries had a direct impact on the Orang Asli.¹⁵ The first migration was believed to have been from central Java through the Straits of Malacca between 3000 and 2500 years ago.¹⁶ Subsequently, an influx occurred of many other peoples, consisting of Arabs, Chinese, Indians and Siamese, into Peninsular Malaysia. They married into the local Proto-Malays, resulting in a more diverse population referred to as the Deutero-Malays.¹⁷ In the late 19th century, another

¹¹ Francois-X Ricau, M Bellatti and Marta Mirazon Lahr, 'Ancient Mitochondrial DNA from Malaysian Hair Samples: Some Indications of Southeast Asian Population Movements' (2006) 18 *American Journal of Human Biology* 654, 663; Vincent Macaulay et al, 'Single, Rapid Coastal Settlement of Asia Revealed by Analysis of Complete Mitochondrial Genomes' (2005) 308(5724) *Science* 1034, 1035.

¹² Ricau, Bellatti and Lahr, above n 11, 663; Macaulay et al, above n 11, 1035. They suggested that the Negritoes in the peninsula are direct descendants of the Hoabinhians who lived between 8000 BC and 1000 BC during the age called the Middle Stone Age. They are considered as one of the principal 'relic' groups in Southeast Asia from an archaeological, osteological, morphological and genetic perspective. Another view believed that the Negritoes arrived in the peninsula in 1000 BC or what was known as the Mesolithic era or at least 25 000 years ago. See also, Carey, above n 2, 13.

¹³ Colin Nicholas, *The Orang Asli and the Contest for Resources* (International Work Group for Indigenous Affairs, 2000), 4.

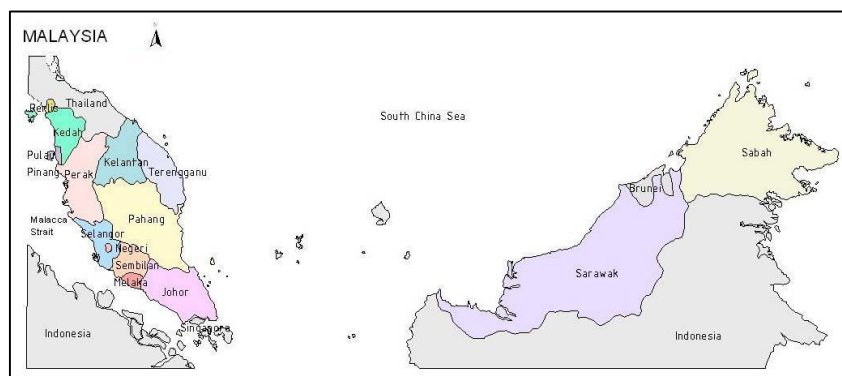
¹⁴ Ibid, 4.

¹⁵ The linguistic and archaeological evidence suggested that the first migrants, referred to as Proto Malay, originated from Taiwan around 4000 to 3000 BC. This migration took place towards Borneo, Sulawesi, Central Java and Eastern Indonesia through the Philippines: Leonard Y. Andaya, 'The Search for the 'Origins' of Melayu' (2001) 32(3) *Journal of Southeast Asian Studies* 315, 316.

¹⁶ Ibid, 316.

¹⁷ Wan Isa Hatin et al, 'Population Genetic Structure of Peninsular Malaysia Malay Sub-Ethnic Groups' (2011) 6(4) *PLOS ONE* e18312. doi:10.1371/journal.pone.0018312

influx of migration from various regions in the Indonesian Archipelago occurred and grew stronger during British colonisation.¹⁸ This group mostly inhabited the coastal areas of the Malay Archipelago and also pushed the more primitive Proto-Malays into the rural and mountainous areas.¹⁹



Map 1: Map of Malaysia

For some former colonies, such as Malaysia, the concept of ‘indigenous’ as understood in international law is problematic (Chapter 7.II.A). The Orang Asli fall within the standard definition as they have an ancient connection with their land: however, they also fall outside the definition as they were not colonised by European powers so much as by Malays. This occurred so long ago that Malays are also within the definition in that they too have an ancient connection with the land. Upon achieving independence, some former colonies with indigenous populations refused to concede that there were any indigenous peoples in their territories and the majority groups in these countries continued the dispossession of minorities.²⁰ In Peninsular Malaysia, which achieved its

<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0018312>. Another account believes that the Malays are descendants of the former Deutro Malays who left the southern Yunnan province to come to the peninsula during the second wave of mass migration that occurred in the 15th century: Bellwood PS, *Prehistory of the Indo-Malaysian Archipelago*, (University of Hawai'i Press, 1997) x, 384.

¹⁸ Wan Isa Hatin et al, above n 17. See also, Maruyama S et al, 'MtDNA Control Region Sequence Polymorphisms and Phylogenetic Analysis of Malay Population Living in or around Kuala Lumpur in Malaysia' (2010) 124(2) *International Journal of Legal Medicine* 165.

¹⁹ Alan G. Fix, 'Malayan Paleosociology: Implications for Patterns of Genetic Variation among the Orang Asli' (1995) 97(2) *American Anthropologists* 313, 313.

²⁰ Amelia Cook and Jeremy Sarkin, 'Who Is Indigenous: Indigenous Rights Globally, in Africa, and among the San in Botswana' (2009-2010) 18 *Tulane Journal of International and Comparative Law* 93, 105-109; Aoife Duffy, 'Indigenous Peoples' Land Rights: Developing a Sui Generis Approach to Ownership and Restitution' (2008) 15(4) *International Journal on Minority and Group Rights* 505, 515-16; Benedict Kingsbury, 'Indigenous Peoples in International Law: A Constructivist Approach to Asian Controversy' (1998) 92(3) *The American Journal of International Law* 414, 416-18.

independence in 1957 as Malaya, a concept of different ethnicities was preserved, but the Malays remained the dominant indigenous group.²¹

The Orang Asli also have similarities with the concept of 'national minorities' in international law. This concept emerged as the rise of nationalism in Europe in the 1800s linked states to particular national languages and cultures, revealing distinct groups which did not share those characteristics. This explains why national minorities are described in terms of 'ethnic, religious and linguistic minorities'.²² Whereas it was once the view that such groups should be assimilated, the present general view is that such differences should be preserved. If they constitute 'original populations' and live a pre-industrial life, they may be treated as 'indigenous'.²³ The research thus treats the Orang Asli as indigenous but is informed by the limitations of that concept and the insights to be derived from the concept of 'minority'.

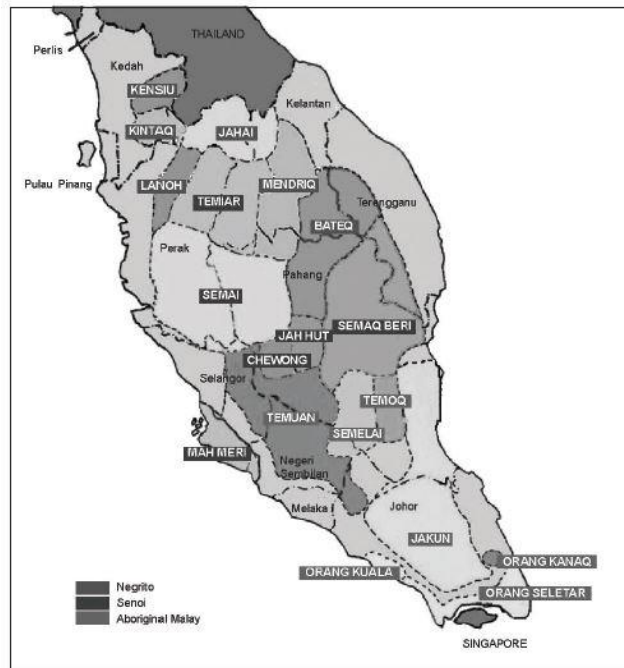
B The Orang Asli, Access to Forest Resources and the Law

Ownership of, and access to, land and resources is a major issue faced by the Orang Asli communities about 40% of whom reside within or near forested areas. The following Figure 1 shows the geographical distribution of the Orang Asli. Most of them are located within the mountainous and forested areas in the middle part of the peninsula.

²¹ Alice M Nah, '(Re) Mapping Indigenous 'Race'/Place in Postcolonial Peninsular Malaysia' (2006) 88(3) *Human Geography* 285, 285-8; Alice M Nah, 'Negotiating Indigenous Identity in Postcolonial Malaysia: Beyond Being 'Not Quite/Not Malay'' (2003) 9(4) *Social Identities: Journal for the Study of Race, Nation and Culture* 511; William F Case, 'The New Malaysian Nationalism: Infirm Beginnings, Crashing Finale' (Sept 2000) 1(2) *Asian Ethnicity* 131, 134-9.

²² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27 (ICCPR); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, UN Doc A/Res/47/135 (18 December 1992).

²³ Justin Kenrick and Jerome Lewis, 'Indigenous Peoples' Rights and the Politics of the Term 'Indigenous'' (2004) 20(2) *Anthropology Today* 4, 4-5; Cook and Sarkin, above n 20, 105-9.



Map 2: Locations of Orang Asli Groups²⁴

They depend on forest resources both for subsistence and cash income. Most communities living in or near forests still rely on the forests, rivers, shifting cultivation, hunting and gathering, fishing and other subsistence-based activities. Many also seek cash income from trading non-timber forest products including herbal medicines, wild honey, resin, bamboo, rattan, akarwood, fish and frogs. Many also grow cash crops of rubber, oil palm or cocoa. Their ancestral lands are also fundamental to their cultural and spiritual needs. The significance to the Orang Asli of the forest, its environment, land and resources is discussed in Chapter 5.

There has been considerable conflict between the Orang Asli communities and state governments over their continued customary rights in relation to land and forests. The indigenous minorities assert, on the basis of their traditional and customary laws, a right to the occupation of land and use of forest resources that they have enjoyed for generations. On the other hand, the prevailing view of the Orang Asli's occupation of land and access to forest resources is that these are 'privileges' extended by the states at the governments' discretion. Without the grant of title, it is widely believed that the Orang Asli live on state land as tenants-at-will, at the absolute discretion of the state authorities.

²⁴ The map is reproduced from Human Rights Commission of Malaysia (Suhakam), above n 3, 13. The names of the groups are labelled in boxes.

In July 2013, the Malaysian National Human Rights Commission released its report on a national inquiry into the position of land rights of the indigenous peoples in Malaysia. This is the first inquiry in Malaysia to study the land rights issues faced by the indigenous peoples including the Orang Asli. The report reveals gross violation of their rights to land and resources.²⁵ This report suggests an urgent need for the law in Malaysia to be reformed.

The traditional rights of the Orang Asli are partly recognized by Malaysian common law. Under common law, their customary laws, customs and practices are the source of the rights that define the nature of aboriginal land rights, ie, the scope and extent of their rights and interests.²⁶ Continuous occupation and control of land may also evidence their land rights²⁷ which may also include the right to forage and hunt the resources in the area.²⁸ The principles developed by the court are supported by: the common law principle of respect for the right of the inhabitants that acknowledges the use and occupation of land by indigenous peoples; the statutory right provided under the *Aboriginal Peoples Act 1954*; and, the constitutional provisions on the special position of the Orang Asli.²⁹

Statute law is generally silent on matters of Orang Asli land rights, although the communities' special position is acknowledged and some access to forests is recognized.³⁰ Under the state land codes, state authorities have wide powers to dispose of title to state land. Title to state land cannot be acquired by adverse possession, unlawful occupation or occupation under any licence. However, there is a savings clause in the codes preserving customary tenures.³¹ These may include the customary rights of

²⁵ Human Rights Commission of Malaysia (Suhakam), above n 3.

²⁶ *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 (High Court of Malaya) ('*Adong (No 1)*'); *Kerajaan Negeri Johor v Adong bin Kuwau* [1998] 2 MLJ 158 (Court of Appeal) ('*Adong (No 2)*'); *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241 (High Court of Sabah and Sarawak) ('*Nor Anak Nyawai (No 1)*'); *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591 (High Court of Malaya) ('*Sagong (No 1)*'); affirmed by Federal Court in *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677 ('*Madeli*'). See also a recent case, *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] MLJU 291 (High Court of Malaya) ('*Mohamad Nohing*').

²⁷ *Madeli* [2008] 2 MLJ 677.

²⁸ *Mohamad Nohing* [2013] MLJU 291.

²⁹ *Adong (No 2)* [1998] 2 MLJ 158; *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289 (Court of Appeal) ('*Sagong (No 2)*').

³⁰ See Chapter 6.

³¹ See, eg, *National Land Code* (Malaysia):

s 4(2)(a): Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of any law for the time being in force relating to customary tenure.

s 40: There 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

the Orang Asli but were not interpreted as extending to their land until *Sagong Tasi v Kerajaan Negeri Selangor* in 2002.³² This interpretation of the law and its implementation in practice jeopardized the land tenure of the Orang Asli. The state forestry laws and other legislation enforce state control of forests and have led to the creation of forest reserves and other conservation-related reserves. These further restrict the access of the Orang Asli to their resources.³³ In the 10th Malaysia Plan (2011–2015), the federal government proposes to grant land to Orang Asli communities as agricultural development schemes,³⁴ without acknowledging their customary rights over their land. This has been seen as an attempt to abolish those rights.³⁵

The uncertain law, the lack of formal recognition and the practice of state agencies has resulted in insecurity for the Orang Asli. Despite common law on Orang Asli land rights, encroachment on their customary lands by outsiders continues, either with state permission or illegally for logging, commercial plantations and farming, and infrastructure development.³⁶

any land in the State the rights to which have not been specifically disposed of by the State Authority

S 41 provides for power of disposal and reversion to state authorities:

No title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever.

³² [2002] 2 MLJ 591.

³³ See, eg, Jeyamalar Kathirithamby-Wells, *Nature and Nation: Forests and Development in Peninsular Malaysia* (NIAS Press, 2005), 125-133; Shaik Mohd. Noor Alam Hussain, 'Legal Aspects of Forestry' (1983) 1 *Current Law Journal* 64.

³⁴ Economic Planning Unit Government of Malaysia, '10th Malaysia Plan (2011-2015)' (2010), 149; National Land Council Malaysia, 'Dasar Pemberimilikan Tanah Orang Asli (The Policy of Land Alienation to Orang Asli)' (4 Dec 2009).

³⁵ Persatuan Orang Asli SeMalaysia and Alliance of NGOs of Orang Asli Malaysia, 'Memorandum Bantahan Dasar Pemberimilikan Tanah Orang Asli (Memorandum against the Policy of Land Alienation to Orang Asli)' (17 March 2010) <http://www.aliran.com/index.php?option=com_content&view=article&id=1256:memo-bantahan-dasar-pemberimilikan-tanah-orang-asli&catid=95:2010&Itemid=48>. See also, Jerald Gomez, 'The Recognition and Content of Native Title in Peninsular Malaysia' (2011) *Malayan Law Journal* xci; Rusalina Idrus, 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) 29(Suppl. 1) *Malaysian Studies* 53, 69-70.

³⁶ Eg of news reports on state sponsored encroachment of Orang Asli land and conflict: 'Temiar Tribe in Dire Straits', *The Sun Daily* (online), 13 February 2013, 4 <<http://www.thesunpaper.com/wed/13022013/files/assets/basic-html/page4.html>>; Nigel Aw, 'Mega Plantations Gobble Up Kelantan Orang Asli Land', *Malaysiakini* (online), 28 December 2012 <<http://www.malaysiakini.com/news/217554>>; Mustafa K. Anuar, 'The Temiar Blockade, Arrests in Gua Musang', *The Malaysian Insider* (online), 30 January 2012 <<http://www.themalaysianinsider.com/litee/sideviews/article/the-temiar-blockade-arrests-in-gua-musang-mustafa-k.-anuar/>>; Zulaikha Zulkifli, 'Hundreds of Orang Asli Deliver Memo to Pahang MB', *Malaysiakini* (online), 17 October 2012 <<http://www.malaysiakini.com/news/211999>>; Hasan Mat Nor et al, 'Mengapa kami jadi begini? Konflik masyarakat Orang Seletar dan Pembangunan

From a legal point of view, there is also a conflict between that developing common law and existing legislation, practices and policies on forests, the main source of revenue for some states in the Malaysian Federation.

The growing global economic significance of forests in carbon trading and REDD+ (Reducing Emissions from Deforestation and Forest Degradation) schemes may also adversely affect Orang Asli rights.³⁷ Malaysia is also proposing to implement REDD+. While there is growing recognition that the indigenous peoples need to be consulted and their rights addressed, such schemes are criticised for their lack of commitment to addressing those rights.³⁸ This could lead to further loss by the Orang Asli of their forest rights.

The precarious status of the land rights of the Orang Asli is also increasingly inconsistent with the growing recognition of indigenous rights in international law and in the domestic laws of other jurisdictions. There is legislation giving recognition to the customary land rights of indigenous peoples in common law countries, such as Australia, Canada, New Zealand, and India.³⁹ At the international level, the *Declaration on the Rights of Indigenous Peoples* (UNDRIP)⁴⁰ has been adopted by a majority of votes, including Malaysia's, by the United Nations' General Assembly. An earlier instrument is the

Iskandar, Johor Bahru, Malaysia [Why do we become like this? The conflict of Orang Seletar communities and Iskandar Development, Johor Bahru Malaysia] (2009) 5(2) *Malaysian Journal of Society and Space* 1; 'Orang Asli protest loss of land', *The Star* (online) 20 June 2010 <http://thestar.com.my/news/story.asp?file=/2010/6/20/nation/6508246&sec=nation>; Laven Woon, 'Orang Asli Land Still under Threat', *Free Malaysia Today* (online), 28 September 2012 <<http://www.freemalaysiatoday.com/category/nation/2012/09/28/orang-asli-land-still-under-threat/>>; 'Orang Asli ordered to vacate land get consent stay', *Sunday Daily* (online), 14 August 2012 <<http://www.thesundaily.my/node/111762>>. Malaysia has also been cited as among the countries with rapid and increasing loss of forests: M C Hansen et al, 'High-Resolution Global Maps of 21st-Century Forest Cover Change' (2013) 342(6160) (November 15, 2013) *Science* 850.

³⁷ REDD+, which is one of the global responses to climate change, creates an incentive for developing countries to protect and preserve the forest. It is supported by the United Nations through its organizations ie Food and Agriculture Organization (FAO), United Nation Development Programme (UNDP) and United Nation Environment Programme (UNEP). It creates a value for the carbon stored in trees of participating developing countries which is paid by participating developed countries for the trees' carbon offsets. See, eg, Ingrid Barnsley, 'UNU-IAS Report: Emissions Trading, Carbon Financing and Indigenous People' (Institute of Advanced Studies, United Nations University, 2008) <http://www.ias.unu.edu/resource_centre/UNU-CARBONMARKET.pdf>.

³⁸ See, eg, Torsten Krause, Wain Collen and Kimberly A Nicholas, 'Evaluating Safeguards in a Conservation Incentive Program: Participation, Consent, and Benefit Sharing in Indigenous Communities of the Ecuadorian Amazon' (2013) *Ecol Soc*; Monica Di Gregorio et al, 'Equity and REDD+ in the Media: a Comparative Analysis of Policy Discourses' (2013) 18(2) *Ecology and Society* 39.

³⁹ See Chapter 7.

⁴⁰ GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/RES/61/295, adopted 13 September 2007.

*International Labour Organisation's ('ILO') Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (ILO Convention No 169).*⁴¹ These developments affirm the existing rights of the indigenous peoples to land and resources, and have created awareness amongst the Orang Asli of the possibility of a greater recognition of their rights. The recognition in Malaysian common law of some of their customary land rights has also been influenced by these developments.⁴²

The increasingly restricted access to natural resources for the Orang Asli is having serious effects on their livelihoods, security, health, mobility, and cultural and spiritual well-being. In 2003, less than 6% of the Malaysian population lived in poverty whereas 77% of the Orang Asli did. One third are amongst the very poor, which is 25 times the national average.⁴³ The high incidence of poverty among the Orang Asli is also acknowledged in the current 10th Malaysia Plan (2011–2015).⁴⁴ Many lack basic amenities. They have low levels of education.⁴⁵ They suffer from poor health, with a disproportionately high number of deaths in childbirth and high infant mortality rates, a lower life expectancy compared to the national average, and higher reported rates of infectious and parasitic diseases and malnutrition.⁴⁶ The present situation of the Orang Asli represents the common set of problems identified by Wiessner in arguing for a specific prescription of human rights for indigenous peoples: their shared lands were taken away; the way of life of the dominant group was imposed; their political autonomy was drastically curtailed; they have been reduced to extreme poverty, disease, and despair.⁴⁷

In view of this position, there is an urgent need for Malaysian law on land and forests to be reformed to redress the inequities endured by the Orang Asli.

C Previous Works on the Law and Resource Rights of the Orang Asli

⁴¹ Opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

⁴² *Adong (No 1)* [1997] 1 MLJ 418; *Sagong (No 2)* [2005] 6 MLJ 289.

⁴³ Colin Nicholas, *Orang Asli: Rights, Problems, Solutions* (Suhakam, 2010), 37-9.

⁴⁴ The Economic Planning Unit, 'Tenth Malaysia Plan' (The Economic Planning Unit, Prime Minister's Department, 2010) <http://www.pmo.gov.my/dokumenattached/RMK/RMK10_Eds.pdf>, 162.

⁴⁵ Suhakam, *Laporan Status Hak Pendidikan Kanak-kanak Orang Asli (Report on the Status of Education Rights of the Orang Asli Children)* (Suhakam, 2010).

⁴⁶ See, eg, Nicholas, above n 13, 33-6; Lim Y AL, 'Intestinal Parasitic Infections Amongst Orang Asli (Indigenous) In Malaysia: Has Socioeconomic Development Alleviated The Problem?' (2009) 26(2) *Tropical Biomedicine* 110.

⁴⁷ Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57, 98.

While there is a large body of literature available from various disciplines including anthropological and sociological perspectives on the use of the forest by the Orang Asli communities, the legal literature remains quite limited.⁴⁸ Legal studies at PhD level specifically pertaining to the legal position on the rights of the Orang Asli in Malaysia have been undertaken by Yogeswaran Subramaniam,⁴⁹ Rohaida Nordin⁵⁰ and Hamimah Hamzah.⁵¹ The first two have relied on the international law on indigenous peoples to consider the legal position on the rights of the Orang Asli in Malaysia. The thesis by Subramaniam is a law reform project that proposes a legal framework for recognition and protection of the Orang Asli land and resource rights by specific reference to the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) with reference to the *Federal Constitution*. Having a similar focus on international law, Rohaida considered the possibilities for international law to impact on the indigenous peoples's rights within the Malaysian context. Examining the local laws and practices, she argued that regardless of the position of international law, the position of Orang Asli rights depends on domestic factors, both statutory and constitutional provisions, the judiciary and the state's capacity and willingness to act in the interests of the Orang Asli. The thesis by Hamimah is an empirical study on the land transactions among the Orang Asli in Pahang. She found that the customary land tenure of the Semai, the community studied, has gradually changed under the influence of the laws and policies introduced by the government.

There are also many studies in various disciplines on government and public policies affecting the Orang Asli's land rights.⁵² An earlier study by Colin Nicholas, using a socio-political approach, was a pioneering survey of the resource rights of the Orang Asli.⁵³

⁴⁸ On analysis on literature on Orang Asli studies, see Tuck-Po Lye, 'A History of Orang Asli Studies: Landmarks and Generations' (2011) 29(Supp. 1) *Malaysian Studies* 23.

⁴⁹ Yogeswaran Subramaniam, *Orang Asli Land Rights by UNDRIP Standards in Peninsular Malaysia: An Evaluation and Possible Reform* (PhD Thesis, University of New South Wales, 2012) <http://www.unsworks.unsw.edu.au/primo_library/libweb/action/dlDisplay.do?docId=unsworks_11285&vid=UNSWORKS>.

⁵⁰ Rohaida Nordin, *The Domestication of the Rights of the Indigenous Peoples (Orang Asli) in Malaysia* (PhD Thesis, Lancaster University, 2008).

⁵¹ Hamimah Hamzah, *Rights and Interests in Land among the Orang Asli in the State of Pahang: A Case Study* (PhD Thesis, International Islamic University Malaysia, 2011). See also, Hamimah Hamzah, *Rights and Interests in Land Among the Orang Asli in Pahang: Orang Asli and Customary Land Rights* (Lambert Academic Publishing 2012).

⁵² See, eg, Idrus, above n 35; Rusalina Idrus, 'From Wards to Citizens: Indigenous Rights and Citizenship in Malaysia' (2010) 33(1) *Political and Legal Anthropology Review* 89; Nah, above n 21; Gordon P Means, 'The Orang Asli: Aboriginal Policies in Malaysia' (1985) 58(4) *Pacific Affairs* 637; Alun Jones, 'The Orang Asli: An Outline of the Progress in Modern Malaya' (1968) 9(2) *Journal of Southeast Asian History* 286.

⁵³ Nicholas, above n 13.

Equally important was a study by Dentan et al which analysed the impact of development policies on the Orang Asli. It highlighted their exclusion from the special position enjoyed by the other indigenous peoples which led to the denial of their land rights.⁵⁴ These studies inform the administrative practice relating to Orang Asli land and resources and are thus useful to this thesis.

This study aims to address the gap in the legal analysis by examining this issue with a different approach. Using the various discourses on justice and human rights, and the historical development of law, philosophy and religion, it aims to argue for Orang Asli resource rights based on the principles of justice and humanity that govern the interpretation of existing laws and actions that affect those resource rights. It maintains the necessary multidisciplinary approach dictated by the subject. While the study relies on legal materials using doctrinal and comparative legal research, it also relies on anthropological, sociological and political sources available in both academic writing and the general media. Further details on the approach taken by the study are in Chapter 2, the 'Methodology of Research'.

With respect to the theoretical framework, a considerable number of works have analysed the various aspects of justice and humanity for indigenous peoples, especially related to international law. Some are referred to in Chapters 3 and 4. These studies, which are also connected to the growing significance of the concept of human rights, have contributed to the emergence and increasing strength of indigenous peoples' rights in international law. This thesis extends this approach to a Malaysian domestic context. It considers various aspects of justice relating to the resource rights of the Orang Asli and has analysed them against the conception of the Malaysian law.

III THE OBJECTIVE OF THE RESEARCH, THEORETICAL FRAMEWORK AND RESEARCH QUESTIONS

A Objective of the Research

Using aspects of selected concepts of justice, fairness, equality and non-discrimination as a theoretical framework, this research examines and analyses several key issues related to the reform of Malaysian law on Orang Asli rights in forests. It seeks to argue that the principles of justice are the governing principles which influence the development of the laws relating to access to resources including by the Orang Asli. The present laws

⁵⁴ Dentan et al, above n 2.

should be interpreted and their reform should be considered in the context of these principles.

The term 'forest resources' refers to both forest produce, including plants and animals, as well as the lands as places of living and fulfilling human needs, both social and cultural, and as bases for economic activities such as the source of livelihoods.

B Theoretical Framework: Principles of Justice, Equality and Non-Discrimination

Central to the emergence of the recognition of indigenous rights both in national and international law are principles of justice, equality and non-discrimination. This can be seen in the historical development of laws, in the common law principles that developed from long-standing practice, in emerging international law, in concepts of equality before the law, and in non-discrimination and distributive justice based on the equal distribution of social benefits and burdens. The thesis suggests that the principles are normative in the analysis of laws and policies, their interpretation and future direction. These principles are used to frame the research questions considered below.

There is an initial question of whether ideas of justice derived from other areas of law can apply to indigenous rights, which may be unique.⁵⁵ This project assumes that they can be, provided that this question is borne in mind.

The thesis takes multiple approaches to establish the framework based on the principles of justice and fairness, including historical, legal, philosophical and religious approaches. From historical and legal perspectives, this thesis traces the origin of the recognition of indigenous rights, the literature and past practice in Peninsular Malaysia and other regions. It argues that the principles, developed from long-standing practices, were significant to the development of the present laws affecting the rights to resources by the Orang Asli. It argues that the laws were developed with the intention of respecting the rights of the inhabitants including the Orang Asli. It also suggests that the current legal arrangements in Malaysia rest on the value and ideals of justice which respect rights and represent equality and fairness. These principles provide the background against which the law is assessed and interpreted (Chapter 3).

From a philosophical perspective, the thesis examines the debates on the moral justifications for distributive justice as proposed by contemporary philosophers (Chapter 4). These debates provide the scope and meaning of contemporary discourse on justice

⁵⁵ Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land Rights* (Cambridge University Press, 2007), 91; Duffy, above n 20, 538.

that focuses on recognition and respect of rights and interests of people and their diversity as the central element of justice. This is significant in the matter of resource distribution that may violate existing peoples' rights, including those of the indigenous peoples.

Justice can be used in at least three significant contexts: fairness in the allocation of resources; fairness in restitution for, or reparation of, wrongs; and fairness in processes and procedures.

Firstly, distributive justice is about the distribution of benefits and burdens in society.⁵⁶ The basis of distributive justice is equality, that is, all persons should share equally the benefits and burdens in society.⁵⁷ As proposed by Rawls, distributive justice seeks to maximise the rights of all individuals without disadvantaging those with the least endowment of rights. It acknowledges that equality of opportunity as represented by formal equality is not sufficient. Some affirmative action is required to deliver real or substantive equality according to needs, relative poverty and contribution to general well-being.⁵⁸ Nozick, whose conception of justice is based on legitimacy, opposed Rawls' views. According to him, justice requires that people not violate the rights of others which is what occurs when there is a redistribution of rights. According to Nozick, property is only acquired through having the right genealogy. That genealogy can be demonstrated in two ways: one is by working on things which are unowned; while the other is by a transfer from a person with valid rights by sale, gift or inheritance.⁵⁹ Substantive equality, of the Rawlsian kind, attempts to address the reasons for, and effects of, complex discrimination. This allows laws which target the inequalities experienced by particular groups, which have been adopted in Malaysia. At the same time, any distribution must be in accordance with fundamental rights which incorporate rules of natural justice.⁶⁰

The foundation for substantive equality is recognized by the *Federal Constitution* which acknowledges the special interests of the indigenous peoples.⁶¹ The absence of recognition of the rights of indigenous peoples under their traditional laws of land tenure

⁵⁶ Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009), 333.

⁵⁷ John Rawls, *A Theory of Justice* (Oxford University Press, 1999), 47, 51-6.

⁵⁸ *Ibid.*

⁵⁹ Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974), 150-3, 207-13.

⁶⁰ *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, [5]; cf *Haw Tua Tau v PP* [1981] 2 MLJ 49, both are appeals in the Privy Council, Singapore on the position of the principle of natural justice in the interpretation of the word 'law' in Art 9(1) of the Singapore Constitution which is in *pari materia* with Art 5(1) Malaysian *Federal Constitution*. The Privy Council was the highest appellate court in the Malaysian legal system until 1 January 1985.

⁶¹ *Federal Constitution* (Malaysia) arts 8, 153; S M Huang-Thio, 'Constitutional Discrimination under the Malaysian Constitution' (1964) 6(1) *Malaya Law Review* 1, 1.

contravenes the principle of non-discrimination. Even Nozick may have problems with this as, without it, there would have been a previous redistribution which would have violated the rights of the indigenous peoples. International law explicitly recognizes that historical discrimination against indigenous people involves denial of their fundamental rights, including property rights.⁶² However, discrimination on the basis of race contravenes liberal ideas of individual rights and equality, as well as Malaysian law and international instruments on human rights recognized to be common to all peoples and nations. These ideas are in possible tension with the recognition of the rights of indigenous peoples in the *Constitution*.

Secondly, restorative justice seeks to rectify past wrongs, such as the misappropriation of rights or resources. It is commonly associated with crimes but it also applies to restitution in civil law. It is seen in emerging international law, such as Art 28 of UNDRIP.⁶³ It is increasingly seen in national legal systems seeking to address issues over land⁶⁴ but also the removal of indigenous children from their families and peoples.⁶⁵

Thirdly, procedural justice deals with the resolution of disputes over conflicts in the allocation of resources. A fair procedure is one that affords those who are affected with an opportunity to participate in the decision making.⁶⁶

The study also considers the religious perspectives relevant to Malaysia to support the position of respect for the rights of peoples on an equal basis regardless of religion.

The theoretical discussion informs the study on the necessary normative principles to be used in the analysis and it provides standards by which existing laws and proposed laws can be evaluated. It establishes a principle-based framework giving a central focus on human rights in approaching the issue of Orang Asli forest rights. The elements of justice established above are used as the framework in examining the domestic law and in the comparative perspectives in the chapters that follow.

⁶² Lavanya Rajamani, 'Community Based Property Rights Regimes and Resource Conservation in India's Forests' in Aileen McHarg et al (eds), *Property in the Law in Energy and Natural Resources* (Oxford University Press, 2010) 453, 453.

⁶³ It provides for the granting of new land 'equal in quality, size, and importance to that lost'.

⁶⁴ See, eg, Anita Jowitt, 'Indigenous Land Grievances, Customary Land Disputes And Restorative Justice' (2009) 13(1) *Journal of South Pacific Law*, [10]; Duffy, above n 20, 522; Meredith Gibbs, 'Using Restorative Justice to Resolve Historical Injustices of Indigenous Peoples' (2009) 12(1) *Contemporary Justice Review* 45, 45-6; Susan Dodds, 'Justice and Indigenous Land Rights' (1998) 41(2) *Inquiry* 187, 195-6; Peter d'Errico, 'Restorative Indigenous Justice: States and Communities in Tension' (1999) 2(4) *Contemporary Justice Review* 383.

⁶⁵ See, eg, Antonio Buti, 'Reparations, Justice Theories and Stolen Generations' (2008-2009) 34(1) *University of Western Australia Law Review* 168, 170-1.

⁶⁶ Rawls, above n 57, 52-3, 198.

Taking the principled approach in the analysis of various perspectives highlights the need to recognise that there is a gap between what the law is, especially its prevailing practice; and the normative aspects of it as argued. At the same time, although the analysis is normative in its approach, the position and the practice in the law that seriously affect the position of the rights of the Orang Asli are also acknowledged and considered (chapter 9).

C Research Questions

On that basis, the thesis sets out to answer the following research questions:

1. What are the rights of the Orang Asli in forests under their own laws and customs?
2. To what extent are the rights of the Orang Asli recognized in existing laws and policies on forests in Malaysia?
3. What are the rights and interests of the indigenous peoples in forests under international law?
4. What is the most effective way to accommodate the rights of the Orang Asli in forests?
5. In this context, if legal ideas were to be transplanted, what are the factors that would influence effective legal transplants between donor and host legal systems?

The extent of the rights and interests of the Orang Asli in land and forest resources under their customs and traditional laws are briefly examined using available ethnographic resources (Chapter 5). Chapter 5 attempts to identify their entitlements in the forest land and resources in their own law as reflected in customs, usages and traditions. It analyses the position of custom in the Malaysian legal system as it provides a basis for the entitlement of the communities. It examines two aspects of custom and practice: the peoples' perspective on land and forest resources in terms of interests that they perceive according to their custom and practice; and the economic significance of forest land and resources. It is based on the accounts of various studies from different disciplines especially sociology and anthropology. Data from interviews conducted during the fieldwork are used to corroborate the information.

These rights are compared with the relevant existing laws and policies in Malaysia by examining rights of the Orang Asli through emerging common law, forest-related legislation and the legal powers of the states vis-à-vis their fiduciary duties to the Orang Asli (Chapter 6). This is to identify Orang Asli rights in forest resources under current

Malaysian laws and the effect of current Malaysian laws on those rights. Chapter 6 explores the current position of those rights and their specific contents, particularly in respect to forest resources. It analyses the relevant laws and attempts to identify the rights as recognized by legislation and common law. Chapter 6 also considers key issues involving the relationship between common law developments and statutes, specifically the impact of emerging common law rights on forestry-related statutes and customary rights. It examines the issues that affect the security of those rights. It identifies the limitations of the current position from the aspects of justice and fairness around which the thesis is structured.

The thesis also employs a comparative perspective on access to natural resources by indigenous peoples. This perspective provides standards to assess the possibility of law reform. It draws on laws in other selected jurisdictions considered relevant to Malaysia through comparative perspectives and on international law relating to human rights in general and the rights of indigenous peoples and minority groups in particular (Chapters 7-8). This includes the chapter on Malaysian law: these are interpreted using principles of legal interpretation which are more often applied than subjected to consideration and critique of their methodology (Chapter 2). In referring to the foreign laws as sources of appropriate standards, the thesis also considers their relevance to Malaysian law.

The position in other jurisdictions and in international law is framed by the elements established in the structure: 1. the recognition and acknowledgement of rights to natural resources including the contents and extent of the rights; 2. restorative measures; 3. environmental justice; and 4. procedural mechanisms proposed or established to address claims from the perspectives of procedural justice. The norms developed in international law and the law reform projects in foreign jurisdictions suggest possible mechanisms to accommodate the customary rights of the Orang Asli in forest resources in the Malaysian legal system.

In considering international law as a source of legal principles and the appropriateness to Malaysia of principles from the selected foreign legal systems, the study employs concepts from comparative law including legal transplants. The discourse on legal transplantation is employed to consider the position of Malaysian law relating to the forest rights of the Orang Asli, the impact of the changes made to these rights through common law, the influence of international law and developments in other jurisdictions, and the appropriateness and effectiveness of any proposals for law reform.

The final part of the thesis provides a conclusion and recommendations drawn from the research, including suggestions for future research and the limitations of this research.

IV CONTRIBUTION TO KNOWLEDGE AND STATEMENT OF SIGNIFICANCE

A Academic Contribution

The research is significant in the Malaysian context. While it is framed within the context of legal analysis, it extends the current knowledge on possible reforms to the law involving the land rights of the Orang Asli. It may also provide a model for indigenous peoples in other jurisdictions. In the context of comparative law, it will assist in understanding the limits to, and the adaptability of, transplants across legal systems. The study also contributes to the literature analysing the relationship between international law and national law, and the role of international law in the convergence of legal systems.

B Practical Contribution

This research also makes a practical contribution to the legal policies and legislation for the protection of the forest resources rights of the Orang Asli. It provides data for law reform in the area which is significant in realizing restorative justice for peoples who have long been deprived of recognition of their land rights. Reform to the law relating to the land and resources rights of the Orang Asli is vital in view of the association of land with their life and in preserving their distinct identities and cultures as well as enhancing their socio-economic status. This is also crucial for Malaysian society as a whole and for a nation which seeks social integrity and harmony.

CHAPTER 2: METHODOLOGY OF RESEARCH

This chapter discusses the methodology of research adopted in the study, the means used to gather information and data, the rules of interpretation and the criteria for admissible explanations and analysis. Research is 'a systematic and organized effort to investigate a specific problem that needs a solution'.⁶⁷ Based on the research questions identified at the outset, data collecting techniques and data processing routines were developed to answer them.⁶⁸

The theoretical framework for this study incorporates the concepts of fairness and justice as the necessary normative principles in the analysis of laws and policies, including those relating to the rights of indigenous peoples in natural resources. This can be seen in common law principles, in emerging international law, in concepts of equality before the law, and in non-discrimination and distributive justice based on the equal distribution of social benefits and burdens. This especially applies in the analysis of the position of the law affecting the rights of the Orang Asli to forest resources. Part of the framework involves the use of ethnographic resources to construct the Orang Asli communities' rights under their own legal systems. Other parts of the framework draw on Malaysian law, similar laws in other jurisdictions and on international law by using doctrinal and law reform approaches. These approaches are applied to examine various legal rules in Peninsular Malaysia affecting the rights of the Orang Asli in forest resources. Specifically, the doctrinal study analyses relationships between various kinds of rules in terms of their applications, interpretations and implementations. Using a reform-oriented approach, this study evaluates the existing legal provisions that affect the interests of the indigenous peoples in forest resources. The approaches in the law reform study use:

1. a comparative law methodology, involving relevant law and relevant policy on indigenous rights to resources in international law and some selected jurisdictions;
2. an empirical data collection by way of interviews; and
3. an analysis of various literature including news databases, internet sites and annual reports of relevant organisations to examine the context of the domestic legal framework and its impact within the broader social and political milieu.

⁶⁷ David E Gray, *Doing Research in the Real World* (Sage Publication, 2nd ed, 2009), 2.

⁶⁸ Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3rd ed, 2010), 2.

I CATEGORIES OF LEGAL RESEARCH

This study adopts a theoretical, doctrinal, reform-oriented approach to legal research to answer each of the research questions identified. Each of these categories makes use of a variety of methodologies. The use of these three categories of legal research is a common feature of legal research.⁶⁹

II THEORETICAL RESEARCH

Theoretical research seeks to foster a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.⁷⁰ The approach is used to understand the position of the relevant law based on the theoretical framework combining theories of justice and fairness, and the concepts of indigenous peoples and minority groups under international law. The theory provides the basis to assess and evaluate the existing law and to seek a better and more acceptable legal outcome. The theoretical framework is discussed in Part 2 (Chapters 3 and 4).

III DOCTRINAL LEGAL RESEARCH

Doctrinal and library-based research of legal rules and principles is a traditional method of legal research. It provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and may also predict future developments. It also involves background reading which leads to identification of primary and secondary sources of law and the process of synthesising all the issues in context to reach a tentative conclusion about what the law is.⁷¹

A Sources of Law

In Malaysia, Art 160(2) of the *Federal Constitution* defines law as including 'written law, the common law in so far it is in operation in the Federation and any custom or usage

⁶⁹ Submission of Australian Law Deans (April 1986) to the CTEC Assessment Committee for the Discipline of Law, published in Dennis Pearce, Enid Campbell and Don Harding, *Australian Law School: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra: Australian Government Publishing Service, 1987) vol. 2, para. 9.15, cited in Michael Pendleton, 'Non-empirical Discovery in Legal Scholarship - Choosing, Researching and Writing a Traditional Scholarly Article' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press Ltd, 2007) 159, 159.

⁷⁰ Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Method for Law* (Edinburgh University Press Ltd, 2007) 16, 19.

⁷¹ *Ibid*, 41-2.

having the force of law in the Federation'. The position of custom as the source of law in the legal system is discussed in Chapter 5.1.

Secondary sources of law provide a background and context that assist in the analysis of the primary sources. They include reports by Parliamentary Committees; parliamentary inquiries; reports by consultants, law reform and non-governmental organisations (NGOs); government policy statements; legal commentaries (scholarly and professional journals or periodical articles, conference papers, textbooks, newsletters, circulars, speeches by key figures within relevant legal institutions); news databases; and internet sites of relevant organisations. Thus, this research involves a critical analysis of the existing research literature, theoretical and empirical, related to the research topic. This is to establish the nature and parameters of the law and to consider the problems currently affecting the law and the policy underpinning the existing law. The literature is reviewed, synthesised and summarized to form overall principles, standards and rules.

B Common Law and Legal Reasoning

1 Nature of the Common Law

A large part of the law is common law, even if precedent interprets legislation. The common law is created by judges in the exercise of the judicial role interpreting constitutions and statutes in a process of legal reasoning. On the nature of the common law, Eisenberg wrote,

What then does the common law consists of? It consists of the rules that would be generated at the present moment by application of the institutional principles of adjudication. ... To determine the context of the common law, courts do not begin with doctrinal propositions adopted in past texts and work backward to determine their validity; they begin with a set of institutional principles and work forward to generate legal rules. These institutional principles instruct the courts that in determining the law, they should take account not only of doctrinal propositions promulgated by officials of the relevant jurisdictions, but also of the criticism and understanding of those propositions expressed in the professional discourse, doctrinal propositions established in the professional literature, and applicable social propositions. The rules generated by the interplay among those propositions under the institutional principles of adjudication are what the courts conceive to be law and properly so.⁷²

This shows that judges, in interpreting the laws which are written or unwritten, do not work in a vacuum, but are informed not only by doctrinal propositions but also by social propositions, including morality, policy and experience. The professional legal

⁷² Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988), 154, 156.

community consisting of not only judges, but also lawyers and academics, plays a large role in the common law's evolution. It may not be about the text so much as the understanding of the professional community which gives the law predictability. That community, as has been argued by some, including Karl Llewellyn and Fish,⁷³ can predict how far a judge can go in making choices, within the understood boundaries.

Llewellyn also identified 14 major 'steading factors' in the law including 'legal doctrine' and 'known doctrinal techniques' that guided but did not control judicial behaviour⁷⁴ as he wrote in the context of the US legal systems in the first part of the 1900s. This perspective was informed by his knowledge of Cheyenne law and legal procedure.⁷⁵ He observed that the courts need to be persuaded that both justice and decency require the use of a particular doctrine and also the result which is argued for. This means that the manner in which facts are presented to give the context for the application of the doctrine is critical.⁷⁶ Judges also have broad but finite leeway, or discretion, in which they can interpret and apply the standards derived from legal doctrine.⁷⁷ There they are also constrained by other factors including those which Fish later developed into the concept of lawyers as members of interpretive communities.⁷⁸

In other words, legal reasoning is a complex process involving the interplay of various factors. In the words of Atiyah, 'the law does seem to be a seamless web, a huge network of interrelated rules of common law or case law, and of statute law'.⁷⁹ In many areas, statute law and common law are entwined; they may work in fusion or in the form of partnership. The courts function to interpret statutory provisions to build a body of principles which govern future cases. There are also statutes that specify broad standards that give courts the discretion to be exercised in accordance with common law methods to resolve conflicts or disputes as they think to be just and equitable.⁸⁰

⁷³ Fish S, 'Working on the Chain Gang: Interpretation in Law and Literature' (1982) 60 *Texas Law Review* 551.

⁷⁴ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, 1960), 6-7.

⁷⁵ Karl N Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Constructed' (1949-1950) 3 *Vanderbilt Law Review* 395, 401-6. See also, William Twining, 'Two Works of Karl Llewellyn. II: II. The Cheyenne Way' (1968) 31(2) *Modern Law Review* 165.

⁷⁶ Llewellyn, above n 74, 237-9.

⁷⁷ *Ibid*, 21-3. Llewellyn also observes that for almost every canon of construction, there exists the opposing canon against it: Llewellyn, above n 75, 401-6.

⁷⁸ See, eg, Llewellyn K, Anasaldi M (trans), *The Case Law System in America* (University of Chicago, 1989), 11; Fish S, *Is There a Text in This Class?* (Harvard University Press, 1980); Fish, above n 73.

⁷⁹ P S Atiyah, 'Common Law and Statute Law' (1985) 48(1) *Modern Law Review* 1, 3.

⁸⁰ *Ibid*, 2-5.

Many scholars divide legal reasoning into three types: induction, deduction and reasoning by analogy. However, Twining and Miers remarked that often in legal interpretation, the three types may be woven together within a single argument in a complex series of intermediate as well as ultimate conclusions.⁸¹ They argued that it is an endemic weakness of the theoretical literature on legal reasoning that it regularly presents an oversimplified picture of what is an extremely intricate process.⁸² What constitutes an appropriate interpretation is relative to the situation, role and objective of the particular interpreter.⁸³ The context of the situation and problems which led to its creation and of the processes in which it operates in practice is also important.⁸⁴

2 *Ratio Decidendi*

It is generally understood that based on the principle of *stare decisis*, the *ratio decidendi* of previous decisions by courts of appropriate rank bind other courts in later cases involving similar facts. This in part gives the common law predictability, and is also a basis of the common law. The body of common law emerges from the cases as they are decided by judges. On the other hand, Dworkin suggested that the common law is the principles which underlie the cases.⁸⁵

There are, however, conflicting definitions of ratio for a single case. Julius Stone observed

Two main methods of finding the ratio of a case are currently regarded as permissible and proper: one which seeks the holding on the "material facts" of the preceding case, the other which seeks the rule propounded by the precedent court as the basis for its decision. In the material facts version, the ratio decidendi is that reason which "explains" (or is "the basis" of, or is "necessary to explain") the holding by the precedent court on "the material facts" as identified by the precedent court. In the rule-propounded version, the ratio decidendi is that reason which is propounded by the court as "the basis" of (or as "explaining", or as necessary for "explaining its decision".⁸⁶

This substantiates the argument that the nature of the common law rules is indeterminate,⁸⁷ and is only a restraint within a broad leeway, as observed by Llewellyn. There is no single right and accurate way of reading a case or a cluster of cases. While Dworkin disagreed, his approach is principle based, which means that it has some

⁸¹ William Twining and David Miers, *How to Do Things with Rules* (Cambridge University Press, Third ed, 1992), 352.

⁸² *Ibid*, 358.

⁸³ William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1, 366.

⁸⁴ Twining and Miers, above n 81, 367.

⁸⁵ Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998).

⁸⁶ Julius Stone, *Precedent and Law Dynamics of Common Law Growth* (Butterworths, 1985), 123.

⁸⁷ Twining and Miers, above n 81, 367.

flexibility. For him, the law, as properly interpreted according to some coherent set of principles drawn from the complex political structure and decisions of a particular community, will give a right answer.⁸⁸ Twining and Miers also observed that there is no authoritative definition or clear criteria to determine the ratio.⁸⁹ This affords power and choices to judges through the interpretation of precedents.⁹⁰ More formalist judges will be attracted to the second of Stone's rules, deferring to the reasons given by the judge in the precedent, rather than the first of his rules, constructing the material facts in the precedent and generating a rule which reflects the results in the precedent. Twining and Miers agreed that judges do not always consider themselves to be strictly bound by the actual words used in explicit formulation of rules in binding precedents. This may be given considerable weight but they may reformulate the rules more widely or narrowly in their own words.⁹¹

Llewellyn suggested that there may be different factors that influence the selection process: the current tradition of judging and the current style of the court in what are believed to be the accepted and correct ways of handling precedent.⁹² Most importantly, he argued, the felt sense of the situation as the judge sees it, affects the court's choice of techniques for reading or interpreting and then applying the authorities. At times, elements of 'uprightness', 'conscience', 'judicial responsibility' and 'motive' provide leeway for judges to determine which techniques are correct in the situation.⁹³

This has been referred to by Twining and Miers as 'ratio-scepticism'. They argued that, in England and Wales in the late 1900s, certain aspects of the discourse and practice in interpreting cases should be considered.⁹⁴

First, the interpretation of ratio takes place in a growing body of legislation. This operates as a constraint on subsequent judicial interpretation because the statutory or other text provides a more clearly identifiable 'anchorage' for interpretation and argument than do the texts of judicial opinion.⁹⁵ This is also the case in Malaysia where legislation has always been more significant and is increasingly taking a more predominant place.

⁸⁸ Dworkin, above n 85, 245.

⁸⁹ Twining and Miers, above n 81, 319-20.

⁹⁰ *Ibid*, 319.

⁹¹ *Ibid*, 319-20.

⁹² Llewellyn, above n 75, 395-9.

⁹³ *Ibid*, 398.

⁹⁴ Twining and Miers, above n 81, 319.

⁹⁵ *Ibid*.

Second, unlike legislation, common law rules are not, as pointed out by Stone, a fixed verbal form of rules. They suggest that the texts of precedents are and should be interpreted, and reinterpreted in the context of other factors, including other precedents, which at the same time 'serve to constrain the range of plausible or colourable interpretation in a context'. Accordingly, interpretations of precedents can and do change over time.⁹⁶

Third, the propositions of law explicit or implicit in the reasoning in prior cases are often invoked as part of arguments and presented as part of the ratio. But both the propositions and the theory of its binding aspects are still open to question.⁹⁷ As already indicated, there is no theoretical consensus about the correct way of extracting authoritative rules in judicial reasoning.⁹⁸ Scholars have suggested several accounts of normative theory of judicial reasoning. Robert Summers, for instance, accorded priority to substantive reasons, which include goals and rightness reasons. Ronald Dworkin, on the other hand, argued that decisions should be based on principles, not policies which prescribe goals.⁹⁹

Fourth, it must also be noted that *obiter dicta*, similar to other explicit rule formulations in judicial opinions, have varying degrees of persuasiveness.¹⁰⁰

Different from legislation, precedents also have to be constituted from more than one judgment. Lord Reid in *Broome v Cassell*¹⁰¹ remarked that,

it is not the function of ... any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much they say is intended to be illustrative or explanatory and not be definitive. When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it.

Because a series of cases are more persuasive and binding on a judge than a single case, it is usual in common law legal reasoning to interpret a series of or a group of precedents rather than isolated cases.¹⁰²

These commentaries on common law methodology in the United States (US) and the United Kingdom (UK) in the 1900s do not address the current methodology used by Malaysian judges. Given the limited published research, these insights inform this study

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ [1972] AC 1027.

¹⁰² Twining and Miers, above n 81, 319.

in the analysis of legal texts and factors that influence the evolution of common law including in Malaysia.

3 *The Scope of the Common Law in Malaysia*

Malaysian judges differ about the scope of the common law applicable in the domestic legal system as defined in Art 160(2). Augustine Paul JCA, sitting in the Federal Court,¹⁰³ qualified the 'common law' in that provision as the common law which had already been brought into operation in the Federation at the date of the *Constitution*, through s 3(1) of the *Civil Law Act 1956* (CLA). He argued that the common law, as it existed at the commencement of the *Constitution*, was to be developed by Malaysian courts after that date¹⁰⁴ and could be modified by statute.¹⁰⁵ This rejects the other approach that regards the common law not merely as a collection of rules but as a system of law which incorporates fundamental principles of natural justice which may not have been specifically referred to by Malaysian courts. For Gopal Sri Ram, the word 'law' in Art 160(2) is non-exhaustive and open-ended and includes unwritten principles including a system of law that is fair and just.¹⁰⁶ This followed the Privy Council approach in *Ong Ah Chuan v Public Prosecutor ('Ong Ah Chuan')*¹⁰⁷ that associated the word 'law' in various constitutional provisions with fundamental rules of natural justice which form part of the common law.¹⁰⁸ These views on the meaning of law in the *Constitution* represent the conflicting strands of natural law and positivism that affect judges in legal interpretation. These conflicting perspectives and their impact in Malaysia are further discussed in Chapter 9.II.B.1.

4 *The Hierarchy of Precedents in Malaysia*

The following table shows the hierarchy of courts in Malaysia.¹⁰⁹ Decision of the High Court and the courts above it are regarded as having the status of precedents. The lower

¹⁰³ *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council, Malaysia, Intervener)* (2004) 2 MLJ 257, 268 ('*Danaharta*').

¹⁰⁴ 7 April 1956 (S 3(1) of the *Civil Law Act 1956*).

¹⁰⁵ *Danaharta* (2004) 2 MLJ 257, 268.

¹⁰⁶ *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 ('*Kekatong*'). Gopal Sri Ram JCA suggested that the enacted law must satisfy the common law test of fairness as subjected by the constitutional provision of Art 8(1) that he viewed as embodying Dicey's rule of law. The Parliament must be presumed not to legislate contrary to the rule of law.

¹⁰⁷ [1981] AC 648.

¹⁰⁸ The view by the Privy Council is followed in the Malaysian case of *S Kulasingam v Commissioner of Lands, Federal Territory* [1982] 1 MLJ 204, 211.

¹⁰⁹ Wu Min Aun, *Malaysian Legal System* (Pearson Malaysia, Second ed, 2005), 155.

courts which consist of Sessions Courts and the Magistrates Courts are not included in the table.

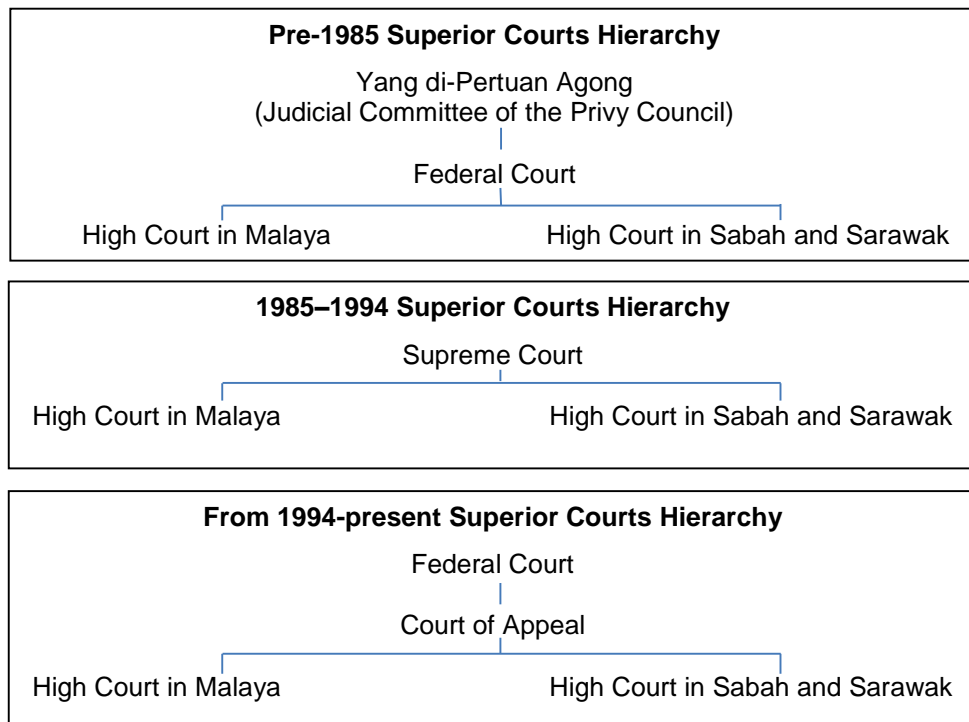


Table 1: Hierarchy of Courts in Malaysia

C Constitutional Interpretation

1 Malaysian Federal Constitution: Basic Elements

The *Federal Constitution* of Malaysia is a written constitution using a Westminster model. It is self-declared as the supreme law of the land. The power of the legislature is limited by the *Constitution*.¹¹⁰ The *Constitution* also contains a chapter on fundamental liberties which, as part of the supreme law, command greater protection than other statutory interests or privileges. However, it should also be noted that there are many ouster clauses that restrict the scope of that protection and are often upheld by courts.¹¹¹ Other provisions that undermine its scope include the limiting standing rules that inhibit public interest and rights advocacy litigation. This problem is later mentioned in Chapter 6.III.C.

2 Different Kinds of Constitutional Interpretive Arguments

¹¹⁰ *Federal Constitution* (Malaysia) Art 4(1); *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, 113. For the concept of constitutional supremacy, see, eg, Jutta Limbah, 'The Concept of the Supremacy of the Constitution' (2001) 1(2-3) *Modern Law Review* 1189.

¹¹¹ Andrew Harding and Amanda Whiting, 'Custodian of Civil Liberties and Justice in Malaysia: The Malaysian Bar and the Moderate State' in Terence C Halliday, Lucien Karpik and Malcolm M Feeley (eds), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge University Press, 2012) 247, 254.

There are various typologies of constitutional arguments around constitutional interpretation. Richard H Fallon identified in the US context at least five forms of constitutional argument that are generally accepted as legitimate: arguments from the plain, necessary or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from hypothesized purposes that best explain either particular constitutional provisions or the constitutional texts as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policies.¹¹²

On the other hand, it should also be recognized that constitutional interpretation is under-theorized or engaged with by judges in an inconsistent and ad hoc manner.¹¹³ Many judges reject any comprehensive theory of constitutional interpretation. They simply use or refuse to use particular cases. Even judges who subscribe to particular theories of interpretation rarely maintain a purity of approach across all cases.¹¹⁴ There are numerous factors that play a deep role in interpretative decisions. For instance, Carolyn Evans observed that different narratives justify different forms of judicial interpretation and legitimise certain forms of adjudication.¹¹⁵ Culturally and legally created stories about the role, purpose, history and relevance of the *Constitution* in a particular society are embedded in the manner in which the *Constitution* is seen and thus affect the textual meaning of the constitutional provisions.¹¹⁶

3 *The Trend in Constitutional Interpretation in Malaysia*

(a) *The 'Living Tree' or Prismatic and Liberal Approach*

Azmel FCJ in the Federal Court in *Badan Peguam Malaysia v Kerajaan Malaysia* ('*Badan Peguam*')¹¹⁷ summarized certain general principles of constitutional interpretation as follows:

- (i) A constitution should be considered with less rigidity and more generosity than other statutes.

¹¹² Richard H Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1987) 100 *Harvard Law Review*

¹¹³ Carolyn Evans, 'Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia' (2009) 23 *Emory International Law Review* 437, 441.

¹¹⁴ Susan Kenn, 'The High Court on Constitutional Law: The Term' (2003) 26 *University New South Wales Law Journal* 210, 222-3.

¹¹⁵ Evans, above n 113, 440.

¹¹⁶ See, eg, HP Lee, 'Part II: An Analysis of the Legal Effects of Constitutional Amendments in Malaysia' (1976) 18(1) *Malaya Law Review* 75, on the historical background of the *Constitution* in Malaysia and its development.

¹¹⁷ [2008] 2 MLJ 285, [126].

- (ii) The only true guide and only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find a meaning by legal reasoning.
- (iii) The Constitution is not to be construed in any narrow or pedantic sense.
- (iv) A vitally important function of the court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford.
- (v) [Statutory] [p]rovisions derogating from the scope of guaranteed rights are to be read restrictively.
- (vi) Judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation.
- (vii) Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

The Federal Court affirmed the foregoing as principles established within the country's jurisprudence, particularly relating to fundamental liberties' provisions. It regarded the *Constitution* as a living piece of legislation. The fundamental liberties' provisions are to be read 'prismatically' to discern implied rights from the text in order to ensure that the citizen 'obtains the full benefit and value of such rights'.¹¹⁸

As Gopal Sri Ram put it:

the 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 in its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view it is the duty of a court to adopt a prismatic approach. ... When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. ... [it] gives life to abstract concepts such as 'life' and 'personal liberty' in Article 5(1).¹¹⁹

He also suggests that this approach calls for a 'generous and purposive' interpretation to be given to the constitutional bill of rights as a check on state power. While the court was not at liberty 'to read its own predilections and moral values into the Constitution', it was bound to 'consider the substance of the fundamental right' and to ensure 'contemporary protection' of that right in accordance with 'evolving standards of decency that mark the progress of a maturing society'.¹²⁰

¹¹⁸ Gopal Sri Ram, 'Human Rights: Incorporating International Law into the Present System' (Paper presented at the Constitutionalism, Human Rights and Good Governance Conference, Kuala Lumpur, 2003), cited in Li-Ann Thio, 'Beyond the Four Walls in an Age of Transnational Judicial Conversations Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore' (2005-2006) (19) *Columbia Journal of Asian Law* 428, 439.

¹¹⁹ *Lee Kwan Woh v Public Prosecutor* [2009] MLJU 0620 ('*Lee Kwan Woh*').

¹²⁰ Thio, above n 118, 440.

This prismatic approach allows for reliance on a broad range of sources including principles of common law and constitutionalism that may inform the interpretation of the basic law. As indicated, the articulation of a universal common law test of fairness has been argued to be implied by the definition of law which is non-exhaustive and open-ended.¹²¹ The rule of law is regarded as part of the common law and, as such, part of the law of the common law countries including Malaysia.¹²²

However, the superior courts are divided. The prismatic approach which was initially advanced in the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* ('*Sugumar (No 1)*'),¹²³ was rejected by the Federal Court on appeal. It was later affirmed by the Court of Appeal in another case, *Public Prosecutor v Kok Wah Kuan* ('*Kok Wah Kuan (No 1)*').¹²⁴ On appeal, in *Kok Wah Kuan v Public Prosecutor* ('*Kok Wah Kuan (No 2)*'),¹²⁵ the majority of judges in the Federal Court held that an Act of Parliament could not be declared invalid as unconstitutional on the ground that it violated the doctrine of separation of powers.¹²⁶ Later in 2009, the Federal Court in *Lee Kwan Woh*¹²⁷ and *Shamim Reza v Public Prosecutor*¹²⁸ re-affirmed the Court of Appeal's ruling in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 ('*Sugumar (No 2)*').¹²⁹ In *Lee Kwan Woh*¹³⁰, it is specifically held that the fundamental liberties expressed in the *Constitution* must be read in a prismatic fashion to discover the rights submerged in the wider concepts expressly guaranteed.

This, Rueban argued, is related to two ideas in a demonstration to Fallon's third form of argument, reasoning from hypothesized purposes, that best explains the *Constitution* as a whole.¹³¹ First, the existence of a supreme written constitution is treated as evidence that the Malaysian constitutional order is predicated upon a moral conception of the rule of law that affirms the moral interests of legal subjects. Second, the approach

¹²¹ *Kekatong* [2003] 3 MLJ 1.

¹²² Thio, above n 118, 437.

¹²³ [1998] 3 MLJ 289, 307-8.

¹²⁴ [2007] 6 CLJ 341.

¹²⁵ [2008] 1 MLJ 1.

¹²⁶ The majority of the judges in *Kok Wah Kuan (No 2)* [2008] 1 MLJ 1 ('*Kok Wah Kuan*') held that the judicial powers of the courts were now solely determined by the jurisdiction and powers conferred on them by federal law: the judicial power of the Federation had become irrelevant. The Court also effectively held that the separation of powers' doctrine itself was not an integral part of the *Constitution* [17]. Richard Malanjum dissented on this point.

¹²⁷ [2009] MLJU 0620.

¹²⁸ [2009] 1 LNS 887.

¹²⁹ [2002] 3 MLJ 72.

¹³⁰ [2009] MLJU 0620.

¹³¹ Ratna Rueban Balasubramaniam, 'Has Rule by Law Killed the Rule of Law in Malaysia?' (2008) 8(2) *Oxford University Commonwealth Law Journal* 211, 234.

emphasizes the fact that the *Constitution* explicitly protects moral values as fundamental to the Malaysian constitutional order.¹³²

(b) Literalist or Intentionalist Approach

The prismatic approach was suggested as a departure from the judicial ethos of deference towards parliamentary intent which is the preference of the majority of judges.¹³³ Reflecting Fallon's first and second forms, the 'strict constructionists' believe that the *Constitution* should be interpreted in accordance with the original intention of its framers. The 'plain language' of the provision and its grammatical and ordinary sense should be given effect. Deference should be paid to its legislative history. In this spirit, it was observed in *Datuk Harun v PP*¹³⁴ that the court is not

at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even ... for the purpose of supplying omissions or of correcting supposed errors.

A similar position has also been taken in a Singaporean court whose approach to constitutional interpretation is persuasive to Malaysian judges. In *Jabar v PP*,¹³⁵ it was held that any law is valid and binding so long as it is validly passed and that, '(t)he court is not concerned with whether it is also fair, just and reasonable ...'.

Li-ann Thio suggested that deference to parliamentary power led to reading rules literally, regardless of their substantive content and 'considering as definitive the statutory balance struck between a liberty and permissible restrictions upon it'.¹³⁶ Such a view manifests a certain ideological commitment to statism or utilitarianism at the expense of rights protection.¹³⁷ The standards against which the content of a right are identified, if restricted solely to the parliamentary will, result in parliamentary supremacy rather than constitutional supremacy.

Rueban suggested that such an intentionalist approach is a result of the internalisation of constitutional positivism.¹³⁸ He argued, in line with the clear signal given by the legislature in the amendment to Art 121 of the *Federal Constitution* in 1988,¹³⁹ that judges

¹³² Ibid.

¹³³ Thio, above n 118, 446.

¹³⁴ [1976] 2 MLJ 116.

¹³⁵ [1995] 1 SLR 617.

¹³⁶ Thio, above n 118, 440.

¹³⁷ Ibid, 443.

¹³⁸ Balasubramaniam, above n 131, 213-5.

¹³⁹ *Constitution Amendment Act 1988 (A704)* deleted phrase 'judicial power' in Art 121(1). See, eg, Richard S K Foo, 'Malaysia – Death of a Separate Constitutional Judicial Power' (2010) *Singapore Journal of Legal Studies* 227; A L R Joseph, 'The Doctrine of Separation of Powers Survives in Malaysia' (2007) *Singapore Journal of Legal Studies* 380.

should adopt the narrow textual approach.¹⁴⁰ Similarly, Faruqi also observed that the majority of judges cling to the conservative theory of English legal positivism that judges are law finders and not lawmakers.¹⁴¹ Such line of interpretation

will likely adopt a narrow textual focus when interpreting constitutional provisions affirming moral values, ensuring that there is minimal intrusion on legislative power.¹⁴²

Judges operate as passive reporters of the law who give effect to the meaning of law in a way that tallies with the legislature's specific intention in passing any given law. Rueban observed that this constitutional positivism is extensive within the Federal Court's jurisprudence. Over the last two decades, the Federal Court has consistently interpreted the bill of rights narrowly, emptying it of its moral power as a constraint on legislative and executive authority.¹⁴³ Judges have been criticised as being unable to look at human rights in the same way that they do at other legal rights. They frequently show themselves to be reluctant or not prepared to confront, but prefer to evade, fundamental issues which arise from alleged human rights violations.¹⁴⁴

(c) The Four Walls Doctrine (Domestic Particularity)

There has also been a tendency among Malaysian judges to confine interpretation to the historical context and background of the *Constitution* and the country. This again reflects Fallon's first and second forms of argument. Raja Azlan Shah FJ in *Loh Kooi Choon v Government of Malaysia*,¹⁴⁵ stated

Whatever may be said of other Constitutions, they are ultimately of little assistance of us because our Constitution now stands in [*sic*] its own rights and it is in the end

¹⁴⁰ Balasubramaniam, above n 131, 215. See also the speech by the former Malaysian Prime Minister, Mahathir Mohamad, who indicated that the court was regarded as having made or applied law which is not actually required by statute, thereby contradicting or defying the statute law. It was intended by the amendment to restrict the judicial power to introduce into the statute law and constitution concepts which do not expressly appear in them and to deprive the judiciary of a plenary judicial power of the Federation: Prime Minister Dato' Seri Dr Mahathir bin Mohamad, 'Malaysia, Dewan Rakyat, Parliamentary Debates, vol. 2, no. 9, col. 1585' (18 March 1988), cited in Faridah Jalil, 'The Judiciary and the Constitution' in Abdul Razak Baginda (ed), *Governing Malaysia* (Malaysian Strategic Research Centre, 2009) 185, 219.

¹⁴¹ Shad Saleem Faruqi, 'Human Rights, International Law and Municipal Courts' (Paper presented at the Human Rights Colloquium for the Judiciary, 2009) <http://www.suhakam.org.my/c/document_library/get_file?p_l_id=35723&folderId=69478&name=DLFE-6202.pdf>, 4.

¹⁴² *Ibid.*

¹⁴³ Balasubramaniam, above n 131, 216.

¹⁴⁴ Raja Aziz Addruse, 'The Local Judiciary and International Human Rights Principles: Setting the Standard and Moving' (Paper presented at the Human Rights Colloquium for the Judiciary, 2009) <http://www.suhakam.org.my/c/document_library/get_file?p_l_id=35723&folderId=69478&name=DLFE-6602.pdf>.

¹⁴⁵ [1977] 2 MLJ 187, 188-9.

the wording of our Constitution itself that is to be interpreted and applied, and this wording 'cannot be overridden by the extraneous principles of other Constitutions (see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544, 551). Each country frames its constitution according to the genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

Legal interpretation which is confined to the framer's intent tied the courts to interpreting the *Constitution* 'within its four walls'.¹⁴⁶ Li-ann Thio suggested that the approach limits the legitimate sources of law which may inform constitutional construction.¹⁴⁷ It also inhibits the rethinking of fundamental rights provisions in a positive or progressive fashion.¹⁴⁸ Reference to external sources, although practised widely, is rather seen as importing 'foreign values' into a particular domestic context as opposed to universalist values.¹⁴⁹

(i) Constitutional Comparative Law Approaches

While adhering to the 'four walls' approach which considers that the *Constitution* must be primarily interpreted within its own four walls rather than by foreign analogies, the Malaysian courts do engage in comparative constitutional law exercises.¹⁵⁰ Such an approach falls outside Fallon's typology, perhaps because of the insularity of the US Supreme Court in constitutional interpretation. The sources of legitimate constitutional argument have been extended to case law from other jurisdictions and principles of international law in the interpretation of domestic constitutions to define issues, formulate justifications and to elaborate on the scope and content of rights as claimed against the state that limit state power, especially in the field of human rights.¹⁵¹

Nevertheless, Li-ann Thio observed that the transnational sources are used selectively rather than systematically.¹⁵² Often the sources are used to buttress these four walls in the sense of solidifying *particularist* values, justifying these on their merits or by dispelling the impression of parochialism by demonstrating that such values are applied elsewhere.¹⁵³

¹⁴⁶ Andrew Harding, 'The Westminster Model Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States' (2004) 4(2) *Oxford University Commonwealth Law Journal* 143, 163; See, also Thio, above n 118.

¹⁴⁷ Thio, above n 118, 430; Harding, above n 146, 163.

¹⁴⁸ Harding, above n 146, 163.

¹⁴⁹ Thio, above n 118, 432.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*; Harding, above n 146. See also Evans, above n 113, 465: in a survey of judgments by courts in Malaysia on freedom of religion, she found that all the judges discussed use comparative law.

¹⁵² Thio, above n 118, 518.

¹⁵³ *Ibid.*, 518.

Foreign case law is not legally binding but only persuasive. The *Constitution*, especially Part II with its fundamental liberties and laws providing for preventive detention, is primarily drawn from Indian sources. Decisions of the Supreme Court of India have been claimed to be of 'great persuasive authority' and 'normally will be followed unless the court has cause to disagree with the reasoning of any such decision.'¹⁵⁴ But in many cases, the Malaysian courts prefer English positive law over Indian jurisprudence. Ong Hock Thye stated,

English courts take a more realistic view of things, while Indian judges ... impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers.¹⁵⁵

(ii) International Law

Similar to many common law courts, the Malaysian courts are generally dismissive of arguments based on international human rights law.¹⁵⁶ Treaties signed by the executive may only take effect within the jurisdiction by enabling legislation enacted by the Parliament. Non-binding resolutions such as the Universal Declaration of Human Rights have no legal force in national law unless they embody customary international law that is applicable by doctrine of incorporation.¹⁵⁷ In respect to a statutory provision¹⁵⁸ that mandates reference to the Universal Declaration of Human Rights, the Federal Court has held that the court is not bound to have regard to the Declaration.¹⁵⁹

¹⁵⁴ *Abdoolcader J in Yeap Hock Seng v Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279, 281.

¹⁵⁵ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129. Suffian LP concurred with the view. See also the reasoning by Suffian LP in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, 73 (FC, Malaysia). The view in *Karam Singh* was unanimously followed by later cases, eg, *Datuk Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155; *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1988] 1 MLJ 468 (per Peh Swee Chin J); *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Dipertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420 (per Tan Chiaw Thong J). Cf *Loh Wai Kong v Government of Malaysia* [1978] 2 MLJ 175: The Indian position was adopted rather than the British position on the question of passport control.

¹⁵⁶ See, eg, *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356; *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449 ('*Ezam*'). Discussion on the matter, see, eg, Farid Suffian Shuaib, 'The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse?' (2008) 16 *IJUM Law Journal* 181; Faruqi, above n 141.

¹⁵⁷ See, eg, Abdul Ghafur @ Khin Maung Sein Hamid, 'Judicial Application of International Law in Malaysia: A Critical Analysis' (2005) 1 *Asia-Pacific Yearbook of International Humanitarian Law Quarterly Review* 196; Shuaib, above n 156.

¹⁵⁸ *Human Rights Commission of Malaysia Act 1999*. S 4(4) provides that 'regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the *Federal Constitution* ...'.

¹⁵⁹ *Ezam* [2002] 4 CLJ 309.

A different approach has been seen in a recent High Court decision, *Noorfadilla Ahmad Saikin v Chayed Basirun* ('Noorfadilla').¹⁶⁰ Judge Zaleha held that the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), ratified by Malaysia, has the force of law and is binding on the Malaysian government. In interpreting Art 8(2) of the *Federal Constitution*, she held that the Court's duty is to take into account the government's commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party.¹⁶¹

Judges have also relied on the international position on human rights in interpreting local law that is beneficial in protecting fundamental liberties including the matter of customary land rights cases. This is not as visible as it has been done through relying on cases in other common law jurisdictions.¹⁶² The position of international law in the Malaysian legal system is returned to in Chapter 7.III.

(d) Constitutional Interpretation and Other Jurisdictions Compared

Lord Diplock, in a Privy Council appeal from Jamaica in *Hinds v The Queen*,¹⁶³ emphasized the historical background of a constitution as an important element that differentiates the role of judges in legal interpretation between jurisdictions. The *Constitution* embodies

what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future.

On a historical basis, common law courts in different jurisdictions see their role in constitutional interpretation rather differently although there may be internal disagreements. The Supreme Court of the United States has been more interventionist in ways seen to be political. The United Kingdom Supreme Court and the former judicial House of Lords, where there is no written constitution, is less perceived as political.¹⁶⁴ In respect to the fundamental rights' provisions of the *Constitution*, Li-ann Thio observed that the formulation of liberties in Malaysian jurisprudence departed from the Anglo-

¹⁶⁰ [2012] 1 MLJ 832.

¹⁶¹ The judge also referred with approval to the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh* 183 CLR 273 (1995) 128 ALR 353 ('Teoh'); *Vishaka v State of Rajashtan* AIR 1997 SC 3011.

¹⁶² See, eg, *Sagong (No 1)* [2002] 2 MLJ 591; *Nor Anak Nyawai (No 1)* [2001] 6 MLJ 241; *Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368 (HC, Malaysia).

¹⁶³ *Hinds v Queen* 1976 1 All ER 353, 359.

¹⁶⁴ Kevin YL Tan and Li-ann Thio, *Constitutional Law in Malaysia and Singapore* (LexisNexis, 2010) 1391, 643.

American style of phrasing freedoms in absolute terms. She points out that the rights provisions are expressly qualified by references to community goods like public order and morality. The individual is not autonomous but situated, with responsibilities, within communities.¹⁶⁵

D Statutory Interpretation

Texts on statutory interpretation normally point to both statutory and common law tools of construction. The statutory tools include the interpretation statute¹⁶⁶ and related provisions: intrinsic¹⁶⁷ and extrinsic¹⁶⁸ materials for particular statutes are also relevant.

Briefly, common law rules of statutory interpretation include the literal rule that promotes the use of the natural and ordinary meaning of words. If the words are 'precise and unambiguous or clear, plain and certain', they are to be given their 'grammatical and ordinary meaning'¹⁶⁹ and 'natural and ordinary sense'.¹⁷⁰ The sense of meaning must not be gained from a particular word 'but of a sentence, or a clause as a whole'.¹⁷¹ On the other hand, when the particular word or phrase in a statute is regarded as ambiguous and the literal meaning is considered absurd, the golden rule or mischief rule may be applied to avoid absurdity by looking at the purpose of the statute or the 'mischief' that was intended to be remedied by the legislature.¹⁷² The purposive approach looks at the intention of the legislature from reading or close examination of the statute as a whole.¹⁷³

¹⁶⁵ Thio, above n 118, 434.

¹⁶⁶ *Interpretation Act 1948 and 1967 (Consolidated and Revised 1989)* (Malaysia) ('*Interpretation Act*'). The interpretation legislation applies to all statutes in Peninsular Malaysia including subsidiary legislation. For *Federal Constitution*, art 160(1) makes reference to the *Interpretation and General Clauses Ordinance 1948* which has been consolidated to the *Interpretation Act*. S 66 of the *Interpretation Act* provides that it applies to every written law defined in the Act which is defined to include the *Federal Constitution*. Some expressions in the *Federal Constitution* are given meaning by Article 160(2) of the *Constitution* itself.

¹⁶⁷ Eg, preamble and marginal note. Different from the position in England and most common law jurisdictions, marginal notes are regarded as part and parcel of a statute in Malaysia and they might be used in interpretation of the relevant provisions but merely as a brief guide to the content of the section. Preamble could only be used to ascertain legislative facts, ie, the purpose and object of a statute when the words in the statute are uncertain when applied to the subject matter under query: *Re Application of Tan Boon Liat* [1976] 2 MLJ 83, 85.

¹⁶⁸ Eg, records of parliamentary debate, report of a committee related to legislation or amendment of legislation, explanatory statements accompanying a bill: *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345.

¹⁶⁹ Gibbs CJ in *Cooper Brookes Pty Ltd v Federal Commissioner of Taxation* [1981] 147 CLR 297, 305.

¹⁷⁰ *Kon Fatt Kiew v PP* [1935] MLJ 239, 240 (Cussen J).

¹⁷¹ *Ibid.* See also, *Chong Sin Sen v Janaki Chellamuthu* [1997] 2 CLJ 699, 709.

¹⁷² Aun, above n 109, 284.

¹⁷³ S 17A of the *Interpretation Acts* provides that a construction that would promote the purpose or object of an Act shall be preferred to a construction that would not promote that purpose or object in the interpretation of a provision; *ibid.*, 287.

The judicial discretion in relying on one rule rather than another cannot be predicted.¹⁷⁴ Sometimes judges' attention is drawn to legislation from other jurisdictions and related precedents. The overseas statute may be found to be *pari materia* (similar) with local legislation and, therefore, relevant. Alternatively, the local law may be found to be *sui generis* (a class by itself) and therefore to be interpreted in the local context without the aid of foreign decisions.¹⁷⁵

It is generally presumed that the interpretation of statutes should be made within the context of the *Constitution*. But there are a series of Malaysian cases indicating that the courts have taken the opposite position in giving restrictive interpretations to the fundamental liberties provided in the *Constitution*.¹⁷⁶ This may be related to the limited view of the common law (above in section III.A.B.3) in contrast to the more expanded view of legislation.

The judicial views taken of the *Constitution* seem to presume the existence of the common law rules of interpretation. There are common law rules which require clear legislative intent to extinguish basic rights.¹⁷⁷ The common law principle of extinguishment of common law title is further discussed in Chapter 6.II.C.

IV LAW REFORM RESEARCH

Reform-oriented research evaluates the adequacy of existing relevant law and seeks to recommend changes to any law found wanting. To evaluate the laws affecting Orang Asli rights to forest resources, those laws already referred to were used to assess the existing law. The additional ones selected involved the use of comparative and empirical methodologies. They also involved the use of similar analytical and interpretive methodologies already referred to. The objective is to analyse the need for reform and to suggest the appropriate manner in which to address the rights of the Orang Asli to forest resources.

A Comparative Approach

¹⁷⁴ Faruqi, above n 141, 9-10.

¹⁷⁵ *Ibid*, 10.

¹⁷⁶ See, eg, *Sugumar (No 2)* [2002] 3 MLJ 72: Mohamed Dzaidin FCJ held that constitutional rights as guaranteed in art 5(1) (right to life) can be taken away in accordance with law; *Danaharta* (2004) 2 MLJ 257, Augustine Paul JCA viewed that art 8(1) is not absolute but dependent on any contrary provision made by written law. See also remark by Balasubramaniam, above n 131, 213.

¹⁷⁷ See, eg, *Madeli* [2008] 2 MLJ 677, 696 [31], following *Sugar Refining Co v Melbourne Harbour Trust Commissioners* [1927] AC 343.

Comparative legal methodology is a useful technique to assess Malaysian laws. It is employed in this study for three purposes: first, to analyse the principles laid down by international instruments relevant to both the issues and the Malaysian context; second, to look for practical approaches implemented in other countries to provide access to forest resources by indigenous peoples; and third, to determine the *transplantability* of legal principles and processes from other jurisdictions to the Malaysian setting.

Zweigert and Kotz defined comparative law as ‘an intellectual activity with law as its object and comparison as its process’.¹⁷⁸ Comparative research is part of a non-doctrinal approach which takes into account the extra dimension of the sources of law in other jurisdictions.¹⁷⁹ It has followed well-established paths comparing official law, or law in the books or legal doctrine, of one jurisdiction with another. It has often involved an appreciation of differences in legal cultures and processes which may lead to similar rules being applied in different ways in different legal systems. The method has long served as an aid to law reform.¹⁸⁰ It is used as a construction tool to fill in gaps in legislation or in case law providing the background to legal rules and concepts that have been transplanted from other jurisdictions.¹⁸¹

Of the different varieties of comparative studies, this research project focuses on an approach that objectively and systematically analyses solutions which various systems offer for a given legal problem.¹⁸² It is a policy-centred approach, that is, to look for examples of best practice elsewhere.¹⁸³ Thus the research concerns itself with the question of ‘how the law ought to be’ by studying the rules and institutions of law in relation to each other.¹⁸⁴ It seeks to identify solutions to specific legal problems already encountered in other jurisdictions. This can be done by looking at how the functionally equivalent need was perceived and addressed in other jurisdictions.¹⁸⁵

¹⁷⁸ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans, Oxford University Press, 1998), 2.

¹⁷⁹ Hutchinson, above n 68, 117.

¹⁸⁰ Peter De Cruz, *Comparative Law in a Changing World* (Routledge Cavendish, 3rd ed, 2007), 20 describes that in various legal systems for centuries, one of the strategies for new legislation and reforms of the law has been based on the comparative method.

¹⁸¹ *Ibid*, 22.

¹⁸² *Ibid*, 7 citing Hug, ‘The History of Comparative Law’ (1932) 45 *Harvard Law Review* 1027 who identifies different types of comparative studies.

¹⁸³ Hutchinson, above n 68, 120 citing Clarke E, ‘Comparative Research in Corporate Law’ (1996) 3(1) *Canberra Law Review* 62, 64.

¹⁸⁴ De Cruz, above n 180, 10.

¹⁸⁵ Hutchinson, above n 68, 118.

1 The Technique of Comparative Methodology

The methodology for a comparative law study follows that of De Cruz.¹⁸⁶ First, the problem is identified and stated as precisely as possible in the research questions. Second, the most relevant foreign jurisdictions are identified taking note of the parent legal family to which they belong. The third step involves the finding and collection of relevant materials. The primary and secondary sources of law of the jurisdictions are collected and assembled for analysis. The former includes legislation and case law. The latter includes reports and publications by agencies of national governments and law reform commissions. The international law and transnational law relating to the issue are also relevant. Treaties and conventions as well as reports published by relevant sources of transnational law are also relevant in understanding foreign law. Sources also include professional practice commentaries on relevant laws, literature in scholarly monographs and serials. Fourth, the materials are organised in the context of the research questions in accordance with headings reflecting the legal philosophy and ideology of the legal systems being investigated. Fifth, the possible answers to the problems are provisionally mapped out with a careful comparison of the different approaches. Sixth, the legal principles are initially critically analysed in terms of their intrinsic meaning in each legal system rather than according to any outside standard. Last, the conclusion is set out within a comparative framework with caveats, if necessary, and with critical commentary, wherever relevant, and related to the original aims of the enquiry. That commentary includes not only references to legal doctrine and policy but also to socio-legal studies, particularly legal culture.

In the choice of jurisdictions,¹⁸⁷ Grossfeld suggested several factors to determine comparability: cultural, political and economic components of a society, particularly the relationship that exists between the State, its citizens and its value system.¹⁸⁸ Others stressed choosing jurisdictions which are at similar stages of political, economic and social development or at the evolutionary stage.¹⁸⁹ This includes historical contexts and the influence of international law on national legal systems.¹⁹⁰ Another factor to consider is the familial relationships of the legal systems, that is, the type of legal systems in the

¹⁸⁶ De Cruz, above n 180, 235.

¹⁸⁷ *Ibid*, 119.

¹⁸⁸ *Ibid*, 121.

¹⁸⁹ *Ibid*, 226-7.

¹⁹⁰ Hutchinson, above n 68, 120-1.

jurisdictions chosen.¹⁹¹ Obvious differences need to be acknowledged to achieve useful comparisons. Nevertheless, De Cruz proposed that the ultimate test is in the main aims and objectives in making the comparisons. This study looks for approaches taken by different countries on access to forest resources by minority indigenous communities.

2 International Law and Transnational Law as a Source of Comparison

International and transnational law are also used as a source of appropriate standards. International law has originated as a system of customary law, increasingly supplemented by rules and principles which are agreed in treaties signed by two or more countries. Another category of international legal materials is that referred to as *soft law*. These are materials that are not intended to generate or, by themselves, are not capable of generating legal rules but may, nonetheless, produce certain legal effects. Normally declarations, non-legally binding international agreements, resolutions and guidelines adopted by international organisations or assemblies of states come under this category. The effects of these materials may be:

- a. to provide the evidence of state practice and *opinio juris* required to establish a rule of customary international law;
- b. to provide assistance in the interpretation and application of conventional and customary law whose precise requirement remains unclear; and
- c. to indicate the likely future course of international law's development (*lex ferenda*). The materials may provide the foundations on which states eventually conclude treaties.¹⁹²

Relevant provisions which form part of transnational law have also increasingly influenced domestic practice. The term 'transnational law' is disputed and is still subject to international debates.¹⁹³ In this thesis, it is used to refer to an institutional framework or co-regulation between private actors including corporations and civil society, and public actors on the global stage.¹⁹⁴ Distinct from national and international law, it combines different 'governance mechanisms of private (norms, alternative dispute

¹⁹¹ Scholars divide general categories of legal systems into five: common law, civil law, customary law, Muslim law and mixed legal systems.

¹⁹² Stephen Hall, 'Researching International Law' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 181, 203.

¹⁹³ Graft-Peter Calliess, 'Transnational Law' in Mark Juergensmeyer and Helmut K. Anheier (eds), *Encyclopedia of Global Studies* (SAGE, 2012) vol 3, 1035, 1035. See also, Roger Cotterrell, 'What is Transnational Law?' (2012) 37(2) *Law & Social Inquiry* 500.

¹⁹⁴ Calliess, above n 193, 1035, 1038.

resolution, social sanctions) and public (laws, courts, enforcement) origin'.¹⁹⁵ It has functionally specialized regimes, such as on timber certification and climate change.

International law especially has become more prominent in reforming domestic law both in the process of drafting legislation and in judicial decisions. For judges, the existence of international human rights law and other alternative communities of judging make additional perspectives available.¹⁹⁶ It serves as an aid to statutory interpretation and persuasive authority (see Chapter 7.III.A.2). It is seen that considering and comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the results are the same.¹⁹⁷ There are an increasing number of cases worldwide in which judges are applying international law at a domestic level, which scholars have referred to as 'transjudicialism'.¹⁹⁸ The perspective of Malaysian judges on international law and changes in it are discussed briefly in Chapter 7.III.A.3. The recognition of Orang Asli rights in the transnational regime on forest certification is also discussed in Chapter 6.1.3.b.

B An Empirical Approach: Interviews

An understanding of the law and its practice is crucial in a law reform study. Part of that understanding is based on the earlier methodologies described. To improve that, an empirical research method is employed to look into the broader social and political context in which the relevant laws apply.

This approach involves contextual aspects of social research, looking outside the written words for answers to legal questions unlike the more traditional legal research methodologies which have been discussed. In other words, it investigates the reality of the law and its practice. The aim is to understand how laws operate and what effects they have.¹⁹⁹ It also seeks to identify those involved 'on the ground' as the repository of knowledge in any reform or change process.²⁰⁰ Julius Getman suggests that,

¹⁹⁵ Ibid, 1035, 8.

¹⁹⁶ Karen Knop, 'Here and There: International Law in Domestic Court' (1999-2000) 32 *Journal of International Law and Politics* 501, 532 citing Jennifer Nedelsky, 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill Law Journal* 91.

¹⁹⁷ Ibid, 532 citing Claire L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Relinquist Court' (1998) 34 *Tulsa Law Journal* 15.

¹⁹⁸ Ibid, 532.

¹⁹⁹ John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 881, 881.

²⁰⁰ Hutchinson, above n 68, 23.

empirical study has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, successes and illusions, in a way that no amount of library research or subtle thinking can match.²⁰¹

Empirical research may also give greater prominence to the voice of the consumers of legal services or participants in the legal system, not only the practitioners and professional commentators. The consumers' and participants' perspectives are also valid and a useful corrective both to some rule-based accounts and the voice of the professional practitioner.²⁰² In this aspect, Twining in his analysis of how the Cheyenne's legal processes influenced Llewellyn's theory, stated that,

An essential part of understanding the institutions of a society is to grasp the ways of thought of the people whose institutions they are.²⁰³

The empirical methodology adopted is the interview. The data obtained through the interviews are supplementary to the other sources of data. The findings are used throughout the thesis to address various issues and, in part, the research questions. Interviewing as a means of data collection has the capacity to collect information from, and perspectives of, the participants in the system to assess problems and to evaluate policies. This is an important tool in developing detailed descriptions incorporating multiple perspectives and linking inter-subjectivities, that is, to give opportunities to grasp situations from the inside. It is a tool from which to learn a great deal of any event or development to which we are not privy.²⁰⁴

The information gathered from the interviews informs the relevancy, the possibilities for and the obstacles to analysing and evaluating proposed legal reforms. The purpose is to gain a better understanding of the implementation and practice of the law and policy as they relate to the traditional forest resources of the Orang Asli. It also seeks to identify the perspectives and expectations of the informants including those members of the legal elites who are influential in law making. This will also identify obstacles in incorporating those rights, and emerging rights in international law, in the formal law of the national legal system. It includes gathering suggestions on how the proposed reform should be

²⁰¹ Getman J, 'Contributions of Empirical Data to Legal Research' (1985) 35 *Journal of Legal Education* 489 cited in *ibid*, 99.

²⁰² *Ibid*, 36 citing McCrudden C, 'Legal Research and Social Science' (2006) 122 (Oct) *Law Quarterly Review* 632.

²⁰³ Twining, above n 75, 178.

²⁰⁴ Robert Wiess, *Learning From Strangers: The Art and Method of Qualitative Interview Studies* (The Free Press, 1994), 9-10; Jaber F Gubrium and James A Holstein, *Handbook of Interview Research: Context and Method* (Sage Publication, 2001); 8-9.

planned, and identifying the resources that will be needed, the people who should be involved and any problems that should be avoided.²⁰⁵

The interviews were conducted in Malaysia from 1 May 2011 – 7 September 2011. An open-ended interview schedule was prepared to capture primary data from individual interviewees. Open-ended questions allowed the interviewee a wide choice of possible answers.²⁰⁶ The questions in the schedule related to the research questions. The interview schedule is in Appendix A.

1 Sampling

The study employed several methods of sampling in order to identify and locate the prospective interviewees across different categories. First, it took a purposive sampling method also known as judgment sampling²⁰⁷ in view of the large number of interest groups involved in the matter of forest governance and the Orang Asli. This is a non-probability sampling design in which the elements in the population interviewed have no probabilities attached to them being chosen as sample subjects.²⁰⁸ The sampling was confined to specific types of people within the four categories of people who could provide the information required for the research questions.

In all, 42 individuals were interviewed. The individuals were from four general categories: public and private sectors, NGOs, and Orang Asli representatives. A description of each interviewee is in Appendix D. The following table describes the interviewees according to their categories.

Table 2: List of interviewees according to categories

Sector	Individual sector	Interviewees and the code assigned
Public Sector	Department of Orang Asli Advancement (Kuala Lumpur and Pahang)	Senior officers: INT05; INT08
	Forest Department of Peninsular Malaysia Forest Department of State of Pahang	Senior officers: INT07; INT31
	Department of Wildlife Protection and National Parks (Perhilitan)	5 senior officers, officers and managers of National Parks and Ramsar Sites under management of Perhilitan (Pahang, Terengganu, Kelantan, Perak, Johor) (interviewed in a meeting): collectively coded as INT11

²⁰⁵ Cavana RY, BL Delahaye and U Sekaran, *Applied Business Research: Qualitative and Quantitative Methods* (John Wiley & Sons, 2001), 150.

²⁰⁶ Ibid, 142.

²⁰⁷ Ibid, 263.

²⁰⁸ Ibid, 262.

		A senior officer from Pahang: INT21
	Land Office	An officer at the Land and Mineral Department: INT27
	Forest Research Institute Malaysia (FRIM)	A research officer: INT14
	SUHAKAM (Human Rights Commission of Malaysia)	A commissioner: INT25
	Judges	A Federal Court judge: INT10 – presiding in a native land claim in Sarawak A High Court judge: INT23 – presiding in an Orang Asli claim involving a national project
	Attorney General's Office (federal), State of Pahang's legal advisor	Former State Legal Advisor and legal officer: INT10; INT23, INT27
	Government policy and lawmakers, politician, political representative of the Orang Asli	Member of Senate, Parliament: INT15 Member of State Assembly: INT32 An active member of Pahang Indigenous Peoples Bureau, Parti Keadilan Rakyat: INT03 Consultant at a national project affecting Orang Asli land: INT04 Member of Orang Asli Development Advisory Council under the Ministry of Rural and Regional Development Ministry: INT13, INT29
Private sector	Lawyers representing the Orang Asli	INT37: Counsel for Plaintiffs in an Orang Asli land rights claim Researcher and pro bono lawyer focusing on Orang Asli claims: INT06, INT13, INT22
	Bar Council (Committee of Orang Asli Rights)	Member: INT06, INT22 Observer – INT03
	Malaysian Timber Council	Officer: INT35
	Academic researchers	Sociologist and anthropologist focusing on Orang Asli issues: INT04, INT12, INT13, INT38 Political studies: INT12 Legal studies on indigenous land issues: INT06, INT22. Forestry and policy studies: INT14, INT26 Environmental studies: INT14, INT30 Marginalized communities: INT30, INT01 Human ecology and development - INT01 The Orang Asli and land transaction – INT02 Malaysian Institute of Indigenous Studies: INT06 (Research Fellow)

	Journalist, news writer, website writer, blogger	Various media writers: INT01, INT03, INT06, INT12
Indigenous peoples	Leaders and activists of Orang Asli communities	Active members of Orang Asli Association of Peninsular Malaysia (POASM): INT09; INT13 An active member of Orang Asli Network of Peninsular Malaysia: INT33; INT34 Member of Pahang Orang Asli Association: INT03 Active member of Association of Orang Asli Graduates: INT03; INT 29 Member, Orang Asli Foundation of Perak (YOAP): INT13 Orang Asli student representatives and Muslim missionary: INT16-20
Non-governmental organisations and others working with the Orang Asli	Center for Orang Asli Concerns	Director and founder: INT12
	Orang Asli CARE (missionary)	Member: INT01
	Malayan Nature Society (environmentalist)	A senior member: INT28
	LESTARI (Environmental and Development Institute)	A research officer: INT30
	Others	Former dentist working with Orang Asli communities: INT24 A priest: INT36

The people interviewed were identified based on their position within the relevant institutions in the categories selected or their occupation. The identification process was also made through information given on institutions' websites or other mass media. In some situations, especially involving relevant NGOs, Orang Asli activists and religious missionaries, contacts were made by email or telephone asking for information on the most suitable people to participate in the study. Based on the recommendations given, an online search was conducted to determine the relevance of the persons recommended.

The Orang Asli interviewed were selected from those who have taken positions as spokespeople and intermediaries to remove many of the ethical concerns in interviewing indigenous peoples. Most came from Sen'oi and Malay Proto groups in Pahang, Perak and Selangor, the states with a high number of the Orang Asli. A limitation of the study was that there was no representative from another group, the Negrito.

For public and private institutions, the interviewees were normally nominated by the administrative heads of the institutions. The permission of the heads of the institutions

(within social science literature they are known as *'gatekeepers'*) was necessary to interview officials in the public sector. Approvals from the Economic Planning Unit, Malaysian Prime Minister's Department and the Orang Asli Affairs Department and other government departments were obtained. Arrangements to meet officials could only be made after the approvals were given.

Second, a snowball strategy was also employed to contact prospective interviewees. This strategy maximises the prospect of obtaining participants who are difficult to locate or to identify the most relevant people or experts within the categories specified.²⁰⁹ During interviews or through informal conversation, the interviewees were asked to recommend other individuals to be included in the sample. Invitations to participate were sought personally through the potential informants by telephone, postal mail or email. The copy of the standard letter giving information about the research is attached in Appendix B. When they agreed to participate, appointments to meet were arranged.

There were some potential categories which were difficult to reach. These were people from environmental organisations, politicians and representatives of the plantation industry, regarded as stakeholders. Many refused or did not respond to the invitations but fortunately the study was able to include at least one knowledgeable and experienced participant to represent each category of people sought.

The relatively small sample size in the study is a limitation. However, a simple increase in sample size alone does not necessarily imply that the research findings would be more valid.²¹⁰ Potential benefits of a larger sample size may be outweighed by the extra costs in time and effort required for data preparation.²¹¹

2 Conduct of Interviews

Interviews were conducted mostly at the office of the interviewees. There were some interviews conducted at cafés at the request of the interviewees. The length of the interviews ranged from 30 minutes due to time constraints of the interviewees, and up to two hours in cases where the interviewees had more time. The majority of the interviews were recorded by an audio recorder with the interviewees' permission. Six interviewees requested that the recording be by note-taking and this was written up immediately afterwards. The interview notes were taken in writing and sent back by email to the

²⁰⁹ See eg, Rowland Atkinson and John Flint, 'Accessing Hidden and Hard-to-Reach Populations: Snowball Research Strategies' (2001) (33) *Social Research Updates*.

²¹⁰ Kelle Udo, 'Computer-Assisted Analysis of Qualitative Data' (1997) *Discussion paper series of the LSE Methodology Institute*, 16.

²¹¹ *Ibid*, 16.

interviewees for verification. Only one interviewee added clarification to an answer given during the interview. Cross-checking of data was also done during the interview session itself. One interview was done by telephone after two attempts to meet with the interviewee were cancelled: the first cancellation was without notice.

The questions asked in the interview schedule permitted some variations to allow for the particular knowledge and experience of interviewees. Some questions in the planned schedule were not asked to some interviewees for reasons of relevancy and, in some cases, time constraints on the part of the interviewees.

The empirical data collection observed ethical procedures approved by the Victoria University Human Research Ethics Committee. Research ethics represent a set of moral principles or norms that are used to guide moral choices of behaviour and relationships with others.²¹² The ethical principles followed are found in the *Code of Conduct of Research 1995 Victoria University* and the *Australian Government's Health and Medical Research Council's National Statement on Ethical Conduct in Human Research 2007*.²¹³ In summary, the research undertakes to comply with the following principles and procedures:

- a. Respect for the participants: the process and writing of research respects and considers the beliefs, customs, heritage, cultural values and local laws.
- b. Informed consent: each participant is fully informed of the objectives and scope of the research before the interview is conducted. This was done through the invitation letter sent and verbally before the interview was conducted. Written consent was obtained from every interviewee. The copy of the consent form is in Appendix C.
- c. Freedom of participation: the participant has the right not to answer any questions or to withdraw at any time without giving reasons in which case any information given will not be used in the research.
- d. Non-identification of participants: all data and information obtained in the interviews will be kept strictly confidential. No identifying information will be used in the thesis. Any publication will be in such a way that the identification of respondents, or organisations to which they belong, will not be disclosed.

²¹² Gray, above n 67, 69.

²¹³ The statement is available online at <http://www.nhmrc.gov.au/guidelines/publications/e72> (access date: 25 October 2013).

However, identification of a participant is made in this thesis upon specific request by the participant himself during the interview.

- e. Secure storage of data: the principal investigator, the principal supervisor, is responsible for the security of confidentiality of any data. During the course of the study, the transcripts of the interviews were stored by the student researcher in an identified locked cabinet. The conversations recorded in the form of audio files or as transcribed files were stored by the researcher on a computer with a password protection system.
- f. Restricted access of data: only the researcher and the supervisor have had access to the data.

3 Transcribing and Data Analysis

The audio-recorded interviews were transcribed, that is, converted into text data. The transcriptions were mostly done during the fieldwork itself although approximately half of them were done within a month of the completion of the fieldwork due to the considerable time required. The text data, including the interview notes taken by hand, were analysed. The following section briefly describes the manner in which the interview data were analysed.

The purpose of the interview is the main criterion in choosing the methods for analysing interview data.²¹⁴ The interview sought certain information required to answer parts of the different research questions which were the basis for the interview schedule. The questions were structured around the research questions. The interview data analysis was based on the structure of the schedule.

The methodologies used in qualitative research provide a variety of approaches to the analysis of interview data. Most of the analytical approaches suggested are for open or semi-structured interviews. Mason suggests three possible approaches:

- a. Literal approach: an analytical process that focuses on, for example, the exact use of particular language or grammatical structure.
- b. Interpretive approach: an analytical approach concerned with making sense of research participants' accounts so that the researcher is attempting to interpret their meaning.

²¹⁴ Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (Sage, 2009), 191.

- c. Reflexive approach: an analytical approach that focuses attention on the researcher and her or his contribution to the data creation and analysis process.²¹⁵

To understand the law, its reality and practice, as seen and experienced by the participants in the legal system and those affected by it, this research takes an interpretive approach. Using that approach, several basic steps in analysing the interview data were employed: data exploration, data organisation and making sense of the data.

The first step is data exploration, to get the sense of the data as a whole. Creswell suggests exploring the general sense of data by reading all the transcripts several times. Notes are written in the margin of any ideas, points or concepts that occurred during the readings.²¹⁶ This facilitates the process of sorting and categorising the data.

The second step is organisation, categorisation or sorting of the data. Most researchers will organise the data as an early process in data analysis.²¹⁷ This is done by coding text and breaking it down into more manageable chunks.²¹⁸ The purpose is to construct 'meaningful patterns of facts'²¹⁹ by looking for structures in the data. Different pieces of data are compared in order to find similarities, differences or linkages between them. Traditionally, the process is done through cutting and pasting or even by using scissors to break the data into pieces and to group them into different categories. Several parts and their connections are analysed to form a meaningful picture.²²⁰

This process is known as coding. In the coding process, text passages are related to categories that the researcher had either previously developed or which he or she develops ad hoc.²²¹ In other words, segments of texts are tagged and similar text segments are sorted with similar content into separate categories.²²² Coding leads to categorisation which is a more systematic conceptualisation of a statement.²²³

²¹⁵ Elaine Welsh, 'Dealing with Data: Using NVivo in the Qualitative Data Analysis Process' (2002) 3(2) *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research*, [1] citing Jennifer Mason, *Qualitative Researching* (Sage, 1996).

²¹⁶ John W Creswell, *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research* (Pearson, Fourth ed, 2008), 244.

²¹⁷ Welsh, above n 215, [2] citing Tina Miller, *Exploration of First Time Motherhood: Narratives of Transition* (University of Warwick, 2000).

²¹⁸ Creswell, above n 216, 244.

²¹⁹ D L Jorgenson, *Participant Observation. A Methodology for Human Studies*. (Sage, 1989) cited in Udo, above n 210, 5.

²²⁰ Udo, above n 210, 5.

²²¹ Ibid, 5.

²²² Barbara DiCicco-Bloom and Benjamin F Crabtree, 'The Qualitative Research Interview' (2006) 40 *Medical Education* 314, 318.

²²³ Kvale and Brinkmann, above n 214, 202.

In this study, the data categories had already been developed prior to the interview process. In qualitative research, this process is referred to as the 'template approach' where the text segments are applied to categories developed based on prior research and theoretical perspectives.²²⁴ Gibb labels this type of coding exercise as 'concept-driven coding', that is, using codes that have been developed in advance by the researcher through the literature review process.²²⁵

The process of breaking down the data according to the divisions defined in the interview schedule allows for easier and manageable interpretation of data that relate to specific research questions. The codes are then written on paper as a list to be examined for redundancy and may merge into broad themes to form a preliminary organising scheme. New codes may emerge when reading through the transcripts. The specific quotes in the transcript that support the codes are highlighted with different colours. Erlandson et al suggest unitizing the data, that is, to consider a section or entire answer to one question to assist with categorisation.²²⁶

The last step is to make sense of the data by developing typology based on the research questions in the study.

4 NVivo; Its Use and Its Criticisms

For the purpose of data organisation, NVivo computer-assisted data analysis software was used. The data from the interviews were used in a limited way, that is, to complement data collected from other sources and to seek perspectives of people on various issues related to the research questions. NVivo was used in this study primarily as a tool to organise interview data according to categories of interviewees and the themes already constructed in the interview schedule.

NVivo supports the process of categorising and comparing text segments by offering 'code-and-retrieve' facilities. In this program, documents can be imported directly from a word processing package. Texts or segments may be coded directly. At the same time, the texts separated from the original documents may be easily retrieved whenever necessary for validation or cross-checking. It is also possible to write memos about particular aspects of documents and make a link to relevant pieces of texts in different

²²⁴ DiCicco-Bloom and Crabtree, above n 222, 318.

²²⁵ G Gibbs, *Analyzing Qualitative Data* (Sage, 2007) cited in Kvale and Brinkmann, above n 214, 202.

²²⁶ D A Erlandson et al, *Doing Naturalistic Inquiry: A Guide to Methods* (Sage, 1993).

documents.²²⁷ NVivo's searching facility also allows greater efficiency. It helps to save time and can assist the management of large samples.²²⁸

The use of software packages can make the research process more systematic and explicit, and therefore more transparent and rigorous.²²⁹ Time can be reduced in data management to allow more space for creative and analytic tasks.²³⁰ In addition, the use of computer-assisted data analysis software may overcome human error from using manual methods in searching for simple information in the whole data set.

However, many suggested that researchers should recognize the value of both manual and electronic tools in managing and analysing data and take advantage of both.²³¹ This allows the researcher to make sense of the relationship between different codes and memos written electronically.²³² Software does not analyse data but it can be a tremendous aid in data management and in the analysis process.²³³ It merely replaces the manual method of 'cutting and pasting' different pieces of text relevant to a single category onto pieces of paper and filing them in a pocket file.

There are several issues related to the process of coding. One can be overwhelmed by the sheer volume of information that becomes available.²³⁴ Another is the need to avoid the 'coding trap' or the problem of being too close to the data which may affect analysis. Coding can become mechanical or be done without much thinking.²³⁵ To avoid this, the researcher explored the interview data and prepared a list of codes and categorisation before using the software. This may allow for the analytical distance necessary for good analysis.²³⁶

The influence of grounded theory in the use of the software raises the concern that the software may push analysis in one direction rather than the directions sought in a

²²⁷ Welsh, above n 215, [3].

²²⁸ Udo Kelle and H Laurie, 'Computer Use in Qualitative Research and Issues of Validity' in Udo Kelle (ed), *Computer-aided Qualitative Data Analysis. Theory, Methods and Practice* (Sage, 1995) cited in Udo, above n 219.

²²⁹ P Conrad and S Reinartz, 'Qualitative Computing: Approaches and Issues' (1984) 7 *Qualitative Sociology* 34, cited in Udo, above n 219, 17.

²³⁰ R M Lee and N G Fielding, 'Users' Experiences of Qualitative Data Analysis Software' in Udo Kelle (ed), *Computer-aided Qualitative Data Analysis. Theory, Methods and Practice* (Sage, 1995).

²³¹ Welsh, above n 215, [12]; Kvale and Brinkmann, above n 214, 198-9.

²³² Welsh, above n 215, [9]; Kvale and Brinkmann, above n 214, 198-9.

²³³ DiCicco-Bloom and Crabtree, above n 222, 318-9.

²³⁴ Udo, above n 219, 16.

²³⁵ L Gilbert, 'Going the Distance: "Closeness" in Qualitative Data Analysis Software' (2002) 55(3) *International Journal of Social Research Methodology* 215, 219.

²³⁶ Ibid.

particular study.²³⁷ Grounded theory is a popular qualitative method in which the inquirer generates a general explanation (a theory) of a process, action or interaction shaped by the views of a large number of participants. As mentioned above, the interview data were used in a limited way. They were analysed within the framework built in the study and, therefore, criticisms around grounded theory were avoided.

V VALIDITY AND RELIABILITY

For the purpose of verification of data, triangulation is used to establish an objective opinion on contentious or disputed issues through the use of different methodologies. The usual purpose of data triangulation is for cross-checking data from multiple sources to search for irregularities and differences.²³⁸ Cohen and Manion (1989) suggested three types of verification:

- a. researcher–subject corroboration which involves cross-checking the meaning of data between the researcher and the respondents. This cross-checking may occur during data gathering or after interpretation of the raw data has been made, for confirmation of accurate reporting;
- b. confirmation from other sources about specific issues or events identified;
- c. two or more methods of data collection should be used and the resultant interpretation should be compared.²³⁹

All three types are applied in this study in order to avoid researcher's bias and to ensure accuracy in the interpretation of data and reporting.

The use of different methodologies provides the opportunity for methodological triangulation to test the validity of results. This involves the use of more than one method or source of data in the study so that findings may be cross-checked.²⁴⁰ Multiple methodological techniques provide complementary information and together the result can provide a stronger evidence base for argument in the research and more confidence in the result. The use of theoretical, doctrinal and reform-oriented analysis of law, a comparative approach and interviews can all build a fuller picture of the issue at hand. Each technique used addresses a different aspect of the phenomenon as well as providing some overlap.

²³⁷ Welsh, above n 215, [4].

²³⁸ RY Delahaye and Sekaran, above n 205; John W Creswell and Dana L Miller, 'Determining Validity in Qualitative Inquiry' (2000) 39(3) *Theory into Practice* 124.

²³⁹ RY, Delahaye and Sekaran, above n 205, 136.

²⁴⁰ Hutchinson, above n 68, 128.

VI CONCLUSION

To conclude, the research methodology outlined provides the basis and justification for the conduct of the research in a manner that has been well established in the study of law and its social context. It is specifically designed based on the research questions identified at the outset of the study.

PART 2: THEORETICAL FRAMEWORK

This part establishes the framework for the research. It relies on selected concepts of justice, fairness, equality and non-discrimination as the theoretical framework. These principles are instrumental in the emergence of the recognition of indigenous rights both in national and international law. The research takes a multidisciplinary approach drawing on historical, legal, philosophical and religious perspectives.

CHAPTER 3: PRINCIPLES OF JUSTICE AS THE FOUNDATION OF LAW IN MALAYSIA

This chapter considers the forest rights of the Orang Asli from broader historical and legal perspectives. First, it traces the relationships between the Malays and the Orang Asli communities in the past, and, the colonial practices that shaped the present law. It finds that the development of these laws respected and acknowledged the rights of peoples, including the Orang Asli, based on their own laws and customs. However, other counter-prevailing considerations and perspectives as well as misunderstandings influenced the development of law and its interpretation which overrode the rights and interests of the Orang Asli. Second, this chapter also highlights the provisions entrenched in the Malaysian *Constitution* that uphold the principles of justice, fairness and equality.

I PRINCIPLES OF RESPECT FOR THE RIGHTS OF PEOPLE: HISTORICAL PERSPECTIVE

A The Relationship between the Malays and the Orang Asli

Orang Asli communities were regarded as distinct communities from the Malays, having autonomy and control over their own territories with their own customs and traditions regulating their own affairs. Although various accounts suggested that the Malays often regarded themselves as superior to the aborigines, the autonomy and control of the aborigines over their own territories were not denied. The aborigines regarded themselves as the original inhabitants of the Malay Peninsula and independent of the Malay rulers.¹ Historical accounts indicate that they had their own political

¹ Nicholas, Colin, *The Orang Asli and the Contest for Resources* (International Work Group for Indigenous Affairs, 2000), 74-6 citing various works including: Andaya, Barbara Watson and

establishments with their own leaders and legal systems. Their leaders, who were the reference point for all customary matters, were regarded as having the same standing as that of the Malay rulers.² Many had important political alliances with the Malay sovereigns. Some played important roles in the defence of some Malay rulers. Traditional stories suggest that marriage with the Orang Asli legitimised Malay connection with, and political power over, their territories.³ The Orang Asli also had trading relationships with the Malays particularly in the supply of forest resources in exchange for other needs.⁴ Custom in Negeri Sembilan or locally known as *Adat*⁵ *perpatih* specifically recognized that the aborigines owned the forests and its resources and required Malays to respect their needs and interests.⁶

Andaya Y Andaya, *A History of Malaysia* (Macmillan Education, 1982) 49-50: suggest that when the Malay newcomers arrived with an established system and political ranks, there were already Orang Asli groups in the Malacca region. When Parameswara, the founder of the Malacca Empire, arrived in Malacca, there were populations including the Orang Asli living in the region. Parameswara tightened his position by building relationships with the communities, enjoining them in the political establishment or through inter-marriage; Mikhulo-Maclay, N Von, 'Ethnological Excursions in the Malay Peninsula: Nov. 1874 to Oct. 1875: (Preliminary Communication)' (1878) 2 (Dec) *Journal of the Straits Branch of the Royal Asiatic Society*, 203-221, 215: recorded that 'the Orang Sakai and the Orang Semang consider themselves the original inhabitants and independent of the Malay Rajahs, and so they are in fact in their woods'; Noone, H D, 'Report on the Settlements and Welfare of the Ple-Temiar Senoi of the Perak-Kelantan Watershed' (1936) 19(1) *Journal of the Federated Malay States Museums* 1, 61-2: observed that the Temiar people prior to the intervention of British rule 'pursued the independent existence of a hill people on the Main Range'; AH Hill, *The Hikayat Abdullah: The Autobiography of Abdullah bin Kadir (1797-1854) (An Annotated Translation)* Second Impression, (Oxford University Press, 1985) 260-1: the Orang Asli tribes in Naning held dominion over Naning in Malacca since early Portuguese control of Malacca. It also relates that in 1642, a representative from the Biduanda tribes was appointed as ruler in Naning during the Dutch rule in Malacca; Wilkinson, RJ 'Malay Law in Papers on Malay Subjects, Part I, 1-45', 1908 reprinted in MB Hooker (ed), *Readings in Malay Adat Laws* (Singapore University Press, 1970): the Biduanda tribes were also regarded as having control of their territories; Newbold, TJ, *Political and Statistical Account of the British Settlements in the Straits of Malacca 2 Volumes 1839*, (Oxford University Press, 1971 – reprint), Vol II 117-126: relates that Jakuns and Biduandas were the respected leaders in Malacca.

² Ibid, 75 citing Endang, an Orang Asli leader in Pahang with reference to an oral tradition of Batin Simpok and Batin Simpai in Pahang.

³ Eg of the legends: Haji Buyong Adil, *Sejarah Negeri Sembilan* (Dewan Bahasa dan Pustaka, 1981), 4 on inter-marriage of a Sultan of Johor with a Biduanda from Negeri Sembilan; Maxwell, WE, 'The History of Perak from Native Sources' (1882) 8 *Journal of the Straits Branch of the Royal Asiatic Society* 93-125 on the legend of the White Semang in Perak, a member of whom married a Nakhoda Kasim from Johor and founded the Perak Sultanate; Gullick, JM, *Indigenous Political Systems of Western Malaya* (1965) 17 (The Athlone Press, 1965), 39 on how aspiring heirs in Negeri Sembilan had to resort to claiming Orang Asli (matrilineal) ancestry in order to be eligible for hereditary positions. This was achieved by claiming that the founders of their families were the sons of Orang Asli ancestresses married to Malaccan noblemen. The works are cited in ibid, 75.

⁴ John D Leary, 'Orang Asli Contacts with the Malays, Portuguese and Dutch in Peninsular Malaya from 1400 to 1700' (1994) 18(2) *Asian Studies Review* 89, 98.

⁵ 'Adat' is the Malay word for custom.

⁶ Hooker, MB, *Readings in Malay Adat Laws* (Singapore University Press, 1970), 25-6 cited in Nicholas, above n 1, 74.

B Colonial Practices, Respect for Autonomy and Regard for Existing Rights

The British practices and political and legal writings that shaped the approach towards indigenous nations in North America influenced the development of common law native title in common law jurisdictions including the United States, Canada and Australia. Under the persuasive authorities from these jurisdictions, Malaysian common law has also recognized the common law principle that recognizes the native title of the aboriginal peoples in the Malay Peninsula as well as the natives in East Malaysia (Chapter 6.II.A).

The British practice in India in particular directly influenced British policies in the Malay Peninsula. The practice of treaty and agreement making was adopted in the British Indian Empire. The resulting process of colonisation respected the peoples' residence in these new British territories and protectorate as distinct communities with their own customs and rights. This is seen in the development and administration of laws.

1 The Origin of British Imperial Practice: Recognition of Rights, Equality and Humanity

The legal concept of indigenous peoples was developed in the context of European colonisation. It was directly influenced by the writings of Spanish jurists in the 16th century, including Francisco de Vitoria and Bartolomé Las Casas, who defended the rights of the indigenous peoples in Spain's American colonies.⁷ Their writings contributed to the development of the law of nations that regulated the conduct of states during colonisation.⁸ They laid the foundation of the legal tradition of the recognition of indigenous rights.⁹ Some also claim that this marked the beginnings of international law itself.¹⁰

⁷ G C Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolomé de Las Casas' (1992) 13 *Australian Year Book of International Law* 1, 2-5; SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press, second ed, 2004), 16-19.

⁸ Anthony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (University of Michigan Press, 1999) 89, 89; James W Zion and Robert Yazzie, 'Indigenous Law in the Wake of Conquest' (1997) 20 *Boston College International Comparative Law* 55, 59-65.

⁹ Marks, above n 7, 8 citing Scott JB, *The Spanish Origin of International Law* (1932) IX; Brierly JL, *The Law of Nations* (6th ed, 1963); Sanders, 'The Re-emergence of Indigenous Questions in International Law' (1983) 3 *Canada Human Rights Yearbook* 12-30. Sanders notes and endorses the role of de Vitoria and Las Casas in asserting indigenous rights at an early stage of international law, but he also observes that de Vitoria does provide some grounds for justifying colonialism, especially if the subjugation of the indigenous people should appear to be for their benefit, eg the doctrine of trusteeship: 5 cited in *ibid*, 12.

¹⁰ Anghie, above n 8, 89; Zion and Yazzie, above n 8, 59-65.

Both Las Casas and de Vitoria, better known as Vitoria, argued that the Indians¹¹ possessed certain original autonomous powers and entitlements to land, which the Europeans were bound to respect. They denied the power of the Pope, called the papal authority, to distribute the lands of infidels to Christian princes.¹² Las Casas specifically noted the importance of the recognition of Indian rights as a constraint on the behaviour of the settlers.¹³

But Vitoria, considering the legal issues of discovery, conquest and settlement in the Americas, sought justification for how Europeans could validly acquire Indian lands or assert authority over them.¹⁴ For him, one way that Indians could lose their rights was through conquest following a 'just' war, but the criteria for determining whether a war was 'just' were grounded in the European values system. Although inherently discriminatory, it did establish the principles for a legal framework recognizing the inherent right of Indians. From the same Eurocentric bias, he also articulated that Indians may be 'unfit to found or administer a lawful State up to the standard required by human and civil claims'.¹⁵ Although he did not confirm that this view justified Spanish administration over Indian lands, this argument was a precursor to the trusteeship doctrine later adopted and acted on by states in the 19th century.¹⁶

By contrast, Las Casas maintained that the dispossession of the natives of their land was unlawful, tyrannical and unjust. In *Defence of the Indians*, Las Casas provided a detailed rebuttal of the basis on which Spanish colonialism attempted to justify the

¹¹ Presently referred to as Native Americans. The word 'Indians' was used in both Las Casas and de Vitoria's writings to indicate the natives living in the Americas.

¹² Anthony Pagden, 'The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700' in Alain M Low and Nicholas P Canny (eds), *The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century* (2001) 34, 39:

In 1493 Pope Alexander VI had issued five Bulls which conceded to Ferdinand and Isabella the right to occupy a region vaguely defined as 'such islands and lands ... as you have discovered or are about to discover'. This concession was dubious, at best, since it relied upon an assumption which few, even among Catholics, were prepared to concede: that the papacy could exercise authority over secular as well as spiritual affairs, and that its jurisdiction extended to non-Christians as well as Christians. Nevertheless, the 'Bulls of Donation' remained a central component of the Spanish defence of empire until the mid-eighteenth century.

¹³ Marks, above n 7, 25, 35.

¹⁴ Anaya, above n 7, 16.

¹⁵ Ibid, 18 citing Francisco de Vitoria, *De indis et de Ivre Belli Relectiones* (Classics of International Law Series, 1917) (translation by J Bate based on Laques Boyer ed, 1557; Alonso Munoz ed, 1565 & Johann G. Simon ed., 1696), 161, available online: <http://faculty.cua.edu/pennington/Law508/VitoriaDeIndis.htm> (access date: 1 August 2013)

¹⁶ Ibid, 18.

subjugation of the Indians.¹⁷ He attempted to define the correct juridical basis for the relationship between the Spanish Crown and Indian peoples and their rulers.¹⁸ He specifically repudiated the idea of Juan Gines de Sepulveda who was an apologist for colonisation by the force of arms and the deprivation of the Indians of their liberty.¹⁹

The writings of the Spanish jurists laid the groundwork for international relations. They devised a merger of *Ius Gentium*, originally rooted in reason, with Christian beliefs, to define relations between larger polities and foreign relations and place some obligations on larger polities to respect certain aspects of human equality.²⁰ Vitoria's prescriptions for European encounters with indigenous peoples of the Western hemisphere contributed to the development of a system of principles governing encounters between all peoples of the world.²¹ His writings have had considerable influence on some international lawyers to the present day,²² including Hugo Grotius, the most prominent early international lawyer.²³

Grotius, a century after the Spanish jurists, similarly argued for an essential humanity although without specifically addressing the rights of the American Indians. Unlike the earlier jurists, who based their arguments on divine law, his jurisprudence was based on natural law or the dictates of right reason as a source of legal authority. Grotius rejected title by discovery to all lands inhabited by humans,

even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one.²⁴

Grotius affirmed that the ability to enter into treaty relationships is a necessary consequence of the natural rights of *all* peoples. The right to enter treaties is so common to them that it did not admit distinction arising from religion.²⁵ Vitoria's natural law theory

¹⁷ Marks, above n 7, 23.

¹⁸ Ibid, 23 citing Hanke L, *All Mankind is One* (1974), 88.

¹⁹ Ibid, 23. De Sepulveda JG, *Democrates* (1531): an interpretation of the Aristotelian theory of slaves by nature which purported to justify enslaving 'inferior' people; De Sepulveda JG, *Democrates Alter of Secendus* (1543): application of the doctrine of 'slaves by nature' to the justification of wars against the Indians.

²⁰ See, eg, Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61(1) *University of Toronto Law Journal* 1, 12.

²¹ Anaya, above n 7, 16.

²² Marks, above n 7, 18.

²³ Anaya, above n 7, 16 citing Hugo Grotius, *The Freedom of the Seas, Carnegie Endowment for International Peace ed. 1916*, (Ralph van Deman Magoffin, trans. of 1633 ed.).

²⁴ Ibid, 19 citing Grotius, *The Law of War and Peace, Classic of International Law ed. 1925* (Francis W Kelsey trans. of 1646 ed.), 550.

²⁵ Ibid.

of relations between peoples was also applied by Grotius in his work, *On the Law of War and Peace* in 1625. It contributed to the conclusion of the treaties forming the Peace of Westphalia in 1648. Those treaties marked the beginning of the modern nation state.²⁶

The central point in the writings of all these jurists is the idea of humanism and universality of the rights of human beings. This principle is normative whether sourced from either divine or natural law. It is seen independent of, and higher than, the positive law or decisions of temporal authorities.²⁷ These jurists assumed the equality of all humans as rational beings, whether Christian or not, and consequently they argued that all peoples have rights in natural law to their own governments and laws.

The early theorists not only influenced the contemporary international human rights law but also the development of policies and legal prescriptions handed down by European sovereigns. Those policies and prescriptions often failed to be observed in practice, defeated by other prevailing interests unable to be contained by local officials.²⁸ Felix Cohen, researching the link between Spanish and US law, suggested that Spanish law became part of US law. He noted that Vitoria's work provides a basis for the formulation of legal doctrines of Aboriginal rights in the US and became the foundation for US Indian law. Part of the territory of the US was also under Spanish control from the 16th to 19th centuries.²⁹ In *United States, as Guardian of the Indians of the Tribe of Hualapai v Santa Fe Pacific RR Co*,³⁰ Spanish law was applied in a dispute over land between a railway company and a Native American in recognition of their rights of occupancy, largely on the basis of the writings of Vitoria and the *Laws of the Indies*. The Supreme Court noted the community of doctrine between Spanish and US law on the issue. In the USA, protection of Native American rights developed into a body of Indian law giving Native American nations the status of dependent nations to protect them and Native American land from the predatory interests of settlers and the constituent states of the USA.³¹

²⁶ Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *The International History Review* 569.

²⁷ Anaya, above n 7, 16 citing Arthur Nussbaum, *A Concise History of the Law of Nations*, (Macmillan Co, 1954), 61-114; and Harold Damerow, *A Critical Analysis of the Foundations of International Law* (Rutgers University, 1978), 23-9.

²⁸ Ibid, 19 citing Felix Cohen, 'The Spanish Origin of Indian Rights in the Law of the United States' 31 *Geo Law Journal* 1 (1942), 12-13; Lewis Hanke, *The Spanish Struggle for Justice in the Conquest for America* (University of Pennsylvania, 1949), 83, 91-2.

²⁹ Marks, above n 7, 13-14 citing Felix Cohen, 'The Spanish Origin of Indian Rights in the Law of the United States' 31 *Geo LJ* 1 (1942).

³⁰ 314 US 339 (1941).

³¹ Marks, above n 7, 14.

Subsequent to Grotius, the rise of modern states led to the emergence of the law of nations. This had a direct consequence on the position of indigenous peoples as distinct nations. The concept of nationhood emerged in Europe to acknowledge, validate and designate politically conscious groupings that were consolidated by monarchical rule and bound by common cultural, sociological and ethnic characteristics. On the other hand, statehood developed by reference to the post-Westphalian political communities and their attendant bureaucracy, with a common territory as their dominant characterisation.³² Both concepts converged as mutually reinforcing concepts and political phenomena.³³ This developed into the concept of the primacy of state and the notion of free, independent and equal states derived from the natural rights of a state's individual constituents as articulated by Emmerich de Vattel in his famous treatise.³⁴ This provided the basis for the doctrine of state sovereignty in later international discourse that came to be dominated by positivist constructs. The discourse limited the scope of international law only to the relationship between nation states that were recognized as civilized nations based on a construct of European models of political and social organisations.³⁵ For this reason, indigenous peoples subjected to colonisation were not regarded as groups having sufficient characteristics to be recognized as 'civilized nations'. The consequence was that indigenous peoples were denied sovereignty or the status of distinct communities entitled to be governed by their own laws safeguarded by the law of nations.

However, as noted, divergent views existed about the status of natives on colonisation. Vattel himself did not deny that some non-European Aboriginal peoples may qualify as states or nations with rights as such. He denounced those European states which attacked American nations and subjected them to their 'avaricious rule' to civilize them. He did not hold expressly that a society based on agriculture and settlement was a prerequisite for statehood. Anaya suggested that Vattel seemed to distinguish between forms of indigenous societies by accepting Locke's natural law view that cultivation of the soil led to private property rights in the soil when mixed with labour. Vattel himself

³² Anaya, above n 7, 21, citing JH Shennan, *Liberty and Order in Early Modern Europe: The Subject and the State, 1650–1800* (Longman, 1986) 3.

³³ *Ibid*, 21 citing David Beetham, 'The Future of the Nation State' in Gregor McLennan et al, eds, *The Idea of the Modern State* (Open University Press, 1984) 208-9.

³⁴ *Ibid*, 20 citing Emmerich de Vattel (1714–1769), *The Law of Nations, or the Principles of Natural Law* (Charles G. Fenwick trans, Classics of International Law Series, 1916) [trans of *Le Droit des Gens, ou Principes de la Loi Naturelle* (1758 ed)].

³⁵ *Ibid*, 19-26.

only suggested that cultivating land established a greater right to the land than did hunting and gathering.³⁶ Besides, Locke, whose property rights theory had a significant influence on the contemporary laws, provided a robust defence of native rights to lands and possessions that survived for succeeding generations even after conquest.³⁷ He wrote that

The inhabitants of any country who are descended and derive a title to their estates from those who are subdued and had a government forced upon them against their free consents retain a right to the possession of their ancestors. ... Their persons are free by a native right, and their properties, be they more or less, are their own and at their own disposal, and not at his.³⁸

He also indirectly supported respect for the property rights of Native Americans who were mostly hunters and gatherers. He, however, justified the settlers' expropriation of the land of the natives. He may have been under a belief that the resources of the Americas were inexhaustible, suggesting that settlers were to leave enough for others for their subsistence.³⁹ Locke stated that

men ... have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence.⁴⁰

Specific to the Native Americans, he stated

The fruits, or venison, which nourishes the wild Indian, who knows no enclosure, it is still a tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life.⁴¹

2 Relations between Nations: the Influence of the Ottoman Empire

The relations between nations were also shaped by the practice of capitulations and concessions practised by the Ottoman Empire. This practice that involved treaty arrangements regulated relations between Christian European powers and their Muslim neighbours, the Ottoman Empire and Morocco. Capitulations or *imtiyazat* were treaty arrangements that allowed foreign merchants to live in Muslim territory indefinitely

³⁶ Ibid, 22.

³⁷ John Locke, *The Second Treatise of Civil Government* (1690).

³⁸ Ibid, Sec 192 Ch XVI Of Conquest.

³⁹ Labor theory of property known also as Lockean proviso. Sec. 33. Ch V:

Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same.

⁴⁰ Locke, above n 37, Chap V of Property.

⁴¹ Ibid, s 26, Chapter V of Property.

without becoming the sultan's subjects. Concessions were conceded by the Ottomans to the Genoese in 1453, French and English in the 16th century and the Habsburg Empire, Sweden and Naples in the early 18th century.⁴²

The same arrangements were also made by the English kings who issued letters patent for the merchants in England from the end of the 14th century. The letters patent allowed the merchants to elect a consul to rule over them, do justice, and settle disputes and award compensation.⁴³ The consuls became the heads of their communities under authority delegated by the king. Statutes were directed towards individual English subjects and not towards territory.⁴⁴ This system reflected the *millet* system, practised by the Ottomans which provided for separate legal arrangements for non-Muslim communities in their own civil affairs.⁴⁵

3 British Colonial Practice: Treaty Making and Indigenous Rights

The British practices in the colonisation of North America may have laid the foundation for the development of the doctrine of native title in the common law jurisdictions. Subsequent to the loss of the significant colonies of British North America on the establishment of the United States in 1776, Britain expanded its political territory in Asia, the Pacific and Africa. The practices which recognized the political autonomy of the indigenous peoples and their rights to property developed into a body of global political practices and common law.⁴⁶

In North America, the Royal Proclamation of 1763 recognized the political autonomy of the Native Americans allied with the Crown as well as their control of their lands and resources.⁴⁷ The treaty forbade direct purchase of native land by settlers under the principle that the Crown was the sole source of title to land for settlers. Land from Native American territories could only be acquired by government officials in public treaty processes rather than taken by force or usurpation. The practice was intended to promote peace and avoid the cost of war by inhibiting the dispossession of the

⁴² CR Pennell, 'The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty' (2010) 83(221) *Historical Research* 465, 470.

⁴³ *Ibid*, 470.

⁴⁴ *Ibid*, 484-5.

⁴⁵ *Ibid*, 470-1.

⁴⁶ Zion and Yazzie, above n 8, 65.

⁴⁷ *Ibid*, 65. Following the Royal Proclamation, Treaty of Niagara 1764 was negotiated with representatives from at least 22 Indian nations. The principles agreed to include the recognition of Indian governance, free trade, open migration, respect for Indian land holdings, affirmation of Indian permission and consents on treaty matters, and respect for hunting and fishing rights.

inhabitants from their land by force as practised by Spanish conquistadores in the Spanish expansion which they denounced.⁴⁸

Treaty making became the official policy of the British Crown in acquiring land from Native American nations and First Nations, not only for reasons of justice and morality but for pragmatic reasons such as commercial expansion. Although there is disagreement among scholars on whether the Royal Proclamation recognized or undermined tribal sovereignty, the proclamation established an important precedent that the indigenous inhabitants had rights to their unceded lands and those rights could be surrendered voluntarily only to the Crown or its duly appointed agents in a public process.⁴⁹ It recognized that lands possessed by Indians throughout British territories in America were reserved for their exclusive use, unless previously ceded to the Crown.⁵⁰ A treaty evidenced the recognition of the indigenous peoples as legal and political entities with rights to sovereignty and political authority over their respective lands. It defined the relationship between the British Crown and the indigenous peoples. The terms of treaties varied depending on the circumstances of particular territories but the common principle was that the indigenous peoples did not lose their rights to land and their resources by being subjected to British sovereignty and they maintained a right to some form of political representation in relation to the powers of the new government formed by the British.⁵¹

The British North American experience heavily influenced the development of legal principles and policy in the independent United States of America (the USA),⁵² Canada and other territories. In the USA, these developed into laws protecting the sovereignty of Native American nations and imposing fiduciary obligations on the US government to protect their property.⁵³ In Canada, the treaty-making practice led to the recognition of First Nations' property rights at common law which also, much later, received

⁴⁸ PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011), 26.

⁴⁹ Colin G Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (Oxford University Press, 2006), 96.

⁵⁰ Brian Slattery, 'The Hidden Constitution: Aboriginal Rights in Canada' (1984) 32 *American Journal of Comparative Law* 361, 371.

⁵¹ Tom G Svensson, 'On Customary Law: Inquiry into an Indigenous Rights Issue' (2003) 20(2) *Borialis, Acta* 85, 95-119.

⁵² In 1783, Great Britain ceded the territory to the United States through the Treaty of Paris: Zion and Yazzie, above n 8, 66-7.

⁵³ *Ibid.*

constitutional protection.⁵⁴ The concept of treaty making spread to other parts of the world including New Zealand and some parts of British Columbia.⁵⁵ It was also used in Africa and Asia, particularly in India and the Malay States.

The state practices respecting the rights of the existing inhabitants laid the basis for the development of the doctrine of Aboriginal title as endorsed by courts in the common law jurisdictions. It was also acknowledged by the International Court of Justice in 1975.⁵⁶ The British practice is not unique as the same is also seen in the pattern of treaty making between other European powers and indigenous peoples in the period of colonisation.⁵⁷ Despite many flaws and breaches in practice, this tradition as noted in the context of the US and Canada has become an important source for the legal order in countries with substantial indigenous groups.⁵⁸

4 The Australian Experience

Even in Australia, where there was no treaty concluded with the Aboriginal peoples, there was evidence that the British intended to respect the possession and use of land by the existing inhabitants. Colonial Office policy required respect for the local Aborigines and directed Governors to 'protect their persons and the enjoyment of their possessions, to

⁵⁴ Slattery, above n 50, 366-72. The Royal Proclamation of 1763 is mentioned in s 25 of the Canadian Charter of Rights and Freedom. S 25 provides:

The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

⁵⁵ A few treaties were concluded on Vancouver Island but the mainland was not covered by the foundation of the treaty. See McHugh, above n 48, 30.

⁵⁶ *Western Sahara, Advisory Opinion of 16 October 1975*, 975 ICJ 12, 37039, [80]. The majority state that:

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers.

⁵⁷ Anaya, above n 7, 19.

⁵⁸ Audun Sandberg, 'Collective Rights in a Modernizing North – On Institutionalizing Sámi and Local Rights to Land and Water in Northern Norway' (2008) 2(2) *International Journal of the Common*, [3]. In other regions, the practice of ensuing treaty arrangements between local sovereigns and the European powers, changed as the politics and economies in the East came increasingly under the influence of inter-European power rivalries based on the establishment of trade monopolies: Marcia Langton and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 34, 37.

prevent and restrain violence and injustices towards them, and to punish any of our subjects who harmed them'.⁵⁹ The Aboriginal peoples were excluded from English law, although their land had been incorporated by settlement.⁶⁰

Cases in the 19th century, although limited and not relating to the issue of land rights, represented the perspective that the existing inhabitants were distinct political communities with their own legal systems and rights over their land and resources. In *R v Ballard*,⁶¹ the judges unanimously held that the indigenous inhabitants were to be governed by their own customs and laws based on the principles of equality and justice and supported by the law of nations or international law.⁶² Dowling J, in obiter, stated that the principle applies to the preservation of property, as an

Englishman has no right wantonly to deprive the savage of any property he possesses or assumes a dominion over.⁶³

Subsequently, in *R v Jack Congo Murrell*,⁶⁴ a charge of murder against an Aborigine over the killing of another Aborigine within a British town, Justice Burton held that the indigenous peoples were 'amenable to the laws of the Colony'. Justice Burton held that the Aboriginal peoples were entitled to be regarded as a free and independent people and entitled to their rights from their own perspectives but their institutions of government and laws 'had not attained ... to such position in points of numbers and civilization' to be

⁵⁹ Instructions to Arthur Phillip Esq (25 April 1787) *Historical Records of Australia* ser 1 vol 9, 13-14, cited in Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (Australian Law Reform Commission, 12 June 1986) <<http://www.alrc.gov.au/publications/4.%20Aboriginal%20Customary%20Laws%20and%20Anglo-Australian%20Law%20After%201788/australian-law-applied>>, [41].

⁶⁰ Pennell, above n 42, 485 citing Ann Hunter, 'Boundaries of Colonial Criminal Law in Relation to Inter-Aboriginal Conflict (Inter Se Offences) in Western Australia in the 1830s-1840s, The' (2004) 8 *Australian Journal of Legal History* 215; Damen Ward, 'Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c. 1840-60' (2006) 34(4) *The Journal of Imperial and Commonwealth History* 483.

⁶¹ *R v Ballard or Barrett* [1829] NSWSupC 26; sub nom. *R v Dirty Dick* (1828) NSW Sel Cas (Dowling) 2, Forbes CJ and Dowling J 13 June 1829 in Dowling, Proceedings of the Supreme Court, Vol 22, Archives Office of New South Wales, 2/3205. The case involved a murder of a native by another native believed to be for execution of punishment meted according to the tribe's custom. It is the earliest case known involving a native in New South Wales. Available online at: http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/r_v_ballard_or_barrett/

⁶² *Ibid*, 107. Dowling J stated: 'The rule is founded upon principles of equal justice, inasmuch as the law of England will not endure wrong or injury. ... Amongst the civilized nations this is the universal principle, that the lex loci, shall determine the disputes arising between the native and the foreigner.'

⁶³ *Ibid*, 110.

⁶⁴ *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35. The case is available at: http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/r_v_murrell_and_bummaree/.

recognized as 'sovereign states governed by laws of their own'.⁶⁵ The fact that the killing occurred in a British town may have indicated that the deceased had chosen to live as the British did and so had come within the protection of the English legal system.

This judgment attracted criticism⁶⁶ and was not followed in a later case, *R v Bonjon*, although it became the accepted law. Willis J saw the Aboriginal peoples as nations, distinct communities and dependent allies of the Crown, having sovereignty to their own land and governed by their own laws and customs.⁶⁷ He held that English law was not applicable to them for these reasons. Relying on the law of nations that was applicable to colonising nations, Willis J held, on the basis of equality and justice, that they remained unconquered and free. Even tribes dependent

on the colonists as their superiors for protection; their rights as a distinct people cannot, from their peculiar situation, be considered to have been tacitly surrendered.

He referred to the report of a Select Committee of the House of Commons on Aboriginal Peoples in 1837, in which the importance of property rights of the existing inhabitants of British settlements was strongly affirmed. The report stated

It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, however which seems not to have been understood. Europeans have entered their borders, uninvited, and when there, have not only acted as if they were undoubted lords of the soil but have punished the natives as aggressors if they have evinced a disposition to live in their own country.⁶⁸

⁶⁵ Ibid, reported in Supreme Court, Miscellaneous Correspondence relating to Aborigines, State Records of New South Wales, 5/1161, 210-216, 211. The report was published in Sydney Gazette in 23 February 1836

⁶⁶ 'Jack Congo Murrell – The Black Native', *Sydney Herald*, 5 May 1836 <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/r_v_murrell_and_bummaree/> .

⁶⁷ *R v Bonjon* (*Port Phillip Patriot*, 20 September 1841, Melbourne). This view is based on, first, the consistency of the practice of the British in the treatment of natives in other jurisdictions acquired by cession and settlement as well as in conquered territories; and second, the writing of Vattel on the rights of nomadic people.

⁶⁸ Select Committee on Aborigines (British Settlements), Report, House of Commons, Sessional Papers, 1837, vol 7, no 425 at 85. This report was referred to by Willis J in *R v Bonjon*. The Select Committee was established in response to uprising atrocities in Australia. The address by the House of Commons to William IV in July 1834 reflected the principles of justice and humanity with respect of the rights of the existing inhabitants in British expansion of power. It stated that the Commons in British Parliament,

impressed with the duty of acting upon the principles of justice and humanity in the intercourse and relations of this Country with the native inhabitants of its Colonial Settlements, of affording the protection in the enjoyment of their civil rights, ... and humbly to pray that His Majesty will take such measures, and give such directions to the Governors and officers of His Majesty's Colonies, Settlement and Plantations, as shall secure to the natives the due observance of justice, and the protection of their rights, promote the spread of civilization amongst them, and lead them to the peaceful and voluntary reception of the Christian religion.

But over time, argued Watson, under the influence of the most extreme form of discovery doctrine adopted into common law by Marshall J in *Johnson v M'Intosh*,⁶⁹ the legal fiction of terra nullius took root in Australia. *R v Jack Congo Murrell* was formally reported and cited right up to the end of the 20th century.⁷⁰ It was maintained through more than a century and a half that indigenous occupants of a 'discovered' country had no enforceable property rights.⁷¹ As McHugh described

There [in Australia] settlement mostly spread without formal concession to Aboriginal presence with official effort to maintain a line of settlement frustrated by what became unstopable patterns of 'squatocracy' defiance.⁷²

Therefore, the High Court of Australia in *Mabo v Queensland (No 2)* ('*Mabo (No 2)*')⁷³ in 1992 can be seen to merely affirm the position of the Aboriginal peoples as it was understood during the first 50 years of settlement. The court rejected the prevalent understanding of the distinction between cession and settlement and the concept of *terra nullius*⁷⁴ in determining the existing rights of the inhabitants at the time when the British Crown took possession.⁷⁵ It found that propositions implying that the Indigenous peoples had no proprietary interest in their lands would depend on a discriminatory denigration of them, their social organisations and customs.⁷⁶ In the absence of any explicit territorial cession, all pre-existing Aboriginal rights to territory continued as common law native title.

⁶⁹ 21 US (8 Wheat) 543 (1823).

⁷⁰ Bruce Kercher, 'Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project', (2000) 18(3) *Law and History Review*, cited in Janine Rizzetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law' (2011) Refereed Paper ANZLH *E-Journal* 5, 18.

⁷¹ Blake A Watson, 'The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada and New Zealand' (2011) 34 *Seattle University Law Review* 507, 512.

⁷² McHugh, above n 48, 30.

⁷³ (1992) 175 CLR 1 [29].

⁷⁴ *Terra nullius* is Latin for 'territory which belongs to no one'.

⁷⁵ In his view, under the international law, indigenous peoples' rights have different status, origin and force depending on the means of obtaining sovereignty employed by the colonising state: conquest, cession and occupation of territory which was terra nullius. Distinction was made between those classed as hunters/food gatherers and those classed as agricultural gardeners which marked distinction in levels of social organisation. The view was grounded in productive use of land to mark the status of ownership as articulated by Locke and Vattel. See, John Locke, *Second Treatise of Government*, (Cambridge University Press, 1963); Emerick de Vattel, *Le droit de gens, ou principes de la loi naturelle* (1758), reprinted as *The Law of Nations or the Principle of Natural Law*, trans Charles G Fenwick (Washington, Carnegie Institute, 1902) 207-10. Blackstone summarized the law as follows

For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force ... but in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain ... (W Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1978), Bk 1, ch. 4, 104).

⁷⁶ *Mabo (No 2)* (1992) 175 CLR 1, [39].

5 The Doctrine of Protection in the United States, Its Misconception and Its Impact in Other Common Law Jurisdictions

It was in the US in the 1800s that the law continued to develop. Marshall CJ in the Marshall Trilogy,⁷⁷ ie the reference to three major cases involving the Native Americans in the US, established key legal principles relating to their rights within the states.⁷⁸

The first principle established by the Trilogy was related to the relationship of the Native American nations with the United States. This relationship was characterised by the concept of 'domestic dependent nations'. This position was made in reliance on the international law doctrine of discovery which Marshall adopted into the common law. This doctrine, Marshall wrote, not only operated as a limitation for the Native Americans but also on European nations.⁷⁹ It regulates the rights given by discovery to the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before human memory.⁸⁰ Marshall also cited Vattel to establish that the domestic dependent status did not limit the importance of tribal sovereignty. Vattel considered that tributaries and feudatory states remain as sovereign and independent states so long as they exercise self-government and have independent administrative authority.⁸¹

Marshall announced that the Native Americans were 'the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.'⁸² Based on the discovery rule, the tribes retained interest in the possession and use of their lands, that is, 'the two sticks in the property bundle of rights commonly associated with a fee simple absolute'.⁸³ But under the discovery doctrine, Marshall decided, the tribes lost, 'their rights to complete sovereignty, as independent nations' and 'their power to dispose of the soil at their own will, to whomsoever they pleased.'⁸⁴

⁷⁷ *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823) ('*Johnson*'); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) ('*Cherokee Nation*').

⁷⁸ Anaya, above n 7, 23-26.

⁷⁹ Anaya, above n 7, 25.

⁸⁰ *Ibid*, 25.

⁸¹ *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831).

⁸² *Johnson* 21 US (8 Wheat) 543 (1823), 574.

⁸³ Michael C Blumm, 'Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country' (2003-2004) 28 *Vermont Law Review* 713, 983.

⁸⁴ *Johnson* 21 US (8 Wheat) 543 (1823), 574.

In *Worcester v Georgia*,⁸⁵ Marshall dropped the 'limited possessor' view in favour of a limited owner conception.⁸⁶ He ruled that the Cherokee Nation was a 'distinct community occupying its own territory with boundaries accurately described'. The laws of Georgia were not enforceable in its territory so that the citizens of Georgia could not enter except with the assent of the Cherokees or in conformity with treaties and with the Acts of Congress. The decision effectively limited the earlier decision in *Johnson* to the right of preemption amongst the European colonisers, excluded state authority over Native American nations and established that the Native American had a right to self-government unless voluntarily ceded or lost by military conquest. Michael Blumm describes the title referred to by Marshall as a 'fee simple subject to the government's right of preemption'⁸⁷ or as a 'fee simple with a partial restraint on alienation'.⁸⁸

The second principle derived from *Cherokee Nation* and *Worcester* is the concept of the fiduciary trust responsibility of the US government to Native American tribes. This principle of trust responsibility is concomitant with the third principle that the states have no authority in the territory of Native Americans as they are domestic dependent nations. The US government had an obligation to protect their interests from those that could encroach upon their rights. Earlier in 1790, the US government enacted the *Indian Intercourse Acts 1790* to prohibit unregulated trade and travel in Native American territories.

The interplay of the above legal principles laid the foundation for contemporary expression of self-government by Native American nations within the European-derived legal framework. They have had limited influence on the practice of self-government in the states. However, they influenced legal principles on land rights and native title operating in Canada, New Zealand and Australia although the contents of those rights in those jurisdictions vary (Chapter 8).⁸⁹

However, as Blumm suggested, the trilogy was misinterpreted by later decisions that failed to recognize that Marshall CJ had recognized that the Indian tribes had fee simple

⁸⁵ 31 US (6 Pet.) 515, 544 (1832) cited in Blumm, above n 83.

⁸⁶ Watson, above n 71, 511.

⁸⁷ Blumm, above n 83, 741.

⁸⁸ Ibid, 740.

⁸⁹ Watson, above n 71.

absolute in their land.⁹⁰ The misunderstanding was used to justify the diminishment of the land rights of the Native Americans.

6 British Practice in India and Its Influence in the Malay States

The British relationship with India and East Asia began as trade in the 17th century through the British East India Company (BEIC). It then expanded with Britain making a large part of the region its dominion by 1773 with Calcutta as its capital. The Indian Empire later comprised: 1. British India, which was under direct imperial rule;⁹¹ over 600 princely states, which were either protectorates or protected states; and other territories not formally included in the Indian Empire: Bhutan, Nepal, Afghanistan, Arabia and Somalia.⁹²

The BEIC in the beginning was firmly opposed to conquest as a way of expansion.⁹³ The relationship with the territories in Asia was established through a series of treaties with the local rulers to whom rent or tribute was usually paid. The treaties defined the relationship with the local rulers and the extent of British powers in the territories varied.⁹⁴ British settlements in India, Madras and Calcutta were acquired by treaty. Mumbai was ceded by the Portuguese in 1661.⁹⁵ By the mid-1700s, however, BEIC expanded the territories it occupied in India as well as continuing its indirect rule through treaty arrangements with local princes.⁹⁶

The British developed a system of 'Residents', who advised the local rulers, which originated from the practice of the BEIC in the 18th century.⁹⁷ Under this system, all states

⁹⁰ Michael C Blumm, 'Why Aboriginal Title is a Fee Simple Absolute' (2012) 15(4) *Lewis & Clark Law Review* 975.

⁹¹ British India consisted of seven to 17 colonial provinces during 1858–1947, each headed by a British governor, lieutenant-governor or chief commissioner: James Onley, 'The Raj Reconsidered: British India's Informal Empire and Spheres of Influence in Asia and Africa' (2009) XL(1) *Asian Affairs* 44, 45.

⁹² Onley pointed out that the Indian Empire was much larger than most historians realize, for it also included Bhutan, Nepal, Afghanistan, Arabia and Somalia: *ibid.*

⁹³ Pagden, above n 12, 37-39.

⁹⁴ According to Onley, above n 91, 50:

they were known variously as British protectorates, protected states, dependencies, dependent states, states under British protection, and states in exclusive (or special) treaty relations with the British Government. Their sovereignty was divided between the British Crown and the local ruler, but in proportions that varied greatly according to the history and importance of each state. Their relationship with the British Crown was regulated partly by the treaties or less formal agreements, partly by usage, and ultimately by British policy.

⁹⁵ Pagden, above n 12, 38.

⁹⁶ This could be differentiated from its settlement in North America, as well as Pacific territories, in the sense that the British did not intend to settle in the territories in Asia. There were few British settlements established in Asia.

⁹⁷ For history of the origin of the residential system, see: Onley, above n 91, 47-51.

and territories other than British India (which was directly under British rule as a result of conquest or cession), whether independent or under British protection, were incorporated into a vast diplomatic network controlled by the government of the Indian Empire. Each had its own ruler or chief overseen by a British Resident or agent. These residencies and agencies were run by the Indian Political Service (IPS). Originally, Residents took their orders from the headquarters of one of the BEIC's three residencies in India.⁹⁸

By 1824, the Indian Empire also comprised the territories of Penang, Malacca and Singapore in the Malay Peninsula. These territories were formed into the Straits Settlements in 1826. The Straits Settlements had been part of the territories under control of the BEIC from Calcutta. They came under direct British control as Crown colonies in 1867 when their affairs were shifted to the Colonial Office in London. In 1858 at the end of the Indian Mutiny and the removal of the last Mughal Emperor the British government assumed direct control.⁹⁹

British's involvement in governmental and administrative matters in the Malay states began only in the late 19th century. The Treaty of Pangkor was signed in 1874 following which the first British Resident was appointed in Perak. Prior to this, treaties were made but for trade purposes.¹⁰⁰ In the same year, British officers were sent to Selangor. Although there was no treaty signed for the appointments of the British officers, Roland Braddell wrote that an interchange of letters, a proclamation and the reception of officers were to assist the Sultan to 'govern his country and to protect the lives and property of dwellers in, and traders to, Selangor'.¹⁰¹ These became the general reasons for the reception of the British officials and their power in the Malay States. In each of the other states, treaties were also made with their respective local authorities to define their relationship.¹⁰²

⁹⁸ The headquarters were established in Surat (1616–1877), later Bombay Castle in Bombay; Fort St George in Madras (established 1653); and Fort William in Calcutta, Bengal (established 1698): *ibid* 91, 45.

⁹⁹ *Ibid* 91, 50.

¹⁰⁰ Eg, Treaty with the East India Company 1825, Cession of Dinding 1826, Treaty with the East India Company 1826.

¹⁰¹ Roland Braddell, *The Legal Status of the Malay States* (MPH, 1931), 6, the extract was reproduced in Salleh Buang, 'Malay Customary Tenure: A Brief Historical Survey' in Ahmad Ibrahim and Judith Sihombing (eds), *The Centenary of the Torrens System in Malaysia* (Malayan Law Journal, 1989) 171, 151.

¹⁰² Negeri Sembilan: Treaty of 1889; Pahang: Treaty of 1887; Kedah: Treaty of 1791, Third Treaty of 1800; Kelantan: Treaty with Great Britain 1910; Johor: Treaty of 1885, Treaty of 1914 (Amendment of 1885 Treaty).

In 1895, the four states of Perak, Selangor, Pahang and Negeri Sembilan formed themselves into a federation, the Federated Malay States (FMS). The British Resident-General of the FMS was answerable to the Governor of the Straits Settlements who was also the High Commissioner of the FMS.

In most cases, the British Residents handled the external affairs and the defence of the Malay states, whilst the states continued to be responsible for their domestic matters. By the mid-19th century, Residents became colonial administrators in those regions where the BEIC assumed direct control. In other states indirectly controlled by the British, British officers generally acted as diplomatic officers controlling external affairs but British influence in internal affairs was also substantial in many states.

In its practice in the Indian Empire, the British demonstrated interest and sensitivities to the existence and use of Hindu and Islamic law. The local laws were referred to in the courts established since the BEIC's rule.¹⁰³ Introduction of English law was applied only for Indians who had no other applicable body of law such as Armenians and Parsis.¹⁰⁴ Local customary laws were compiled and judicial institutions were established for different multicultural communities.¹⁰⁵ The same practice was also reflected in the Malay states as discussed below.

C British Practice in the Malay Peninsula

In the Malay states, the local inhabitants were largely governed by their own laws and customs during the colonial period. In the Malay Peninsula, the Portuguese and the Dutch left the administration of justice, except for their own subjects, in the hands of local political leaders.¹⁰⁶ Britain introduced a range of new laws in the region¹⁰⁷ but regard was had for the existing rights and interests of the inhabitants, and their local customs and

¹⁰³ John F. Riddick, *History of British India: A Chronology* (Greenwood Publishing Group, 2006), 184.

¹⁰⁴ Ibid, 193. Eg was the *Lex Loci Act* which was enacted in 1845.

¹⁰⁵ Ibid, 184-96.

¹⁰⁶ PP Buss-Tjen, 'Malay Law' (1958) 7(2) *The American Journal of Comparative Law* 248, 253: The Dutch practice was not really known but as it was their practice in Java to leave the natives to their own customs and laws, unless they clashed with what they regarded as accepted principles of justice, Buss-Tjen suggests that this was also the case in Malacca. Maxwell was also of the same view that in 1825 when Malacca was taken by the British, the land tenure in Malacca was governed by Malay customary land unchanged by the previous rulers (W E Maxwell, 'The Laws and Customs of the Malays with Reference to the Tenure of Land' (1884) *JSBRAS* 72, 148.

¹⁰⁷ The First Charter of Justice introduced the common law of England to Penang in 1807, and the Second Charter of Justice introduced the common law to Malacca and Singapore in 1826. In 1855, another Charter of Justice was granted to the Straits Settlements which comprised Penang, Malacca and Singapore.

religions. In providing for the common law to be the basis of the legal system in the Crown colonies, the local laws and custom were not meant to be abrogated.

1 *The Straits Settlements*

In Penang, the introduction of English law was mainly intended to resolve the legal chaos from the absence of laws applicable to British subjects, which had led to perceived injustice for local inhabitants.¹⁰⁸ Maxwell R observed in *Regina v Willan*¹⁰⁹ that the *First Charter of Justice 1807* respected native religions and usages and that the law in Penang before 1807 was the personal law of the local people. Cases, he felt, should be decided by the principles of natural law and equity which he said, in the case of British subjects, was English law. Many judges, however, found that English law was applicable in an erroneous belief that there was no legal system existing in Penang before the *First Charter of Justice*.¹¹⁰ The same practice of respect for the local custom and existing rights was also seen in Singapore.¹¹¹ In Malacca, ceded by the Dutch to the British,¹¹² lands under Dutch grants were converted to English fee simple in 1839. The lands in the interior continued to be governed by local customary law which recognized private

¹⁰⁸ *Kamoo v Thomas Turner Bassett* (1808) 1 Ky 1. Stanley R held that the application of English law to the case which in fact happened before the grant of the 1807 Charter was consistent with its objective to protect persons, liberties and properties of the natives from oppression and injustice inflicted by the British subjects.

¹⁰⁹ (1858) 3 Ky. 16.

¹¹⁰ The judiciary in Penang was divided on the position of the custom and laws of the existing inhabitants. Judges in *Yeap Cheah Neo v Ong Cheng Neo* (1885) LR 6 PC 381; 1 Ky 326; and *Fatimah v D Logan* (1871) 1 Ky 255 for instance ruled that Penang was wholly uninhabited, 'no trace of any laws having been established' and thus all settled in Penang became the subject of English law. In an earlier case, *Regina v Willans* (1858) 3 Ky 16, Sir Benson Maxwell doubted that the English law can be made *lex loci* by Captain Light and his companies which 'were a mere garrison'. However, Logan wrote that Malay Muslims such as Tengku Syed Hussain and their families were governed by their own custom and were not subjected to the English laws. Logan, J R 'Notices of Pinang' (1850) (4) *JIA*, 655 cited in Mahani Musa, 'Keterlibatan Orang Melayu-Muslim dalam Persatuan Sulit di Pulau Pinang Sejak Abad ke-19 (Involvement of Malay-Muslims in Secret Societies in Penang since 19th Century)' (Paper presented at the Pengkisahan Melayu Pulau Pinang, Penang, 2001). That Penang was uninhabited was also refuted by recent studies. See, eg, Abdur-Razaq Lubis, 'The Indonesians in Penang, 1786–2000' (Paper presented at the Indonesian Students Gathering, Northern Region, Malaysia, Penang, 2000) <<http://www.ias.nl/iasn/24/regions/24SEA3.html>>.

¹¹¹ *Yeap Cheah Neoh v Ong Cheng Neo* (1872) 1 Ky. 326 PC: the English common law was in force in Singapore in so far as it is applicable, but that the Charter of 1826 provides that the Court of the Colony was to exercise jurisdiction as an Ecclesiastical Court in so far as the religions, manners and customs of the inhabitants will admit. See also, *Isaac Penhas v Tan Soo Eng* (1953) MLJ 73 PC: The common law of England was in force in Singapore in 1937 except in so far as it was necessary to modify it to prevent hardships upon the local inhabitants who were entitled by the terms of the Charters of Justice to exercise their own respective religious customs and practices.

¹¹² Malacca was ceded by the Dutch to the British through the Anglo-Dutch Treaty of 1824.

ownership of land by right of occupation with the capacity to be inherited.¹¹³ The customary tenure protected both the owner and his sub-tenant cultivator.¹¹⁴ Although the English deeds system was implemented to replace the former system of title including customary law, the rights in land held under customary land continued.¹¹⁵ British judges were often called upon to administer Islamic law as a matter of personal law. They gave themselves the power to admit or refuse evidence of Islamic law and local customs when adjudicating cases involving such matters.¹¹⁶

It was generally believed that the introduction of English law into Penang in 1807 was because the island was regarded as uninhabited at the time of Captain Light's occupation in 1789.¹¹⁷ However, official records dated 1795 show that local communities were living there.¹¹⁸ Drawn from the context of Blackstone's categories of colonies as ceded,

¹¹³ *Sahrip v Mitchell* (1879) Leic 466: Sir Benson Maxwell CJ held that:

The Portuguese, while they held Malacca and after them, the Dutch, left the Malay custom or *lex non scripta* in force. That was in force when this Settlement was ceded to the Crown appears to be beyond dispute, and that the cession left the law unaltered is equally plain on general principles ... Further, the custom has always been recognized by the Government ... The *Malacca Land Act 1861* plainly refers to and recognizes the same customary tenure.

¹¹⁴ Claridge R, *Abdul Latif v Mohamed Meera Lebe* (1829) 4 Ky 249.

¹¹⁵ The English Deed System was implemented gradually until fully implemented in 1886. Among efforts made, except in Naning, to recognize the customary land was *Malacca Lands Customary Rights No. IX of 1886* (Ordinance 1886). The 1886 Ordinance was replaced by *National Land Code (Penang and Malacca Titles) 1963* (Act 518) (in force on 1 January 1966). Act 518 extended the Torrens system to replace the Deed System formerly in practice. The customary land in Naning, a district in Malacca, continued to be governed by *Adat Perpatih* (local customary law in practised in Negeri Sembilan) up to the present day.

¹¹⁶ See, eg, *Shaik Abdul Latif v Shaik Elias Bux* [1915] 1 FMSLR 204. Respect of the existing law could be seen in the judgment of Malkin, R in *In the Goods of Abdullah* (1835) 2 Ky. Ec. 8:

I believe it would be very difficult to prove the existence of any definite system of law applying to Prince of Wales' Island or Province Wellesley previous to their occupation by the English; but that law, whatever it was, would be the only law entitled to the same consideration as the Dutch law at Malacca; indeed, even that would not in general policy, though it might in strict legal argument; for there might be much hardship in depriving the settled inhabitants of Malacca of a system which they had long understood and enjoyed ... any man therefore who wishes his possessions to devolve according to the Mohamedan, Chinese, or other law, has only to make his Will to that effect, and the Court will be bound to ascertain that law and apply it for him.

¹¹⁷ See, eg, Buss-Tjen, above n 106, 254.

¹¹⁸ A note dated 1795 found in an old register of surveys recorded the existence of a fairly large Malay *kampong* [village] of about 18 acres on the south bank of the Penang River. It also stated that the land had been occupied for 90 years, thus establishing a Malay population in Penang as early as 1705. Another smaller settlement further south was also mentioned, and it would seem that Penang was after all no virgin country at the time of its occupation by the British. What law prevailed amongst these inhabitants is not known. As the island belonged to the Sultanate of Kedah, we can only guess that either Kedah laws [*adat temenggong*] applied or else the local custom, whatever it was. Seen in this light, Penang was definitely not a settled colony: F G Stevens, 'A Contribution to the Early History of Prince of Wales' Island' (7) *JRAS-MB*; C F Skinner, (1) 'Notes and Queries', 6, cited in *ibid*, 254.

conquered or terra nullius under the law of nations, absence of inhabitation was regarded as justifying the application of the discoverer's law to the land. Buss-Tjen suggests that the British approach in introducing their laws is contrary to a principle of Dutch colonisation which left the native populations to their own laws and customs, unless they clashed with principles of justice and equity in Dutch law. He suggests that this difference is the cause of the different valuation of and approach to native custom law by the two colonising powers.¹¹⁹

However, this view does not take into account that the concept of rule over territory rather than rule over people came into general practice in the early 19th century. The laws introduced to Penang were meant to be applicable to British subjects. Increasingly, in the 19th century, the British tended to apply English law but personal laws based on Islam, Hinduism, Buddhism etc continued. This is evident by the recognition and continuance of local institutions alien to English law.¹²⁰

2 Malay States under Direct and Indirect British Rule

The Malay states¹²¹ were legally sovereign and independent and British administrators applied the practices and customary laws of the inhabitants as they understood them.¹²² Minatur suggested that custom and practices of the locals were viewed by the British as the common law of the people in those spheres of lives where it applied.¹²³ But the content of customary laws was often misunderstood as they were unwritten, varied

¹¹⁹ Ibid, 255.

¹²⁰ See eg, the *Six Widows' Case* 12 SSLR 120 (polygamy amongst Chinese was acknowledged); Muslim matrimonial law was recognized in the *Ordinance No. V of 1880* and its amendments; an amendment in 1923 (No. 26 of 1923) applied Muslim law in matters of intestacy succession: ibid, 256.

¹²¹ Perak, Selangor, Negeri Sembilan and Pahang were under direct rule of the British with a resident appointed to assist in the States' administration. In 1895, the four states were confederated into Federated Malay States (FMS) which lasted until the establishment of the Federation of Malaya in 1946. The other Malay states were indirectly ruled by the British through a British Advisor.

¹²² During the advent of the British, some customary laws were coded into writing. Examples were Malacca Laws 1523, Pahang Laws 1596, Kedah Laws 1605, Johor Laws 1789, Minangkabau Digests, Perak Code and the Ninety-Nine Laws of Perak 1765. But the exact content of the laws was in doubt as numerous customary laws were in fact unwritten, varied in different districts and changed gradually through local judicial procedures. Hooker pointed out that there is a probability that the contents of the written codes were never applied as legal rules. M B Hooker, 'The Challenge of Malay Adat Law in the Realm of Comparative Law' (1973) 22 *International and Comparative Law Quarterly* 492, 497.

¹²³ Joseph Minatur, 'The Nature of Malay Customary Law' (1964) 6(2) *Malaya Law Review* 327, 251.

between districts and changed gradually over time and through local judicial procedures.¹²⁴

Legislation was introduced in matters thought not to be provided for in local laws. In other areas, legislation was introduced to replace local laws to achieve what was thought to be better justice.¹²⁵

In the absence of local laws, civil law enactment¹²⁶ provided references to the common law and equity of England. But the application of English law was subject to the consideration of its consistency with local circumstances. However, reference to English common law and equity was the practice of judges even before the passing of the civil law enactment.¹²⁷ In some cases, the judges found no recognizable laws applicable, although the finding may have been erroneous. In some other cases, local custom was thought to be unreasonable, unjust and against public policy.¹²⁸ Terrell CJ, suggested in *Motor Emporium v Arumugam*¹²⁹ that the courts on many occasions acted on equitable principles, not because English rules of equity applied, but because such rules happened to conform to the principles of natural justice.¹³⁰

In effect, extensive laws based on English common law principles and legislation were gradually introduced. One reason was the difficulty in determining the exact local

¹²⁴ M B Hooker, 'The Interaction of Legislation and Customary Law in a Malay State' (1968) 16(3) *The American Journal of Comparative Law* 415; Hooker, above n 122.

¹²⁵ For instance, criminal law based on local custom was replaced by a penal code based on the Indian Penal Code, and a criminal procedure code. Evidence laws were introduced on the belief that they were more favourable to a suspect and in consonance with the principle of natural justice. Buss-Tjen, above n 106, 258: local custom on law of evidence such as declaring an accused person guilty just because of 'rumors spread by flies' or because the man did not stop to ask for betel, was considered as unjust and unreasonable.

¹²⁶ *Civil Law Enactment 1937 (FMS)*. The provision was extended to other Malay states in 1951 and to the whole Federation in 1956.

¹²⁷ *Government of Perak v AR Adams* [1914] 2 FMSLR 144 (tort action); Buss-Tjen, above n 106, 256.

¹²⁸ In *Re The Will of Yap Kwan Seng, Deceased* [1924] 4 FMSLR – a trust for ancestral worship was held as not for public religious or charitable use and infringed the rule against perpetuities.

¹²⁹ *Motor Emporium v Arumugam* [1933] MLJ 276.

¹³⁰ See also, *Jamil bin Harun v Yang Kamsiah* [1984] 1 MLJ 217: Lord Scarman:

it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so. The Federal Court is well placed to decide whether and to what extent the guidance of modern English authority should be accepted.

custom.¹³¹ Another was the Eurocentric perspective of the English-trained lawyers who were influenced by the stadial or stepped view of civilisation. Together with the notions of 'progress', 'less civilised' peoples had the potential to ascend the grades or steps towards civilisation.¹³² This belief was used to justify colonisation in the 17-18th centuries and shaped perspectives on the status of local peoples and the standard of their laws. The moral imperative of 'the white man's burden' reflected a belief that Christian nations should guide less civilized societies to enlightenment.¹³³ The same perspectives were also reflected in other regions such as Australia and New Zealand.¹³⁴

D Preservation of Local Laws

1 Privilege of the Malays as Indigenous Groups

The colonial practice of recognizing indigenous rights laid the basis for the present-day laws relating to the protection and special privilege of indigenous groups, specifically the Malays, in the Malay Peninsula. Malay rights to land were recognized through Malay ancestral land protection policies and Malay Reservation legislation that aimed to safeguard certain areas for Malays. The aim was to protect the local people's land from being sold to non-Malays following the rubber rush of 1910.¹³⁵ The first Malay

¹³¹ This difficulty was noted by many writers who researched customary law in the region. See, eg, Buss-Tjen, above n 106; Hooker, above n 122. Although there were some digests of law, including the Laws of Malacca and the Ninety-Nine Laws of Perak, the enforceability of the written laws was doubted. Some *qadhis* of districts [judges administering Islamic law] who were often called upon to clarify the custom of the locals were not really familiar with the exact custom in practice but instead gave the content of Islamic law that they knew but not in practice locally. Some *qadhis* having education backgrounds from Middle East countries were resistant towards customs as practised by the local people. Whereas local custom is accepted by Islamic law as a source of law, the *qadhis* took a narrow approach towards Islam and regarded local custom as un-Islamic, thus imposing their view upon the local people on what laws were supposed to regulate them.

¹³² See eg, Nathaniel Wolloch, 'The Civilizing Process, Nature, and Stadial Theory' (2011) 44(2) *Eighteenth-Century Studies* 245.

¹³³ See eg, Charles Hirschman, 'The Making of Race in Colonial Malaya: Political Economy and Racial Ideology' (1986) 1(2) *Sociological Forum* 330; Daniel P S Goh, 'Imperialism and 'Medieval' Natives: The Malay Image in Anglo-American Travelogues and Colonialism in Malaya and the Philippines' (2007) 10 *International Journal of Cultural Studies* 323; SH Alatas, *The Myth of the Lazy Native: A Study of the Image of the Malays, Filipinos and Javanese from the 16th to the 20th Century and Its Function in the Ideology of Colonial Capitalism* (Frank Cass, 1977).

¹³⁴ Ward, above n 60, 486.

¹³⁵ Charles Kingsley Meek, *Land Law and Custom in the Colonies* (Oxford University Press, 1949), 41; Paul H Kratoska, "'Ends That We Cannot Foresee": Malay Reservations in British Malaya' (1983) 14(1) *Journal of Southeast Asian Studies* 149, 151-2. In Selangor, a category of 'customary land' was created in 1891 land legislation to provide a security of tenure (referred to as 'a permanent, transmissible, and transferable right of use and occupancy'). Surveys of customary land were to be rudimentary but less costly than the surveys required for land involved in commercial transactions and, accordingly, less of a burden on the finances of a landholder. The restrictive ownership provisions were removed from the law upon disagreement by some

Reservation legislation was enacted in 1913.¹³⁶ Subsequently, on independence, the Malay rights and their special position were safeguarded in the 1957 *Constitution* extending the position already provided in the *Constitution* of the Federation of Malaya 1948.¹³⁷

The local people were also left to practise customary laws. This included the land being held under local custom or Muslim law. Land legislation¹³⁸ introduced by the British administrators required landowners to record their titles in the Land Offices, and provided a procedure for the transmission of lands to heirs of a deceased holder, without indicating what the law of succession was. The practice of the Collectors, the heads of the district administration, was to apply custom which was often mixed with Islamic law.¹³⁹ The office of Collector was created by the British administration in India mainly for collection of revenue after 1772 to replace the position known as Supervisor.¹⁴⁰

Statutes were also enacted to protect the land of local peoples and their customs. This included the *Malacca Land Act 1861*, the *Negeri Sembilan Customary Tenure Enactment 1909* which restricted dealings with ancestral lands and the *Laws of Perak (Enactment No. 6 of 1951)*.¹⁴¹ Institutional means were also established to protect local property. For instance, to aid and assist the Ruler in matters concerning the Muslim religion and

portions of the communities. But in 1897 land enactments (land enactment and registration of titles enactment enacted in all FMSs), the term 'customary land' was abandoned in the land enactments. The enactments allowed for registration of title to land upon survey in a government-maintained register, the entry constituting the title. In 1926, a revised land code (came into force in 1928) consolidated the two laws in a single enactment.

¹³⁶ *The Malay Reservation Enactment (1913)* (FMS) was repealed and replaced by the *Malay Reservation Enactment (1933)* (Cap.142). Similar laws were also passed, for example, in the State of Kelantan (1930), Kedah (1931), Perlis (1935), Johor (1936) and Terengganu (1941).

¹³⁷ For history of the Malay reservation legislation, see, eg, Nor Asiah Mohamad and Bashiran B M Ali, 'The Prospects and Challenges of Malay Reservation Land in the 21st Century' (2009) 4(2) *Malaysian Journal of Real Estate* 1. For analysis of the unforeseen impact incompatible with the objective of protection of the indigenous Malay, see Kratoska, above n 135.

¹³⁸ Eg of the legislation: the *Land Enactments No 17 of 1897* (Perak); *Registration of Titles Regulations 1891* (Selangor); the *General Land Regulations 1889* (Pahang); the *Land Enactments 1897* (Pahang); the *Land Enactment No 11 of 1911* (FMS); the *Registration of Title Enactment No 13 of 1911* (FMS); the *Land Enactment No 1 of 1910* (Johor); the *Land Enactment 1912* (Kedah).

¹³⁹ Buss-Tjen, above n 106, 257 citing E N Taylor, 'Divorce and Inheritance' *JRAS-MB* 21 Part 2; E N Taylor, 'Malay Family Law' *JRAS-MB* 15.

¹⁴⁰ John F Riddick, *History of British India: A Chronology* (Greenwood Publishing Group, 2006), 186.

¹⁴¹ *Sahrip v Mitchell* (1870) Leic, 466, Sir P Benson Maxwell CJ held that the *Malacca Land Act 1861* plainly refers to and recognizes the same customary tenure when it declares that 'all cultivators and resident tenants of lands ... who hold their title by prescription are, and shall be, subject to the payment of one-tenth of the produce thereof to the Government'.

custom, a Council of Religion and Malay Custom¹⁴² was established in all states except Selangor.¹⁴³ The role of Islamic law was preserved in a formalised Syariah Court that operated under the jurisdiction of the states.¹⁴⁴ Nonetheless, conflict often arose over what laws were applicable to personal matters including the validity of wills¹⁴⁵ and marriage.¹⁴⁶ The conflict could arise from the different perspectives among judges of the exact laws practised by local people.

2 Land and Forestry Legislation and the Existing Rights

The policy of respecting the interests of the existing inhabitants may have also influenced the legislation governing the administration of land, customary land and forests. There is nothing in the legislation introducing the Torrens system in the Malay states that denies existing local rights. In *Sahrip v Mitchell*,¹⁴⁷ a failure to take out the proper title for occupied land under the relevant legislation¹⁴⁸ did not make the occupier liable for ejectment, as was also the case in *Roberts @ Kamarulzaman v Ummi Kalthom*.¹⁴⁹ The provision of land legislation, the *Land Code Cap 138*, on the indefeasibility of title of registered land did not affect entitlements under Malay customary law in matters of 'jointly acquired property'.¹⁵⁰ Legislation providing for reserves of forests and sanctuary that calls, by notice, for any claims of interests in the proposed reserves, reflects the same policy.

However, legislation regulating land administration in particular was introduced under the presumption that the locals had no ownership rights in the soil but a mere usufruct under local custom. Maxwell compared this to English law:

¹⁴² The institution's name in Malay was *Majlis Ugama Islam dan Adat Melayu*.

¹⁴³ Buss-Tjen, above n 106, 257.

¹⁴⁴ *Federal Constitution* Ninth Schedule.

¹⁴⁵ See above n 116.

¹⁴⁶ See, eg, *Re Maria Huberdina Hertogh; Adrianus Petrus Hertogh v Amina binte Mohamed* [1950] MLJ 215; [1951] MLJ 164 (Singapore): the validity of marriage of a Dutch girl who was adopted and raised as a Muslim was held to be determined by her *lex domicili*. The marriage under Muslim law was held as invalid according to Dutch law as the girl, being a minor, had no capacity to marry. But the judge, Brown J, also considered the position of Islamic law in the matter. He found that under Islamic law the marriage was also invalid as the *qadhi* who performed the marriage had no authority as a valid guardian [*wali*] to perform the marriage (page 15).

¹⁴⁷ *Sahrip v Mitchell* (1870) Leic, 466, Sir P. Benson Maxwell CJ.

¹⁴⁸ *Act XVI of 1839* (Malacca).

¹⁴⁹ *Roberts @ Kamarulzaman v Ummi Kalthom* [1963] 1 MLJ 163.

¹⁵⁰ The then Raja Azlan Shah J also referred to other cases affirming the established principle: *Re Noorijah deceased* (Selangor Civil Appeal No 44 of 1934) (1937) 15/1 JMBRAS 59 in relation to indefeasibility provision in *Land Code Cap 138*; *Habsah bte Mat v Abdullah* [1950] MLJ 60 in relation to *Kedah Land Enactment (No 56)*; *Hujah Lijah bte Jamal v Fatimah bte Diah* [1950] MLJ 63 in relation to *Kelantan Land Enactment 1938*.

No subject in a Malay state can lawfully claim to hold any property in land approaching (the English) freehold or fee simple tenure.¹⁵¹

In drafting legislation for land administration in the Malay states, Maxwell made the Sultan the owner of the lands in his state. David Wong refuted this claim, pointing out that none of the old Malay Digests contained a statement that the Sultan was the owner of the lands in his state.¹⁵² Kratoska also suggested that pre-colonial land tenure in the Malay Peninsula is imperfectly understood. Legal codes containing local practice and custom indicated that peasants enjoyed security of tenure so long as their lands remained under cultivation. On the other hand, British accounts suggest that the Malay aristocracy could and did seize peasant properties at will.¹⁵³

3 Orang Asli Land Prior to and Post-Independence

The treatment of the Orang Asli communities was also on the basis that they owned their land. The laws and policies in the peninsula acknowledged that the aboriginal peoples were distinct communities with rights and interests to the lands and territories on which they lived. British records indicated that certain territories belonged to the Orang Asli.¹⁵⁴ In 1861, a British colonial officer refused an application for land located in Ulu Sungei Langat up to the Pahang border by one Jaafar on the grounds that the rights to the area were recognized as belonging to an Orang Asli group living in the area.¹⁵⁵

¹⁵¹ Maxwell, above n 106, 1122.

¹⁵² David SY Wong, *Tenure and Land Dealings in the Malay States*, Singapore University Press (1975), 16, fn 29. Wong pointed out that the Perak Code states that the forests belonged to no man. See also *The Laws of Melaka (Undang-undang Melaka)*. It contains no provision about the ownership of land by Ruler or Sultan. S 20.1 provides:

With regard to 'dead land', nobody has property rights to it, (when) there is no sign of its being under cultivation by someone, then certainly nobody can lay a claim to that land. If someone cultivates it into (a rice-field, be it) a huma or ladang or sawah or bendang, no one can proceed against him. That is what is understood by dead 'land'.

[The original text: Adapun tanah mati itu tiada siapa yang empunya hak, tiadalah alamatnya empunya dia, niscaya tiadalah ada lagi perkataannya pada tanah itu. Jikalau diperbuatnya huma atau ladang atau sawah atau bendang, tiada siapa dapat berkata-kata lagi akan dia. Itulah tanah mati nama dia.]: Liaw Yock Fang, *Undang-undang Melaka (The Laws of Melaka)*, Bibliotheca Indonesica (Koninklijk Instituut, 1976), 110-1.

¹⁵³ Paul H Kratoska, 'The Peripatetic Peasant and Land Tenure in British Malaya' (1985) 16(1) *Journal of Southeast Asian Studies* 16, 40. He suggests that the British version was based largely on statements made to various officials and not on the evidence of particular instances where such occurrences took place, and without further empirical evidence the question of whether and under what circumstances the aristocracy could override customary prescriptions cannot be answered.

¹⁵⁴ See, eg, David Radcliffe, 'The Peopling of Ulu Langat' (1969) 8 *Indonesia* 155.

¹⁵⁵ *Ibid*, 170, 172. In the census return of 1884, the area beyond Ulu Langat was considered as 'Sakai country' (171). It was also recorded that migrants who came from Minangkabau (now in Indonesia) applied for permission from the Orang Asli's leader to occupy their land (citing document of the Ulu Langat District Office no. DOUL. 610/02).

Edo also pointed out that prior to independence, Orang Asli areas were marked on land register maps.¹⁵⁶ Land recognized as the 'country of the *Sakai*'¹⁵⁷ was not included in the general land registration system. This was to protect the aborigines from being exploited by selling off their land for unfair consideration which had occurred if they were issued formal titles.¹⁵⁸ It is evident that a factor considered by the administrators in the alienation of land, in the form of the grant of title, was the perceived level of 'civilization' of the applicants.¹⁵⁹

The Orang Asli were regarded as less civilized and subjected to greater government control with the objective of protecting them from exploitation. This distinction between treatments of the natives was made in accordance with perceived European standards of civilization.¹⁶⁰ It was believed that the Orang Asli would gradually assimilate with the Malays.¹⁶¹

¹⁵⁶ The initiative to mark Sen'oi areas in Perak was taken by HD Noone, the ethnographer of Taiping Museum in the early 20th century. The Sen'oi areas were marked as 'Sakai Ladang' or 'Sakai Reserve', together with the name of the penghulu [head of community] of each of these areas. Edo stated:

Subsequently, all marks indicating Seng-oi [Sen'oi] areas were erased from the new map reproduced by the independent Malaysian government, leaving no Seng-oi land on the map. This then became a major problem when the state based land transactions solely on the map without considering its reality on the ground. As a result most of the Seng-oi areas were approved to other parties, the majority of which were state subsidiaries responsible for projects such as oil palm estates, logging, hydro-electric dams, and recently, tourism industries. (Edo, Juli, *Claiming Our Ancestors' Land: An Ethnohistorical Study of Seng-oi Land Rights in Perak, Malaysia* (PhD Thesis, Australian National University, 1998), 314).

¹⁵⁷ In the early writing about the aborigines, the word *Sakai* is the name that normally referred to aborigines who are now grouped as Sen'oi.

¹⁵⁸ Radcliffe, above n 154, 172 citing Ulu Langat Land Office files 1242/00 and Selangor Secretariat files 6443/00: Radcliffe pointed out that in 1900 the Resident-General ruled that there would be no extension to the Sakai of the system instituted for recording land titles.

¹⁵⁹ An application for the grant of temporary occupational licence to a group of aborigines was allowed as they were considered as 'civilized as any of their Malay neighbours'. Sakai Reserve was considered as not suitable in their case: File 825/1939: Excision of a portion of land which had been planted with rubber by Sakais from the Malay Reservation in Mukim Luit, Pahang (ANM – 1957/0534944).

¹⁶⁰ Alice M Nah, '(Re) Mapping Indigenous 'Race'/Place in Postcolonial Peninsular Malaysia' (2006) 88(3) *Human Geography* 285, 286: suggested that the social construction of indigeneity and its link to power in contemporary Peninsular Malaysia is deeply rooted in colonial imaginings and continues under post-colonial administration. The British conceived that the subjects of the main polities on the peninsula constituted Malays and were part of a large single community and the other tribal groups were regarded as the aborigines. It was during the British colonial era that the distinction between the groups was reinforced in their classification of natives through policies and practices.

¹⁶¹ A R Wallace, 'On the Varieties of Man in the Malay Archipelago' (1865) 3 *Transactions of the Ethnological Society of London* 196: following Henry Morgan's three stages of social evolution, describes the aborigines as 'savages' and less civilized than the *Mohamedan* Malays. The aborigines were referred to in early writings as Semang, Sakai, Jacoon and Orang-Utan, among other names, which were derogatory indicating the general perspectives towards the people.

The pervasive government control was similar to the British practice in other jurisdictions. In Canada, the *Indian Act 1876* (Can) consolidated and imposed a system of pervasive government control over the First Peoples and their lands. In Brazil, legislation established Indians as wards of the state and set in motion government programs to manage their affairs and facilitate their adoption of Euro-Brazilian ways. The US constituted a vast government bureaucracy to consolidate and manage its system of Native American reservations.¹⁶² This system was developed from trusteeship doctrines akin to those proposed earlier by Vitoria as the parameters for non-consensual exercise of authority over indigenous peoples.¹⁶³

The first federal legislation specific to the aboriginal peoples was the *Aboriginal Peoples Ordinance 1954*,¹⁶⁴ adopted from the *Perak Aboriginal Tribes Enactment 1939*.¹⁶⁵ The Perak legislation ostensibly sought to address the developments that were dispossessing the aboriginal people as well as the health and social problem they faced.¹⁶⁶ Its provisions included the establishment of Orang Asli Areas and Orang Asli Reserves. It also created the position of 'Protector for Aborigines'¹⁶⁷ with similar duties as those created in Australia, including protection of their land from transgression by the settlements of new settlers.¹⁶⁸

The same approach was also adopted by the *Aboriginal Peoples Act 1954*, federal legislation introduced in 1954 amidst security concerns during the communist insurgency (1948–1960). The legislation was instituted to address the security threat posed by the Orang Asli. Most of them were living in the forests and were used by communist guerrillas

¹⁶² Anaya, above n 7, 32-3.

¹⁶³ Ibid, 31.

¹⁶⁴ *Ordinance No. 3 of 1954*. The Ordinance was revised as the *Aboriginal Peoples Act 1954* in 1974 (Act 134). This was mainly a response to communist resurgence post the 2nd World War to establish a special administrative regime to control the aborigines from the communist influence.

¹⁶⁵ *State of Perak Enactment No. 3 of 1939*.

¹⁶⁶ Noone, H D 'Report on the settlements and welfare of the Ple-Temiar Senoi of the Perak-Kelantan watershed'. (1936) *Journal of the Federated Malay States Museums* 19(1): 1-85, cited in Idrus, Rusalina, 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) 29(Suppl. 1) *Malaysian Studies* 53, 60.

¹⁶⁷ Ibid, 60.

¹⁶⁸ The position of the Protector of Aborigines was first created in the Australian colonies upon the recommendation in a report by the Select Committee of the House of Commons, Select Committee on Aborigines (British Settlements). The report recommended the appointment of Protectors of Aborigines. Their duties included to safeguard the rights of the Aboriginal peoples from encroachment on their property and to protect them from acts of cruelty, oppression and injustice: House of Commons Select Committee on Aborigines (British Settlements), *Report*, Parl Paper, House of Commons no 425, 1837, 84.

to supply their needs.¹⁶⁹ This partly explains the extensive government control of the Orang Asli in the APA.

The APA gives extensive power to the Director General of Orang Asli Affairs concerning the administration, welfare and advancement of the Orang Asli. However, it is expressly stated that the power of the Director General does not preclude the 'aboriginal headman from exercising his authority in matters of aboriginal custom and belief'.¹⁷⁰ It also provides for the creation of Aboriginal Areas and Aboriginal Reserves which are given priority over other types of reserves including Malay Reserves and animal sanctuaries.¹⁷¹ The Act also limits the power of the state authorities to alienate land or grant licences affecting land declared as Aboriginal Areas by subjecting them to consultation with the Director General at Federal level.¹⁷² Alienation or grant of land within an Aboriginal Reserve could only be made to aborigines who normally reside within the reserve.¹⁷³

This is a similar pattern to that taken by the British in the Royal Proclamation 1763 that restricted conveyance of title to Indian land in order to protect it. This policy later influenced US government policy in dealing with the Indians in the US territories. For example, the *Indian Intercourse Act* adopted in 1790 controlled trade and travel in Indian territories and also restricted conveyance of title to Indian lands without the consent of the US government.¹⁷⁴

In policy announced in 1957, it was proposed that the hereditary land rights of the Orang Asli would be recognized and they would not be forced to move against their will for any economic or political reason.¹⁷⁵ This legislation is further considered in Chapter 6.I.B.2.

¹⁶⁹ J D Leary, *Violence and the Dream People: The Orang Asli in the Malayan Emergency, 1948–1960* (Center for International Studies, Ohio University, 1995).

¹⁷⁰ *Aboriginal Peoples Act 1954* (Malaysia) s 4:

The Director General shall be responsible for the general administration, welfare and advancement of aborigines: Provided that nothing in this section shall be deemed to preclude any aboriginal headman from exercising his authority in matters of aboriginal custom and belief in any aboriginal community or any aboriginal ethnic group.

¹⁷¹ *Aboriginal Peoples Act 1954* ss 6(2), 7(2).

¹⁷² *Aboriginal Peoples Act 1954* ss 6(2)(iii)-(iv).

¹⁷³ *Aboriginal Peoples Act 1954* s 7(2)(iv).

¹⁷⁴ Benjamin J Richardson, 'The Dyadic Character of US Indian Law' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 51, 59.

¹⁷⁵ 'The Long Term Administration of the Aborigines of Malaya 27 May 1957 ANM – 2005/0018322 (Malaysia National Archive)' (1957).

4 Changes of Perspectives and Their Impact on the Orang Asli

This historical perspective of law and official practice in North America, Australia, New Zealand, the Indian Empire and the Malay Peninsula show the continuation of principles respecting the land and resource rights of indigenous peoples as well as their distinct political and social identities. However, other factors led to the continuing loss of land by the indigenous peoples including conflicting economic interests and cultural attitudes towards them.

The continued recognition of indigenous peoples' rights was also hampered by the positivism that came to prevail both in international law and national legal systems.¹⁷⁶ By the turn of the 20th century that saw unprecedented mass exploitation of lands and forests, a grant by state and registration were increasingly believed to be the only prerequisites to land entitlement. Alienation and reservation of land were also made without proper surveys or due notification for interests to be claimed. Customary land holdings were regarded by many as only confined to Negeri Sembilan and Naning as they were codified by statute. Societies deemed to be primitive, without forms of government similar to those of European states, were considered as having no law.¹⁷⁷ The Orang Asli started to be labelled as squatters on their own land. It became a prevalent perception that communities had no land but were occupying state land.

On the contrary, even though the aborigines continued to lose their authority, autonomy and territories in the span of almost two centuries, the principle of recognition of tribal *dominium* [ownership] remains and is alive. This has allowed Malaysian courts to be able to recognize the rights of the indigenous peoples to their land and resources in the late 20th and early 21st centuries. From this perspective, the developments in Malaysian common law that address the concerns of the Orang Asli and natives in the East Malaysia are not novel. They are the continuing application of long-standing principles in these jurisdictions.

II LEGAL ARRANGEMENTS IN MALAYSIA: JUSTICE, FAIRNESS AND EQUALITY AS THE BASIC PRINCIPLES

This section suggests that the formal legal systems in Malaysia rest on the values and ideals of justice which respect rights and represent equality and fairness. This is entrenched in the written constitution which is the supreme law. It provides for a limited

¹⁷⁶ Anaya, above n 7, 26.

¹⁷⁷ HLA Hart, *The Concept of Law* (1994).

government, and the safeguarding of individual fundamental liberties. Included in the fundamental liberties' provisions is the right to equality which is inherent in the principle of respect for people as equal and free. Malaysia also has a common law tradition with a judicial role in making and shaping the law.¹⁷⁸

A The Supremacy of the Constitution and Limited Government

The Federation of Malaya was established as a sovereign independent state in 1957. The *Federal Constitution*, the supreme law, sought to establish a framework for parliamentary democracy. It outlines the basic separation of powers found in Westminster models. It provides for the judiciary as co-equal with the other two arms of government, the bi-cameral legislature and an executive, nominally associated with a constitutional monarch as the head of state. The separation of powers is considered as a basic feature of the *Constitution*¹⁷⁹ and as being essential for good governance and its system of checks and balances. It limits the power of the state which serves as a protection for the rights of the people.¹⁸⁰

The *Constitution* also expressly provides for its supremacy. It is the basic law that determines the validity of other laws.¹⁸¹ The idea of constitutional supremacy recognizes the *Constitution* as the ultimate source of legality rather than any individual or body.¹⁸² As Hans Kelsen saw it, the *Constitution* is the ultimate norm, or *grundnorm*, against which the legality of all other norms or laws must be measured.¹⁸³ This view rejects the idea that legal power is subjugated to actual de facto power.¹⁸⁴ As Suffian LP stated

Here we have a written constitution. The power of Parliament and of state legislatures in Malaysia is limited by the *Constitution*, and they cannot make any law they please.¹⁸⁵

Sultan Azlan, a former Lord President of the Federal Courts, also stated that

This Constitution reflected a social contract between the multi-racial peoples of our country Further, there was afforded to the peoples of Malaysia certain

¹⁷⁸ A Aziz Bari, 'Constitutional Bases for Affirmative Action – Comparing the Malaysian Position with that of India and the United States' (2002) *LAWASIA Journal* 137, 128.

¹⁷⁹ Ibid; A L R Joseph, 'The Doctrine of Separation of Powers Survives in Malaysia' (2007) *Singapore Journal of Legal Studies* 380. See also, Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction* (The Other Press, 2003).

¹⁸⁰ Abdul Aziz Bari, 'Malaysian Constitution After 50 Years' in Abdul Razak Baginda (ed), *Governing Malaysia* (Malaysian Strategic Research Centre, 2009) 59, 60.

¹⁸¹ *Federal Constitution* art 4(1) provides that: 'This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'.

¹⁸² Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1949).

¹⁸³ Ibid.

¹⁸⁴ Ibid, 102.

¹⁸⁵ *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, 113.

fundamental rights as embodied in Part II of the *Federal Constitution* ... By these checks and balances in our Constitution we had sought to establish a system of government based on laws and not of men ... It is fundamental in this regard that the *Federal Constitution* is the supreme law of the land and constitutes the grundnorm to which all other laws are subject. This essential feature of the *Federal Constitution* ensures that the social contract between the various races of our country embodied in the independence Constitution of 1957 is safeguarded and forever enures to the Malaysian people as a whole for their benefit.¹⁸⁶

The idea of limited government was not a new institution or introduced by the 1957 *Constitution*. It was part of the local Islamic ideology which regarded the Sultans or Rajas as the Caliph who were bound to rule in accordance with the law.¹⁸⁷

B The Primacy of Fundamental Liberties

Part II of the *Federal Constitution* safeguards the basic liberties or rights of individuals and citizens in the country. It includes civil and political rights of individuals (freedom of speech, assembly and association, and of religion); protection of individual rights (including liberty of person, due process of law, prohibition on slavery, protection against retrospective criminal laws, equality before the law, freedom from discrimination in the provision of education), and rights to property. The list is minimal but these rights are given primacy within the *Constitution*. The statement of rights in the *Constitution* was drawn heavily from the Indian *Constitution* by an independent committee of Commonwealth jurists.¹⁸⁸

This protection of fundamental liberties in the *Constitution* indicates their significance.¹⁸⁹ Furthermore, the Malaysian courts have established that the fundamental liberties'

¹⁸⁶ 'Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches by HRH Sultan Azlan Shah', ed Visu Sinnadurai (Sweet & Maxwell Asia, 2004), 330-331 reproduced in Cyrus Das, 'Basic Law Approach to Constitutionalism: Malaysia's Experience Fifty Years On' (2007) 15(2) Asia Pacific Law Review 219, 221.

¹⁸⁷ Bari, Abdul Aziz, 'The Monarchy and State Governing' in Abdul Razak Baginda (ed), *Governing Malaysia* (Malaysian Strategic Research Centre, 2009) 75, 78-80; Bari, above n 180, 62-3.

¹⁸⁸ Charles OH Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press, 2007), 73.

¹⁸⁹ *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, [8] ('*Sivarasa Rasiah*'). The Federal Court recognized the doctrine of basic structure as enunciated by the Supreme Court of India in the landmark case of *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461. In this case, Gopal Sri Ram FCJ, in delivering the unanimous decision of the Federal Court, said (at p 340):

Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso ... The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of art 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

In an earlier case, *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, although the Federal Court rejected the 'doctrine of basic features', the chapter on the fundamental provisions is considered as one of three basic concepts on which the *Constitution* is founded. The Court,

provisions are subject to rules of interpretation distinct from that of ordinary statutes. The constitutional provisions on fundamental liberties must be interpreted generously and liberally to give them their full meaning according to the 'prismatic approach', discussed in Chapter 2.III.C.3. The prismatic approach gives life to abstract concepts or statements of fundamental rights to ensure citizens benefit as the *Constitution* intended.¹⁹⁰ Richard Malanjum consistently stated

(the court) is there not only to safeguard the textual rights "but also rights that are implicit" therein. The focus should also be rights-based and principle-based.¹⁹¹

It follows that the provisos that limit or derogate from the rights and any limits imposed by statute to the fundamental rights must be narrowly interpreted or read restrictively. Any restriction is subject to a 'reasonableness test' incorporated by the principles of natural justice integral to the principle of rule of law.¹⁹² The principle, as the Federal Court suggested, is incorporated into the *Constitution* by the use of the word 'law' in Art 5(1) on protection of life, and Art 8(1) that affirms the equality of persons and the equal treatment of law.¹⁹³ The equality provision is considered as the 'all pervading provision' that guarantee fairness of all of the state's actions.¹⁹⁴ The word 'law' as defined in Art 160(2) of the *Constitution* includes the 'common law', that is, the 'Common law of England' under s 66 of the *Consolidated Interpretation Act 1948 and 1967*. This interpretation was also supported by a Privy Council judgment that the word 'law' in the *Constitution* refers to a system of law which incorporates the fundamental rules of natural justice which formed part of the common law of England that was in operation in the peninsula on independence.¹⁹⁵ In contrast, Rueban suggested that the principle of the

however, rejected that substantive justice of certain legislation could be subject to judicial determination hence viewed that the court is confined to literal interpretation of the legislation.

¹⁹⁰ *Lee Kwan Woh* [2009] MLJU 0620; *Badan Peguam* [2008] 2 MLJ 285, 317, 328; *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 (Court of Appeal), 218-9.

¹⁹¹ *Bato' Bagi v Kerajaan Negeri Sarawak* (2011) 6 MLJ 297, [44] ('*Bato' Bagi*').

¹⁹² *Ong Ah Chuan* [1981] 1 MLJ 64; affirmed by the Federal Court in *Lee Kwan Woh* [2009] MLJU 0620; *Che Ani bin Itam v Public Prosecutor* [1984] 1 MLJ 113; *Tan Tek Seng* [1996] 1 MLJ 261.

¹⁹³ *Lee Kwan Woh* [2009] MLJU 0620; *Tan Tek Seng* [1996] 1 MLJ 261; *Sugumar (No 2)* [2002] 3 MLJ 72. Art 8(1) provides that: 'All persons are equal before the law and entitled to the equal protection of the law.' Art 8(2) provides that,

Except as expressly authorized by this *Constitution*, there shall be no discrimination against citizens on the ground only of religion, race, descent ... in any law or ... in the administration of any law relating to the acquisition, holding, disposition of property.

¹⁹⁴ *Tan Tek Seng* [1996] 1 MLJ 261.

¹⁹⁵ *Ong Ah Chuan* [1981] 1 MLJ 64, 749. The Privy Council rejected a view adopted in the Federal Court in *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 that Art 9(1) of the *Constitution* (Art 5(1) in *Malaysian Constitution*) disregarded the fundamental rules of natural justice by adopting the literal interpretation of the word 'law' in the fundamental liberties' provisions to be confined to provisions enacted by legislation. The court went to the extent to declare that

rule of law is embodied in the *Constitution* by the supremacy of a written constitution and the constitutional safeguard of fundamental liberties.¹⁹⁶

The same position was taken in 1981 in *Dato' Menteri Othman bin Baginda v Dato' Ombi Syed Alwi bin Syed Idrus*¹⁹⁷ referring to the *Minister of Home Affairs v Fisher*, an appeal to the Privy Council from Bermuda.¹⁹⁸ In that case, Lord Wilberforce emphasized the need to give full recognition and effect to fundamental rights and freedom.

Based on this approach, courts have held that the word 'life' in Art 5(1) is not only confined to mere existence but includes the right to livelihood and the means for livelihood such as employment;¹⁹⁹ and the right to access justice.²⁰⁰ In *Nor Anak Nyawai (No 1)*,²⁰¹ Ian Chin suggested that native customary rights can be considered as a right to livelihood.²⁰² In relation to extinguishment of native customary rights, Richard Malanjum FCJ, in obiter, suggested that

It [expression of life in art 5(1)] 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. ... If indeed extinguishment of their native customary rights has an adverse effect on the livelihood of the natives in the same way as dismissal has on the livelihood of a gainfully employed person in the public service, then it is only fair in my view that before any extinguishment direction is issued the holders of native customary rights should be given the opportunity to present their case. This is essential justice and procedural fairness

the reasonableness of the enacted law restricting the fundamental liberties is not relevant to how arbitrary it is.

¹⁹⁶ Balasubramaniam, Ratna Rueban, 'Has Rule by Law Killed the Rule of Law in Malaysia?' (2008) 8(2) *Oxford University Commonwealth Law Journal* 211. See also similar view in Ahmad Masum, 'The Rule of Law under the Malaysian Federal Constitution' (2009) 6 *Malayan Law Journal* c.

¹⁹⁷ [1981] 1 MLJ 29.

¹⁹⁸ [1973] All ER 21, Lord Wilberforce:

A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect of those fundamental rights and freedoms.

¹⁹⁹ *Tan Tek Seng* [1996] 1 MLJ 261; *Kanawagi s/o Seperumaniam v PPC* [2001] 5 MLJ 433. Other cases suggested that scope of life protection in Art 5(1) includes reputation the deprivation of which would be a violation of fundamental rights (*Lembaga Tatatertib Perkhidmatan v Utra Badi a/l K Perumal* [2000] 3 MLJ 281; and the liberty of an aggrieved person to go to court to seek judicial relief *Sugumar (No 2)* [2002] 3 MLJ 72.

²⁰⁰ *Sivarasa Rasiyah* [2010] 2 MLJ 333, [4].

²⁰¹ [2001] 6 MLJ 241.

²⁰² *Ibid*, [53].

which a public decision-maker should ensure as having been meted out before and when arriving at his decision.²⁰³

It has to be noted, as discussed in Chapter 2, that before 2000, the direction in constitutional interpretation had inclined towards a literal approach.²⁰⁴ This has had serious implications for fundamental liberties. The new development promises greater protection for fundamental rights by giving them a proper place in the general law on the basis of their status as ideals embodied in the *Constitution*.

C Procedural Justice

Under Malaysian public law, the doctrine of procedural fairness has been an important principle that governs the relationship between states and citizens. This is a recent development, involving a shift from the rules of natural justice developed under the common law to the principle of procedural justice backed by Art 8, the constitutional provision on equality.²⁰⁵ This is in line with the developments in other common law countries including India, the US and Canada. The change in Malaysian common law was directly influenced by the Indian position.²⁰⁶

The shift from the common law status of natural justice to the constitutionally backed principle of procedural justice is significant for fundamental liberties under the law. Being a creation of common law, the rules of natural justice can be easily and effectively negated by statute.²⁰⁷ Furthermore, the rules of natural justice have been confined to twin concepts of the right to be heard and the rule against bias.

The Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* ('*Tan Tek Seng*'),²⁰⁸ following an Indian case of *Maneka Gandhi v Union of India*,²⁰⁹ held that: first, Art 8 of the *Federal Constitution* imported the notion of 'fairness'; and second, the phrase 'law', in Art 5, which provides for the right to life included not only substantive law

²⁰³ *Bato' Bagi*, [75]-[76].

²⁰⁴ See critics on the constitutional interpretation by courts in Malaysia, eg, Thio, Li-Ann, 'Beyond the Four Walls in an Age of Transnational Judicial Conversations Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore' (2005-2006) (19) *Columbia Journal of Asian Law* 428; Shad Saleem Faruqi, 'Constitutional Interpretation In A Globalised World' (Paper presented at the 13th Malaysian Law Conference, 2005).

²⁰⁵ Sudha CKG Pillay, 'The Changing Faces of Administrative Law in Malaysia' (1999) 1 *Malayan Law Journal* cxi.

²⁰⁶ Vanitha Sundra Karean, 'Charting New Horizons in Procedural Fairness and Substantive Fairness in Individual Labour Law in Malaysia' (2007) 6 *Malayan Law Journal* i, iii citing *Tan Tek Seng* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481; *Rama Chandran R v The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433.

²⁰⁷ Pillay, above n 205.

²⁰⁸ [1996] 1 MLJ 261.

²⁰⁹ AIR 1978 SC 597.

but 'procedure'.²¹⁰ On this basis, the combined effect of Arts 5(1) and 8(1) of the *Federal Constitution* was held to ensure that a fair procedure is adopted in each case based on its facts. The equality provision assures individuals of the right to equal treatment with other individuals in similar circumstances or situations.²¹¹ It comprises respect for the rights of people which must be taken into consideration when decision making affects them.

The principles provide a basis for administrative law principles that ensure impartiality and fairness in public decision making.²¹² Individuals have the right to demand fairness, both substantive and procedural, in a public law decision that has an adverse effect on a person.²¹³ The scope of procedural justice was seen to include, but was not limited to, the rules of natural justice. It thus includes the right to be heard and the rule against bias. Under English common law, natural justice was extended to novel concepts including legitimate expectation, the right to reasons for decision and the general duty to act fairly.²¹⁴ Procedural justice was extended to include the duty of public decision-makers to give reasoned decisions in cases where the decision adversely affects a fundamental liberty guaranteed by the *Federal Constitution*.²¹⁵ This scope was later enlarged to include cases where the rights of a person are adversely affected by a public law decision.²¹⁶ However, it was also seen that such a duty is not applicable to cases involving land acquisition, national security, public safety or public interest.²¹⁷

D Respect for Differences and Diversities

It is also explicit in the *Constitution* that, regardless of the privilege given to the Malays and to natives in East Malaysia, the legitimate interests of other communities are also

²¹⁰ Following *Ong Ah Chuan* [1981] AC 648 which supported the contention that the word law in Art 5 included procedure.

²¹¹ *Ong Ah Chuan* [1981] AC 648; *Tan Tek Seng* [1996] 1 MLJ 261; *Datuk Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155.

²¹² *Tan Tek Seng* [1996] 1 MLJ 261. See also, *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29; *Deputy Chief Police Officer, Perka v Ramesh a/l Thangaraju* [2001] 1 MLJ 161.

²¹³ *Sugumar (No 2)* [2002] 3 MLJ 72. See also, *Sivarasa Rasiah* [2010] 2 MLJ 333: citing Thommen J in *Shri Sitaram Sugar Co Ltd v Union of India* (1990) 3 SCC 223, 225 who states: The principle of equality enshrined in Art 14 must guide every state action, whether it be Legislative, Executive, or Quasi-Judicial: *Ramana Dayaram Shetty v International Airport Authority of India* (1979) 3 SCC 489, 511-512; *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722 and *DS Nakara v Union of India* (1983) 1 SCC 305.

²¹⁴ Karean, above n 206, iv-v.

²¹⁵ *Hong Leong Equipment Sdn Bhd v Liew Fook Chua* [1996] 1 MLJ 481.

²¹⁶ *Balakrishnan v Pengarah Imigresen Negeri Sabah dan Pihak Berkuasa Negeri* [1996] 1 MLJ 481.

²¹⁷ *Hong Leong Equipment Sdn Bhd v Liew Fook Chua* [1996] 1 MLJ 481.

protected.²¹⁸ The constitutional provision which allows for the creation of the Malay Reservation land also safeguards the interests of non-Malays.²¹⁹ The special position, or affirmative action, for certain indigenous peoples provided in the *Constitution* is necessary to allow the state to take ameliorative measures to remove disabilities of vulnerable communities in order to achieve equality in society.²²⁰ The *Constitution* also affirms the protection of religions and languages of other communities regardless of Islam and the Malay language being given special positions.²²¹ The principles clearly attempt to accommodate the pluralism already in practice and allude to the respect for communities and the communal nature of the society.

There are also numerous political statements that affirm the principle of equality of all persons regardless of race and religion as the national goal to be achieved for an inclusive society.²²² The national ideology, the 'Rukunegara' providing for the enabling spirit and common shared values of the society, constitutes an affirmation of the

²¹⁸ *Federal Constitution* art 153(1):

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

²¹⁹ *Federal Constitution* art 89(4):

Nothing in this article shall authorise the declaration as a Malay reservation of any land which at time of the declaration is owned or occupied by a person who is not a Malay or in or over which such a person has then any right or interest. Art 89(1) provides for the Malay Reservation land.

²²⁰ Huang-Thio, S. M., 'Constitutional Discrimination under the Malaysian Constitution' (1964) 6(1) *Malaya Law Review* 1, 6; Harry E Groves, 'Equal Protection of the Laws in Malaysia and India' (1963) 12(3) *American Journal of Comparative Law* 385. In *Fan Yew Teng v Public Prosecutor* [1975] 2 MLJ 235, 238: Lee Hun Hoe CJ held in respect to art 153, these provisions cannot be questioned and are necessary to assist the less advanced or fortunate in the light of conditions prevailing at the time of independence.

²²¹ Although it provides for Islam as the religion of the Federation, it also affirms that other religions may be practised in harmony. Art 3(1): 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.' Freedom to profess and practise religion is safeguarded in Art 11(1). Art 152(1):

The national language shall be the Malay language and shall be in such script as Parliament may by law provide. Provided that (a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and (b) nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation.

²²² See, eg, *Vision 2020: Seeks towards establishing a 'matured, liberal and tolerant society in which Malaysians of all colours, and creeds are free to practise and profess their customs, cultures and religious beliefs and yet feeling that they belong to one nation* (Mahathir Mohamad, 'Malaysia: The Way Forward (Vision 2020)' (Paper presented at the Malaysian Business Council, 1991) <<http://www.wawasan2020.com/vision/index.html>>; Najib Razak, *1Malaysia* (Prime Minister Office, 2011), 4: outlines that the national mission towards establishing a developed country is based on justice for all races and respect for different identities in the society as the main principles.

multiracial and liberal-democratic nature of Malaysian society and respect for the *Constitution* and the rule of law. It seeks to have a just society with an equitable share of wealth and a liberal approach to rich and diverse cultural traditions.²²³ In the New Economic Model for Malaysia,²²⁴ equality, fairness, social equity, environmental sustainability, fair and efficient enforcement of law, effective protection of property rights, and transparent and fair processes are outlined as the necessary principles to achieve a united nation and inclusive society. Although it states nothing specifically about minority groups and on rights and freedom of people, one program proposed under the principle of inclusiveness is 'to allow access to resources on the basis of needs and merit to enable improvement in capacity, incomes and well-being'. Needs and merits are considered as important variables in resource distribution. In addition, the principles of just government, free and independent people, and the protection of minority group rights were made explicit in national policy under the fifth Prime Minister, Abdullah Badawi in his statement on 'Islam Hadhari'.²²⁵

The fact that the values and principles which govern public life are repeatedly affirmed by political leaders to gain confidence in their leadership shows their appeal to the public. Systems of values and norms are particularly important in a country in which the state has extensive power but capitalism dominates the economic system. As Hazim puts it

To deprive politics of the sense of ethics, morals and justice, is to deprive politics of legitimacy. And we know that without legitimacy governments cannot rule, except by force or coercion ...²²⁶

III CONCLUSION

This chapter suggests that principles of justice, equality and fairness form a significant part in the value system of public life in Malaysia. The principles have influenced the development of laws as seen in the historical experience and the present framework of laws. The historical perspective is significant as it provides meaning to the laws, including

²²³ *Rukunegara* (National Principles) <http://www.epu.gov.my/html/themes/epu/images/common/pdf/3rd_OPP_rukunegara.pdf>. For historical background that led to the statement, see, Andrew Harding, 'The Rukunegara Amendments of 1971' in Andrew Harding and H P Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 Years 1957–2000* (LexisNexis, 2007) 115.

²²⁴ National Economic Advisory Council, *New Economic Model for Malaysia* (National Economic Advisory Council, 2009). The policy was announced by the present Prime Minister, Najib Razak.

²²⁵ 'Human Capital Development: Collection of Speeches by Datuk Seri Abdullah Ahmad Badawi' (2006), 20 cited in Sharifah Hayaati Syed Ismail, 'Government Agencies and Public Services' in Abdul Razak Baginda (ed), *Governing Malaysia* (Malaysian Strategic Research Centre, 2009) 141, 162.

²²⁶ Mohd Hazim Shah, 'Ethics, Politics and Economics: Philosophical Reflections on Economic Development' (2008) 73 *Akademika* 97, 106.

the legislation affecting the people and the Orang Asli, and should be interpreted accordingly.

The analysis of the historical development and practice of laws from the period prior to colonisation on the relationship between the Malays and the Orang Asli and the practice adopted during the period of colonisation developed into the principle that the law respects the pre-existing laws, and the rights recognized by those laws, of the existing inhabitants. This was practised by local people even prior to colonisation of the Malay Peninsula. This principle governs the relationship between groups of peoples.

The same pattern of respect for the rights of peoples, as the principles governing the relationship between peoples, can also be seen in the writings of early international law scholars. Further examination of imperial practices during the colonial era since its beginning reveals the same underlying principles that govern the practices and the development of laws in many jurisdictions including the Malay states. This practice allows for the continuance of many local institutions. This principle influenced the development of laws until the present. It is also submitted that the same principle of respect for the rights of people is the primary principle that not only governs the interpretation of present laws but also the future direction of laws.

It has also been shown that the same principle of respect governs the resource rights of the Orang Asli. The laws regulating the land and resources of the Orang Asli, although based on a protection regime, were intended to protect Orang Asli land and rights. It was never intended to deny that they had rights over their lands.

Furthermore, the examination of the Malaysian constitutional provisions suggests that the position of the rights of people is given primacy under the *Constitution* as evident by the framework for rule of law, limited government, the fundamental liberties' provisions and the affirmation of the rights and interests of individuals. This is also evident in the commitment in various political statements which are indicative of the value system accepted by the public. However, although Malaysia is a communal and pluralistic society which is multicultural and multi-religious, there is a lack of attention on the rights of communities in law and practice.

The principles found as embedded in the law through the historical and legal analyses in this chapter establish the principle-based framework used as an analytical tool in assessing the laws in Malaysia (chapter 6) and in the comparative study (chapter 7 and 8).

The next chapter, Chapter 4, examines the concept of justice from a philosophical perspective. It will be seen that the contemporary discourse centred on the principle of respect is the central element of the concepts of justice and fairness.

CHAPTER 4: DISTRIBUTIVE JUSTICE AS A STANDARD OF JUSTICE

This chapter examines the concept of distributive justice and the theoretical debates on its moral justifications as proposed in contemporary philosophy. It also identifies its scope and meaning, as well as several other related aspects of justice. These are fairness in decision making which is considered in the theory of procedural justice; justice in reparations for injustices inflicted by previous actions and distributions; and disproportionate impact of the distribution of burdens on disadvantaged peoples including indigenous peoples.

The chapter also adopts religious perspectives relevant to Malaysia as a source of normative values. These principles are used to frame the research questions set out in the thesis. The questions are considered in the next parts, Parts 3 and 4.

I THE PHILOSOPHICAL DISCOURSE ON DISTRIBUTIVE JUSTICE

The concept of distributive justice or social justice is a moral, political and philosophical ideal concerned with fairness or equitable sharing in the allocation of resources, benefits and burdens in society. This directly affects laws and their implementation, the expectations of peoples and the well-being of society. It suggests that society as a whole has a moral duty to bring about just distributions of the benefits and burdens of economic and social life.

It is clear from the writing of the major contributors to the debate about justice that it has been influenced by the developed, liberal and capitalist Western democracies in which the writers have lived. The debate has not been informed by the detailed consideration of the situation of indigenous peoples or minorities although, as will be seen, more recent writers have considered the situation of pluralist societies. This means that the major theories need to be reconsidered in the context of indigenous peoples and their rights.

Briefly, contemporary liberal philosophers such as Rawls, Nozick and Dworkin emphasize conceptions of justice based on just political arrangements and equality in individual freedom compatible with the rights of others. Whilst they promote liberal society as an ideal form, Amartya Sen argues for a framework to assess justice in society from the perspective of actual opportunities for the exercise of freedom by people in societies which are not confined to one form such as a liberal society. Liberal ideas are also criticised by communitarians such as Walzer and Sandel as failing to recognize the role of the community in shaping understandings about individuals in society. Collective

rights are defended by Walzer, Kymlicka and Newman as significant elements in contemporary society.¹

On the other hand, welfare-based conceptions of justice such as utilitarianism deny any natural right in property and insist instead that government must produce, distribute and regulate property to achieve results defined by some specified function of the happiness or welfare of individuals.² Another group of theories seeks to achieve material equality in outcome of goods, opportunities and other resources.³ But, over time, the result is likely to undermine the form of equality that the schemes originally secured, especially equality of welfare and material equality. Welfarism, for instance, ignores the claim that people deserve certain economic benefits in light of their economic actions. Welfare schemes often do not consider that people will make private choices and, over time, the equality initially targeted will be undermined.⁴

The following part identifies the main elements in achieving distributive justice in society.

A Respect for the Liberties of Persons and the Position of Communities

Most of the contemporary philosophers writing on justice place significant emphasis on the point that every person in society is equal and free. This is the core element that dictates the rights-based approach which is the dominant strand in the discourse of justice. The main proponents including Rawls, Dworkin and Nozick retain their focus on the individual position in society. Walzer, on the other hand, argues for respect for both individuals and communities.

The principles of equality and respect of both persons and communities are important in the discussion of the resource rights of indigenous peoples. Their position and interests are often regarded as inferior to the dominant majority groups in society. As their land rights are generally communal, the focus on individual rights and resistance to communal

¹ Michael Walzer, *Spheres of Justice: A Defence of Pluralism & Equality* (Basil Blackwell, 1983); Will Kymlicka, *Multicultural Citizenship* (Clarendon Press, 1995); Dwight G Newman, 'Theorizing Collective Indigenous Rights' (2006–2007) 31 *American Indian Law Review* 273; Dwight G Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart Publishing, 2011).

² For comparison between the conceptions of classical utilitarianism as traditional welfare theory, neoclassical welfare theory and the new *Contractarian* approach: Hahnel, Robin & Albert, Michael, *Quiet Revolution in Welfare Economics* (Princeton University Press, 1990), Chapter 1.

³ See, eg, Kenneth Cauthen, *The Passion for Equality* (Rowman & Littlefield, 1987). Cauthen argued that equality for outcome is common goods which people both contribute to and receive benefits from and therefore should be enjoyed in common. He suggests that equality for outcome was a fundamental basis for both equality of opportunity as well as equality of outcome.

⁴ Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998), 297-8.

rights led to significant setbacks for the indigenous peoples in asserting their communal rights.

1 Rawls' and Dworkin's Propositions

Derived from his hypothetical device of the 'original position',⁵ John Rawls suggested that every person must be treated as a citizen free and equal having moral capacity capable of being a fully cooperating member of society. This follows from the first principle in his theory of justice that stresses equality in the distribution of primary goods in society.⁶ Self-respect is one of the primary goods apart from basic rights and liberties, income and wealth.⁷

The basic and equal liberties and fair equality of opportunity are to be secured within the setting of background institutions as the essentials of the constitutional structure.⁸ The distinction between regulation and restriction of liberty must be noted to avoid interfering with the effectiveness of the system.⁹ Persons are at liberty to do something when they are free from certain constraints and protected from interference by other persons, including the government.¹⁰ Rawls listed the basic and equal liberties as including

⁵ Rawls proposed that the appropriate perspective from which to choose among competing conceptions or principles of justice is a hypothetical device of social contract or choice situation in which contractors are constrained in their knowledge, motivations and tasks in specific ways which he called the 'veil of ignorance' or the 'original position'. Rawls speculated that people in the 'original position' negotiating behind the 'veil of ignorance' will agree to a kind of political arrangement which is fair to all participants, that is, in his view, principles guaranteeing equal basic liberties and equality of opportunity, and a principle that permitted inequalities only if they made the people who are worst off as well off as possible: John Rawls, *A Theory of Justice* (Oxford University Press, 1999).

⁶ These guiding ideas of justice as fairness were expressed in its two principles of justice:
(a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;

(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle) (John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), 42-43).

⁷ Ibid, 58.

⁸ Ibid, 43, 46.

⁹ Rawls, above n 5, 178.

¹⁰ Ibid, 177-8.

freedom of thought and liberty of conscience,¹¹ political liberties,¹² the rights and liberties or 'the social bases of self-respect',¹³ and the rights and liberties covered by the rule of law.¹⁴

Dworkin also held that government is responsible for treating people as equals and with respect in all of its decisions that govern the property scheme it creates and enforces.¹⁵ This follows from the principle that individuals are responsible for their decisions and actions but not for other circumstances beyond their control including race, religion, social status and gender. This is the responsibility principle. The factors beyond their control are morally arbitrary and should not affect the distribution of resources in society.¹⁶ Therefore, he assumed that people's wealth should differ as they make different choices about investment and consumption. This supposes that if people begin with the same wealth and other resources, then equality is preserved through market transactions.

2 Amartya Sen's Capability Approach

The protection of liberties and rights, and equal opportunities open to all will result in inequality if people have no capabilities to realize or benefit from them. Amartya Sen proposed that a system and an institution should be assessed in terms of what people are capable of, both in terms of real or substantive freedoms and the opportunity to enjoy the freedom (capability approach).¹⁷ He argued that focusing on freedom is a more accurate way of dealing with what people really value and introduces fewer distortions. It emphasizes functional capabilities as substantive freedoms that people have reason to value instead of focusing on utility or access to resources. Sen listed five distinct types of freedom significant in advancing the general capacity of a person. They are: political freedom; economic facilities; social opportunities; transparency guarantees; and

¹¹ Liberty of conscience dictates that persons are 'free to pursue their moral, philosophical, or religious interests without legal restrictions requiring them to engage or not to engage in any particular form of religious or other practice, and when other men have a legal duty not to interfere'. Ibid, 177.

¹² Ibid, 194-200, the contents of the political liberties are explained to include rights to fair representation, right to free and fair election, freedom of speech and assembly, liberty to form political association and rights to equal access to public office.

¹³ Rawls, above n 5, 59 [17.2]: 'Those aspects of basic institutions normally essential of citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence.'

¹⁴ Ibid, 44.

¹⁵ Dworkin, above n 4, 296.

¹⁶ Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10(4) *Philosophy & Public Affairs* 283.

¹⁷ This capability approach, considered as a pragmatic approach to realizing human rights, has now become a paradigm for policy debate in human development.

protective security. These freedoms, he argued, have 'remarkable empirical connections' that link to each other which help to promote the others.¹⁸

In relation to indigenous groups who have different kinds of lives that they have reason to value, justice requires substantial acknowledgement and recognition of the values and institutions of the relevant indigenous group even though these values and institutions may not readily fall under the frameworks of existing state structures.¹⁹ Sen's proposition helps to bridge the ideals of liberal theories of justice to the practical realities. Rawls' theory may be an ideal unachievable in reality. Sen invited peoples to engage in public reasoning in pursuit of justice by comparing the impact of particular policies and reflecting on the way in which things are done in the name of impartiality and fairness.²⁰

3 The Proposition for Collective Rights: Liberal Individualism vs Collectivism

The contemporary debates on distributive justice are generally limited to the protection of individual rights. The rights of a community, or 'collective entitlement directly vested in collective entities'²¹ have been less recognized. This has created barriers to group claims including those made by indigenous and minority peoples. This position has been criticised by scholars including Sandel and Walzer in the 1980s. More recently, Amartya Sen has also criticised individual rights as not adequately recognizing the role of the community in shaping the understanding of justice and the common good, such as moral values, shared understandings and the public interest. Fictions, such as the original position and social contract, detach individuals from their social context that form beliefs and understandings about what justice is.²²

Sandel asserted that individuals in reality are 'community-constitutive' rather than 'pure' and 'unadulterated' as proposed in the Rawlsian conception. He called for philosophy to give 'fuller expression to the claim of citizenship and community than [philosophical] liberalism allows'.²³ He argued that persons as we know them are always 'situated' or 'embedded' in a social context. They are 'encumbered' by ties of economy. We cannot

¹⁸ See, Amartya Sen, *Development as Freedom* (Oxford University Press, 1999).

¹⁹ Susan Dodds, 'Justice and Indigenous Land Rights' (1998) 41(2) *Inquiry* 187, 187.

²⁰ Amartya Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press, 2009).

²¹ Miodrag Jovanović, 'Are There Universal Collective Rights?' (2010) 11(1) *Human Rights Review* 17.

²² Sen, above n 20; Walzer, above n 1; Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 1982).

²³ Sandel, above n 22, 5.

conceive of our personhood without reference to our roles as citizens and as participants in a common life.²⁴

In a similar way, Michael Walzer called for treatment of justice that is 'socially and historically situated rather than abstract and detached'²⁵ from community values which he viewed as inherent in human life.²⁶ Walzer believed that justice underlies 'shared understandings of human needs and capabilities within different communities'²⁷ rather than conceptions based on abstract notions, such as the original position, which are not real.²⁸ The 'shared understanding' is based on assumptions that they are 'basic, transculturally applicable moral principles upon which we can legitimately rely precisely because they are, in fact, widely shared.'²⁹ The values seen from this shared understanding include the liberal values of life and liberty which are universal and not confined to liberalism only.

Amartya Sen has also identified the need to take a more comparative approach by looking holistically at social realizations which are not only the products of institutions but also of other factors including human and social behaviour. He warned against seeing people in terms of one dominant 'identity' to the exclusion of others which he saw as the tendency in the present intellectual climate.³⁰ He sought to offer a discourse about conceptions of justice which is open to plural voices rather than confined to establishment institutions and a homogenous liberal society with an ideal of justice with a view detached from its social reality.³¹

²⁴ Ibid.

²⁵ Glen Stassen, 'Michael Walzer's Situated Justice' (1994) 22(2) *The Journal of Religious Ethics* 375, 375.

²⁶ Walzer, above n 1, 29-30.

²⁷ Walzer stated that,

By virtue of what characteristics are we one another's equal? One characteristic above all is central to my argument. We are (all of us) culture-producing creatures; we make and inhabit meaningful worlds. Since there is no way to rank and order these worlds with regard to their understanding of social goods, we do justice to actual men and women by respecting their particular creations. And they claim justice, and resist tyranny, by insisting on the meaning of social goods among themselves. Justice is rooted in the distinct understanding of places, honors, jobs, things of all sorts, that constitute a shared way of life. To override those understandings is (always) to act unjustly. (Ibid, 314; Stassen, above n 25, 397).

²⁸ Walzer, above n 1, 82-3.

²⁹ Ibid, 378. Stassen argued against critics that justice of the Walzer kind is of *communitarian particularism*, ie, defined and determined by the shared understanding of each particular community. See, eg, Joshua Cohen, 'Review of Sphere of Justice, by Michael Walzer' (1986) 83(8) *The Journal of Philosophy* 457-68; Ronald Dworkin, Review of Sphere of Justice, by Michael Walzer 1983 30(6) 4-6, cited in Stassen, above 25, 378.

³⁰ Sen, above n 20, 247.

³¹ Ibid, xi-xiii. In his words:

(a) Reconciliation of Individuals and Collective Rights

The avoidance of the subject of collective rights in philosophical discussions of justice may have influenced the position of collective rights in international human rights law and, specifically, the rights of indigenous peoples to land and resources. The indigenous peoples' rights are mainly collective in nature. Although the rights of indigenous peoples as well as minority peoples are recognized as collective rights in the relevant international instruments, tension between the two contexts of rights remains. The growing recognition of indigenous peoples' rights at the domestic level has often been confined to individual rights of the members of the group whereas for many indigenous communities the right to occupy their ancestral land is a precondition to survival as a people. But very few jurisdictions recognize the rights to own land, for instance, as a collective right. Jarboe described the refusal of the US Supreme Court to recognize the collective rights of a Native American nation as an unjust imposition of Western views of individual rights on tribal land ownership.³²

An aspect of the tension between individual and collective rights is over how collective rights can be addressed. Kymlicka suggested that group rights are seen as asserting the moral primacy of a group against the individual which is a tool to restrict the freedom of individual members.³³

Sen maintained that his capability approach is also applicable to groups. He observed that there is no particular analytical reason for excluding groups 'from the discourse on justice or injustice in their respective societies, or in the world'.³⁴

Kymlicka asserted that some 'group differentiated rights' are not merely compatible with individual rights, but are required by the very same principles of freedom and equality. His proposition for group differentiated rights, that is, rights held by members of a group on the basis of their group membership,³⁵ provides a foundation for group rights within liberalism to which his proposition is confined.

Individual human beings with their various plural identities, multiple affiliations and diverse associations are quintessentially social creatures with different types of societal interactions. Proposals to see a person merely as a member of one social group tend to be based on an inadequate understanding of the breadth and complexity of any society in the world. (247)

³² Melanie Riccobene Jarboe, 'Collective Rights to Indigenous Land in *Carcieri v Salazar*' (2010) 30(2) *Boston College Third World Law Journal* 395, 395.

³³ Kymlicka, above n 1, 2. See also, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), 193-7. Dworkin indicates resistance against collective rights arguing that any individual rights trump collective rights.

³⁴ Sen, above n 20, 246.

³⁵ Kymlicka, above n 1, 35.

He argued that such a right can, in various ways, provide members of a group with protection against threats posed by the economic and political powers of the wider society. Rights applicable to groups, including land rights and representation rights, can serve as external protections in particular circumstances, such as to address minority indigenous groups whose rights are often disadvantaged by their limited political power. Kymlicka suggested that, since the disadvantages suffered by national minorities are not a result of their own free choices, group differentiated rights can be a legitimate, and sometimes morally required, means to address them.³⁶

The fundamental interests that individuals have in leading a good life require the freedom to live in accordance with their own beliefs about what gives value to life, and to be able to question and revise those beliefs.³⁷ When individuals are deprived of their cultures (which are constituted by shared language, values, institutions and practices) not only does their autonomy suffer, but they are also subject to a morally arbitrary disadvantage compared to those who can live and work in their own languages and cultures.³⁸ Liberal principles of freedom and equality require, in some circumstances, group differentiated rights to protect individuals against the potential loss of their cultures.³⁹

But Kymlicka's concept is still confined to individual rights available to members of a minority rather than actual group rights. Newman, on the other hand, argued that groups could actually hold moral rights. Collective rights, he asserts, exist when a collective interest is sufficient to ground a duty.⁴⁰ Some individual rights, including political rights, are interdependent with collective rights. Newman suggested that a group right may legitimately serve the interests of members other than their right to autonomy and still have moral weight attached to the group's interests.⁴¹

(b) Walzer and Respect for Communities

As with the other philosophers, Walzer also claimed that the element of respect is the main variable in the discourse on justice. But he argued that similar to a person, communities as institutions also demand mutual respect. The position of communities must also be taken into consideration in any societal design that affects resource distribution. Inherent in this is also a respect for diverse communities with their shared

³⁶ Ibid.

³⁷ Ibid, 83.

³⁸ Ibid, 126.

³⁹ Ibid.

⁴⁰ Newman, above n 1; Kymlicka, above n 1, 80.

⁴¹ Kymlicka, above n 1, 107. See also, Newman, above n 1, 282.

concepts of social goods.⁴² Related to the idea of equality and respect is opposition to domination. Walzer suggested that it is inherently understood that domination in more than one sphere would be unjust.⁴³ Distribution in one sphere such as money, politics, welfare and resources, should not determine the distribution in the other spheres.

In contrast with the majority of other liberal views which promote a homogenous liberal community as the ideal system for political society, Walzer advocated for a broad-based set of norms argued to be universal. He suggests that the norms are a shared understanding of human beings across the world regardless of their political systems⁴⁴ nor are they confined to a liberal society. The norms are universal but the social goods may vary in particular communities.

Based on this principle, Walzer identified three sets of basic rights: life; liberty and community. The three sets of rights are interrelated, especially in relation to the value of community. He argued that the right to life is expansive, not only limited to protection from harm but also to the positive right to the goods required for life. It extends to a positive right to the 'goods of life – to resources for developing their interests and capabilities, to opportunities to be socially useful and creative, and to opportunities to achieve wealth, meaning and happiness'.⁴⁵

With respect to the right to membership in a community, he asserted that a community is 'conceivably the most important good' that is universally valued.⁴⁶ The right to a community includes rights to not be excluded or deprived of community as well as a right to establish and preserve distinctive communities that command the respect and recognition of others.⁴⁷ He proposed that particular historical communities have a

⁴² Stassen, above n 25, 397. See also, Michael Walzer, 'What It Means to be an American' in (Marsilio, 1992), 3, 42, 48-9, 97-7, 101, 118-21 cited in Stassen, above n 25, 397.

⁴³ In his words,

I don't doubt that many political communities have distributed resources on very different principles, not in accordance with the needs of the members generally but in accordance with the power of the wellborn or the wealthy ... In any community, where resources are taken away from the poor and given to the rich, the rights of the poor are being violated. (Walzer, above n 1, 83)

⁴⁴ As Stassen, above n 25, 396, described

These do not require a homogenous community for their basis, nor are they identical with a positivistic interpretation of any one community; they are based on deep interpretation of many communities, and they provide leverage for social criticism in particular communities.

Walzer derived his three sets of rights from fundamental principles of justice shared by human beings in all cultures.

⁴⁵ Walzer, above n 1, 44-5, 47, 203; Stassen, above n 25, 384.

⁴⁶ Walzer, above n 1, 29.

⁴⁷ Ibid, Chapter 2. See, also, Stassen, above n 25, 384-5.

positive 'communal right to preserve their ways of life and shared understanding'. People have a right to 'the place where they and their families have lived and made a life'.⁴⁸ The right entails the land on which the people have their community.⁴⁹

However, he expressly stated that his principle of justice applies to a 'political community' which he frequently indicated to be an independent state, being tied by politics that establish a 'bond of commonality'.⁵⁰ Nevertheless, indigenous peoples may also qualify as a 'political community' with a distinct political structure, apart from other characteristics that commonly create a bond of commonality including history, language and culture which have been recognized at the international level.⁵¹ This is seen in the USA, where Native American polities are domestic dependent nations within the US with territorial sovereignty. To a certain extent, the First Nations in Canada also practise tribal self-government on some matters (Chapter 8.I.A and B).

4 Redistribution to Address Inequalities

(a) Rawls and Dworkin: Redistribution to Address Inequality

Philosophers, except Nozick, promote redistribution as a way to address inequalities. However, they differ in the manner that any redistribution in society could be conducted by government. Rawls sought to maximise the rights of all individuals without disadvantaging those with the least endowment of rights. His second principle suggests an arrangement for equality of opportunity to offices and positions in the formal sense. If native endowment is given in a society, for instance, all those similarly motivated and endowed must have the same prospect of culture and achievement 'regardless of their social class of origin, the class into which they are born and develop until the age of reason'.⁵²

As formal equality is not sufficient, Rawls promoted affirmative action to deliver real or substantive equality according to needs, relative poverty and contribution to general well-being.⁵³ Social institutions are arranged so that inequalities of wealth and income work to the advantage of those who will be worst off. This allows laws which target the inequalities experienced by particular groups. Rawls argued that in situations of

⁴⁸ Walzer, above n 1, 43.

⁴⁹ Ibid, 43-4; Stassen, above n 25, 388.

⁵⁰ Walzer, above n 1, 28-30.

⁵¹ The *United Nations Declaration of the Rights of Indigenous Peoples* recognized indigenous peoples as distinct groups capable of having their own sovereignty to exercise the right to self-determination. See, Arts 4 and 5.

⁵² Rawls, above n 5, 44.

⁵³ Ibid; Rawls, above n 9.

inequality which are inevitable, the determination of whether an act is just turns on whether it tends to increase the welfare of the least advantaged.⁵⁴ Even so, the establishment of basic institutions in society that address the first principle takes priority over fulfilment of the second principle, and within the second principle, *fair equality of opportunity* takes priority over the *difference principle*.⁵⁵

In contrast, Dworkin recognized that differences in talent are differences in resources and therefore must be compensated.⁵⁶ Redistribution in the form of compensation is required for the unequal inheritance of wealth, health and talent. Opposing Rawls, Dworkin asserted that equal opportunity is insufficient because it does not compensate for unequal innate gifts.⁵⁷

Therefore, in examining justice in a society in its distribution of both benefits and resources, reasons for current inequalities need to be identified. For Dworkin, the only morally relevant inequalities are those caused by unchosen circumstances, including those caused by membership of a race.⁵⁸ Unequal distribution of resources is considered fair only when it results from the decisions and intentional actions of those concerned.⁵⁹ Pierik noted that this differs from Rawls' position, which 'defends egalitarian policies for the worst-off in society, regardless of the reason why they are worst-off'.⁶⁰

But both focus on individuals' rights which may not address the land and resource issues of indigenous peoples whose orientation is communal. Nonetheless, the discourse highlights issues of equality in the distribution of resources affecting indigenous minorities. What is the reason for serious inequalities between the indigenous peoples and the other sections of society? What is the position in the ownership of property in the country? Is the reason for this beyond those for which the indigenous communities could be responsible?

(b) Nozick: Minimal State and Opposition against Redistribution

Contrary to Rawls and Dworkin who believe redistribution is justified to address inequalities, for Robert Nozick, redistribution by the government is not allowed, being beyond the limit of its power. Nozick, whose conception of justice is based on legitimacy, opposed Rawls' views but shares the same emphasis on individual liberties and free

⁵⁴ Rawls, above n 9, 60-2, 75-80.

⁵⁵ Rawls, above n 5, 43.

⁵⁶ Dworkin, above n 4, 297-8.

⁵⁷ Dworkin, above n 16.

⁵⁸ Ronald Dworkin, *Sovereign Virtue* (Cambridge, 2000), 73-8.

⁵⁹ Dworkin, above n 16, 291.

⁶⁰ R Pierik, 'Reparations for Luck Egalitarians' (2006) 37 J Social Philosophy 423, 440.

markets as the means for the distribution of goods. He proposed that justice requires that people not violate the rights of others, which may occur when there is a redistribution of social goods of the kind proposed by Rawls. According to Nozick, property is only acquired when it has the right genealogy: one way is by working on things which are *unowned*. The other is by a transfer from a person with valid rights by sale, gift or inheritance.⁶¹ People acquiring property according to the right genealogy are entitled to that property.⁶² Thus, it provides a powerful argument for indigenous peoples as the first peoples to have an unequal share and also for treaties to redistribute that wealth. But he emphasized the rights of individuals and not the collective.

Whether a distribution is just is historical in nature ie depending upon how it came about. He rejected other theories of justice orientated towards '*current time-slice principles of justice*'⁶³ including utilitarian and welfare justifications,⁶⁴ and other principles of justice patterned according to matters such as needs and moral merits.⁶⁵

For Nozick, the state is an institution that arose within a 'state of nature'⁶⁶ to safeguard the rights of people in a particular geographical territory.⁶⁷ The state's power or its legitimacy is limited to its purpose, that is, to provide a machinery to identify rights and create the protective force to protect these rights.⁶⁸ Accordingly, redistribution of social goods is not within the power or legitimate activities of the state. Redistribution of social goods to maintain equality as proposed by Rawls infringes liberties. The only situation where the state may redistribute is where there has been a violation of the *principles of justice in holdings* to rectify the injustice in holdings.⁶⁹

Rawls suggested that observance of the principles for acquiring and transferring property in Nozick's proposition ensures justice in the succeeding states. But, Rawls asserted that

⁶¹ Nozick, above n 150-3, 207-13.

⁶² Nozick referred to this principle as 'justice in holding',

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding. 2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding. 3. No one is entitled to a holding except by (repeated applications of 1 and 2). (Ibid, 151, 153).

⁶³ This is determined by how things are distributed.

⁶⁴ Nozick, above n 61, 153-4.

⁶⁵ Ibid, 156-164.

⁶⁶ Ibid, 52.

⁶⁷ The state is therefore a 'protective association': *ibid*, 117-8.

⁶⁸ He argued that 'no state more powerful or extensive than the minimal state is legitimate or justifiable'. 'Any state more extensive violates people's rights'. *Ibid*, 53, 149.

⁶⁹ Referred to as 'justice in rectification'. This theory is referred to as the entitlement theory of justice in distribution. Acquisition of property through 'justice in rectification' renders just title. *Ibid*, 151-3.

regulation of basic institutional structure is necessary as accumulation of wealth is likely to result in injustice over an extended period of time.⁷⁰ Nevertheless, Nozick's proposition offers a critique of the extensive role of state institutions in distributive measures without adequate respect and concern for private individual and group interests.

5 Criticism of Welfare-based Equality and Utilitarianism

Much of the development policy that is practised in many developing countries including Malaysia, is grounded in two approaches: first, a welfare base that focuses on income and resources accumulation and second, utilitarianism. Both approaches in practice tend to overlook indigenous peoples. As was recognized in the 1990 Human Development Report, the basic objective of development to create an enabling environment for people to live long, healthy and creative lives is often lost in the more immediate concern for the accumulation of commodities and financial wealth. This focus ignores the diversity of human beings and the fact that people may have different objectives in their lives which they have reason to value.⁷¹ Development policy that seeks equality of welfare requires the government to design and distribute property to make the welfare of all citizens roughly equal as far as possible.⁷² Utilitarianism, on the other hand, requires the government to secure roughly the greatest possible average welfare, counting the happiness or success of each person in the same way.⁷³

These two approaches have been the subject of criticism by scholars who place an emphasis on the rights and freedoms of human beings. They fail to recognize the rights and freedom of human beings including the natural rights to property acquired legitimately, such as the land rights of the indigenous peoples. On the other hand, liberal philosophy emphasizes the recognition of the natural rights of people that the government should accurately identify and protect in their exercise.

Dworkin suggested that it is improbable that the approaches may achieve their purpose of equality. This is because the form of equality that the welfare-based conceptions originally secured are likely to be undermined by choices and trades that people make so that they will achieve more or less welfare than other people.⁷⁴ He also asserts that

⁷⁰ Rawls, above n 5, 51-2.

⁷¹ Sen, above n 18.

⁷² Dworkin, above n 4, 297.

⁷³ Ibid, 297.

⁷⁴ Ibid, 298-9.

the recognition of the natural rights of property is an essential element in achieving equality.⁷⁵

Furthermore, Sen argued, the utilitarian view of individual well-being can be easily swayed by mental conditioning and people's happiness adapting to oppressive situations. These are certainly the experience of the indigenous peoples who suffer through the loss of land, territory and resources. But others are telling them that these losses are justified for the benefit of the larger society. Therefore, the utility calculus can essentially be unfair to those who have come to terms with their deprivation as a means of survival, as they adjust their desires and expectations. In the words of Rawls,

[j]ustice denies that the loss of freedom for some is made right by a greater good shared by others.⁷⁶

Insights from economics are also important in this context. The recognition of property rights carries with it economic entitlements which give indigenous peoples control of their land and allow them to bargain over access to it and its natural resources. These entitlements encourage owners to conserve its value and, should they seek to share or dispose of the rights, to sell them for the highest price. This is important in the Orang Asli context as the economic significance of forests as carbon banks is recognized. This also has the potential to lead to communities and individuals becoming economically self-sufficient.⁷⁷

Recognition of rights empowers people in a way in which depending on the benevolence of the government of the day – as promoted by the welfare approach – does not. In Australia, for instance, this approach to assist indigenous peoples has failed to address the systemic and institutionalized impediments to socio-economic problems evidenced in the disparity between indigenous peoples and the general population.⁷⁸ The same situation is also observed in Malaysian policy in dealing with the Orang Asli communities. The Orang Asli remain on the bottom rung in socio-economic status dependent on the state's welfare.⁷⁹

⁷⁵ Ibid, 299. Dworkin stated that if natural property right is recognized, the choices people make in using their property will complement rather than threaten what government has achieved in terms of equality.

⁷⁶ Rawls, above n 25.

⁷⁷ Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (The Federation Press, 2003), 11.

⁷⁸ Ibid, 7-9. See also, Richard Trudgen, *Why Warriors Lie Down and Die* (Aboriginal Resource and Development Services Inc, 2000).

⁷⁹ See, eg, Nicholas, Colin, *The Orang Asli and the Contest for Resources* (International Work Group for Indigenous Affairs, 2000); Yi Fan Chung, *The Orang Asli of Malaysia: Poverty, Sustainability and Capability Approach* (Master of Science Thesis, Lund University Centre of

Furthermore, the means to ensure the promotion and realization of all of their human rights – politically, socially, economically and culturally – are unequivocally the real security of indigenous peoples struggling for survival as peoples.⁸⁰ Recognition of their rights may lead to positive steps to counter prejudice, and improve their health, education and socio-economic status. There is an interrelated link between property rights, economic improvement and social mobility which is recognized in some of the literature as important in wealth distribution and poverty eradication. A higher level of confidence from property being protected by law will contribute to national stability as people know their rights are respected and more secure.⁸¹

Arguing against the thesis that freedom must be sacrificed for the sake of development, which is frequently invoked by leaders of developing states, Sen proposed that development should be seen as a process of expanding the real freedoms that people enjoy. Freedom is both the principal ends and means of development, which is an integrated process. Apart from the growth of gross domestic product (GDP) and individual incomes which are the main determinants of conservative economic policy, Sen argued that other determinants, including freedom and liberties, are equally important in assessing the quality of life of whatever manner that people have reason to value.⁸²

II OTHER CONCEPTS OF SUBSTANTIVE JUSTICE

A RESTORATIVE JUSTICE

To address injustice is to seek for reparation which is to restore justice, atone and make amends for a wrong on a political, moral or legal basis. Restorative justice seeks to rectify past wrongs, such as the misappropriation of rights or resources. It goes further than classic corrective justice in that it does not only seek to repair the loss or injury, but also to reconcile the wronged with the perpetrator.⁸³

Sustainability Science, 2010)
<http://www.lumes.lu.se/database/alumni/08.10/Thesis/YifanCHUNG_Thesis_2010.pdf>.

⁸⁰ Resolution in a meeting of representatives from 17 countries of Asia discussing issues around the theme 'Democracy and Security of the People of the Asian Region, held in Nakhon Nayok, Thailand on 23-25 August 2002 cited in Jeswyn Rohan Yogaratnam, 'The 'sun rises' illuminating the Orang Asli's Native Customary Rights to land – Let it not 'set" (2003) 2 *Insaf*, 36.

⁸¹ Anne Chandima Dedigama, 'International Property Rights Index (IPRI) 2009 Report' (Property Rights Alliance, 2008) <http://www.internationalpropertyrightsindex.org/atr_Final1.pdf>, 14.

⁸² Sen, above n 18.

⁸³ Buti, above n 60, 170.

Restorative justice is commonly associated with the criminal justice system in which programs are established with the aim of repairing the injuries caused by the wrong, and assisting the victim, the perpetrator and their communities to find a lasting resolution to the conflict.⁸⁴ Restitution in civil law is grounded on the same justification. It has also been used to seek reparation for historical injustices involving indigenous peoples including land grievances. It offers theoretical justifications for designing programs for reparations and enhancing relationships between the indigenous communities and the state. It is seen in emerging international law, such as Art 28 of UNDRIP.⁸⁵ It is increasingly seen in national legal systems seeking to address issues over land⁸⁶ but also in the removal of indigenous children from their families.⁸⁷

The concept also provides both a process and a value framework for the awarding of reparations. It places particular emphasis on the principles and aims of human dignity and its strong relationship with morality. It includes a range of forms of reparation including apologies, compensation, restitution and guarantees of non-repetition.⁸⁸ As Walker argued, restorative justice requires the 'need to establish a governing understanding of "right relationship"'. It requires 'bottom-up and incremental attempts at repair as a social and political process'. This is a long-term process which may be signified, but not exhausted, by particular forms of reparations such as public apologies.⁸⁹

Responsibility for restoring justice directly arises from a breach of legal duty or encroachment of the legal rights of particular peoples or groups. In relation to indigenous

⁸⁴ Ibid, 178.

⁸⁵ It provides for the granting of new land 'equal in quality, size, and importance to that lost'.

⁸⁶ Anita Jowitt, 'Indigenous Land Grievances, Customary Land Disputes And Restorative Justice' (2009) 13(1) *Journal of South Pacific Law*, [10]; Aoife Duffy, 'Indigenous Peoples' Land Rights: Developing a Sui Generis Approach to Ownership and Restitution' (2008) 15(4) *International Journal on Minority and Group Rights* 505, 522; Meredith Gibbs, 'Using Restorative Justice to Resolve Historical Injustices of Indigenous Peoples' (2009) 12(1) *Contemporary Justice Review* 45, 45-6; Susan Dodds, 'Justice and Indigenous Land Rights' (1998) 41(2) *Inquiry* 187, 195-6; Cyndy Baskin, 'Holistic Healing and Accountability: Indigenous Restorative Justice' (2002) 8(2) *Child Care in Practice* 133; Peter d'Errico, 'Restorative Indigenous Justice: States and Communities in Tension' (1999) 2(4) *Contemporary Justice Review* 383.

⁸⁷ Mary Ivec, Valerie Braithwaite and Nathan Harris, "'Resetting the Relationship" in Indigenous Child Protection: Public Hope and Private Reality' (2012) 34(1) *Law and Policy* 80; Buti, above n 170-171.

⁸⁸ Gibbs, above n 86, 46.

⁸⁹ Margaret Urban Walker, 'Restorative Justice and Reparations' (2006) 37(3) *Journal of Social Philosophy* 377, 378.

peoples, the legal duty may originate from certain legislation;⁹⁰ or the fiduciary duty of the government under common law⁹¹ or legislation; treaty; or legislation. Indigenous peoples have suffered a range of injustices which amounts to the losses for which reparation compensates. This historical injustice is affirmed in the United Nations Declaration of the Rights of Indigenous Peoples in, among others, dispossession of their lands, territories and resources. Their dispossession of land prevents them 'from exercising in particular, their right to development in accordance with their own needs and interests'.⁹²

Nevertheless, the responsibility for amending wrongs may not arise from legal responsibility, especially in the cases involving indigenous peoples where the states' acts are normally sanctioned by formal laws or legislation.⁹³ Certain laws providing for the protection of minorities are often not implemented well. Conflicting laws or legal provisions may also be interpreted to justify the states' acts although they have the effect of encroaching on the legal rights of indigenous peoples. In relation to this issue, Gibbs suggests that for restorative justice principles and practices to operate successfully in the context of land grievances involving indigenous peoples where there are likely to be different cultural conceptions of justice at play, attention must shift from defining crime in a legalistic sense to defining injustices or wrongs in a moral, rather than strictly legal, way.⁹⁴

US reparations scholar, Roy Brooks, associated restorative justice with the 'atonement model', which centres on the rehabilitative aspects of reparations. The crux of Brooks' 'atonement model' is the requirement of an apology to the victims of a past injustice, made more effective by monetary or other additional reparations.⁹⁵ Restorative justice encompasses an array of measures – including, but not limited to, monetary compensation – to address historical wrongs. The theory implicitly recognizes that victims of historical wrongs have material, emotional and moral needs, and that compensation may even be insulting without a surrounding framework of respectful

⁹⁰ For example, the decision in *Mabo (No 2)* (1992) 175 CLR 1 was taken after the *Queensland Coast Islands Declaratory Act* was held to be invalid in *Mabo v The State of Queensland (Mabo No 1)* (1988) 166 CLR 186, being in conflict with *Racial Discrimination Act 1975* (Cth).

⁹¹ In Canada, eg, infringement and extinguishment of the indigenous rights are subject to the fiduciary duty of the government (Chapter 8.I.A); Malaysian cases: *Sagong (No 2)* [2005] 6 MLJ 289; *Bato' Bagi* (2011) 6 MLJ 297 (Chapter 6.II.C.(b).(i)).

⁹² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/RES/61/295, adopted 13 September 2007, Preamble 6.

⁹³ Buti, above n 60, 168.

⁹⁴ Gibbs, above n 86, 47.

⁹⁵ Buti, above n 60, 179.

acknowledgement, responsibility and concern.⁹⁶ It seeks the empowerment of the victim by encouraging communication between wrongdoer and victim⁹⁷ and avoiding the domination of one party over the other party or parties.

Gibbs argued that applying restorative justice practices and principles could maximise justice for indigenous peoples by, firstly, refocusing indigenous land claims on the restoration of tribal respect and dignity rather than on the restoration of property rights, and secondly, acknowledging the wider social relationships in which such conflicts arise.⁹⁸

At present, the courts' remedy in terms of restorative justice is limited to restitution in terms of payment of compensation according to the relevant law. Cases have normally been brought to courts after the indigenous peoples have been dispossessed of their land and monetary compensation is the only remedy available.

The restitution measures suggested in the UNDRIP are the return of land whenever possible, compensation in the form of lands, territories or resources equal in quality, size and legal status or monetary compensation (Chapter 7.II.C.4).⁹⁹

B ENVIRONMENTAL JUSTICE

Another concept of justice which is relevant in the context of this project is environmental justice. It may be influenced by Rawls' concept of distributive justice but it remains an under-theorized concept. The term has been used to highlight the distributional impacts of the dominant society's environmental decision-making process on disadvantaged communities, including the poor and racial minorities.¹⁰⁰ Instances are the disproportionate siting of undesirable hazards and land use on lands owned by minority populations and in low-income areas.¹⁰¹ The Environmental Justice Movement started in

⁹⁶ Walker, above n 89.

⁹⁷ Buti, above n 60, 171.

⁹⁸ Gibbs, above n 86.

⁹⁹ Art 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.

¹⁰⁰ Rebecca Tsosie, 'Indigenous People and Environmental Justice: The Impact of Climate Change' (2007) 78(4) *University of Colorado Law Review* 1625, 1627.

¹⁰¹ Alice Kaswan, 'Environmental Justice: Bridging the Gap Between Environmental Laws and Justice' (1997) 47 *American Law Review* 221221, 227-8; Tsosie, above n 100, 1635-44.

the US and later expanding globally¹⁰² was a grassroots response to evidence that environmental hazards disproportionately affect the health and well-being of certain kinds of communities including the indigenous minorities compared to other groups.¹⁰³ The problem has also been highlighted by indigenous peoples in Asia.¹⁰⁴

The indigenous peoples are acknowledged to be the most affected due to various environmental problems including climate change, environmental degradation and resource depletion.¹⁰⁵ This is particularly because of the great interdependence of the people with their local environments and the centrality of traditional life to basic survival in the areas where they live. Hydroelectric dam projects are known to have had a severe impact on indigenous communities, resulting in permanent loss of tribal lands, water resources and fishing resources.¹⁰⁶ The effects of resource depletion on indigenous communities such as the Orang Asli are devastating. Where people continue to live in traditional subsistence ways and are dependent on the environment, including many floral and faunal species, for their culture and material survival, not only are the animals and river and lake fishes disappearing, but forests are also shrinking. Many of the Orang Asli live in forests or on their fringes and are now caught in increasingly mono-crop forests that supply fewer, if any, food resources.¹⁰⁷

C PROCEDURAL JUSTICE

The concept of distributive justice extends to the process involved in the distribution of goods in society and links to the concept of procedural justice in resolving disputes over

¹⁰² Transnational Networks for Environmental Justice comprise various organisations around the world which work with the objective to reduce the impact of environmental injustice. See, eg, Gordon Walker, 'Globalizing Environmental Justice: The Geography and Politics of Frame Contextualization and Evolution' (2009) 9(3) *Global Social Policy* 355.

¹⁰³ Ibid.

¹⁰⁴ 'Asia Indigenous Peoples Caucus Statement: Millennium Development Goals and Indigenous Peoples: Redefining the Goals [notes]' (2007) 8(1) *Asia-Pacific Journal on Human Rights and the Law* 64, 64.

¹⁰⁵ See, eg, Bali Principles of Climate Justice in 2002 released by the International Climate Justice Network (29 August 2002) <http://www.ejnet.org/ej/bali.pdf>.

¹⁰⁶ Michaels, Pete S and Napolitano, Steven F, 'The Hidden Costs of Hydroelectric Dams' (1988) 12(2) *Cultural Survival Quarterly* <<http://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/hidden-costs-hydroelectric-dams>>.

¹⁰⁷ See, eg, Azrina Abdullah, Or Oi Ching and Kamal Solhaimi Fadzil, *Collectors and Traders: A Study of Orang Asli Involvement in the Belum-Temenggor Complex, Perak* (Center for Malaysian Indigenous Studies, 2011); Tijah Yok Chopil, 'Biological Diversity and the Survival of the Identity of the Orang Asli' in G S Nijar and Azmi Sharom (eds), *Indigenous Peoples' Knowledge Systems and Protecting Biodiversity* (APC and Centre for Legal Pluralism and Indigenous Laws, UM, 2004).

conflicts in the allocation of resources. A fair procedure is one that affords those who are affected an opportunity to participate in the making of the decision.

Dworkin and Walzer shared the idea that respect for people or their communities is the basis of the principle of fair procedure. Dworkin's work relating to the principle of equal concern and respect extends to political justice and fairness in decision-making processes or procedural justice. The principle holds that citizens have the right to be treated as equals. As Dworkin stated

This is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed.¹⁰⁸

For Walzer, the right to basic personal liberty also includes the right to participate in decision making and value creating in one's community. This right is both individually inalienable and communally inflected. Walzer associated the right to liberty as the basis of dignity and self-respect. He asserted that a person who cannot or does not participate in decision making is deprived of self-respect.¹⁰⁹

Rawls distinguished three types of procedural justice. Firstly, perfect procedural justice has two characteristics: an independent criterion for what constitutes a fair or just outcome of the procedure and a procedure that guarantees that the fair outcome will be achieved. Secondly, imperfect procedural justice shares the first characteristic of perfect procedural justice, but has no method that guarantees that the fair outcome will be achieved. He stated that a political process is at best one of imperfect political justice. Thirdly, pure procedural justice describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself.¹¹⁰

Pure procedural justice is obtained when there is no independent criterion for the right result; instead, there is a correct or fair procedure so that the outcome, whatever it is, is likewise correct or fair if the procedure has been properly followed."¹¹¹ The procedure for determining the just result must be actually carried out, as there is no independent criterion by reference to which a definite outcome can be known to be just.¹¹²

Under Rawls' proposition, in applying the notion of pure procedural justice to a distribution share, it is necessary to set up and adhere to a just system of institutions.

¹⁰⁸ Dworkin, above n 33, 273.

¹⁰⁹ Stassen, above n 25, 385.

¹¹⁰ Rawls, above n 9, 74-5.

¹¹¹ Ibid, 75.

¹¹² Ibid.

Only against the background of a just basic structure, including a just political constitution and a just arrangement of economic and social institutions, can one say that the requisite just procedure exists.¹¹³

The correctness of the distribution is founded on the justice of, firstly, the scheme of cooperation from which it arises, that is, the arrangement of the basic structure and, secondly, on answering the claims of individuals engaged in it.¹¹⁴ The role of the principle of fair opportunity under the second principle of justice is to ensure that the system of cooperation is one of pure procedural justice.¹¹⁵

The arrangement of the basic structure is the first element by which the justice of the system is to be judged. The basic structure of society comprises the main political and social institutions and the way they fit together as a scheme of cooperation and the way they assign basic rights and duties and regulate the division of advantages that arise from social cooperation over time.¹¹⁶ The constitution should establish equal rights to engage in public affairs and should ensure that measures are taken to protect these rights.¹¹⁷

Applied to the political procedure defined by the constitution, the principle of equal liberty refers to a principle of equal participation.¹¹⁸ It requires that all citizens are to have equal rights to take part in, and to determine the outcome of, any decision-making process. This includes the constitutional process that establishes the laws with which they are to comply,¹¹⁹ and administrative decisions that directly affect certain groups of people within a particular territory. If a state is to exercise a final and coercive authority over a certain territory and, in this way to permanently affect people's prospects in life, then the constitutional process should preserve the equal representation to the degree that is practicable.¹²⁰

Knowledge and capacity are important to allow for equal participation. Rawls states that citizens should be in a position to assess how proposals affect their well-being and which policies advance their conception of the public good. They should have the means to be informed about issues especially those directly affecting them.¹²¹ They also should have

¹¹³Ibid, 76.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Rawls, above n 5, 10.

¹¹⁷ Ibid, 200.

¹¹⁸ Ibid, 194.

¹¹⁹ Ibid, 194.

¹²⁰ Ibid, 195.

¹²¹ Ibid, 198.

a fair chance to add alternative proposals to the agenda.¹²² The principle of participation compels those in authority to be responsive to the felt interests of the electorate ensuring that the government will respect the rights and welfare of the governed.¹²³

From a practical aspect, procedural justice is significant in a legal order. Public trust is the key to maintaining the legitimacy of the legal system. The policies that promote procedural fairness offer a vehicle by which to reach favourable decisions for both parties in disputes. It has a significant potential for changing how the public views the state and the law.¹²⁴

This philosophical discussion raises questions of how just the present institutions are in the ways in which they affect minority or indigenous peoples, such as the Orang Asli, in terms of the basic structures of a society, the administrative decision-making process and the mechanisms to address claims by the indigenous peoples.

In the context of indigenous peoples, Sossin suggested that the procedural solution is prudent as it implies respect for the parties and their position. It has the potential for reconciliation and improves relations between disputing parties. This is because the process builds on both parties' norms of dialogue. It promotes reasoned engagement by disputing parties. It allows parties to defer 'difficult decisions, and leaves open further opportunity for compromise, settlement, building of trust and improvement of relations'. It also improves the potential to achieve substantive justice in the outcome of the process as risk of error is minimised. Ultimately, it allows parties to take 'ownership' over the substantive resolutions which result from the process. Therefore, the procedural approach is a significant aspect in addressing conflict involving indigenous peoples' claims to land and resource rights.¹²⁵

1 The Courts and Procedural Justice

The ways and the means to address the claims of individuals are another way in which justice in distribution could be assessed. The courts, which are the main recourse for complaints by people, play a significant role in procedural justice. The judicial system provides people with a forum in which they can obtain justice as it is defined by the

¹²² Ibid.

¹²³ Ibid, 202.

¹²⁴ For instances of studies that evaluate the significance of procedural justice in legal settings, see, eg, Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44(1/2) *Court Review*.

¹²⁵ Lorne Sossin, 'The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights' (2010) 23 *Canadian Journal of Administrative Law & Practice* 93, 95.

framework of the law. The question is how far the court mechanisms can go in achieving procedural justice in the process itself.

Fautsch, looking at how indigenous peoples fare in the context of litigation, argued that results in land disputes between governments and indigenous peoples are likely to be similar to disputes between 'repeat players' and 'one-shotters'.¹²⁶ The government plays the role of a repeat player, and the indigenous peoples play the role of one-shotters. Governments tend to hold a systemic advantage over indigenous communities because governments, being frequent litigators with substantial resources, can anticipate legal problems and can often structure transactions and compile a record which justifies their actions.¹²⁷ A repeat player can use its economic and informational advantages to settle claims that are likely to result in unfavourable precedents, seek procedural changes from courts or seek substantive changes to the law from legislative bodies.¹²⁸ Even if indigenous peoples are fortunate enough to successfully litigate their claims, they still suffer serious impediments in enforcing court judgments.

2 Engagement in Decision Making

Apart from the litigation process which is often the last recourse, there are various kinds of resolutions that are more suitable for addressing this kind of issue. They include the dispute resolution process: negotiation, mediation and arbitration or, through the political process: treaty and negotiated legislation.

An important element, as pointed out by Sach, is engagement in the exercise of public power especially when it affects marginalized communities. It requires parties to meet and seek to find fair and practicable solutions within the matrix of legal requirement. Such a process not only facilitates good outcomes but provides voice and dignity to the people who are often sidelined in policy making.¹²⁹

¹²⁶ David Fautsch, 'An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform' (2009–2010) 31 *Michigan Journal of International Law* 449, drawing an analogy to Marc Galanter's influential analysis of long-run litigation outcomes in Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review*.

¹²⁷ Fautsch, above n 126, 452, 456.

¹²⁸ Ibid, 456 citing Galanter, above n 126, 807.

¹²⁹ Albie Sach, 'Preface' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership* (Routledge, 2010), x.

D JUSTICE IN TRANSLATION

In the context of comparative law and transplantation of international law into national legal systems, there are other relevant concepts of justice. In discussing justice as translation, White described translation as owing fidelity to the other language and text but also requiring the assertion of one's own as well. The ideal is thus, neither wholly international nor wholly national, but a hybrid that expresses the relationship between them. The process of translation as a method, respects differences in national law.¹³⁰ Homi Bhabha asserted that 'It is the "inter" – the cutting edge of translation and negotiation' that opens a space in which 'we will find those words with which we can speak of Ourselves and Others'.¹³¹ Knop argued that one way to uncover the nature and potential of the domestic application of international law is to note the problematique it shares with comparative law: how and why we use the norms of other communities to judge our own. As a discipline, comparative law offers resources to measure this problem because comparativists, unlike internationalists, are attentive to the nature of translation, its significance and justification.¹³² A great strength of comparative law is its unique techniques to critically evaluate the claims, strategies and projects asserted in the guise of globalization.¹³³ This concept is closely connected to the issues discussed in comparative law discipline, that is, the comparability and transplantability of the laws being considered in the national context (Chapter 2.IV.A).

III THE CRITICISM ON RESOURCE DISTRIBUTION IN MALAYSIA

The validity of values within a society is dependent on the cultural and social imprints of a particular society. In the context of Malaysia, the ideas of rights and human rights as elements of social justice are not given specific emphasis. Some regard the idea of rights with scepticism especially among local politicians and religious leaders mainly in the past 20 years. Arguments focus on the national identity issue and the need to have strong government for the country's development as people's rights means restraint to the state. The approach to development that does not give sufficient recognition of the natural rights of people is criticised by Sen as failing to acknowledge and recognize the values

¹³⁰ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press, 1990), 264.

¹³¹ Homi K Bhabha, 'The Commitment to Theory' (Summer 1988) *New Formations* 5, 22 cited in Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *International Law in Politics* 501, 507.

¹³² Knop, above n 131, 507.

¹³³ Annelise Riles, 'Wigmore's Treasure Box: Comparative Law in the Era of Information' (1999) 40 *Harvard International Law Journal* 221, 226.

and institutions of each community in the society, specifically the minority indigenous peoples.

Sen also pointed out that the approach attaches no intrinsic value (ethics) to claims of rights and freedom which people have reason to value. It ignores the extent of inequalities in what is needed to obtain happiness on the individual level. Whilst it may take much less to bring about happiness than approaches designed by the utilitarians, Sen emphasized that subjecting people to lesser opportunity for resources and benefits is by no means fair or just.

Those in authority in Malaysia frequently use the public interest reason to justify aggression on individual rights.¹³⁴ Malaysian society is said to place emphasis on community interests and well-being as a whole rather than on those of individuals. The culture inhibits assertive and confrontational behaviour and gives priority to maintaining harmony for collective well-being and 'display[s] a strong humane orientation within a society that respects hierarchical differences'.¹³⁵ Some reinforce rejection stating that the idea, although unsubstantiated, is 'Western' and even 'Christian'. Martinez, looking into Malay culture and the plurality of voices which is paramount in democracy, pointed out that much of Malay cultural tradition is legitimising 'feudal absolutism' through promoting the culture of absolute leadership and blind loyalty to the ruler. This has been further sanctified and justified by Islamic authorities who are part of the state establishment.¹³⁶ Among some religious scholars, calls for the equality of rights among citizens and women, greater political freedom and freedom in religion are often rejected as a threat against Islam by misleading Muslims.¹³⁷ They have alleged that these activists rely on

¹³⁴ There is considerable literature on this view which also relates to the scepticism against international human rights law. See eg, Kent, Ann, Discussion Paper, No. 3. (1989) n.p; R Zamani Idris and M Shauki M Radzi, 'Controversies behind the Idea of Universal Human Rights: A Malaysian Perspective' (2009) 2(1) *Sosiohumanika* 67; Mohd Azizuddin Mohd Sani, 'Mahathir Mohamad as a Cultural Relativist: Mahathirism on Human Rights' (Paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia, Melbourne, 1-3 July 2008) <<http://arts.monash.edu.au/mai/asaa/mohdazizuddinmohdsani.pdf>>. See also recent argument by the former Prime Minister, Mahathir Mohamad, that rejects liberty and equality ideas saying that they amount to allowing greater freedom in sex, his blog post at <http://chedet.cc/blog/?p=689#more-689>. The report of it in English could be found in <http://www.theborneopost.com/2012/02/10/anwar-trying-to-change-laws-in-malaysia-says-dr-mahathir-update/>.

¹³⁵ Jeffrey C Kennedy, 'Leadership in Malaysia: Traditional Values, International Outlook' (2002) 16(3) *Academy of Management Executive* 15.

¹³⁶ Patricia A Martinez, 'Is it Always Islam versus Civil Society?' in K S Nathan and M Hashim Kamali (eds), *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century* (Institute of Southeast Asian Studies, 2005) 135.

¹³⁷ See, eg, Jaffary Awang et al, 'Islamic Studies in Malaysia in Confronting Liberal Islam' (2011) 5(5) *Advances in Natural and Applied Sciences* 432.

ideas which are not Islamic and have accused them of promulgating secularism which is regarded as an attempt to separate religion from the state and its administration.¹³⁸

Nevertheless, a political shift towards more universal and democratic politics, equality and social justice is apparent. Political science studies examining political change within the civil society indicate growing public sentiments in favour of participatory politics rejecting prevalent ethnicized political insensitivities to social justice.¹³⁹ Weiss wrote in 1999 that the political culture of Malays is also changing. They are responding politically far more openly than previously and demanding a higher level of accountability and transparency than before.¹⁴⁰ In 2004, she later wrote that

While Malaysian civil society remains segmented along racial and religious lines, its demonstrated ability to cut across these lines to collaborate on certain issues presents uniquely valuable, if not yet fully realised, contributions to the possibilities for political change.¹⁴¹

Lopez also suggested that the society has evolved with the rise of a new generation with different perspectives on key issues, including democracy and human rights. This, however, she noted, is a growing mismatch with the values within the main political parties that dominate the Malaysian political landscape and is being resisted.¹⁴² Berger, examining the result of the 2008 election and public sentiment heading to the next election, predicted fundamental qualitative change within the society towards better democratic practice.¹⁴³

But those within the legal community are not that optimistic.¹⁴⁴ Harding and Whiting, for instance, continued to lament the increasing authoritarian practice by the government in

¹³⁸ Ibid.

¹³⁹ See eg, Johan Saravanamuttu, 'Twin Coalition Politics in Malaysia since 2008: A Path Dependent Framing and Analysis' (2012) 34(1) *Contemporary Southeast Asia*.

¹⁴⁰ Meredith L Weiss, 'What Will Become of Reformasi? Ethnicity and Changing Political Norms in Malaysia' (1999) 21(3) *Contemporary Southeast Asia*.

¹⁴¹ Meredith L Weiss, 'Malaysia: Construction of Counterhegemonic Narratives and Agendas' in Muthiah Alagappa (ed), *Civil Society and Political Change in Asia: Expanding and Contracting Democratic Space* (Stanford University Press, 2004) 269.

¹⁴² Carolina C Lopez, 'Globalisation, State and Local Human Rights Actors: Contestations between Institutions and Civil Society' in Edmund Terence Gomez (ed), *Politics in Malaysia: The Malay Dimension* (Routledge, 2007); Laws such as the *Internal Security Act 1960* (ISA), the *Societies Act 1966*, the *Sedition Act 1948*, the *Universities and University Colleges Act 1971* allow the government to control both civil and political activities. The ISA was abolished in April 2012. However, the *Prevention of Crime Act 1959* was amended in 2013 to allow for detention without trial and restriction on judicial review.

¹⁴³ Dominic Berger, 'The 2008 Malaysian General Election: Killing the Ghost of 1969?' (2010) Asia Online (Flinders Asia Centre Occasional Paper. See, also, Andreas Ufen, 'The Transformation of Political Party Opposition in Malaysia and Its Implications for the Electoral Authoritarian Regime' (2009) 16(3) *Democratization*.

¹⁴⁴ See, eg, Harding and Whiting, above n; Ratna Rueban Balasubramaniam, 'Judicial Politics in Authoritarian Regimes' (2009) 59(3) *University of Toronto Law Journal* 405.

tackling dissent.¹⁴⁵ Although civil and political rights are itemized and guaranteed in the *Constitution*, the effective protection given to these rights is weak because they are subject to statutory qualifications and inconsistent legislation. As already mentioned in Chapter 2, access to court is restricted by limiting standing rules, public interest and rights advocacy litigation is discouraged, ouster clauses are abundant and are often upheld by court.

Furthermore, the philosophical ideas of justice and equality are the elaboration of democratic principles. These are the Malaysian aspiration in both its foundational legal documents such as the *Constitution* and repeated self-claims as a democratic regime although, in practice, it lacks some attributes of a full-fledged democratic regime. Some have labelled the style of government as soft authoritarian,¹⁴⁶ quasi-democracy,¹⁴⁷ pseudo-democracy¹⁴⁸ and an electoral one-party state.¹⁴⁹ But the aspiration for the country as expressed in the government's Vision 2020 is for a society that is 'democratic, liberal and tolerant, caring, economically just and equitable, progressive and prosperous.' It calls the citizens to face up to the challenge of 'establishing a matured, liberal and tolerant society in which Malaysians of all colours and creeds are free to practice and profess their customs, cultures and religious beliefs and yet feeling that they belong to one nation'.¹⁵⁰ It is furthermore a part of a national ideology seeking that Malaysia will ensure 'a liberal approach to her rich and diverse cultural traditions'.¹⁵¹ This inevitably shapes the legitimate expectation of the citizens and others that the nation will practise a democracy with the country's leadership not in conflict with this.

Besides, Malaysia is a pluralist society of different races and religion and it is possible that only political principles which are free of racial and religious bias will satisfy each section of society and will achieve justice and equality in both social and economic

¹⁴⁵ Harding and Whiting, above n 144, 254.

¹⁴⁶ Gordon P Means, 'Soft Authoritarianism in Malaysia and Singapore' (1996) 7(4) *Journal of Democracy* 103.

¹⁴⁷ Zakaria Ahmad, 'Malaysia: Quasi Democracy in a Divided Society' in Larry Diamond, Juan J Linz and Seymour Martin Lipset (eds), *Democracy in Developing Countries* (Lynne Rienner, 1989).

¹⁴⁸ William F Case, 'Semi-Democracy in Malaysia: Withstanding the Pressures of Regime Change' (1993) 66(2) *Pacific Affairs* 183.

¹⁴⁹ See, eg, Wong Chin Huat and Noraini Othman, 'Malaysia at 50 – An "Electoral One-Party State"?' in Abdul Razak Baginda (ed), *Governing Malaysia* (Malaysian Strategic Research Centre, 2009) 1.

¹⁵⁰ Vision 2020 is the vision put forward in 1991 by the government with the mission of achieving a developed country by year 2020. Ironically it was designed by strong opponents of liberal ideas.

¹⁵¹ The National Principles or 'Rukunegara' is the declaration of national philosophy instituted by royal proclamation on Independence Day in 1970 in reaction to a serious race riot in the history of the country which occurred on 13 May 1969.

aspects. The political conception agreed by the citizens to govern the political society is referred to by Rawls as a reasonable overlapping consensus. It means a political conception 'supported by the reasonable though opposing religious, philosophical and moral doctrines that gain a significant body of adherents and endure over time from one generation to the next'.¹⁵² Citizens of a country with different conflicting ideas, moral doctrines and religions may be agreeable to a political conception which is 'the most reasonable basis of political and social unity available to citizens of a democratic society'.¹⁵³ They need a conception that 'enables them to understand themselves as members having a certain political status – in a democracy, that of equal citizenship – and how this status affects their relation to their social world'. It is the role of political philosophy to contribute to how 'a people think of their political and social institutions as a whole, and their basic aims and purposes as a society with a history – a nation'.¹⁵⁴

The difference between the concepts of 'society' and 'community' may counter some of the *Islamists'* argument mentioned above. Rawls stated that these concepts cannot be understood as the same entity. A community refers to a body of persons unified in affirming the same comprehensive moral doctrine or religious ideas and the values to be sought in the life of the community.¹⁵⁵ Muslims and indigenous peoples are both examples. Members within each of these communities are governed by the values and belief upheld by the members of the community which are applicable only to them. These values are to be respected by the democratic society to which the communities also belong. The philosophical ideas aim to explain how a 'democratic society' as a political unit will work to achieve justice for its members.¹⁵⁶ The political history of Malaysia has shown that it is almost impossible for the society to be united in accepting one single political doctrine from a particular religion or community.

IV DISTRIBUTIVE JUSTICE FROM RELIGIOUS PERSPECTIVES

The ideas of restraints on state power, equality of the basic rights of human beings and toleration of differences are not foreign to local values of communities in Malaysia. Equally, eastern philosophies like Confucianism¹⁵⁷ or religions like Islam¹⁵⁸ and

¹⁵² Rawls, above n 6, 32.

¹⁵³ Ibid.

¹⁵⁴ Ibid, 2.

¹⁵⁵ Ibid, 3.

¹⁵⁶ Ibid, 3, 198-200.

¹⁵⁷ The Confucian ethic promotes state harmony by adherence to a virtuous monarch with an extremely broad mandate from heaven to govern.

¹⁵⁸ See, eg, Abul A'la Mawdudi, *Human Rights in Islam* (Islamic Publication Ltd, 1995); M Hashim Kamali, *Freedom, Equality and Justice in Islam* (Ilmiah Publishers, 2002); Mashood A Baderin,

Buddhism¹⁵⁹ promote values related to understanding the purpose of the state that emphasize the same goals of fairness and equality to achieve the objectives of human welfare. Amartya Sen highlighted that reason, justice and liberty are not uniquely Western ideas that the rest of the world is invited to acknowledge and to which they are expected to adhere: they are part of the common heritage of humanity.¹⁶⁰

As Islam is one of the main religions in Malaysia,¹⁶¹ this part focuses on the virtues of justice and equality promoted by the religion. There is no specific discussion by scholars about the treatment of indigenous peoples in Islam. Relevant, however, are studies on the subject of religious minorities based on the basic principles of Islam and human relationships. In these studies, contrary to the views of some sections within Islamic societies, many Muslim thinkers hold that Islam is not hostile to but advocates the idea of equal basic liberties of citizens in a society.¹⁶² It promotes a system of basic human rights applicable to all, regardless of religion.¹⁶³ This includes equality and liberties of individuals and the autonomy of communities including those of religious minorities. The autonomy of religious communities includes the rights to exercise their religion and customary practice. Violation of human rights in the interests of the majority community is not tolerated. Islam also does not prohibit the ideas and principles, customs and

International Human Rights and Islamic Law (Oxford University Press, 2003); Deni K Yusup, 'The Concept of Human Rights in the Philosophy of Islamic Law Perspective' (2013) 14(1) *Arts, Social Sciences* 15.

¹⁵⁹ See, eg, Aung San Suu Kyi, *Freedom from Fear: And Other Writings* (Penguin Adult, 2010).

¹⁶⁰ Graham K Brown, 'Legible Pluralism: The Politics of Ethnic and Religious Identification in Malaysia' (2010) 9(1) *Ethnopolitics: Formerly Global Review of Ethnopolitics* 31, 311.

¹⁶¹ Islam is the religion of the majority of the population in Malaysia and Islamic culture is extensive in the administration of the country and declared as an official religion of the federation (*Federal Constitution* (Malaysia), Art 3(1)).

¹⁶² See, eg, Kamali, above n 158, 47-97: The author surveyed Islamic scholarly literature across different regions and times. He concluded that the Syariah is supportive of equality and justice for all including non-Muslims. He suggested that the divergent interpretations of jurists of different ages, which assigned a different status to women and non-Muslims, 'should be seen as circumstantial developments that may have been prompted by the pressure of the prevailing conditions'. He also suggests that, as advocated by contemporary scholars, the prevailing conditions at the end of the 20th century are strongly supportive of universal equality. This direction is in harmony with the spirit of fraternity and promotes cooperation between the various strata of society (p 97).

¹⁶³ Abul A'la Mawdudi described that there are three categories of human rights protected in Islam: (i) basic human rights for all human beings Muslim and non-Muslim to include right to life, safety of life, respect for the chastity of women, basic standard of life, freedom of individual and right to justice; (ii) rights of citizens in Islamic state to include security of life and property, protection of honour, to protest against tyranny, freedom of conscience and conviction, protection from arbitrary imprisonment and right to basic necessities of life; and (iii) rights of enemies at war. See Mawdudi, above n 158.

practices of different communities. Likewise, respect and protection of the rights of all minorities is an obligation on Islamic states.¹⁶⁴

Besides, the religion seeks to protect property rights including land acquired legitimately. These rights are to be addressed and respected in all circumstances by the responsible state authorities. Many Muslim writers refer to non-Muslim minorities who live in an Islamic state as 'guaranteed irrevocable protection of their life, property and honour exactly like that of a Muslim'.¹⁶⁵ With respect to land rights, Sait and Lim observed that the differences between the position in international human rights and Islamic conceptions appear minimal.¹⁶⁶

On the other hand, it has to be admitted that the virtues of Islamic justice have been undermined in practice by a range of controversial exterior factors,¹⁶⁷ outside the values of Islam. Mashood and Javaid, analysing Muslim states' practices, found that the liberal paradigm of freedom of religion and rights of religious minorities and the Syariah [Islamic law] are not inherently antithetical to each other.¹⁶⁸ As Javaid argued, the violations of the rights of minorities and restraints on freedom of religion committed by some Islamic

¹⁶⁴ Mohamed Between, 'Non-Muslims in the Islamic State: Majority Rule and Minority Rights' in Mashood A Baderin (ed), *International Law and Islamic Law* (2008) 600.

¹⁶⁵ Siraj Sait and Hilary Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World* (Zed Books, 2006), 96. See also, Abdur Rahman I Doi, *Shari'ah: The Islamic Law* (A S Noordeen 1997), 246. See also the *Universal Islamic Declaration of Human Rights* (UIDHR) that recognizes the minority rights in Islamic states. The non-Muslim minorities in a Muslim country 'have the choice to be governed in respect to their civil and personal matters by Islamic Law, or by their own laws': Art X, Universal Islamic Declaration of Human Rights, Islamic Councils in Paris (19 September 1981).

¹⁶⁶ Sait and Lim, above n 165, 84. They argued that a sensitive and careful recognition of Islamic religious and political sensitivities can help deliver international human rights more effectively in Muslim societies, without offending Islamic principles.

¹⁶⁷ Javaid Rehman, 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' (2008) 7 *International Journal on Minority and Group Rights* 139, 139, 150: Investigating state practices, he observed that the causes of the existing inconsistencies affecting religious minorities in Islamic states such as Sudan, Pakistan and Iran, are embedded not in the Islamic system of governance (which these states are claiming to follow) but in domestic politics and constitutional inadequacies and urgency to enforce national identities. He pointed out that as the Syariah itself does not represent a monolithic system, within Islamic states there are widespread differences in interpretations of the basic sources of the Syariah. Sait and Lim, above n 165, 84: Sait stressed that despite assertions to the contrary, Muslim societies are pluralist, exhibiting a range of religious and secular ideals, and the experience of Muslim countries cannot be generalised.

¹⁶⁸ Baderin, above n 158, 13-16. He discussed four categories of Islamic responses to the human rights' universality debate: the inherent incompatibility claim, the view that true human rights can only be fully realized within Shariah (Islamic law), the claim that human right is nothing but part of cultural imperialism that should be rejected and the compatibility claim. He supported the compatibility claim and seeks to enhance it through the Islamic law principles of *maslahah* and *maqasid-al-syariah*. He suggests that although there are differences of scope and application, there is no fundamental incompatibility between the two bodies of ideals.

states are not a consequence of the application of Islamic law.¹⁶⁹ He suggested that they result from embedded political and constitutional inadequacies and the urgency to enforce a national identity based exclusively on the religion of the dominant majority.¹⁷⁰ They reject the interpretation by some Islamists that the nation state is built on Islamic values that differentiate between Muslims and non-Muslims.¹⁷¹

V CONCLUSION

Briefly, several aspects of justice are highlighted in the philosophical discourse of justice relevant to the allocation of resources involving indigenous peoples:

- (a) Both substantive and procedural aspects of justice emphasize the acknowledgement of and respect for persons as equals with their rights and interests treated equally. This includes respect for freedom and natural rights of people including the autonomy of a community and specific interests that people have in the allocation of resources. A distribution of resources that does not take into account property rights legitimately acquired is a violation of rights and unjust.¹⁷²

In relation to the allocation of resources in the forests, the principle of justice requires that the liberties, self-respect, rights and interests of the forest stakeholders such as the Orang Asli be given central place. They are entitled to equal concern and respect¹⁷³ as citizens free and equal.¹⁷⁴ The value of rights and freedoms must be assessed from actual opportunities that people have to advance their functional capabilities to exercise the freedoms.¹⁷⁵ As suggested by Walzer, respect for diversity of communities including their shared concepts

¹⁶⁹ Rehman, above n 167. See also the 1981 Universal Islamic Declaration of Human Rights. It acknowledges with regret that human rights are being violated by many states including the Muslim countries. It emphasizes 'that human rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim government and organs of society to implement them in letter and in spirit within the framework of that order'. (*Universal Islamic Declaration of Human Rights*, Islamic Councils in Paris (19 September 1981)).

¹⁷⁰ Baderin, above n 168, 594; Ronald Inglehart and Pippa Norris, 'The True Clash of Civilizations' (2003) *Foreign Policy* 62: suggested that the only dispute between the two blocs lies in social and cultural issues (such as gender equality, homosexuality and abortion) rather than in political and ideological attitudes. See also, Rehman, above n 167.

¹⁷¹ See also, eg, Institute of Defence and Strategic Studies (IDSS), 'Report on a Conference: Progressive Islam and the State in Contemporary Muslim Societies' (2006) <http://www.rsis.edu.sg/publications/conference_reports/ProgressIslamConference06.pdf>.

¹⁷² Nozick, above n 61.

¹⁷³ Dworkin, above n 4; Walzer, above n 1.

¹⁷⁴ Rawls, above n 9.

¹⁷⁵ Sen, above n 20.

of social goods is also an essential part of equality. The idea of seeing people and constructing national identity based on one dominant identity to the exclusion of others¹⁷⁶ amounts to domination. Domination is a failure to respect people as equal and is inherently unjust.¹⁷⁷

- (b) Affirmative action in addressing inequality is to be designed to contribute to the general well-being of society according to the needs and relative poverty.¹⁷⁸
- (c) Justice demands reconsideration of laws and practices that allow the extensive power of states in the distribution of resources when they discount the legitimate rights of citizens.¹⁷⁹ This is specifically where one sphere, such as political or financial power, dominates the distribution process.¹⁸⁰
- (d) Collective rights are significant, particularly for indigenous peoples, who continue to value their community as a distinct identity. For indigenous minority groups, group rights protect members from the economic and political power of the other dominant groups. The principles of freedom and equality require group differentiated rights including land rights to be recognized. Denial of group rights is an unjust imposition of the values of the dominant others.¹⁸¹
- (e) Restorative justice seeks reparation with an emphasis on the principles and aims of human dignity. A range of approaches to achieve restorative justice is discussed in section 4.II.A.
- (f) Environmental justice is also related to general issues of justice as it seeks to avoid a disproportionate burden shared by the disadvantaged in society. Environmental injustice enlarges inequality in society which harms the well-being of society as a whole.
- (g) There are three aspects to achieving procedural justice as a mechanism. First, decision making including formulation of law and policies that affect the rights of people requires participation of the people. Second, as a prerequisite, Rawls calls for the establishment of a basic political and social institution which assigns basic rights and duties to all citizens equally. Third, the mechanism to address the claims must be fair. Procedural justice is particularly important in the context of indigenous peoples' disputes due to, among other reasons, its potential for reconciliation, and its increased potential to achieve substantive justice and to

¹⁷⁶ Ibid.

¹⁷⁷ Walzer, above n 1.

¹⁷⁸ Rawls, above n 9.

¹⁷⁹ Nozick, above n 61.

¹⁸⁰ Walzer, above n 1.

¹⁸¹ Kymlicka, above n 1; Newman, above n 1; Jarboe, above n 32.

allow parties to reach outcomes agreeable to both parties. The concept provides evaluative perspectives to consider the present and prospective mechanisms to address the issue.

- (h) As the research also seeks to compare approaches across different jurisdictions dealing with the same issues, the discourse of 'justice in translation' spells out the need to respect differences and consider their relevance.

The discussion informs the study by providing the necessary normative principles to be used in the analysis of laws and suggestions for reform. It provides a standard by which existing laws and proposed laws, as they affect the Orang Asli as minority and indigenous peoples, should be judged. In particular, this theoretical framework supports the discussion and analysis in the thesis. Under this framework the chapters are divided into 3 parts.

Part 3 of the thesis consist of Chapter 5 and Chapter 6. Chapter 5 examines the rights of the Orang Asli under their customary laws and practices. In Chapter 6, the position of the rights of the Orang Asli to forest resources in the laws and policies in Malaysia is compared with the rights and interests of the Orang Asli as identified in Chapter 5. The framework of justice discussed in the current chapter is used to evaluate the criteria of the laws.

In Part 4, Chapters 7 and 8 respectively consider the approach adopted in international law and other jurisdictions in relation to the access to natural resources by indigenous peoples. The analysis of the law in these jurisdictions is also based on this framework of justice. Further in Chapter 9 the prospect of legal reform in Malaysia relating to the rights of the Orang Asli is assessed should the principles and approaches be transferred to Malaysia. The changes to laws in Malaysia through the impact of both the common law and international law on the Malaysian policy is considered by using concepts from comparative law including legal transplants and a model of law as an autopoietic system.

Part 5 summarises and concludes the discussion under the theoretical framework established in this chapter.

**PART 3: ORANG ASLI CUSTOMARY RIGHTS AND THE POSITION UNDER
MALAYSIAN LAW**

CHAPTER 5: THE RIGHTS OF THE ORANG ASLI UNDER CUSTOMARY LAW

In Chapter 4, it has been seen that respect, understanding and acknowledgement of peoples' entitlements are key features of theories of justice. From the perspective of the indigenous peoples, rights and entitlements may be concepts which have been introduced from outside their societies and cultures. Nonetheless, it appears that the concept of rights as it is understood in international law has been the basis for political movements by the Orang Asli. These movements could be seen as a response to continuing violation of their land and territories. This is partly influenced by the recognition of the entitlements of indigenous peoples in international law and in other national jurisdictions.

This chapter attempts to identify the entitlements in the forest land and resources in their own law as reflected in customs, usages and traditions. The first section explains the position of custom as part of law in society and in the Malaysian legal system as it provides a basis for the entitlement of the communities. The second section examines two aspects of custom and practice: the Orang Asli perspective of their land and forest resources in terms of custom and practice; and secondly, the economic significance of those lands and resources. As these indigenous communities are heterogeneous and are subject to drastic changes, this account can be neither comprehensive nor conclusive. It is based on the accounts of various studies from different disciplines, especially anthropology and sociology. Data from interviews conducted during the fieldwork are used to interpret the information.

Both impose limitations on this study. The secondary sources used were not written with a focus on the legal issues addressed in the research questions. As indicated in Chapter 2, the interviews, for ethical reasons and the resources available, were with a limited number of the Orang Asli people who are spokespeople or representatives for their communities. Other limitations on the use of these sources on the study are also considered in section II.C of this chapter.

I CUSTOM, THE ORANG ASLI AND THE LAW IN MALAYSIA

A Custom and the Law

Custom is a regular pattern of social behaviour and norms, perceived as correct and accepted by a given society as binding on itself.¹ It is established through usage and the common consent of the community. It becomes the accepted norm or law of the place and regulates daily activities including agricultural practices' systems and the settlement of disputes.² It is used as a means to generate harmonious relationships within society and to resolve conflicts to maintain a cohesive society.³ Custom may be applied as a binding rule of law. Its content and force are 'both derived from a constant uniformity of conduct in the community or locality'.⁴

Discussion of custom is often associated with the practices of traditional society. Some consider custom as an ancient practice⁵ but custom is not necessarily ancient but accepted by a particular society and gradually evolves to adapt to changes in the society.⁶ Nevertheless, the practice, usage and norms of local people are a necessary constituent of the law and its development in many jurisdictions. Eugene Ehrlich, one of the founders of the sociology of law, saw law as not being just state law but also norms of conduct which form the popular consciousness. State law normally only applies to matters taken to the courts. From this perspective, law is wider in scope than the norms created and applied by state institutions.⁷ Custom, practice and usage of the people within the association become part of the law that people obey. In various areas, from business and company law to constitutional law, practice and convention are accepted as part of the law.

This position of custom as part of the law is also reflected in the observation by Chiba that

¹ Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak* (Suhakam (Human Rights Commission of Malaysia), 2009), 17.

² Ibid, 17.

³ Ibid, 17 citing Lakshman Marasinghe, Customary Law as An Aspect of Legal Pluralism: With Particular Reference to British Colonial Africa (1998) 25 *Journal of Malaysian and Comparative Law* 7-44.

⁴ E K Braybrooke, 'Custom as a Source of English Law' (1951) 50(1) *Michigan Law Review* 71, 71.

⁵ See, eg, the definition of customary law in Bekker, JC, *Seymour's Customary Law in Southern Africa* (Juta & Co, 5th edn, 1989) 11.

⁶ Raja Devasish Roy, *Traditional Customary Laws and Indigenous Peoples in Asia* (Minority Rights Group International, 2005) <www.minorityrights.org/download.php?id=131>, 7.

⁷ E Ehrlich, *Fundamental Principles of the Sociology of Law* (1913) cited by Roger Cotterrell, *The Sociology of Law: An Introduction* (Butterworths, 1992), 27.

The whole structure of law in a non-Western society is seen from a cultural point of view, formed in the interaction between received law and indigenous law.⁸

This may also be true of the law in Malaysia, including matters of land and resources. In Malaysia the term custom, in Malay is known as *adat*, is used interchangeably with customary law or native law.⁹ Custom is constitutionally recognized as a source of law.¹⁰ This is similar to the position of English law in which custom is a source of law distinct from other sources of common law.¹¹ The Malaysian legal system is characterised by legal pluralism.¹² Each racial community has its own customary law. The areas of law to which the custom of different communities normally applies includes matters of land tenure and the inheritance of ancestral land and property.¹³ However, little is written and known outside of Orang Asli communities about the custom of the Orang Asli communities.¹⁴ Discussion of custom in the context of the legal system is often confined to the groups with significant numbers: Malays, natives in Sabah and Sarawak, Chinese and Indians.

As discussed in Chapter 3, the customs of certain sections of society are codified in statutes. But such statutes do not necessarily preclude related customs as an element that may have the force of law.¹⁵ This is endorsed in *Nor Anak Nyawai (No 1)*¹⁶ that asserted the enforceability of unwritten custom although part of it is codified. It has been held that where customs are codified, such codification does not extinguish uncoded, related customs.¹⁷ This is similar to the position of Islamic law in Malaysia which has been incorporated into legislation. Reference to other written sources and to the opinions

⁸ Chiba, Masaji (ed.), *Asian Indigenous Law: In Interaction with Received Law*. (Kegan Paul International, 1989), cited in William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1, 25.

⁹ Bulan and Locklear, above n 1, 17.

¹⁰ *Federal Constitution* art 160(1). It defines the word 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'.

¹¹ Braybrooke, above n 4, 72.

¹² Aun, Wu Min, *Malaysian Legal System* (Pearson Malaysia, 1990), 168.

¹³ Malay adat law or Malay customary law which is a mixture of traditional practice and Islamic law, and native custom are still widely practised and recognized under the law. Chinese and Hindu law on marriage and divorce have diminished relevance since the coming into force of the *Law Reform (Marriage and Divorce) Act 1976*. The Act was largely based on English legislation. It introduced a uniform law on marriage, divorce and its ancillary matters among non-Muslims.

¹⁴ See, eg, Hooker, M B, 'The Challenge of Malay Adat Law in the Realm of Comparative Law' (1973) 22 *International and Comparative Law Quarterly* 492.

¹⁵ See, eg, *ibid*.

¹⁶ [2001] 6 MLJ 241.

¹⁷ *Ibid*, 285-6.

of experts on the contents of Islamic law are not specifically mentioned in legislation which is normal practice.¹⁸

In investigating customs, McDonnell reminded us that they emerge over time. They 'do not exist with pristine coherence just beyond the contemporary clutter'.¹⁹ Observing Cree customs in the province of Quebec and their relationship with the justice system of the state, he found that the intersection of belief and traditions between the group itself and the outside wider society 'occurred in a very uneven manner ... and, consequently, the views on, knowledge of and manner of learning Cree customs vary in highly significant ways'.²⁰ This is specifically true in the context of the diverse Orang Asli communities who have had different experiences of contact and relationship with other groups. Dispossession and assimilation policies may have altogether eroded the customs and autonomy of some communities. Some community members, especially those who have converted to other religions, may not be interested in traditional beliefs or knowledge. Consequently, they may discourage their dissemination. In contrast, there are people, including the young, who are concerned to continue traditional belief and knowledge.²¹ They see the customary ideas, values, beliefs and stories as crucial to ordering their relations with others, as a guide to their future responsibilities, and as a way to retain their distinctiveness as a group.²² These perceptions have significant implications for their customs specifically with regard to whether they still have the force of law.

B Custom and Orang Asli Communities

The Orang Asli, similar to other groups considered as natives in Malaysia, also continue to be regulated internally by their own traditional laws on various matters including land and natural resources.²³ The legal systems of indigenous peoples are recognized in international law as an integral part of their identity.²⁴ Under Malaysian common law, in

¹⁸ See, eg, Siraj, M, 'Recent Changes in the Administration of Muslim Law in Malaysia and Singapore' (1968) 17(11) *International and Comparative Law Quarterly* 221.

¹⁹ Roger F McDonnell, 'Contextualizing the investigation of customary law in contemporary native communities' (1992) *Canadian Journal of Criminology* 299, 309.

²⁰ *Ibid*, 309.

²¹ Interview data: Orang Asli representatives.

²² Svensson, Tom G, 'On Customary Law: Inquiry into an Indigenous Rights Issue' (2003) 20(2) *Borialis, Acta* 85.

²³ See, eg, Chung, Yi Fan, *The Orang Asli of Malaysia: Poverty, Sustainability and Capability Approach* (Master of Science Thesis, Lund University Centre of Sustainability Science, 2010) <http://www.lumes.lu.se/database/alumni/08.10/Thesis/YifanCHUNG_Thesis_2010.pdf>, 15.

²⁴ *United Nations Declaration of the Rights of Indigenous Peoples* art 5 declares that: 'Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions ...' The UN Special Rapporteur, Martinez Cobo in JM Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations, United Nations NE/CN.4/Sub.2/1986/7/Add. 4' (1989) acknowledges that indigenous peoples:

matters of indigenous rights to land and resources, the custom of indigenous communities including the aborigines determines the content of the communities' title and interests (Chapter 6.II). The rights and interests under the custom remain in force unless extinguished by clear and plain legislation or by an executive act authorised by such legislation. In *Nor Anak Nyawai (No 1)*,²⁵ the High Court held that custom is accepted as law if it is proved to be a long-established practice. It follows the proposition stated in *Halsbury's Laws* that,

as a general rule proof of the existence of the custom as far back as living witnesses can remember is treated, in the absence of any sufficient rebutting evidence, as proving the existence of the custom from time immemorial.²⁶

In a brief survey of Orang Asli representatives interviewed for this research, on the Orang Asli's perspective of custom, it appears that custom continues to have significance. A Semai from Perak described custom as a community system that regulates their communal life.²⁷ It is the crux of the peoples' economic, social and political lives. For them, institutions, which appear to be separated in other societies, should continue to be united so that custom often appears to be both law and religion. A Temuan asserted,

Custom is our religion. Different groups have their own custom and many still hold strongly to their own custom, even the young generations.²⁸

As forests are part of the communities' environment, he highlighted that Orang Asli communities have their own rules regulating different relationships in different contexts of their life. Responses from the researcher's interviews with other Orang Asli representatives reflected a similar relationship between peoples in other communities which have their own political authority and regulation.²⁹ They are obliged to observe specific rules in relation to exploitation of resources within the forest.³⁰ This represents

are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system ...

²⁵ [2001] 6 MLJ 241, [30].

²⁶ Halsbury's Laws of Malaysia, Vol 12 (4th ed), [422].

²⁷ Interview data: An Orang Asli representative from Perak.

²⁸ This is the researcher's translation of a conversation with a Temuan, an Orang Asli representative and activist from Selangor (Interview data). The interview is in Malay.

²⁹ Interview data: Orang Asli representatives (two Semais from Perak, another Temuan from Selangor, a Jakun from Pahang),

³⁰ Eg, in the words of a Temuan from Selangor:

Rimba' basik rumah berbasa, lalu' bertabik, naik rumah bertingkat, masuk rumah berpintu, duduk bertempat, makan berajak, cincang beralas, berlumpat bertumpu kepada sapa? lembaga adat: cekera, jenang berlimo, batin.

This is a kind of poem in the community's language. Briefly, he says that there is rule in everything for human beings which must be observed by the community. There are even specific rules to observe in the forests. It is of significance to the extent that it is equated with the manner in which

the significance to them of the forest resources which are to be cared for in the interests of the community as a whole. Similar principles are also seen in the manner in which land and forests are used among the Batek in the eastern region of the Peninsular³¹ and the Semai of the middle-eastern region.³²

II RIGHTS AND INTERESTS OF THE ORANG ASLI IN FORESTS

A Traditional Territories

1 The Concept of Traditional Territory or Ancestral Land

All Orang Asli communities have strong sentimental attachments to the land on which they and their ancestors have lived.³³ Generally, the land and resources within the control of a community is regarded as a form of communal land. It is a definite territory consisting of a large tract of land occupied by a community that has lived in the area for a very long time governed by their specific traditional laws. These laws are referred to as *adat*, *pengham* or *resam*.

Sen'oi, for instance, who have permanently settled in one place for a long time, referred to their territory as *saka'*, *lengri'* or *dengri'* [territory] and the communities residing in the *saka'* as *gu* [group]. These communities regard themselves as the original occupants. The members of the community have rights within the communal territory – to dwell, forage and gather forest resources and to use the land subject to certain customary

people conduct themselves within their own house and the social relationships to be taken care of with other people within the community in a systematic political system.

³¹ See, eg, Lye Tuck-Po, *Changing Pathways: Forest Degradation and the Batek of Pahang, Malaysia* (Strategic Information Research Development, 2005).

³² Semai, once a swidden [slash and burn] community, have their own vocabulary to explain their customary land and the manner of its use. An Orang Asli representative who is from the Semai community explains the vocabulary related to land use as follows: *genei* – settlement areas; *pendeq* – water reservoir; *pabel* – a large tract of land for swidden or shifting cultivation; *selai* – an area where hill paddy plantation is undertaken; *tebok* – originally small rivers but later became small lakes due to mining, etc and has become an area for fish sources; *redang* – wetland that contains plants such as *umbut* and *bet* (leaves used for traditional and medicinal purposes); *melaki'* – areas which were once cleared by their ancestors in the past but are no longer in use for current generations and are now back to jungle again; *ne'enduk* – holy area where people believe that some ancestors disappeared. It is believed that the area can heal people from strange diseases; *sempak saka'* – area where durian trees were planted by their ancestors and which belongs to the community. Members could collect fruits from the trees. In the past, during the durian season, the whole community would go together to the area to collect the fruits; *jerus* – stock area – like a forest reserve. One could go into the area and take the resources from there but the forests could not be cleared: no trees could be planted in the area. The area is for reserve resources to be used during emergencies; *beket* – certain areas that must be avoided. It is believed that bad incidents happened in these areas. People who go through the area must observe certain rules.

³³ Dentan, Robert Knox et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, 1997), 74.

conditions. There is also a shared belief that members must ensure that the land and its resources exist in perpetuity for the use of future generations.³⁴ By mutual understanding, the communities recognize the boundaries of their territory which are normally marked by certain trees, rivers or streams. The Sen'oi could not enter another gu's territory regarded as *saka' mai* [belonging to others].³⁵ They only moved to another territory by joining or marrying into the group which owned the territory.³⁶ With the consensus of the community, individuals and families could acquire personal rights within the communal territory by clearing forests or opening up land for cultivation.³⁷

Similarly, the Temuan also consider particular groups to have more or less exclusive rights over land with clear boundaries.³⁸ Groups of western Semang, Mendriq and Jahai also practise the same concept of a defined territory in which they have control subject to certain restrictions under their customs.³⁹

Hunter-gatherers, such as the Batek who are often considered as 'nomads', have the notion of traditional territories. Tuck-Po points out:

if the Batek did not have ties to the land, they could not be mobile. One cannot just wander randomly around the forest; it is much too complex a landscape for that. Without topographic and resource knowledge to start with, it is not possible to be mobile. The development of that knowledge over generations fosters important bonds and sentiments: both among people who share a place, and between people and the land. Contrary to popular perception, hunter-gatherers tend *not* to be expansionist. They do not habitually move into other people's territories unless it makes absolute sense: land loss, displacement, outmigration of neighbouring populations, and government resettlement are among the usual reasons.⁴⁰

Some writing suggests that some communities, such as the Jah Hut in some regions, do not practice the concept of communal land anymore.⁴¹ Many communities have lost their traditional territories through dispossession or relocation.

2 Special Connection to the Land

³⁴ Kirk Endicott, 'Property, power and conflict among the Batek of Malaysia' in Tim Ingold, David Riches and James Woodburn (eds), *Hunters and Gatherers* (St Martin's Press, 1988) 110, 141 (Batek, a subgroup of the Orang Asli); Edo, Juli, *Claiming Our Ancestors' Land: An Ethnohistorical Study of Seng-oi Land Rights in Perak, Malaysia* (PhD Thesis, Australian National University, 1998), 299.

³⁵ Edo, above n 34, 10; Endicott, above n 34, 114; Dentan et al, above n 33, 74.

³⁶ Juli Edo, 'Traditional Alliances: Contact between the Semais and the Malay State in Pre-modern Perak' in Geoffrey Benjamin and Cynthia Chou (eds), *Tribal Communities in the Malay World* (2003) 137, 143-44.

³⁷ Nicholas, Colin, *The Orang Asli and the Contest for Resources* (International Work Group for Indigenous Affairs, 2000).

³⁸ Dentan et al, above n 33, 74.

³⁹ Ibid.

⁴⁰ Tuck-Po, above n 31, 5-6.

⁴¹ Couillard, above n 66, Edo, above n 35, 28, 305 .

There is also a belief in special connections between individuals and certain places. This concept is associated with cultural aspects of land evolving to acknowledge some form of individual rights in a particular area.⁴² Batek and Temiar communities recognize a special connection between each individual and certain places which they call *pesaka* to which a person may have strong sentimental ties, for instance, to particular land such as a birthplace, former residence, the place where they grew up, even though they may now be living far from it. They have a right to live in their *pesaka* – but not the right of ownership. This concept of *pesaka* is believed to have evolved in the communal cultural aspects of land – to acknowledge some form or idea of relationship between the community and a particular area or territory as a communal territory. Tuck-Po states that it is the sense of place, that is, the psychological certainty that one belongs to the territory which is marked by certain territorial markers and commonly communicated within the communities in the form of oral stories through generations.⁴³ But, similar to many hunter-gatherers in other parts of the world, they talk about land in terms of proper sharing and inclusion, rather than exclusion or domination.⁴⁴

In summary, the common thread is that the communities have the notion of interests at least to the resources within the environment.

3 Belief Systems and Their Relation to Traditional Territory

The connection to ancestral land is founded on a belief system that has been practised for generations. Generally, land is central to the communities' culture and religion, norms and values, economy, leadership and self-consciousness of identity and their position as indigenous to the land.⁴⁵ They believe that human beings are connected to their ancestral land. They are part of the environment. Land is not only a place to live, or to find resources but a space with spiritual elements significant to the communities.⁴⁶ Therefore, these indigenous communities have a kind of relationship with their land which is distinct from the other communities' relationship with their land.

⁴² Endicott, above n 34, 113; Edo, above n 34, 309.

⁴³ Tuck-Po, above n 31, 56.

⁴⁴ See, eg, Lewis, J, 'Whose Forest is it Anyway? Mbendjele Yaka Pygmies, the Ndoki Forest and the Wider World', in Tadesse, W & Widlok, T (eds) *Property and Equality: Encapsulation, Commercialisation, Discrimination*, (Berghahn, 2004); Kenrick, J, 'Equalizing Processes, Processes of Discrimination and the Forest People of Central Africa. In Widlok T & Tadesse, W (eds), *Property and Equality: Encapsulation, Commercialisation, Discrimination* (Berghahn, 2004).

⁴⁵ Edo, above n 34, 288-99.

⁴⁶ *Ibid* 34, 81.

Many communities believe that almost everything in the environment may anchor spirit and possess a soul.⁴⁷ This includes human beings, plants and animals, mountains and forests. For the Semang⁴⁸ and the Temiar,⁴⁹ for instance, there is no difference between the soul-embodiment properties of people as opposed to those of plants or animals, although other conceptions of the two are different.⁵⁰ It follows that the particular land on which they live is considered as sacred and they cannot be separated from it.⁵¹ They could not practise their religion elsewhere.⁵² Based on this foundation, a strong eco-centric view of human–nature is maintained. This relationship governs everyday life, including economic and social relationships.⁵³

⁴⁷ See, eg, Mohd Salleh Hood, 'Man, Forest and Spirits: Images and Survival among Forest-Dwellers of Malaysia' (1993) 30(4) *Southeast Asian Studies* 444; Geoffrey Benjamin, 'Indigenous Religious Systems of the Malay Peninsula' in Becker AL and Yengoyan Aram A (eds), *The Imagination of Reality: Essays in Southeast Asian Coherence Systems* (Ablex Publishing Corp, 1979).

⁴⁸ In some writings, they are known as Negrito. Negrito is a racial term that means 'little black people'.

⁴⁹ The Temiar are a Sen'oi group.

⁵⁰ Benjamin, above n 47, 14; Kirk Endicott, 'The Batek Negrito Thunder God: The Personification of a Natural Force' in AL Becker and Aram A Yengoyan (eds), *The Imagination of Reality: Essays in Southeast Asian Coherence Systems* (Ablex Publishing Corp, 1979) .

⁵¹ Juli Edo, in his study on the Sen'oi in Perak, highlights several elements under the Sen'oi belief system that lay foundation for the relationship between the Sen'oi people and their ancestral lands: 1. Some places are believed to be the resting places of their dead relatives, and their kikmoij are regarded as the guardians of these places. The inherited land is a part of their religious and spiritual property. 2. The tiik [soil] in their area is considered as part of their sech-behiib (blood and flesh) because it has been selasat [absorbed] with their body and blood. Death is considered as returning to their origin (that people were made from soil) – the traditional territories are considered as originating from the bodies of their dead family members which have been absorbed [selasat] by the previous tiik [soil] to become one mixture. 3. The people who are alive also are closely connected to their land not only through the ancestors who have died but also through the blood on the soil during birth and the placenta buried in the area. 4. Soil is considered as a source of life – soil is the source of plant life that gives food to human beings and animals – which, when they die, go back to their origin – the soil. As human beings are created with certain intelligence, they have the responsibility to care for the soil which is the root of life: Edo, above n 34, 81.

⁵² Shawn Kiyotaka Fukuzaki, 'Spiritual Ecology: Asian Animistic Perspective' (Paper presented at the United Nations Declaration on the Rights of Indigenous Peoples: Implementation and Challenges, Kuala Lumpur, 10 November 2010) <http://www.academia.edu/365501/Spiritual_Ecology_Asian_Animistic_Perspectives>, citing Whitt, LA et al, 'Indigenous Perspectives', in Jamieson D (ed), *A Companion to Environment Philosophy* (Maldon, 2000), 4.

⁵³ Ibid, citing Whitt, LA et al, 'Indigenous Perspectives', in Jamieson D (ed), *A Companion to Environment Philosophy*, (2000, Maldon), 4. Benjamin, in relation to the spiritual belief of the Temiar, states:

'It is simultaneously both the creator and the world it creates, constantly employing the 'bootstrap' cosmogonic power of its own thought and imagination to maintain the differentiated character of the physical world as the Temiar know it. If human beings (or any other agency) should by their actions distract the cosmos's subjectivity away from this task, then it is thought likely that the world will dedifferentiate, through the agency of thunder (the cosmos's voice) and flood, into a muddy undifferentiated chaos. If that should happen all things would lose their identity and disappear ... Plants and animals are thought to partake in this interplay just

As many Orang Asli live in, or have originated from the forest, their belief systems are closely related to the forest and its spirits. This perspective of the forest creates a close and intimate relationship between the forest dwellers and the forest as a place to live, a way of life and a sense of identity. Hood, in his analysis of studies on the belief systems of different groups of forest dwellers in the Peninsula, reveals that the forest has come to be identified with distinct modes of human survival and a way of life that has evolved into distinct cultural systems.⁵⁴ For the Batek, for instance, the forest and its environment define the cosmological and social principles of Batek existence. The forest is intertwined with their religious notions of what constitutes good and bad.⁵⁵ The Chewong similarly associate themselves with the forest. They regard the forest as an important part of their social universe which is a place of exchange and a 'chain of exchange between humans and superhumans who regulate behaviour in the world'.⁵⁶

The belief system of the Orang Asli also links closely with the oral tradition or stories passed through generations. Many stories serve as an important basis for claims to indigenous identities. Among the Sen'oi, for instance, the oral tradition goes back to stories about the creation of the earth. This is considered as the root of the Sen'oi way of life. Through the oral tradition, they claim to be the earliest people to occupy the Peninsular Malaysia].⁵⁷ One of the important elements communicated in the stories reflects the long struggle of the communities to preserve their identity and rights over their ancestral territories.⁵⁸ Stories about contact and alliances with Malay Sultans in the past who acknowledged the communities' autonomy over their territories also provide a

as fully as human beings. It is the temporarily disembodied upper- and lower-body souls of various mountains, animals, plants ... that become the personal spirit guides to which Temiar direct their religious action. (Geoffrey Benjamin, 'Temiar: Community of Malaysia' in T NS Bisht (ed), *Encyclopaedia of the South-east Asian Ethnography: Communities and Tribes* (Global Vision, 2004), 658).

⁵⁴ Hood, above n 47, 445.

⁵⁵ Ibid, 450 citing Endicott, KM, *Batek Negrito Religion*. (Oxford University Press, 1979). See also, Nurul Fatanah Kamarul Zahari, Mustaffa Omar and Salleh Daim, 'Lawad, Ye' Yo' and Tum Yap: The Manifestation of Forest in the Lives of the Bateks in Taman Negara National Park' (2011) 1(1) *Journal of ASIAN Behavioural Studies*.

⁵⁶ Hood, above n 47, 451 citing Howell, SL, *Society and Cosmos: Chewong of Malaysia*, (Clarendon Press, 1984), 116, 118: Superhumans to the Chewong are 'the totality of beings with whom they maintain relations'. Superhumans are important in the creation of the moral universe and symbolised how society was created through 'gifts from the culture heroes'. The gifts gave knowledge and specific ideas on how to lead the good life. Transgressions and not observing the rules of superhumans, which includes maintaining the forest and animals, are punishable, by disease and even death.

⁵⁷ Edo, above n 34, 86.

⁵⁸ See also, Tuck-Po, above n 31: relates the oral tradition of the Batek in Pahang.

basis for their territorial claims.⁵⁹ From their perspective, the title is considered a political recognition.

The distinct position of traditional land coincides with the observations of many interviewees, especially those having direct relationship with the communities.⁶⁰ A Semai who the researcher met during the fieldwork, said,

I do not belong to my mother but I belong to the village, I belong to the land, the community. This is the nature of human beings, even the non-Orang Asli. Human beings are naturally associated with the land that they belong to. Only in that particular land they could find peace.⁶¹

This reflects the strength of the relationship between the people and the land that they regard as their traditional land. The view that land is a source of pride and distinct identity is also felt by the younger generation of the communities.⁶²

4 Proprietary Interest in the Land and Its Produce

For many Orang Asli, owing to their perspective towards the land, the relationship between the land and human beings was not originally one of proprietary interest. For instance, the Batek⁶³ consider that they do not own their home area and all resources are free to all who need them, irrespective of race.⁶⁴ By the same account, the Jah Hut and the Temiar⁶⁵ also believe land itself could not be owned, although they recognize a form of communal proprietorship. Only the produce of the land and houses built on it can be owned.⁶⁶ The benefits or resources from the land and the environment are to be shared by all human beings.

In some communities, especially groups practising agriculture including swidden (slash and burn) and permanent forms of cultivation, particular fields and trees may be owned

⁵⁹ Edo, above n 34, 149-51, 153: The Semais in the past maintained a good relationship with the Malay Sultan of Perak by paying annual tribute and visits to the palace by the headmen of the groups. Some headmen were granted certain title by the Malay Sultan. It was believed that the settlements of the groups were expressly consented to by the Malay Rulers in the past. Some groups were also allocated land within the state. It was also believed that the Semai in Perak began cultivating rubber in the early 20th century on the advice of a Malay Ruler; Data from interview: A Temuan from Selangor also told the researcher the stories told for generations in his community about the relationship of his community with the rulers in the past.

⁶⁰ Interview data: The representatives of the Orang Asli, researchers and public officials.

⁶¹ Interview data: Orang Asli representative from Perak. (The original is in Malay – the phrase is the researcher's translation.)

⁶² Interview data: Orang Asli representatives. See also, Edo, above n 34, 298, 309.

⁶³ Known as subgroup of the Semang.

⁶⁴ Endicott, above n 34, 133.

⁶⁵ Both are subgroups of the Sen'oi.

⁶⁶ MA Couillard, *Tradition in Tension: Carving in a Jah Hut Community* (Universiti Sains Malaysia, 1980), 78.

by individual members or families within the communal territories.⁶⁷ The practice is seen among the Semai,⁶⁸ the Temuan,⁶⁹ the Mah Meri/Besisi⁷⁰ and the Semelai.⁷¹ Both the communal and individual lots have the force of property and ownership in their culture. Villagers can claim exclusive rights over fruit trees that they planted or inherited. This means they are not to be shared among the members of the communities which otherwise have control over the land in which the groves of the fruit trees are situated.⁷² Younger generations may perceive land as the economic base in which family ownership is emphasized.⁷³ The practice of sale and purchase of land is also known to take place among community members even though the land possessed by a person has no formal title in Malaysian law.⁷⁴

Edo notes that with the development of permanent agriculture, normally in the form of fruit orchards, the communities developed a practice of exclusive family land ownership. Under this concept, other members of the community or *gu*⁷⁵ are excluded from using the land subject to this family's ownership. However, in practice, the members of the community may collect the fruits from other community members' orchards with the owner's permission. Other areas within the communal territories are open to access by all members. But with further dispossession from land, many communities only retain control over their settlement areas and land planted with permanent trees including fruit trees, rubber and oil palms.⁷⁶

The Jah Hut communities, which were reported to no longer practice the system of communal territories, have a concept of individual or family ownership of the land that they occupy. This perception towards landholding evolved over time and with outside pressures, such as ecological limitations and the influence of modernisation on their economic modes. This is also influenced by the limitation on access to the forests for swidden cultivation and the shortage of forest produce which they collected both for commercial and domestic use. The government has given each family a plot of rubber

⁶⁷ Dentan et al, above n 33, 74.

⁶⁸ Edo, above n 34, 309.

⁶⁹ Dentan et al, above n 33, 74; Chung, above n 23, 35-9 (Temuan in Kampung Kemensah, Selangor).

⁷⁰ Edo, above n 34, 309.

⁷¹ Ibid, 309.

⁷² Ibid, 28.

⁷³ Ibid, 309-310.

⁷⁴ Interview data: social researchers.

⁷⁵ *Gu* – means group.

⁷⁶ Edo, above n 34, 305.

field. They are now smallholder rubber cultivators, with clearly defined individual land ownership.⁷⁷

5 Foraging Areas

Foraging areas [*tanah rayau*]⁷⁸ are considered as part of the traditional territories of the communities in which they continued to stake a claim against the state.⁷⁹ A Temuan who was interviewed stated that foraging areas are the areas, normally in the forests, accessed to find food and other resources for daily economic needs both for consumption and for sale.⁸⁰ In a recent study, Rosta et al found that the Jah Hut people perceived that the forest belonged to them and that they accessed the resources in it according to their own custom. They do not feel that they should be restricted by outside people on how they should use the forests.⁸¹ This finding is contrary to the previous studies mentioned that some Jah Hut communities have abandoned the concept of communal land (5.II.A.5).

Attitudes towards unharvest resources within the forest, such as fruit trees and other forest produce, varies between the communities. For the Batek De' in Kelantan and the Batek from Pahang, this kind of resource could not be owned by people and is freely available to everyone.⁸² On the other hand for the western Semang, trees are owned by individuals who planted or discovered them and permission is required if anyone within the group intends to harvest the produce.⁸³

There are no exact boundaries to these foraging areas. This observation is consistent with the view of Orang Asli representatives interviewed during the fieldwork. However, as a Temuan explained during an interview, apart from land or trees which are considered as belonging to individuals, the members of the tribes know by mutual understanding the territories to which they belong. The areas originate in places that they

⁷⁷ Couillard, above n 66, Edo, above n 34, 28, 305.

⁷⁸ Malay words. 'Tanah' means land. 'Rayau' means forage. The phrase means the land areas used for foraging of resources for food and cash income.

⁷⁹ Interview data: Orang Asli representatives; social researchers and a senator representing the Orang Asli.

⁸⁰ Interview data: Orang Asli representative in Selangor. He observes that normally if there is an Orang Asli village, there must be a tract of land within the forest near the settlement that serves as economic sources for the people.

⁸¹ Rosta Harun, Yip Hin Wai and M Kamil Yusoff, 'Socio-economic Survey of the Orang Asli In and Around Royal Belum State Park, Perak' (2010) (Unpublished report), 54.

⁸² Tuck-Po, above n 31, 137.

⁸³ Endicott, above n 34, 114-115.

have been before, in places used for shifting agriculture and knowledge imparted by previous generations by oral histories.⁸⁴

The use of territories is also regulated by the custom of the communities. Some Orang Asli representatives interviewed considered that it is part of their custom to ensure that forests remain in their natural state which they claim is also scientifically proven to be essential for the benefit of human beings. Forests are considered as the place where they belong and a source of tranquillity.⁸⁵ Many who were interviewed related to their unique connection with forests as their ideal environment that could not be detached from their lives.⁸⁶ In one way, it might be a connection to the past that they are so associated to the forest in which they may take pride as a form of identity to differentiate themselves from others. A Temuan met during the fieldwork also believed that they have a mandate to protect the forests. The same idea is also observed among the Batek in Pahang.⁸⁷

More importantly for the communities having a high reliance on forests, they need to ensure the sustainability of the resources so that their practices which are imbued with their customs and traditions can continue.⁸⁸ Hunter-gatherers also seek the long-term management of forests by various practices to ensure the sustainability of their resources.⁸⁹ A Semai representative interviewed suggested that the custom of her tribe restricts the use of some areas in the forests, called *jerus* [stock area] which is meant to be a reserve which could not be cleared and in which no trees could be planted. Some

⁸⁴ Interview data: an Orang Asli representative and a former dentist working with the Orang Asli.

⁸⁵ See, also the perception towards forests as discussed in Harun, Wai and Yusoff, above n 81.

⁸⁶ Interview data: Orang Asli representatives

⁸⁷ Tuck-Po, above n 31.

⁸⁸ There are many studies that relate the practice and tradition of the Orang Asli groups to ensure sustainability of forests. See, eg, Csilla Dallos, *From Equality to Inequality: Social Change Among Newly Sedentary Lanoh Hunter-gatherer Traders of Peninsular Malaysia* (University of Toronto Press, 2011) (Lanoh group in Perak), 42; Mustafa Omar, Zanisah Man and Ishak Yusoff, 'Strategi Traditional Komuniti Jakun Tasik Chini, Pahang Mengurus Sumber Semulajadi Secara Lestari (The Jakun Traditional Strategy in Managing Natural Resource Sustainably Surrounding Tasik Chini Basin, Pahang)' (2011) 6(2) *Jurnal e-Bangi* 239 (Jakun, Tasik Chini); Lye Tuck-Po, 'The Wild and the Tame in Protected-Areas Management in Peninsular Malaysia' in Michael Dove, Percy E Sajise and Amity A Doolittle (eds), *Beyond the Sacred Forest: Complicating Conservation in Southeast Asia* (Duke University Press, 2011) 31 (Batek Pahang); Savinder Kaur Gill, Kamal Solhaimi Fadzil and Khali Aziz Hamzah, *Respectful Listening: The Jakun as Partners in Conservation, UNDP/GEF Funded Project MAL/99/G31* (Peat Swamp Forest Project and Forest Research Institute Malaysia, 2009) (Jah Hut, Pahang); Yok Chopil, 'Biological Diversity and the Survival of the Identity of the Orang Asli' in G S Nijar and Azmi Sharom (eds), *Indigenous Peoples' Knowledge Systems and Protecting Biodiversity* (APC and Centre for Legal Pluralism and Indigenous Laws, UM, 2004), 43.

⁸⁹ Dallos, above n 88, 42.

other areas are meant for other purposes including conserving water, fishing and wetlands which are rich in particular foods as well as areas planted with fruit trees.

In contrast, another Orang Asli representative interviewed suggested that there have been changes in the use of the land that they traditionally regarded as foraging areas. There are many forest areas which are now converted by the Orang Asli into plantations including oil palm and rubber either under government-sponsored programs or on their own initiatives.⁹⁰

Furthermore, as revealed by an Orang Asli interviewed, the communities which have or have been moved from their original ancestral land developed a new relationship with the land and consider the new land as a replacement for the lost ancestral land.⁹¹

B Economic Significance of Forest Land and Resources

1 Degree of Forest Dependence

The economic importance of the forest is another way to measure the interests of the communities in forests. An economic perspective gives some indication of the extent of their reliance on forests in meeting the needs of the people.

The anthropological and other literature has not discussed the practices of the Orang Asli from the perspective that they may have the force of law within the state legal system. The focus has been mainly on social and economic aspects including the potential to tap traditional knowledge in the interests of wider society.

There is also no quantitative data at a macro level of the extent of the economic dependence on forests among the Orang Asli. Studies that focus on the degree of dependency on forests by communities in particular places are Howell on the Jah Hut in Krau Reserve, Pahang; Rusli on the Batek in Pahang, the Kintak in Perak and the Jah Hut in Krau Reserve, Pahang; Rosta et al mostly on the Jahai at Air Banun RS, Perak; and Azrina et al on three different groups in Belum Temenggor, Perak.⁹² But there are

⁹⁰ Interview data: an Orang Asli representative.

⁹¹ Interview data: an Orang Asli representative.

⁹² Howell, Colleen J, Kurt A Schwabe and Azizan Hj Abu Samah, 'Non-timber forest product dependence among the Jah Hut subgroup of Peninsular Malaysia's Orang Asli' (2010) 12 *Environment, Development and Sustainability* 1; Rusli Mohd and Nur Hafizah Arzemi, 'Contribution of Income from Forest Products among Selected Rural Communities in Peninsular Malaysia' (Paper presented at the Persidangan Kebangsaan Penilaian Ekonomi Sumber Hutan, Kuala Lumpur, 2009); Harun, Wai and Yusoff, above n 81; Azrina Abdullah, Or Oi Ching and Kamal Solhaimi Fadzil, *Collectors and Traders: A Study of Orang Asli Involvement in the Belum-Temenggor Complex, Perak* (Center for Malaysian Indigenous Studies, 2011); Sheema A Aziz et al, 'Why Conservationists Should be Concerned about Natural Resource Legislation Affecting

considerable studies on various aspects of the Orang Asli that support the observation of the interviewees specifically on current land and resource use. Only studies from 2000 onwards are considered in this analysis.

This survey employs two sources of data, recent studies on various groups from the perspective of different disciplines and the observations of interviewees from the fieldwork. From this, several observations may be made.

Firstly, the extent of economic dependence on forests is directly related to the distance to the forest from where the people live. Data from the Ministry of Rural and Regional Development Malaysia in 2005 shows that the majority of the Orang Asli population live on the outskirts of rural villages. According to the report, about 40% live in remote areas, that is, within the forest areas especially on both sides of the peninsula's central mountain range.⁹³ An officer of a department dealing with the communities, who was interviewed, suggested that 60% of Orang Asli settlements are within forest areas.⁹⁴ Similarly, Anbu Jeba⁹⁵ and Zalizan⁹⁶ estimated a rate of 60% in studies reported in 2010 and 2009 respectively. One study suggests that resettlement activities over the last five decades have resulted in the majority of Orang Asli communities living in rural areas.⁹⁷

Secondly, Orang Asli communities who live within or near forested areas have a high dependence on the forest. However, for various reasons, of which depleted resources is the main one, if there are resources other than forests close to the settlement area, the economic dependence on the forest decreases. Those living within the forest areas are totally dependent on the forests for all aspects of their needs including as a source for cash income to meet needs unavailable within the forest. An activist for the Orang Asli

Indigenous Peoples' Rights: Lessons from Peninsular Malaysia' (2013) 22(3) (2013/03/01) *Biodiversity and Conservation* 639.

⁹³ As of the report, there are 869 Orang Asli villages. Ministry of Rural and Regional Development Malaysia, 'The Development of the Orang Asli Community in Peninsular Malaysia: The Way Forward' (Paper presented at the International Conference on the Indigenous People 2005, Kuala Lumpur, 2005). See also Colin Nicholas, 'Who Can Protect the Forest Better? Pitching Orang Asli against Professionals in Protected Area Management in Peninsular Malaysia' (Paper presented at the Symposium on Eco-Human Interactions in Tropical Forests, Kyoto University, 13-14 June 2005), 1; Nicholas, above n 37.

⁹⁴ Interview data: public officer from government department for affairs of the Orang Asli.

⁹⁵ Anbu Jeba Sunilson et al, 'Ethnomedical survey of plants used by the Orang Asli in Kampung Bawong, Perak, West Malaysia' (2010) 6(5) *Journal of Ethnobiology and Ethnomedicine* 1.

⁹⁶ Zalizan Mohd Jelas, Abdul Razaq Ahmad and Ahmad Razaai Ayudin, 'Perspektif Historiografi Orang Asli di Semenanjung Malaysia (Historiography Perspective on Orang Asli in Peninsular Malaysia)' in Abdul Razaq Ahmad and Zalizan Mohd Jelas (eds), *Masyarakat Orang Asli: Perspektif Pendidikan dan Sosiobudaya (Orang asli Communities: Education and Sociocultural Perspectives)* (UKM, 2009).

⁹⁷ Abdullah, Ching and Fadzil, above n 92, 9.

issues, interviewed during the fieldwork estimated that this group represents about 10-15% of the Orang Asli peoples. They generally live in remote forests in the central mountain range areas in Perak, Kelantan, Terengganu and Kelantan. A few, especially the Semang, are totally dependent on the forest both for subsistence and cash income.⁹⁸ Many others interviewed also suggested that those living on the forest fringe depend on the forest for a large part of their cash income as well as to supplement their basic needs including food, water, building materials and medicine. Other sources of income are mostly from cash crop plantations and casual employment.⁹⁹ This group is estimated at 30-40%.¹⁰⁰ Altogether, about 40-55% of the Orang Asli are dependent on forests to various degrees. A senior enforcement officer in a forestry department suggested that the number may be up to 75% perhaps reflecting the local situation.¹⁰¹

Thirdly, the regions with high economic dependence on forests are Pahang, the state with the largest number of the Orang Asli, and remote areas of Perak,¹⁰² Kelantan and Terengganu. Specifically, in Pahang, recent studies indicate the varying degree of dependence on the forests. The highest dependence is recorded among peoples who reside within and near protected areas. The Batek, who reside within national park areas, rely on forests for subsistence through various activities including hunting and gathering, fishing and growing vegetables.¹⁰³ In the middle region of the state, Howell reveals that more than 75% of the Jah Hut in several villages in Krau Wildlife Reserve¹⁰⁴ are actively engaged with non-timber forest products which, apart from their own consumption, are

⁹⁸ Interview data: Director of the Center for Orang Asli Concerns (COAC).

⁹⁹ Interview data of various sources including the Orang Asli representatives, the Director of COAC, and public officers of various departments.

¹⁰⁰ Interview data: Director of the Center for Orang Asli Concerns; Orang Asli representative; public officer in wildlife protection department.

¹⁰¹ Interview data: an officer in the forestry department at federal level.

¹⁰² Harun, Wai and Yusoff, above n 81; Niclas Burenhult, 'Landscape Terms and Toponyms in Jahai: A Field Report' (2005) *Working Papers* 17; Sunilson et al, above n 95, 1; Mohd and Arzemi, above n 92; Hean Chooi Ong, Elley Lina and Pozi Milow, 'Traditional Knowledge and Usage of Edible Plants among the Semai Community of Kampung Batu 16, Tapah, Perak, Malaysia' (2012) 7(4) *Scientific Research and Essays* 441.

¹⁰³ Tuck-Po, above n 31; Zanisah Man, Nurul Fatanah Zahari and Mustaffa Omar, 'Kesan Ekonomi Pelancongan Terhadap Komuniti Batek Di Kuala Tahan, Pahang (The Impact of Tourism Economy on the Batek Community of Kuala Tahan, Pahang)' (2009) 4(1) *Jurnal e-Bangi* 1. In all villages in the studies, Kg Gua, Kg Dedari and Kg Trenggan, the main economic activities are hunting and gathering both for subsistence and produce for sale. Some are involved in craft making using materials from the forests. See also, Zahari, Omar and Daim, above n 55: on the Batek in Taman Negara National Park.

¹⁰⁴ Krau Wildlife Reserve is a protected area under the *Protection of Wildlife Act 1972*, located in the middle region of Pahang state.

for sale.¹⁰⁵ The same is also observed among the Che Wong who reside within and outside the Reserve,¹⁰⁶ the Jakun in South-East Pahang¹⁰⁷ and the Temiar in Lipis.¹⁰⁸

In Perak, Rosta and Redzuan, two different studies found a very high dependence on forests both for subsistence and produce for cash income in the Resettlement Scheme (RS) of the Air Banun and RS of the Kemar.¹⁰⁹ The same observation is also made by Azrina et al in Belum Temenggor, Perak despite resource depletion.¹¹⁰ In Tapah, Perak, Ong et al (2012) found that almost 50% of the plants eaten are taken from the wild.¹¹¹

Even in the most developed states, Selangor, Johor and Negeri Sembilan,¹¹² a number of interviewees suggested that the forest remains a crucial source of livelihood for the Orang Asli who live in suburban areas.¹¹³ Studies done in Johor¹¹⁴ and Selangor forest

¹⁰⁵ Howell, Schwabe and Hj Abu Samah, above n 92. See, also Mohd and Arzemi, above n 92.

¹⁰⁶ Mostofi J Sima and MN Shukor, 'Natural Resources in Support of the Chewong Tribe in Krau Wildlife Reserve' in Sahir Othman et al (eds), *Management and Status of Resources in Protected Areas of Peninsular Malaysia* (Department of Wildlife and National Parks Peninsular Malaysia, 2006) 95; Anja Lingjerde Lillegraven, *Path of Change in Fields of Power: A Study of the Chewong, an Indigenous Group in Peninsular Malaysia* (Master of Arts Thesis, University of Oslo, 2006).

¹⁰⁷ SK Gill, WH Ross and O Panya, 'Moving Beyond Rhetoric: The Need for Participatory Forest Management with the Jakun of South-East Pahang, Malaysia' (2009) 21(2) *Journal of Tropical Forest Science* 123, 132: It is reported that 26.3% of the Jakun households utilize the forest every day: 40% of households utilize the forests at least once a week. Those dependent on forest resources are not only collectors but include those who are engaged in wage work and those involved in other types of work. Only 1% are not dependent in any way. See also another study in Chini Lake: Omar, Man and Yusoff, above n 88.

¹⁰⁸ Hamzah, Hamimah, *Rights and Interests in Land among the Orang Asli in the State of Pahang: A Case Study* (PhD Thesis, International Islamic University Malaysia, 2011).

¹⁰⁹ Harun, Wai and Yusoff, above n 81; researching villages around RPS Air Banun records that 44% of the people practise mixed economic activities of agriculture and gathering forest products. For 32% of the population, forest products are the main source of income: 15% of the people are fully dependent on forest products. In Ma'rof Redzuan and Zahid Emby, 'Orang Asli: Pembangunan dan Ekologi Hutan (Orang Asli: Development and Forest Ecology)' in Ma'rof Redzuan and Sarjit S. Gill (eds), *Orang Asli: Isu, Transformasi dan Cabaran* (Orang Asli: Issues, Transformation and Challenges) (Putra University of Malaysia, 2008) 204, found that generally, all respondents in two RPS Banun and Kemar, Perak still depend on the forest, even after being relocated to the RPS for more than 20 years, for both basic necessities (subsistence) and cash income.

¹¹⁰ Abdullah, Ching and Fadzil, above n 92.

¹¹¹ Ong, Lina and Milow, above n 102.

¹¹² Krimi MS, Yusop Z and Law SH, 'Regional Development Disparities in Malaysia' (2010) 6(3) *Journal of American Science* 70: Negeri Sembilan is considered to be the fastest growing state.

¹¹³ Interview data. Orang Asli representatives. Those who are from Selangor, the most developed state in the peninsula observe that Orang Asli in Selangor are still dependent on the forest to a certain extent. A social researcher said that there are people who have moved from urban areas to forests to find a living.

¹¹⁴ M I Abdul-Hamid and E C Gan Christopher, 'Valuing Orang Asli Dependency on Forest: A Malaysian Case' (2012) 23(3) *International Journal of Ecology & Development*: The study found that the forest in Johor still provides opportunities to the Orang Asli communities to support their livelihoods in the form of tangible and intangible benefits. In particular, the tangible benefits accrued to them have resulted in hundreds of millions of ringgit in use value.

reserves¹¹⁵ corroborate their observations. In Negeri Sembilan, access to forest resources is in decline¹¹⁶ but edible and medicinal plants are still commonly taken from the wild.¹¹⁷

Finally, even people who have been relocated from their traditional areas under state-sponsored resettlement schemes, which include agricultural activities, as revealed by a number of interviewees, are reported to be continuing to find livelihoods in the forests.¹¹⁸ Some interviewees also stated that there are people who also keep another house in the forest in addition to the house built in the settlement scheme.¹¹⁹ A young Orang Asli graduate, in an interview, observed that many of the parents of Orang Asli university students who he knows still go to the forest to find things to sell.¹²⁰ Things which can be consumed are brought back to supplement daily food and others are to be sold. Another interviewee, a social researcher, found among the Semelai in Pahang that children as young as seven follow their parents to the forests.¹²¹

These observations indicate that the dependence on forests among Orang Asli communities remains significant.

A few interviewees, mainly public officials, refuted the view that the Orang Asli are still dependent on the forests.¹²² They suggest that only the Semang¹²³ are still in need of

¹¹⁵ Haron Norini and S Ahmad Fadli, 'The Importance of Ayer Hitam Forest Reserve (AHFR), Puchong, Selangor, to the Temuan Ethnic Subgroup' (2007) 30(2) *Pertanika Journal of Tropical Agricultural Science* 97; Er A C, Raja Zaharaton Raja Zainal Abidin and Pereira J J, 'An Analysis of Sustainable Development in Bukit Lagong Forest Reserve, Selangor' (Paper presented at the Persidangan Kebangsaan Penilaian Ekonomi Sumber Hutan, Kuala Lumpur, 2009): The studies were conducted in Ayer Hitam Forest Reserve and Bukit Lagong Forest Reserves, respectively.

¹¹⁶ Daisuke Naito et al, 'The Changes of Subsistence Activities among Temuan Communities in Negeri Sembilan, Peninsular Malaysia – Focus on Hunting and Gathering' (Paper presented at the International Symposium for 15th Anniversary of JASTE, Kyoto University Clock Tower Centennial Hall, June 2005).

¹¹⁷ Hean Chooi Ong, Norlia Ahmad and Pozi Milow, 'Traditional Medicinal Plants Used by the Temuan Villagers in Kampung Tering, Negeri Sembilan, Malaysia' (2011) 5(3) *Ethno Med* 169; Hean Chooi Ong, Norlia Ahmad and Sorayya M, 'Traditional Knowledge and Usage of Edible Plants among the Temuan Villagers in Kampung Tering, Kuala Pilah, Negeri Sembilan, Malaysia' (2011) 11(1) *Indian Journal of Traditional Knowledge* 161; Hean Chooi Ong, Mojiun PFJ and Milow P, 'Traditional Knowledge of Edible Plants among the Temuan Villagers in Kampung Guntur, Negeri Sembilan, Malaysia' (2011) 6(8) *African Journal of Agricultural Research* 1962.

¹¹⁸ Interview data: Former chairman of a non-governmental organisation for the environment; a forestry department official.

¹¹⁹ Interview data: Former chairman of a non-governmental organisation for the environment; a President of an Orang Asli representative group.

¹²⁰ Interview data: an Orang Asli representative.

¹²¹ Interview data: a social researcher.

¹²² There were five interviewees: a state legal advisor of a public department; an MP (referring to Selangor only); an officer from a timber industry stakeholder in Malaysia; public officers in a government department on wildlife affairs; and a Federal Court judge.

¹²³ The Semang (also known as the Negrito) is the smallest group of the Orang Asli.

forests.¹²⁴ Another suggests that the Orang Asli in Tasik Bera are no longer going to the forest to find a living but for recreation.¹²⁵ This view may reflect the bias of the observer who is outside of the communities. Several studies refute this view.¹²⁶

Comparing the Malay and Orang Asli communities in several regions, Rusli found that only a few Malays are still dependent on forests for a living. Others who access the forests do so mainly for recreation purpose.¹²⁷ Lim in a study on agar wood harvesting, also found that the Orang Asli are the main community involved whilst Malays are confined to Kelantan and Terengganu.¹²⁸

2 Manner of Forest Access

As indicated, the Orang Asli have a degree of dependency on forest produce or farming that depends on the location, soil fertility and resources available. The forest produce collected varies from varieties of foods, herbal medicines, construction and craft materials, firewood, animals such as frogs, wild boar, deer, squirrels, birds and monkeys and other products specifically for sale such as resin, bamboo, rattan and agar wood. As dependence on money for everyday needs has grown, the forest resources provide important sources of cash income.¹²⁹ The income from the forests is small but significant for poor communities.¹³⁰

The manner of use of forest land among the Orang Asli dependent on forests also includes subsistence farming of vegetables (including chilli, cassava, maize and banana), fruit trees, occasional swidden cultivation and also non-traditional activities such as planting cash crops (rubber and oil palm) and earning cash by labouring on nearby oil palm estates.¹³¹ For many smallholders involved in cash crop farming or plantations, the land is normally provided by state agencies as in-situ development or in

¹²⁴ Interview data: public officers in a government department on wildlife affairs.

¹²⁵ Interview data: a public officer in a government department on wildlife affairs.

¹²⁶ Howell, Schwabe and Hj Abu Samah, above n 92; Lillegraven, above n 106.

¹²⁷ Mohd and Arzemi, above n 92.

¹²⁸ Lim Hin Fui et al, 'Gaharu Harvesting and Its Importance to Rural Households in Peninsular Malaysia' (Paper presented at the National Economic Conference Malaysia, Melaka, 2007)

¹²⁹ Nicholas, above n 37, 72-3; Howell, Schwabe and Hj Abu Samah, above n 92, 7-14; Kasper Svarrer and Carsten Smith Olsen, 'The Economic Value of Non-Timber Forest Products: A Case Study from Malaysia' (2005) 20(1) *Journal of Sustainable Forestry* 17.

¹³⁰ Norini and Fadli, above n 115; Mohd and Arzemi, above n 92; Fui et al, above n 128.

¹³¹ See, eg, KS Fadzil and Hamzah KA, 'Challenges in Applying Traditional Forest Related Knowledge in Sustainable Forest Management and Poverty Alleviation in Malaysia: A Case Study of a Fish Farming Project with the Jakun Community in the Southeast Pahang Peat Swamp Project' in Parotta JA, Jinlong L and Heok-Choh S (eds), *Sustainable Forest Management and Poverty Alleviation: Role of Traditional Forest Related Knowledge* (2008), vol 21, 82.

resettlement schemes. The land in many cases is seen as state land.¹³² Written records suggest that the Orang Asli started to use land for cash crop plantations in the first part of the 1900s following the expansion of rubber plantations in the peninsula.¹³³ Officials in land and forestry offices interviewed in the fieldwork revealed that there has been forest clearance by the Orang Asli without authorisation for rubber or oil palm plantations within forests considered to be state land.¹³⁴

On the other hand, for a small group who are almost isolated from the wider society such as the Batek, their economy remains predominantly subsistence-based hunting and gathering.¹³⁵ Tuck-Po suggests that these activities are undertaken even when there are competing income-generating opportunities because of their high cultural values. However, the main source of cash income is extraction of forest products, primarily rattan and agar wood. When opportunities arise, men may do some day labouring and occasionally there is some casual planting of fast-growing vegetables.¹³⁶

As food security remains a significant issue, the forest is significant economically. The collection of forest products helps households to cope with poverty, insufficient agricultural yields, catastrophic weather events or other unfavourable conditions associated with high-risk rural environments.¹³⁷ It provides a form of natural insurance as a buffer against the effects of rapid rural development or political changes that have displaced them from fertile to more marginal areas with poor soils and low productivity.¹³⁸

C Limitations of the Data

This brief account of the concept of the land rights of Orang Asli communities is drawn from anthropological or sociological works which may limit extended legal analysis. These limitations include: their validity as an independent social reality;¹³⁹ a concentration on observable behaviour and explanations of social actors themselves

¹³² Interview data: Orang Asli representatives; a public officer in a government department on Orang Asli affairs. See also, Omar Mustaffa, 'Rancangan Pengumpulan Semula (RPS) Masyarakat Orang Asli: Pencapaian dan Cabaran (Resettlement Scheme for the Orang Asli Communities: Achievement and Challenges' in Ma'rof Redzuan and Sarjit S. Gill (eds), *Orang Asli: Isu, Transformasi dan Cabaran (Orang Asli: Issues, Transformation and Challenges)* (Putra University of Malaysia, 2008), 190.

¹³³ See Chapter 3.I.D.3 fn 151.

¹³⁴ Interview data: officials in government departments on land and forestry.

¹³⁵ Tuck-Po, above n 31, 13.

¹³⁶ *Ibid* 31, 13.

¹³⁷ Howell, Schwabe and Hj Abu Samah, above n 92, 2.

¹³⁸ *Ibid*.

¹³⁹ Grant Branfield, 'What's Really Wrong with Ethnography?' (2004) 4(4) *International Education Journal* 53, 54.

ignoring fundamental economic forces;¹⁴⁰ a lack of attention to the social context of law as a theoretical object or to its autonomy;¹⁴¹ and the biases of the observers, for example, findings are based on Western conceptions of science and influenced by particular economic, social and political beliefs held by the writers.¹⁴² Tuck-Po, for instance, points out a tendency of some to trivialize whatever the tribal people say or to express disbelief that 'primitives' could ever come up with sophisticated thoughts and actions on their own. Hood has warned that

We must be aware and sensitive to paternalistic orders which try to frame the problems of tribal peoples as if they are in need of civilizing.¹⁴³

Theoretical and conceptual aspects of Orang Asli customary laws also present difficulties in determining the aspect of proprietary rights of these communities. These include the concept of property, the social and political position of customs themselves, the variability of customs between communities and changes resulting from contemporary external pressures.¹⁴⁴ These changes are induced by various factors including contact with outside communities, pressure from limited land, restricted access to forests, shortage of resources and government policies.¹⁴⁵

On the concept of property itself, custom is a diffuse set of social relations, that is, interrelationships between persons, things and actions in which the language of property and propriety, things and persons is interchangeable.¹⁴⁶ Furthermore, the variability of customs and the complexity of their contemporary situation, specifically issues of land claims, exaggerate and complicate things.¹⁴⁷

Rapid changes among the Orang Asli as well as lack of available data mean that the situations described may have changed. There are also many Orang Asli peoples who are not subject to any studies.¹⁴⁸ Another limitation of the research is the diversity of Orang Asli communities practising distinctive customary laws.

¹⁴⁰ Francis G Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction' (1992) 8(2) *British Journal of Law & Society* 141, 163.

¹⁴¹ Laura Nader, 'The Anthropological Study of Law' (1965) 67(6) *American Anthropologists* (Special Publication on Ethnography on Law) 3, 17.

¹⁴² Snyder, above n 140, 164.

¹⁴³ Tuck-Po, above n 31, 23.

¹⁴⁴ McDonnell, above n 20, 301.

¹⁴⁵ Edo, above n 34, 10, 39; Couillard, above n 66, 81-6.

¹⁴⁶ McDonnell, above n 20, 305.

¹⁴⁷ *Ibid*, 301.

¹⁴⁸ Very little is known about smaller groups like the Batek Tanum, Batek Nong, Orang Kanaq and Orang Kuala: Lye Tuck-Po, 'A History of Orang Asli Studies: Landmarks and Generations' (2011) 29(Supp 1) *Malaysian Studies* 23, 39.

III CONCLUSION

In conclusion, custom has been the basis for the legitimacy of the claim of rights and interests of the Orang Asli communities, specifically in aspects of land and forest resources. Forest resources remain economically significant for the communities, especially those who are living within, and at the fringe of, forest areas. The communities regard the large tracts of land on which they have settled for generations as their traditional or ancestral lands. Each group is a distinct community which lives within their own community within a specified territory. These territories, the land and the environment are fundamental to their community life and their cultural and spiritual needs. The traditional territory plays a fundamental role in their belief systems and ways of life, interlinked with space and identity. These perspectives mean that the land could not be owned by human beings who are regarded as part of an environment with benefits to be shared by all human beings. There are also many Orang Asli groups which do recognize some ideas of proprietorship, or sense of ownership, possession or control over land and its environment. The communities regard themselves as the original occupants or, in relocation situations, as the rightful owners of the land. The members of the community have rights within the territory – to dwell, forage and gather forest resources and to use the land subject to certain customary conditions.

The distinct and diverse concepts of land, resources and environment as well as the special connection that the communities have with the land suggest the need to consider a set of laws which recognise these differences. This requires engagement with the communities in the decision making process including in the reform of laws affecting them.

The next chapter considers the rights and interests of the minorities in relation to land and forest resources in the laws of Malaysia.

CHAPTER 6: THE RIGHTS OF THE ORANG ASLI IN FORESTS IN MALAYSIAN LAW

It is established under the common law of Malaysia that the indigenous communities, including the Orang Asli, have rights and interest to their traditional land and forest resources under their customary laws. Although these rights received judicial recognition less than 15 years ago, the need to protect them had already been acknowledged by the *Constitution* and before independence, by statute. With judicial recognition, the law has moved from protection to potentially empowering the Orang Asli through a rights-based approach.

This chapter explores the current position of those rights and their specific contents specifically over forest resources. The first and second sections analyse the relevant laws and attempt to identify the rights as recognized by statute and common law. They also consider key issues involving the relationship between common law developments and the statutory provisions, particularly the impact of the emerging common law rights on forestry-related statutes and customary rights. The third section examines the problems that affect the security of those rights. It identifies the limitations of the current legal position from the aspects of justice and fairness as laid down in the framework for this thesis. Drawing from the interview data, it also analyses the impact of the law in practice from the perspective of the interviewees.

I THE RIGHTS OF THE ORANG ASLI TO FOREST RESOURCES

A The Governance of Land and Forest

The rights to forest resources are subject to an extensive framework of laws and policies governing land, forest and conservation. Briefly, forests in Peninsular Malaysia are governed by various statutes including the *National Forestry Act 1984 (Malaysia) (Revised 1993)* (NFA), the *National Land Code 1965 (Malaysia)* (NLC) and the *National Parks Act 1980 (Malaysia)* (NPA). Under the *Federal Constitution's* Art 74, land and forests are subject matters within state legislative power.¹ Under the NLC, ownership and other kinds of interests in land are granted by the states. Even so, the Code expressly stipulates that its provisions do not override the rights and interests in land

¹ *Federal Constitution* (Malaysia), Ninth Schedule, State List Item 3(b).

acquired under customary law.² The NFA, providing for forest management, is a federal statute enacted to achieve national uniformity but it must be adopted by a state to have legal force.³ Unalienated land, including forests and forest products on the land, are the property of state authorities.⁴ Removal of forest produce on land alienated by a state requires a removal licence.⁵ As more than 95% of forest lands in Malaysia are owned by the respective state authorities, these entities effectively have virtual monopoly rights over their forest land, with an extensive power of disposal over land and natural resources.⁶

Apart from the statutory provisions, lands and forests are also governed by a complex web of policies established to achieve certain national goals. In Peninsular Malaysia, the formulation of policies relating to land and resources is made by various government agencies including the National Land Council, the National Forestry Council and others related to environment, conservation and economic development. Most of these policies, specifically on land and forestry, are confidential and there is no known assessment of their effectiveness.⁷ In addition, the governance of land is also subject to customary laws. Some of them are codified, specifically, the customary land of Malays in certain states.⁸ Contributing further to this complex framework are the developing judicial precedents recognizing the land rights of some indigenous groups including the Orang Asli.

B Specific Laws Recognizing the Rights of the Orang Asli

This section discusses the current law and identifies the extent of the rights to forest resources by Orang Asli communities. It shows that there is substantial recognition of the rights of the indigenous minorities by law although their realization is hampered by various loopholes in the law and other prevailing factors.

² *National Land Code (Malaysia)*, s 4.

³ *Federal Constitution (Malaysia)*, art 76(1)(b), (2). All of the states in the peninsula have adopted the federal legislation and the amendment in 1993 through their respective adoption enactments, *National Forestry Act (Adoption) Enactments (1985–1987)* and enactments adopting the 1993 amendment.

⁴ *National Land Code (Malaysia)*, ss 40, 44, 45; *National Forestry Act 1984 (Malaysia)*, s 14.

⁵ *National Forestry Act 1984 (Malaysia)*, s 40(1).

⁶ *Federal Constitution (Malaysia)*, Ninth Schedule List 2, Forestry and land is a subject matter under the respective states' jurisdiction.

⁷ IM Shukri, 'Land Administration in Peninsular Malaysia – A General Overview' (Department of the Director General of Lands and Mines Federal Malaysia (Unpublished), 2010), 3.

⁸ See Chapter 3.I.D.

1 The Federal Constitution

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

First, the savings clause in the equality provision allows for discriminatory legislation such as the *Aboriginal Peoples Act 1954* (APA) for the 'protection, well-being or advancement' of the aborigines (Art 8(5)(c)).⁹ Although the *Constitution* specifically provides for the special position of other groups who are the natives of the land, the Malays and natives of Sabah and Sarawak, the legitimate interests of other groups are also protected by the same highest authority of the Federation (Art 153).¹⁰ It is suggested that both provisions should be read as an embodiment of the principle of substantial equality in terms of outcomes within certain classes of society. In other words, the provisions amount to an elaboration of equality rather than an exception to the general principle of equality.¹¹

Second, the welfare of aborigines is specifically placed under the jurisdiction of the Federal Government.¹² Even so, it is the responsibility of the states' executive authority to ensure compliance with any federal law applying to the states and not to impede or prejudice the exercise of the executive authority of the Federation.¹³

Third, within the composition of the Senate in the Parliament, there must be members who 'are capable of representing the interests of aborigines'.¹⁴

⁹ *Federal Constitution* art 8(5)(c): 'This Article [Art 8] does not invalidate or prohibit any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service'. Art 8(1) states: 'All persons are equal before the law and entitled to the equal protection of the law'.

¹⁰ *Federal Constitution*, art 153(1): 'It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article'.

¹¹ See above: Chapter 3.II.D. See also, Yogeswaran Subramaniam, 'The UNDRIP and the Malaysian Constitution: Is Special Recognition and Protection of the Orang Asli Customary Land Permissible?' (2011) 2 *Malayan Law Journal* cxxvi referring to the approach taken by the Indian Supreme Court.

¹² *Federal Constitution* Ninth Schedule Federal List Item 16.

¹³ *Ibid*, art 81.

¹⁴ *Ibid*, art 45(2).

There is no specific mention in the *Constitution* of the protection of the land and resources of the aborigines. But, as will be shown in the next section, the protection of land and resources as their hereditary rights based on their customary law is a core element embodied in the notion of welfare concerning the aborigines. This understanding of the nature of aboriginal land rights is evident in existing legislation and the statements of policies by the executive government.

2 *The Aboriginal Peoples Act 1954 (APA)*

The APA is specific legislation addressing aboriginal affairs.¹⁵ It establishes a specific framework comprising both levels of government, federal and state. As argued in Chapter 3.I.D.3, the ultimate objective of the Act is to protect and preserve the rights and interests of the aborigines including their autonomy, identity and land from competing economic and political forces. At the federal level, a special position is created, the Director General of Orang Asli Affairs. This position, as an agent of the Federal Government, is assisted by a government agency, the Orang Asli Advancement Department,¹⁶ also funded by the Federal Government. The law creates extensive powers over the lives of the Orang Asli which are entrusted to the Director General. At the level of state entities which have the power to control land and resources is a legal duty, established by the common law,¹⁷ on the state authorities. The duty is to declare areas to be occupied by the Orang Asli to the exclusion of others.¹⁸

The legislation represents a benevolent intention to protect the interests, autonomy and the way of life of the aborigines as minorities. It covers most aspects of their lives including who is Orang Asli, their education and their security. Although the objective appears paternalistic, the approach was considered at the time as the 'way to protect'.¹⁹

¹⁵ For the background that led to the enactment of the APA, see Idrus, Rusalina, 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) 29(Suppl. 1) *Malaysian Studies* 53. This Act was inherited from British colonial rule, and its precursor, the *Perak Aboriginal Tribes Enactment 1939*. The 1954 law, which was initially referred to as the *Aboriginal Peoples Ordinance (1954)* and later revised as the *Aboriginal Peoples Act (1974)*, was essentially an adoption of the 1939 Enactment. The earlier law, based largely on recommendations by H D Noone, a field ethnographer and curator for the Federated Malay States Museum Department, attempted to protect the Orang Asli's way of life, citing H D Noone, 'Report on the settlements and welfare of the Ple-Temiar Senoi of the Perak-Kelantan watershed' (1936) 19(1) *Journal of the Federated Malay States Museums* 1.

¹⁶ The name of the department in Malay is Jabatan Kemajuan Orang Asli (JAKOA). Previously it was known as Orang Asli Affairs Department or Jabatan Hal Ehwal Orang Asli (JHEOA).

¹⁷ See the discussion below: Section II.B.2(a).

¹⁸ Further information on the background of the APA as a mechanism to protect the Orang Asli's interests is above: Chapter 3.I.D.3.

¹⁹ See above on the same approach taken by the British in other regions to protect natives' land: Chapter 3.I.D.3.

Gopal Sri Ram J, in *Sagong (No 2)*, characterised the APA as a human rights statute as it contains a comprehensive statement on the human rights of the aborigines. Such a statute is pre-eminent over ordinary legislation from its quasi-constitutional status.²⁰ It is an indication given by the public, through the legislature, that the law and the 'values that it endeavours to buttress and protect' are more important than other ordinary legislation.²¹ It gives rise 'to individual rights of vital importance, rights capable of enforcement', in a court of law.²²

(a) Mechanisms Created by the APA to Protect the Orang Asli Land and Resources

There are several mechanisms created by the APA to protect the Orang Asli land:

- (i) *Creation of reserves and the duty of states:* The APA provides for the creation of reserves to protect the land of the Orang Asli: Aboriginal Areas (s 6) and Aboriginal Reserve (s 7).²³ Both aboriginal reserves and areas are protected from the creation of Malay Reservations and sanctuaries for wildlife.²⁴ The Aboriginal Areas were intended to be created to accommodate nomadic aborigines, whereas the Reserves were created for settled aborigines.²⁵ Within the aboriginal reserves, forest reserves may not be created.²⁶ Any disposal of land by the state could only be made to the aborigines of the aboriginal communities normally resident within the reserve.²⁷ No temporary occupation within the reserve is allowed to non-aborigines.²⁸ The High Court in *Koperasi Kijang Mas v Kerajaan Negeri Perak*²⁹ held that the aborigines have exclusive rights to forest produce in declared aboriginal reserves even when it is still awaiting gazettal after state

²⁰ *Sagong (No 2)* [2005] 6 MLJ 289, 303.

²¹ *Ibid*, 303 citing *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145, 303 (Lamer J Supreme Court of Canada).

²² *Ibid*, 304 citing *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114, 1134 (Dickson C).

²³ Aboriginal Areas is meant for areas exclusively or predominantly inhabited by the aborigines, but unlikely to remain permanently in the area (s 6(1), s 7(1)(i)). Aboriginal Reserves are meant for areas exclusively inhabited by the aborigines ((s 7(1)). The Aboriginal Areas were created to accommodate mobile aborigines, whereas the Reserves were created for settled aborigines. The purpose for the differentiation was explained in British Archives, *The Aboriginal Tribes Enactment, Protection of Aborigine*, Colonial Records CO 717/144/12 (1939).

²⁴ *Aboriginal Peoples Act 1954*, s 6(2) – for aboriginal areas; s 7(2) for aboriginal reserve.

²⁵ British Archives, *The Aboriginal Tribes Enactment, Protection of Aborigine*, Colonial Records CO 717/144/12 (1939) cited in Idrus, above n 15, 64.

²⁶ *Aboriginal Peoples Act 1954* (Malaysia), s 7(2)(iii).

²⁷ *Ibid*, s 7(2)(iv).

²⁸ *Ibid*, s 7(2)(v).

²⁹ [1991] CLJ 486.

approval. The state has no power to issue logging permits in that area to any person who is not Orang Asli.³⁰ A general provision in s 62 of the NLC permitting the creation of reserves also allows for the creation of Orang Asli reserves.³¹

The court in *Sagong (No 1)*, following North American common law, held that the creation of reserves is the duty of the state authority as a fiduciary having legal powers and responsibilities to protect the people.³² The intention of the creation of reserves under the law is to prohibit the alienation of land in aboriginal areas to a non-aborigine or dealings by the state with land for the benefit of non-aborigines. It merely reflects the permanent nature of the title vested in the aboriginal peoples. The court rejected the argument that in the event the state authority does not exercise the power, the aborigines would have nothing in the manner of any title to or interest in the land. Such an argument, it was said, frustrates the purpose of the Act to protect the welfare of the aboriginal peoples. The court considered land to be a very valuable socio-economic commodity so it would not be the intention of the legislature to deprive people of their customary title at common law.³³

In practice, most of the Orang Asli's traditional lands are not protected under the APA.³⁴ There are substantial areas inhabited by the communities which are not gazetted.³⁵ Pahang, the state with the highest number of the Orang

³⁰ Ibid, 653.

³¹ S 62 provides for the power of the state authority to reserve any state land for any public purpose.

³² *Sagong (No 1)* [2002] 2 MLJ 591; *Sagong (No 2)* [2005] 6 MLJ 289: the courts viewed that both state and federal governments were in breach of their fiduciary duties upon failure to gazette the Orang Asli land. This is also partly based on the fact that the government has knowledge that the land was occupied by the communities. The government is also aware that failure to gazette the land will affect the communities seriously and expose them to serious loss.

³³ *Sagong (No 2)* [2005] 6 MLJ 289, 306, 313.

³⁴ Nicholas, Colin, *The Orang Asli and the Contest for Resources* (International Work Group for Indigenous Affairs, 2000), 32-4; Suhakam, 'Report on the In-depth Discussion on Native Customary Land Rights of the Orang Asli in Peninsular Malaysia' (13 June 2009), 3; Hakimah Yaacob, 'Rights of Orang Asli in Peninsular Malaysia from Legal Perspectives Concerning de jure Systemic Denial on Continuity pro tempore Rights to Lands, Ignorance of Welfare and Education' (Paper presented at the Conference on Multiculturalism and Law, University of Malaya, Malaysia, 6-7 May 2008), 8; H S Lim, 'The Land Rights of the Orang Asli' in *Land Issues in Malaysia* (Consumers' Association of Penang, 2000), 179 cited Azmi Sharom, 'A Critical Study of the Laws Relating to the Indigenous Peoples of Malaysia in the Context of Article 8(j) of the Biodiversity Convention' (2006) 13 *International Journal on Minority and Group Rights* 53, 57. It states that, of the 83269.86 hectares of land which the Department of *Orang Asli* Affairs requested the state governments to alienate as *Orang Asli* land, only 18587.26 hectares were under gazette.

³⁵ In 2006, Department of Orang Asli Affairs (JHEOA) identified the gazetted land as representing only 15%, from 876 Orang Asli villages (JHEOA, 2006). See also, Nicholas, above n 34, 33-4;

Asli, decided not to create reservations under the APA after 1992.³⁶ Some areas approved but yet to be formally gazetted are also reported to have been reclassified as state land or alienated to individuals or companies without the consent of the Orang Asli concerned. The total area reserved has also declined.³⁷

(ii) *The right of occupancy*: Apart from the provisions for aboriginal reserves and areas, the Act also provides for the power of state authorities to grant to the aborigines 'rights of occupancy of any land not being alienated or land leased for any purpose within any aboriginal area or aboriginal reserve'. This kind of right of occupancy is a kind of tenancy at will.³⁸

Many suggest that this provision of tenant-at-will occupancy applies to all aborigines occupying land within areas declared as aboriginal reserves or areas.³⁹ However, it is suggested that this provision is not applicable to the aborigines already living on the land. As the APA requires the creation of an aboriginal reserve and areas on land already 'predominantly or exclusively inhabited by aborigines', it is unlikely that there is a need for the state to make a grant of occupancy to the aborigines who have been living on the land. Due to this, it is possible that s 8 allows for the state authorities to allow other aborigines who are not habitually living in the reservation to occupy certain particular areas, either unalienated state land or aboriginal reserves/areas.

Salleh Buang, 'Still Many Unanswered Questions', *New Straits Times* (Kuala Lumpur), Dec 6, 2008, 8.

³⁶ Interview data: Legal advisor of a land and resource development office at federal level and senior officer of Orang Asli Affairs Department. The problem is also reported in Perak, a northern state in the Peninsula: Edo, Juli, *Claiming Our Ancestors' Land: An Ethnohistorical Study of Sengoi Land Rights in Perak, Malaysia* (PhD Thesis, Australian National University, 1998), 16-7.

³⁷ In Selangor for instance, within 10 years from 1990, almost 80% of the areas gazetted either as aboriginal areas or reserves, were revoked. The areas which were approved for gazettement in 1990 had yet to be gazetted as at 2001: Nicholas, above n 34, 33-4.

³⁸ *Aboriginal Peoples Act 1954* s 8. It provides:

(1) The State Authority may grant rights of occupancy of any land not being alienated land or land leased for any purpose within any aboriginal area or aboriginal reserve. (2) Rights of occupancy may be granted (a) to (i) any individual aborigine; (ii) members of any family of aborigines; or (iii) members of any aboriginal community; (b) free of rent or subject to such rents as may be imposed in the grant; and (c) subject to such conditions as may be imposed by the grant, and shall be deemed not to confer on any person any better title than that of a tenant at will. (3) Nothing in this section shall preclude the alienation or grant or lease of any land to any aborigine.

³⁹ See, eg, Rusalina Idrus, 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) 29(Suppl. 1) *Malaysian Studies* 53, 64; Colin Nicholas, *Orang Asli: Rights, Problems, Solutions* (Suhakam, 2010), 8.

This may apply in the situation of relocations of the other aborigines when it is necessary.

Based on this argument, the effect of the section should not be applicable to the land reserved under s 6 and s 7. There is nothing to suggest that it could also apply to any other customary land of the Orang Asli to which they have existing rights, recognized by the common law, which is outside the purview of the APA. Therefore, it is submitted that it is a mistake to state that all lands held by the Orang Asli have the status of tenancy at will.

- (iii) *Restriction of dealing by the aborigines:* The Act also aims to protect the land of the aborigines by requiring any land dealings by the aborigines to have the consent of the Director General. Within aboriginal areas, the disposal of land and grants of licences to a non-aboriginal person by the state for collection of forest produce must only be made in consultation with the Director General of the Orang Asli.⁴⁰ The Director General, appointed under the Act, is entrusted with a wide power for the purpose of safeguarding the interests of the aborigines against manipulation. It is clear that the policy imbued in the Act is to protect the peoples' land from loss and them from dispossession. In reality, however, the Director-General, as legal representative of the Orang Asli, has often used this power to assign to others the rights of the Orang Asli to their land.
- (iv) *Priority of aboriginal rights:* The aborigines are also entitled to live within areas declared as Malay Reservations, forest and game reserves subject to conditions prescribed by the state authority. This provision prevails over the other legislation providing for reservations. However, it is also stated that the state authority may require them to leave the area with payment of compensation.⁴¹ Further information on the compensation is in the next section.
- (v) *Compensation:* Compensation is an indication of recognition by the states of the entitlement of the people to their land and resources.

Under the Act, compensation for land is payable:

⁴⁰ *Aboriginal Peoples Act 1954*, s 6(2)(iii),(iv).

⁴¹ *Ibid*, s 10 (3):

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

- a. on the state's ordering the aborigines to leave the land declared as a Malay Reservation, forest reserve or game reserve (S 10(1));
- b. on revocation of aboriginal areas or reserves (s 12(1)).

In these situations, the manner of the payment of the compensation for the land is according to s 12 — that is, to the aboriginal persons entitled or to the Director General to be held in trust for the persons or communities.⁴²

Section 12 uses the word 'may' for requiring payment of compensation, indicating the discretion of the state authority on such payments. However, it was held in *Sagong (No 2)* that the word 'may' is to be read as 'shall' to avoid inconsistency with the constitutional provision protecting property rights.⁴³

Another provision requires compensation for fruit or rubber trees planted by the aborigines on disposal of the land by the state authority (s 11(1)). Section 11(1) provides for compensation for fruit or rubber trees found on state land which is alienated or granted to others.

However, in practice, payment of compensation has been not for the land itself, especially before *Sagong (No 2)*,⁴⁴ but for dwelling and trees only. It is often stated that the compensation is not for the land, as the land was erroneously believed to belong to the states, but for the consequential damages – the buildings and trees that were lost.⁴⁵ On the other hand, the text of ss 10 and 12 clearly requires compensation for the land. Only s 11 requires compensation upon alienation for fruit and rubber trees planted by the aborigines on state land.

- (vi) *The exercise of the powers of the Federal Government and state as the protectors of the interests of the Orang Asli, and the protection that the law extended to these interests, require that any actions that affect these*

⁴² Ibid, s 12:

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

⁴³ *Sagong (No 2)* [2005] 6 MLJ 289, [41].

⁴⁴ [2005] 6 MLJ 289.

⁴⁵ See eg, Nicholas, above n 39, 6.

interests, that is, the excision of the reservations and orders to leave the reserved lands, must be taken with consideration of these interests as the first priority. In many situations, the interests of the Orang Asli to access resources can co-exist with the other interests in reservations, such as with forest and wildlife reserves as well as other environmental conservation-related reservations. However, frequently the interests of the Orang Asli have not been given adequate consideration.

(b) Specific Statement of Policy on the Orang Asli

Consistent with the objective of the APA to protect Orang Asli land, statements of policy relating to the administration of the Orang Asli also acknowledge that the Orang Asli are entitled to their land.

A statement of policy in 1961⁴⁶ contains important broad principles and 'special measures' to be adopted 'for the protection of the institutions, customs, mode of life, person, property and labour of the Orang Asli'.⁴⁷ In particular, the statement reinforces the moral and legal rights of the communities to their customary lands and their autonomy in having a political identity of their own.

The 1961 policy statement reiterates an earlier statement issued in 1957.⁴⁸ The 1957 statement aimed to correct the view that the Orang Asli did not have rightful territorial claims over their hereditary land because they were dependants of the government and inferior people. This had resulted in people being dispossessed and driven further inland.⁴⁹ The policy states that the aborigines' way of life, customs, traditions and mode of life should be accepted and recognized. The hereditary land rights of the various local

⁴⁶ Department of Information, 'Statement of policy regarding the administration of the aborigines of the Federation of Malaya' (Ministry of the Interior, 1961). As of 2001, the Statement was confirmed to be still in force by a Director-General of the JHEOA during testimony under oath during the Sagong Tasi land rights case.

⁴⁷ Some relevant paragraphs are listed down:

Para (a): The aborigines, being one of the ethnic minorities of the Federation, must be allowed to benefit on an equal footing from the rights and opportunities which the law grants to the other communities ... Para (c): The aborigines shall be allowed to retain their own customs, political system, laws, and institutions when they are not incompatible with the national legal system. Para (d): The special position in respect to land usage and land rights shall be recognized ... Also, the Orang Asli will not be moved from their traditional areas without their consent.

⁴⁸ The Long Term Administration of the Aborigines of Malaya 27 May 1957 ANM – 2005/0018322 (Malaysia National Archive).

⁴⁹ *Ibid*, [11(31)].

groups should be recognized by the states and they should not be forced to move against their will for any economic or political reason.

(c) Criticism of the APA

Akhtar Tahir J in a recent Orang Asli claim for judicial review against alienation of their customary land stated that

the fact that the Act was enacted at all is a testimony that the rights of aborigine over the land occupied has [*sic*] been given due recognition.⁵⁰

Nevertheless, despite the idea of protection, after almost 60 years in force, the APA is infamous as a tool for aggression against the communities that it appears intended to protect.⁵¹ Rather than serving the interests of its beneficiaries, the APA is seen as repressive. It gives state governments extensive controls that allow for broad interference in the lives and rights of the people that it ostensibly protects. Many allege that the APA has been an instrument to further disadvantage and limit the autonomy of these communities. Idrus observes that as the Act sets up the Orang Asli as wards of the state, it essentially limits their rights as full citizens of Malaysia.⁵² The legislation effectively places the communities in vulnerable positions as they are subjected to changes decided outside their control.

The government agency created to assist the Director General is also frequently criticised for failure to represent the interests of the communities. One critique suggests that the Department functions more as an administrative arm of the executive government rather than as an independent representative organ representing Orang Asli

⁵⁰ *Mohamad Nohing* [2013] MLJU 291, [12].

⁵¹ There are many writings that criticise the APA. See, eg, Idrus, above n 15; Nicholas, above n 34; Hakimah Yaacob, 'Human Rights of Orang Asli in Peninsular Malaysia – Paper presented for United Nations Delegates on Minority ' (SUHAKAM – Human Rights Commission Malaysia, 2008); Dentan, Robert Knox et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, 1997), 70; Hasan Mat Nor et al, 'Mengapa kami jadi begini? Konflik masyarakat Orang Seletar dan Pembangunan Iskandar, Johor Bahru, Malaysia (Why do we become like this? The conflict of Orang Seletar communities and Iskandar Development, Johor Bahru Malaysia)' (2009) 5(2) *Malaysian Journal of Society and Space* 1, 23-4; Colin Nicholas and A Baer, 'Health care for the Orang Asli: Consequences of paternalism and non-recognition' in H L Chee and S Barraclough (eds), *Health care in Malaysia: The dynamic of provision, financing and access* (Routledge, 2007) 119, 120, Tuck-Po, Lye, *Changing Pathways: Forest Degradation and the Batek of Pahang, Malaysia* (Strategic Information Research Development, 2005); Geoffrey Benjamin, 'On Being Tribal in the Malay World' in Geoffrey Benjamin and Cynthia Chou (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Institute of Southeast Asian Studies, 2002) .

⁵² Idrus, above n 15, 54, 65.

interests.⁵³ Another criticised the agency as being distant, unapproachable and irrelevant in representing and safeguarding their interests.⁵⁴

Both federal and state governments appear incapable of exercising the duties entrusted to them by the APA. The Act is considered to be a failed experiment.

3 *The Laws and Policies on Forestry, Wildlife and Protected Areas*

(a) *Statutory Provisions*

As noted in the introduction to this chapter, in Peninsular Malaysia, areas of land, forestry, wildlife and protected areas are governed by various statutes including *the National Forestry Act 1984* (NFA), the *National Land Code 1965* (NLC), the *National Parks Act 1980* (NPA) and the Malay reservation legislation for each of the states.⁵⁵ Many of these statutes provide for reservation of land for different purposes including environmental conservation and for the protection of the Malays. In relation to reservations provided for in these laws, the APA expressly provides that the Orang Asli may continue to live within the reservation regardless of contrary provisions in the relevant legislation.⁵⁶

In relation to land governance, although the ownership of the unalienated land lies with the state authorities, it is expressly provided in the National Land Code that its provisions do not override the rights and interests in land acquired under customary law.⁵⁷

In territories established as National Parks and protected areas, there is no restriction of the rights of the Orang Asli to access land under the relevant legislation.⁵⁸ However, some suggest that the legislation restricts their rights to own and control their traditional lands within the territories.⁵⁹ A recent report by Suhakam also revealed the problems that

⁵³ Cheah Wui Ling, 'Sagong Tasi: Reconciling State Development and Orang Asli Rights in Malaysian Courts' (National University of Singapore and Asia Research Institute, 2004), [2.1.2]

⁵⁴ Anuar Alias, SN Kamaruzzaman and Md Nasir Daud, 'Traditional Lands Acquisition and Compensation: The Perceptions of the Affected Aborigine in Malaysia' (2010) 5(11) *International Journal of the Physical Sciences* 1696.

⁵⁵ *Malay Reservation Enactment 1933* (Revised 1935) (FMS Cap 142) (applicable to Perak, Selangor, Negeri Sembilan and Pahang); *Malay Reservation Enactment Kelantan 1930*; *Malay Reservation Enactment Kedah 1931*; *Malay Reservation Enactment Perlis 1935*; *Malay Reservation Enactment Johor 1936*; *Malay Reservation Enactment Terengganu 1941*. There is no Malay Reservation legislation enacted in Malacca and Penang.

⁵⁶ Aboriginal Peoples Act 1954 s 10(1).

⁵⁷ *National Land Code* (Malaysia), s 4.

⁵⁸ Eg of the legislation: *National Parks Act 1980* (Malaysia); *Protection of Wildlife Act 1974* (Malaysia); *Wildlife Conservation Act 2010* (Malaysia).

⁵⁹ Nicholas, above n 34; Yaacob, above n 51, 25.

the Orang Asli have in areas variously declared as reserves.⁶⁰ The establishment of protected areas was commonly made without knowledge and participation of the communities living in the areas further restricting their activities and access to their customary land.⁶¹

Specifically, the interests of the Orang Asli in forest resources are recognized in two statutes: the *National Forestry Act 1984* (NFA) and the *Wildlife Conservation Act 2010* (WLCA).⁶² In the NFA, a specific provision gives power to a state authority to exempt the Orang Asli from licence requirements or payment of royalties for taking forest produce from state land or alienated land for specified purposes, mainly for their personal use.⁶³ The forest produce, other than wildlife, is subject to the NFA and the forestry legislation of the states.

The *WLCA* allows the Orang Asli to hunt 10 specified animals otherwise protected for sustenance only, so that they may not be sold.⁶⁴ Sale of the animals is specifically prohibited as an offence punishable under the Act.⁶⁵ This newly enacted legislation reduces the rights accorded in the former Act, the *Protection of Wildlife Act 1974*. It allowed the Orang Asli to kill or take any wild animals and birds for food.⁶⁶ This is another

⁶⁰ Human Rights Commission of Malaysia (Suhakam), 'Report of the National Inquiry into the Land Rights of Indigenous Peoples' (Suhakam, 2013) <<http://www.suhakam.org.my/documents/10124/1326477/SUHAKAM+BI+FINAL.CD.pdf> <http://sarawakreport.org/suhakam/suhakam-chapter8.html>>, 145.

⁶¹ *Ibid.*

⁶² The Act came into force on 26 December 2010.

⁶³ *National Forestry Act 1984*, s 62(2)(b):

Subject to any contrary direction by the State Authority, the Director may reduce, commute or waive any royalty in respect of, or exempt from royalty, (b) any forest produce or class of forest produce taken from any State land or alienated land by any aborigine for: (i) the construction and repair of temporary huts on any land lawfully occupied by such aborigine; (ii) the maintenance of his fishing stakes and landing places; (iii) fuel wood or other domestic purposes; or (iv) the construction or maintenance of any work for the common benefit of the aborigines.

S 40(3) allows the state authority to exempt the requirement of a removal licence for taking forest produce by the aborigines in alienated land for the same purposes specified in s 62(2)(b).

⁶⁴ *Wildlife Conservation Act 2010* (Malaysia), s 51(1): *Notwithstanding anything in this Act, an aborigine may hunt any protected wildlife as specified in the Sixth Schedule for his sustenance or the sustenance of his family members.*

The list of wildlife is specified in the Sixth Schedule. They are wild pig, sambar deer, lesser mouse deer, pig-tailed macaque, silvered leaf monkey, dusky leaf monkey, Malayan porcupine, brushtailed porcupine, white breasted waterhen and emerald dove.

⁶⁵ *Ibid* s 51(2)-(3):

(2) Any protected wildlife hunted under subsection (1) shall not be sold or exchanged for food, monetary gains or any other thing. (3) Any aborigine who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding six months or to both.

⁶⁶ *Protection of Wildlife Act 1974* (Malaysia), s 52.

subject of resentment among the Orang Asli. Some suggest that the provision is 'too prescriptive' and 'restrictive'.⁶⁷ It does not take into account the situation of Orang Asli communities on the ground.⁶⁸

(b) Policy Statements and Influence of the International Principles

At the policy level relating to the administration and management of forests and timber, the rights and interests of the Orang Asli, as forest-dependent communities, are also recognized. The development of the policy and practices that have regard to the rights of the indigenous peoples are directly influenced by developments at the international level regulating forestry and environmental-related areas, both by the relevant public international bodies as well as private or non-state regimes.

In forestry-related matters, the Federal Government endorses the participation of local communities in forest management in two national policies: the National Forestry Policy⁶⁹ and the National Policy on Biodiversity 1998.⁷⁰ The latter also recognizes the rights of the local communities to utilize and benefit from the resources.⁷¹ Pursuant to this, the participation of the public, including the indigenous peoples, in decision making has been practised, acknowledging the need for greater multi-stakeholder participation for good forest governance. This opens an avenue for indigenous community leaders, through their cultural associations, to be involved in consultations as representatives of their own communities.⁷² The National Policy on Biodiversity was adopted following Malaysia's commitment to the Convention on Biological Diversity.⁷³

⁶⁷ Interview data: a lawyer representing the Orang Asli and the Director of the Center for Orang Asli Concerns.

⁶⁸ Some suggest that some items listed did not even used to be taken by the people. Interview data: Orang Asli representatives, a lawyer and a researcher.

⁶⁹ The policy was approved in 1978 and revised in 1992 by the National Forestry Council. FAO, 'Asia and the Pacific National Forestry Programmes: Malaysia' (Food and Agriculture Organisation, 2000) <<http://www.fao.org/docrep/003/x6900e/x6900e0h.htm>>, [13].

⁷⁰ MOSTE, 'National Policy on Biological Diversity' (Ministry of Science, Technology and Environment, Malaysia, 1998).

⁷¹ Ibid: Principle (vii):

The role of local communities in the conservation, management and utilisation of biological diversity must be recognised and their rightful share of benefits should be ensured'. In the Strategies for Effective Management of Biological Diversity, Strategy II requires: 'Enhance sustainable utilisation of the components of biological diversity. Action plan: Facilitate participation of local communities in traditional sustainable use of biological resources.

⁷² Ramy Bulan, 'Indigenous Peoples and the Right to Participate in Decision Making in Malaysia' (Paper presented at the International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making, Chiang Mai, 20-22 January 2010) <www2.ohchr.org/english/issues/indigenous/.../UniversityMalaya.doc>.

⁷³ Opened for signature 5 June 1992, (entered into force on 29 December 1993).

In addition, private forest regulation in the form of transnational law⁷⁴ or that of a non-state regime, has also led to greater recognition of Orang Asli rights in forests. Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest) (MC&I 2011)⁷⁵ require that recognition and respect be given to the legal and customary rights of the indigenous peoples⁷⁶ 'to own, use and manage their lands, territories and resources'.⁷⁷ The local communities 'shall maintain control, to the extent necessary to protect their rights or resources, over forest operations'.⁷⁸ The certification requires that the 'long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established'.⁷⁹ In terms of Orang Asli rights in forests, the laws, apart from the APA, to be complied with in forest management include the common law.⁸⁰ However, the requirement of 'clear evidence of long-term forest use rights to the land' in the form of permit, gazette, records and maps of customary land areas does not favour the traditional communities such as the Orang Asli. Following these principles, forest authorities are required to consult the Orang Asli in matters of their rights affected by timber extraction activities.⁸¹ The MC&I were based on criteria

⁷⁴ The term 'transnational law' is discussed above in Chapter 2.IV.A.2.

⁷⁵ The standard is used for assessing forest management practices at the forest management unit (FMU) level for the purpose of certification or the forest verification system. It has been adopted by the Malaysian Timber Certification Council (MTCC) and the Forest Stewardship Council (FSC): '*Malaysian Criteria and Indicators for Forest Management Certification (MC&I 2011)*'

(<[http://www.mtcc.com.my/documents_downloads/MC&I\(Natural%20Forest\)%2022%20September%202011.pdf](http://www.mtcc.com.my/documents_downloads/MC&I(Natural%20Forest)%2022%20September%202011.pdf)>. This standard supersedes the earlier standard: '*Malaysian Criteria and Indicators for Forest Management Certification (MC&I 2002)*' (<[http://www.mtcc.com.my/documents_downloads/Malaysian%20Criteria%20and%20Indicators%20for%20Forest%20Management%20Certification%20%5BMC&I\(2002\)%5D.pdf](http://www.mtcc.com.my/documents_downloads/Malaysian%20Criteria%20and%20Indicators%20for%20Forest%20Management%20Certification%20%5BMC&I(2002)%5D.pdf)> For the exercise of the audit process, issues and criticism, see, Adrian Wells, HC Thang and Chen HK, 'Multiple approaches to improving forest control in Malaysia' in David Brown et al (eds), *Legal Timber: Verification and Governance in the Forest Sector* (Overseas Development Institute, 2008) 187.

⁷⁶ The term 'indigenous peoples' in this standard is specifically defined to refer to 'Aborigines in Peninsular Malaysia, and Natives in Sabah and Sarawak'. See Malaysian Timber Certification Council (MTCC) and (FSC), above n 75 , 50.

⁷⁷ MC&I 2011 Principle 3.

⁷⁸ MC&I 2011 Principle 2, Criterion 2.2.

⁷⁹ MC&I 2011 Principle 2.

⁸⁰ MC&I 2011 Principle 1 Criterion 1.1.

⁸¹ Interview data: forestry officers (federal and Pahang state office). See also, 'Malaysian Timber Certification Scheme: Public Summary of Surveillance 2 Audit of Pahang Forest Management Unit under the Requirement of MC&I (2002)' (SGS (Malaysia) Sdn Bhd, 30 August 2012) <<http://www.sgs.my/~media/Local/Malaysia/Documents/Technical%20Documents/SGS%20Certificates/Forestry%20Certification/MY02274%20Pahang%20FD%202011%2011%20AD%2036-A%20Surv%2002%20-%20Public%20Summary%20-%20Final.pdf>>. The report reveals a case of the failure to consult and obtain free and informed consent from the Orang Asli affected before logging was conducted. (p 6). There was also inconsistency between the map of Orang Asli settlements and graveyard kept by the State Forestry Department with the map at state level (p 4).

proposed by the International Tropical Timber Organization (ITTO), an intergovernmental organisation of which Malaysia is a member.⁸²

Nevertheless, in contrast with this recognition of the rights of the Orang Asli, it is an explicit policy of the states to reduce the Orang Asli's dependence on the forests. With the aim of achieving developed nation status by 2020, the economic direction of the country is geared towards industrialization that results in increased urbanization. The official attitude is that forest dependence should be overcome by upgrading standards of living and moving to towns and cities. In effect, the rural population has become a minority and the prevailing paradigm sees urban migration as the solution to people's dependence on the forest, rather than safeguarding the rights of the people where they live.⁸³

(c) The Conflicts Related to Customary Access to Forest and Forestry-Related Provisions

(i) Customary Access to Forest Produce

There is a gap between the black letter of forest law and its practice in access to forests by the Orang Asli. The communities have been involved in the trading of forest produce for a long time.⁸⁴ This is generally done without an official permit as required by statute.⁸⁵ From the perspective of forest administrative officials, community members are considered to be labourers working for the traders who have the required permit.⁸⁶ The permit is put to tender and is normally issued to one person in an area to whom the communities sell their produce collected within the area. The common items collected

⁸² The former was ITTO Criteria for the Measurement of Sustainable Tropical Forest Management (1992). The later, MC&I2002 was revised upon the adoption of the new ITTO documents on Criteria and Indicators for Sustainable Management of Natural Tropical Forests and the Manual for the Application of Criteria and Indicators for Sustainable Management of Natural Tropical Forests (Part A – National Indicators and Part B – Forest Management Unit Indicators). The present standard, MC&I 2011, retained the same principles contained in its predecessor.

⁸³ Lim Teck Wyn, 'Critical Review of the Forest-related Regulatory Framework and Its Implementation in Malaysia' in *Critical Review of Selected Forest-related Regulatory Initiatives: Applying a Rights Perspective* (Institute for Global Environmental Strategies, 2011) 51, 60-1.

⁸⁴ It has been well recorded in the history that local people especially the Orang Asli, and Malays, have, for centuries, begun to be involved in the trading of products taken from the forested areas – 'many which functioned in practice as people's "backyard" or gardens': Nancy Lee Peluso and Peter Vandergeest, 'Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand' (2001) 60(3) *The Journal of Asian Studies* 761, 767. See also, Walter William Skeat and Charles Otto Blagden, *Pagan Races of the Malay Peninsula* (Frank Cass & Co Ltd, 1966); GB Cerruti, *My Friends the Savages* (Tipography Cooperative Comense, 1908).

⁸⁵ See discussion in 6.II.B.4.

⁸⁶ Yaacob, above n 51, 24.

for sale are non-timber forest products including agar wood, rattan, petai beans⁸⁷ and durian.

For some officials interviewed, this practice is leniency towards the Orang Asli under a discretion exercised in favour of the poor.⁸⁸ Other interviewees described the practice as the 'one eye closed' policy.⁸⁹ One interviewee, working in the community areas, indicated that there is an element of apprehension among the officials over enforcing the legislation against the communities.⁹⁰ Another suggested that close relationships with the forest people may also prevent officials who work away from other officials from strictly enforcing the law.⁹¹ Many officials met stated that generally officials would not take action if the Orang Asli were found to be selling small amounts without permits. If the amount is large, officials will normally give a warning. Prosecutions are not normally used in cases of non-timber forest produce but incidents involving the sale of wildlife protected under the WLCA⁹² are considered to be serious.⁹³

On the other hand, this law and practice contrasts with the perspectives of the communities. Their view, based on their customary practice, is discussed in Chapter 5.I. Briefly stated, under the customs of certain tribes, trees within a territory of a community can be accessed customarily by members of the community. But individual ownership of trees arises from inheritance or planting. Produce collected from the forest at large belongs to the person who worked to harvest it. This arises from the customary law that they believe is valid. They also observe laws which also regulate the manner of harvesting.

Therefore, for the forest people, it is unacceptable that people from outside their territory – the *gob* [stranger] – can lay down laws which interfere with their life. This was stated by many of the Orang Asli representatives during the interviews. They question the power that forestry officials have to grant permits to others to collect forest produce from their traditional areas.⁹⁴

⁸⁷ Its scientific name is *parkia speciosa*.

⁸⁸ Interview data: Senior forestry officer in enforcement department at federal level; forestry officer at Pahang state; Perhillitan officer.

⁸⁹ Interview data: public officers in a government department on wildlife protection.

⁹⁰ Interview data: a dentist working with the Orang Asli communities.

⁹¹ Interview data: public officers in a government department on wildlife protection.

⁹² *Wildlife Conservation Act 2010* (Malaysia).

⁹³ Interview data: a legal advisor at a land and minerals resource, public officers in a government department on wildlife protection, a public officer in the government Orang Asli Affairs Department.

⁹⁴ Interview data: Orang Asli representatives. See also the same account that the Lanoh people assert on their entitlement: Dallos, Csilla, *From Equality to Inequality: Social Change Among*

(ii) *Creation of Various Reserves and the Rights of the Orang Asli*

There are many statutes providing for the creation of reserves for various purposes. They include legislation relating to national parks,⁹⁵ wildlife reserves, Ramsar sites,⁹⁶ Convention on International Trade in Endangered Species (CITES) areas⁹⁷ and other conservation projects or purposes including water catchment,⁹⁸ and the Central Forest Spine.⁹⁹ Some of the protected areas are within permanent reserve forests created under forestry legislation and may overlap. The areas are established for ecosystems, as habitats for wildlife, water pools, and preservation of biodiversity, for carbon sinks and sequestration, recreation and tourism, and economic sources for the Orang Asli.

Although there is no express restriction on customary access by the communities in the relevant legislation, the actual practice affects their use of the forest.¹⁰⁰ From the official perspective, as represented by the officials met during the interviews, these people occupy the forest so long as allowed by the states. They can hunt and forage the forest resources for their own consumption but not for sale for cash income¹⁰¹ A recent case of Orang Asli groups who were issued order of eviction Endau-Rompin National Park provides evidence of this view.¹⁰² Absence of express acknowledgement in the relevant

Newly Sedentary Lanoh Hunter-gatherer Traders of Peninsular Malaysia (University of Toronto Press, 2011), 88.

⁹⁵ The largest and earliest National Park is Taman Negara National Park which combines three protected areas in three states, Pahang, Kelantan and Terengganu. It accounts for 58% of the total protected areas in the peninsula. Other protected areas are less than 1000 km² and are not viable to support viable populations of most large mammals including tigers. Each of the protected areas is established and managed under different legislation of the three respective states: *Taman Negara Enactment (Pahang) No. 2, 1939* [En. 2 1938], *Taman Negara Enactment (Kelantan) No. 14, 1938* [En. 14 of 1938] and *Taman Negara Enactment (Terengganu) No. 6 1939*.

⁹⁶ Created under the Convention on Wetlands of International Importance especially as Waterfowl Habitat. Ramsar (Iran), 2 February 1971. UN Treaty Series No. 14583 (came into force for Malaysia 10 March 1995).

⁹⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature 3 March 1973 (came into force 1 July 1975). Malaysia acceded in Oct 1977 and ratified in 1978.

⁹⁸ In 2005, there were 0.85 million ha in Peninsular Malaysia declared as watershed areas.

⁹⁹ Central Forest Spine (CFS) is an area of 4.3 million ha in 2005 stretching from north to south in the peninsula which includes forests, lakes, highlands and wetlands to serve as a reservoir for biological diversity, catchment areas and environment for nature and ecotourism.

¹⁰⁰ Human Rights Commission of Malaysia (Suhakam), above n 60, 145: on protests and problems encountered by the Orang Asli upon creation of various protected areas involving their customary lands.

¹⁰¹ Interview data: Two public officers at government Orang Asli Affairs Department; officers at forestry department.

¹⁰² A group of 118 Jakun residents of Kampung Orang Asli Peta in the Endau-Rompin National Park were ordered by Johor State Authority to vacate their customary land on 17 January 2012. An application for judicial review of the eviction order was quashed by the High Court. The case is now pending appeal: 'Orang Asli ordered to vacate land get consent stay', *Sunday Daily* (online), 14 August 2012 <<http://www.thesundaily.my/node/111762>>.

legislation of the indigenous peoples' rights permits state governments to act in disregard of these rights, especially in granting logging concessions; licences and permits for hunting and collection of forest produce, as well as tourism activities.¹⁰³

(iii) Forest Clearance for Agriculture

Another issue involving the Orang Asli from a forestry administrative perspective is the clearance of forests for agriculture. Traditionally, the communities are known to carry out forest clearance for small-scale swidden cultivation of hill rice.¹⁰⁴ There are also records before independence of the Orang Asli being involved in planting rubber within forests.¹⁰⁵ It is acknowledged in the APA that rubber planting on state land is practised by the Orang Asli. There is no restriction on this under the law. Under s 11, on alienation of state land, the Orang Asli who have rubber trees on the land are entitled to compensation from the state authorities.¹⁰⁶

With the rise of prices for palm oil, there is also growing interest among the Orang Asli in the cultivation of oil palms. From the perspective of the forestry administration, the Orang Asli's growing agriculture within forests is a threat to forest conservation, specifically within state forest land. Forestry officers interviewed revealed that there are cases of Orang Asli plantations being destroyed by forestry authorities.¹⁰⁷ They are classified as illegal access to, and encroachment on, state land. Other offences involving the Orang Asli encountered by forestry authorities are damaging trees planted by forest authorities and preventing forest authorities from entering the Orang Asli areas.¹⁰⁸

¹⁰³ Human Rights Commission of Malaysia (Suhakam), above n 60; Robert M Hardaway, Karen D Dacres and Judy Swearingen, 'Tropical Forest Conservation Legislation and Policy: A Global Perspective' (1994) 15 *Whittier Law Review* 919, 937-8; S Sothi Rachagan, 'Sustainable Forest Management in Malaysia – Guidelines for Conflict Resolution' (Institute for Global Environmental Strategies 1998) <<http://enviroscope.iges.or.jp/modules/envirolib/upload/1504/attach/ir98-2-9.pdf>>, 82-4; Yogeswaran Subramaniam, 'Common Law Native Title in Malaysia: Selected Issues for Forest Stakeholders' (2010) 1 *Malayan Law Journal* xv.

¹⁰⁴ Hood Mohd Salleh and Danielle Seguin, 'Malaysia' in Yogesh Atal and PL Bennagen (eds), *Swidden Cultivation in Asia* (1983) vol 1, 141.

¹⁰⁵ See, eg, Radcliffe, David, 'The Peopling of Ulu Langat' (1969) 8 *Indonesia* 155. In an official document, it is also recorded that in Pahang the Orang Asli planted rubber in a forest area and application was made by the Orang Asli group for a grant of title for the land. File 825/1939: Excision of a portion of land which has been planted with rubber by Sakais from the Malay Reservation in Mukim Luit, Pahang (National Archive Malaysia ANM – 1957/0534944).

¹⁰⁶ *Aboriginal Peoples Act 1954* s 11(1):

Where an aboriginal community establishes a claim to fruit or rubber trees on any State land which is alienated, granted, leased for any purpose, [o]ccupied temporarily under licence or otherwise disposed of, then such compensation shall be paid to that aboriginal community as shall appear to the State Authority to be just.

¹⁰⁷ Interview data: forestry officer.

¹⁰⁸ Interview data: a senior forestry enforcement officer, a state forestry officer and officers in wildlife departments at federal and state level.

Furthermore, the forest administrators also suggest that the Orang Asli are now more assertive in their claims to their lands.¹⁰⁹

Asked about the reasons for the problems, a senior forestry enforcement officer admitted that the main factor is the insecurity of the Orang Asli as they do not have ownership over their ancestral land. He also suggests that the Orang Asli may have certain prejudices about, or dissatisfaction over, the use of land by other communities. Clearing of land around Orang Asli areas by other communities is widespread but the Orang Asli themselves are prevented by the officials from doing the same.¹¹⁰

An Orang Asli activist observed that the problem is the law itself which treats the Orang Asli as a single group.¹¹¹ Whereas Orang Asli communities have diverse practices and needs, the laws, specifically on forestry and wildlife, treat the communities as one group with a common need to access forests as a single territory under the state authority. The practice of the people on the ground and their perspectives towards the territory, land and resources are far more complex than the single institution imagined by the state authority. Similar criticism is made by Tuck-Po. She observes that social policies applied to the Orang Asli are based on incomplete information or what she labelled as 'wilful ignorance of established truths'. She observes that policies are made and implemented without sensitivity to the diverse ways of life of disparate Orang Asli communities. Town-based Temuans in Selangor, for instance, have little socio-cultural similarities to the forest-dwelling Batek in Taman Negara.¹¹² Both the activist and Tuck-Po argue for the acknowledgement of this diversity and the different needs of different peoples in policy formulation.

(iv) Implementation of Policies Confined to Land Formally Gazetted

As mentioned in section 6.I.B.3.(b), the resource rights of indigenous peoples including the Orang Asli in forests are recognized. In practice, as revealed by officials interviewed, the land rights recognized under the guidelines, such as the MC&I, are confined to the areas formally gazetted.¹¹³ On the other hand, most of the Orang Asli lands are not gazetted as such.¹¹⁴ As a result, the forest areas which the communities access for

¹⁰⁹ Interview data: information in the paragraph is given by forestry officials at federal and state levels; public officer dealing with land and resources at federal level; and public officers dealing with Orang Asli Affairs.

¹¹⁰ Interview data: a senior forestry enforcement officer.

¹¹¹ Interview data: Director of Center for Orang Asli Concerns.

¹¹² Tuck-Po, above n 51, 39-40.

¹¹³ Interview data: research officer at a forest research institute; officer at a timber institute.

¹¹⁴ See the discussion in 6.II.B.2.(a).

resources are not addressed. The formality limits the potential of the people to secure their interests. Without proper mechanisms to consult, investigate or demarcate the land possessed by the indigenous peoples, the present statutory and policy recognition is limited in its effect.

(v) Participation in Decision Making and Its Implementation

Although the rights of the indigenous peoples to participate in decision making are recognized at a policy level, there are many problems in its implementation. For instance, in the process of formulating the national timber certification guidelines, one of the earliest cases of multi-stakeholder consultations on forest certification, the reported problems include the lack of wide and continuing consultations with full and effective participation. The indigenous communities have criticised the certification system itself for failing to recognize and protect indigenous customary rights in forests that they traditionally occupied or used. It is reported that several cases have been brought to the national courts following grant of timber certification without prior consultation of the communities affected or payment of compensation.¹¹⁵

Another instance that provides a forum for the indigenous groups to voice their concern on indigenous land rights is the negotiation process for FLEGT-VPAs (Forest Law Enforcement Governance and Trade – Voluntary Partnership Agreement) resulting from an agreement between the European Union (EU) and Malaysia. It has been reported that indigenous groups and representatives were disappointed that, despite lengthy consultations, their interpretation of relevant laws and their views on certain criteria were not taken into account in the final Timber Legality Assurance System document. The government's restricted interpretation of customary laws as meaning only 'codified customary laws' resulted in native rights based purely on narrow provisions of the forestry laws and the exclusion of rights based on customary laws and the provisions of the Land Code.¹¹⁶

In cases involving forest conversion or the process of earmarking forest reserve, the opportunity for forest-dependent people to assert and defend their rights is also

¹¹⁵ Rodolfo Stavenhagen, 'A Report on the Human Rights Situation of Indigenous Peoples in Asia (2007)' in *Peasants, Culture and Indigenous Peoples*, SpringerBriefs on Pioneers in Science and Practice (Springer Berlin Heidelberg, 2013) 95, 100.

¹¹⁶ Ramy Bulan, 'Malaysia-EU FLEGT-VPA Stakeholder Consultations and Native Customary Land Rights in Malaysia' (Paper presented at the Illegal Logging Update and Stakeholder Consultation Number 13, Chatham House, 19-20 January 2009) <http://www.illegal_logging.info/item_single.php?it_id>.

compromised by a general lack of free, prior and informed consent prior to extinguishment.

There was also extensive criticism by many interviewees that the participation of the Orang Asli communities, if done at all, was on an ad hoc basis.¹¹⁷ In many cases, the consultation is a mechanism for the government officials to 'inform the affected communities' of approved projects. Effective consultation and public participation require that the affected communities are heard prior to decisions being made and are included in the planning. Other problems raised include the provision of inadequate information and the arbitrary time constraints and pressures imposed by states on the communities in their decision-making processes. In many cases, the negative impacts of projects have not been disclosed to them.¹¹⁸

The enactment of the WLCA 2010 that further restricts the customary access of the Orang Asli was also alleged to have been drafted without participation of the communities. This was pointed out by many Orang Asli interviewees.¹¹⁹

II THE COMMON LAW RIGHTS OF THE ORANG ASLI

A Judicial Recognition

The customary land rights of the Orang Asli have received judicial recognition in *Adong bin Kuwau v Kerajaan Negeri Johor*¹²⁰ and *Sagong Tasi v Kerajaan Negeri Selangor*.¹²¹ Both cases involved the claims by Orang Asli communities for declarations that the lands which were acquired by the state authorities were their customary land and for orders for compensation.

In *Adong*,¹²² the lands in issue were forest areas which the communities accessed for daily resources. On the other hand the land acquired in *Sagong*¹²³ comprised both areas that were used for settlement and the areas that were used to access for foraging. Part of the land was an Aboriginal Reserve under the Aboriginal Peoples Act 1954. The courts

¹¹⁷ Interview data: Orang Asli representatives, an Orang Asli lawyer, an activist and researchers.

¹¹⁸ See, eg, Marcus Colchester and Maurizio Farhan Ferrari, *Making FPIC Work: Challenges and Prospects for Indigenous Peoples* (Forest Peoples Programme, 2007), 17: an account about the practice of 'consultation' of the Orang Asli communities for the construction of the Kelau Dam project as disclosed by the Center for Orang Asli Concerns through a series of video and audio recordings.

¹¹⁹ Interview data: Orang Asli representatives.

¹²⁰ *Adong (No 1)* [1997] 1 MLJ 418; *Adong (No 2)* [1998] 2 MLJ 158.

¹²¹ *Sagong (No 1)* [2002] 2 MLJ 591.

¹²² *Adong (No 1)* [1997] 1 MLJ 418; *Adong (No 2)* [1998] 2 MLJ 158.

¹²³ *Sagong (No 1)* [2002] 2 MLJ 591. The decision was upheld by the Court of Appeal in *Sagong (No 1)* [2005] 6 MLJ 289.

in both cases affirmed that the Orang Asli communities in the areas in dispute have customary rights over the lands and ordered compensation accordingly.

The ruling in *Adong* led to the development of the common law principle of recognition of native title not only of the aboriginal peoples in the peninsula but also the natives in East Malaysia.¹²⁴ In each region, the application of the common law principle is supported by different statutory provisions. In relation to the aborigines, the court ruling is supported by: the common law principle of respect for the right of the inhabitants that acknowledges the use and occupation of land by indigenous peoples; the statutory right provided under the APA; and the constitutional provisions on the special position of the Orang Asli.

In a recent judicial review application by the Semelai in Pahang, *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang ('Mohamad Nohing')*,¹²⁵ the High Court affirmed the principle that recognizes the common law rights over customary land. The court found that the Semelai have rights over their customary land. The creation of Malay Reserve Land (MRL) and conduct of a project by Felcra on the customary land of the Semelais was found to be illegal being an encroachment over their land. The Court ordered that the MRL be de-gazetted and the land used by Felcra be vacated.

The basis of customary title in the judicial precedents is grounded in the laws and customs of the communities,¹²⁶ similar to the Australian common law position.¹²⁷ It follows that the indigenous law determines the nature and scope of the land rights and interests of the respective communities.¹²⁸ The rights and interests of state authorities are subject to these pre-existing rights and interests.

¹²⁴ *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677 ('*Madeli*'); *Bato' Bagi* (2011) 6 MLJ 297. In *Amit bin Salleh v The Superintendent, Land & Survey Department Bintulu* [2005] 7 MLJ 10, the High Court noted that the same principle on the common law land rights of indigenous peoples applies to the Orang Asli and the natives of Sarawak.

¹²⁵ [2013] MLJU 291.

¹²⁶ *Adong (No 2)* [1998] 2 MLJ 158; *Nor Anak Nyawai (No 1)* [2001] 6 MLJ 241; *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai* [2006] 1 MLJ 256 ('*Nor Anak Nyawai (No 2)*'); *Sagong (No 2)* [2005] 6 MLJ 289.

¹²⁷ The Australian common law recognition of the native title is based on the established principles of British colonial and international law, that when the Crown acquired sovereignty over a territory the land rights of the local people under their own systems of law continued, and became enforceable in common law courts, through the doctrine of continuity. See, Kent McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 257, 260.

¹²⁸ In the matter of content of the aboriginal customary title, Mokhtar Sidin J in *Adong (No 1)* [1997] 1 MLJ 418 followed the proposition stated by Brennan J in *Mabo (No 2)* (1992) 175 CLR 1, [64]. In relation to the title of the Meriam people in Murray Islands to their land, Brennan said: 'Native

However, although the Malaysian common law substantially follows the principle laid down in Australian jurisprudence, the nature of the native title in Malaysia varies significantly.¹²⁹ In matters of establishing the connection of the communities to the land, the Malaysian judicial precedents reflect the Canadian position¹³⁰ which accepts that continuous occupation of land since time immemorial may be sufficient.¹³¹ In *Sagong (No 2)*,¹³² changes in traditional law and custom do not affect the connection of the communities to the land. Occupation itself retains the connection of the communities to the land.¹³³ In matters of evidentiary proof, the court held that the oral history of the aboriginal community relating to their practices, custom and traditions and on their relationship with the land is admissible under the *Evidence Act*.¹³⁴ Therefore, the Malaysian courts take a more relaxed approach towards proof of customary rights compared to their counterparts in Australia and Canada.¹³⁵ They are more receptive of oral history and show a greater willingness to accept that even considerable cultural change might not abridge the traditional connection to the land. McHugh suggests that this may be because the Malaysian judges are more accustomed to legal pluralism.¹³⁶ In

title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.'

¹²⁹ Amy Dennison, 'Evolving Conceptions of Native Title in Malaysia and Australia – A Cross Nation Comparison' (2007) 11(1) *Australian Indigenous Law Review*, 79.

¹³⁰ *Calder v Attorney-General of British Columbia* [1973] SCR 313, cited in *Adong (No 1)* [1997] 1 MLJ 418 and *Sagong (No 1)* [2002] 2 MLJ 591.

¹³¹ The High Court in *Adong (No 1)* [1997] 1 MLJ 418, endorsed by the Court of Appeal: 'continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial' gives rise to the common law right to occupy and to access the benefit of the land. There is no issue arising as to whether the occupation of land began prior to the establishment of the present state. In *Sagong (No 1)* [2002] 2 MLJ 591, [39] although the Temuan established the fact that they occupied the land prior to the establishment of the Selangor Sultanate in 1776, continued occupation of land in accordance with their customs and tradition appears to be the main consideration.

¹³² [2005] 6 MLJ 289.

¹³³ In *Sagong (No 1)* [2002] 2 MLJ 591, the court held that oral history of the aboriginal community relating to their practices, custom and traditions and on their relationship with the land is admissible under the *Evidence Act*. In *Adong (No 1)* [1997] 1 MLJ 418, 'continuous and unbroken occupation and enjoyment' give rise to the rights. In *Nor Anak Nyawai (No 1)* [2001] 6 MLJ 241, continuation of the practice of their custom and exercise of the customary right on the land is important to prove the connection. At the same time, Chin J also held that occupation by itself may also suffice. *Sagong (No 1)* [2005] 6 MLJ 289. See also *Madeli* [2008] 2 MLJ 677.

¹³⁴ *Sagong (No 1)* [2002] 2 MLJ 591, 607. The following facts do not impact on their aboriginal identity: that they are no longer dependent on the forest for livelihood; cultivation of non-traditional crops such as palm oil; speaking other languages; embracing other religions; marrying outsiders; and, working outside the community areas prior or after the acquisition. This is also supported by s 3(2), *Aboriginal Peoples Act 1954*. It provides that conversion to another religion did not affect Orang Asli ethnic identity. Neither did election of a leader to the committee established by the state constitute an abandonment of *adat* (custom).

¹³⁵ McHugh, PG, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011), 193.

¹³⁶ *Ibid*, 193.

contrast, Australian law, post *Mabo (No 2)*, requires strict proof of indigenous laws and customs supporting claimed land rights at the time of Crown acquisition of sovereignty, as well as proof that these laws and customs have been maintained up to the present day.¹³⁷ The content of the indigenous peoples' rights are defined by those laws and customs.¹³⁸ This has led to a considerable difficulty for Australian indigenous peoples in proving their traditional laws and customs.¹³⁹

On the other hand, the Australian courts have also been responsive to this ignoring the implicit hearsay problem at common law.¹⁴⁰ It is considered that the common law exception to the hearsay rule relating to public or general rights does not apply as native title involves private rights. The uniform *Evidence Act*, used in a number of jurisdictions, has been amended to provide for an express exception to the hearsay rule for representations about the traditional laws and customs of the indigenous peoples.¹⁴¹

It is already entrenched in Malaysian law that the rights of the Orang Asli to their land and resources are enforceable legal rights. This position refutes the suggestion by some scholars that the Malaysian courts' decisions do not specifically address the land rights of the Orang Asli but are only limited to the amount of compensation.¹⁴²

B The Nature of the Rights Recognized

The following customary rights of the natives or aborigines have been recognized in Malaysian cases:

¹³⁷ McNeil, above n 127, 265 citing *Fejo v Northern Territory* (1998) 195 CLR 96; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1 ('Ward'); *Members of the Yorta Yorta Community v Victoria* (2002) 214 CLR 422 ('Yorta Yorta').

¹³⁸ *Ibid*, 270 citing *Ward* (2002) 213 CLR 1; *Yorta Yorta* (2002) 214 CLR 422. The indigenous peoples do not have any rights to minerals if they did not have laws and customs in relation to those resources.

¹³⁹ See eg, Australian Law Reform Commission, 'Uniform Evidence Law (ALRC Report 102): The ALRC's 1986 report on traditional law and customs' (Commonwealth of Australia, New South Wales Law Reform Commission, Victorian Law Reform Commission, 13 February 2006) <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC102.pdf>>; Human Rights and Equal Opportunity Commission, 'Submission of the Human Rights and Equal Opportunity Commission (HREOC) to the Senate Legal and Constitutional Affairs Committee Inquiry into the Evidence Amendment Bill 2008' (Human Rights and Equal Opportunity Commission, 30 July 2008) <<http://www.humanrights.gov.au/inquiry-evidence-amendment-bill-2008#6>>.

¹⁴⁰ *Gumana v Northern Territory of Australia* (2005) 141 FCR 457. See also Peter Gray, 'Do the Walls Have Ears?: Indigenous Title and Courts in Australia' (2000) 5(1) *Australian Indigenous Law Reporter* 1.

¹⁴¹ See, eg, *Evidence Act 2008* (Victoria) s 72; *Evidence Act 1995* (New South Wales) s 72.

¹⁴² Rohaida Nordin, 'Malaysian Perspective on Human Rights' (2011) *Jurnal Undang-Undang* 17, 26. See also, Sharom, above n 34, 60.

- (a) *Right to live on the land and to the resources*: *Adong* recognizes the aborigines' rights in the areas on which they traditionally foraged. Compensation was given for loss of livelihood, hunting and foraging but not for the land.¹⁴³ In *Mohamad Nohing*,¹⁴⁴ the rights include the rights to exclusively occupy and use the land and its resources. The right to hunt and forage for resources in the forest continue although the people are settled in a permanent place with modern amenities such as schools and hospitals.¹⁴⁵
- (b) *Proprietary interests in land*: *Sagong (No 2)*¹⁴⁶ affirmed the customary land of the Temuan tribal group as a proprietary right with a full beneficial interest in, and to, the land. The lands are inheritable, that is, capable of being passed down from generation to generation. Cases have been confined to customary land of the indigenous communities. In land given to the Orang Asli on resettlement, in obiter, Azman J in *Pedik bin Busu v Yang Dipertua Majlis Daerah Gua Musang ('Pedik Busu')*¹⁴⁷ suggested that the Orang Asli own the land that is given to them by the government through the Resettlement Scheme, although they were yet to be given title.
- (c) *Customary rights to areas accessed for resources*: Formerly, there had been a tendency to restrict the extent of the rights to settlement areas only. In *Sagong (No 2)*, the Court of Appeal limited the rights of the Orang Asli to areas actually settled and not to the land on which they customarily foraged.¹⁴⁸ There was no justification given for the restriction. In *Nor Anak Nyawai (No 2)*,¹⁴⁹ the Court of Appeal reversed the High Court ruling that the natives had a right to the disputed areas used for hunting, fishing and collection of forest produce within the

¹⁴³ [1997] 1 MLJ 418: The common law right is the right 'to live on their land as their forefathers had lived' and inheritable to the future generations. This includes, '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'.

¹⁴⁴ [2013] MLJU 291.

¹⁴⁵ *Mohamad Nohing* [2013] MLJU 291.

¹⁴⁶ [2005] 6 MLJ 289. The Temuan in Selangor sought compensation for the loss of areas acquired for construction of a highway. Part of the land was gazetted under the *Aboriginal Peoples Act 1954*. The other part not under gazette was claimed by the community as customary land.

¹⁴⁷ [2010] 5 MLJ 849, [13].

¹⁴⁸ *Sagong (No 1)* [2002] 2 MLJ 591, [40]: Mohd Noor Ahmad J states

I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land. However, *this conclusion is limited only to the area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition.*

¹⁴⁹ [2006] 1 MLJ 256, [28].

community area [*pemakai menoa*].¹⁵⁰ Access to *pemakai menoa* for resources was recognized by the court as part of the customary system of the natives. However, in determining whether the community has rights over the *pemakai menoa*, the court ruled that there was insufficient evidence to establish continuous occupation. The court also referred to *Sagong (No 1)* which restricted the land rights of the aborigines to occupation by settlement and by cultivation. The pragmatic reasons behind this are revealed by Hashim JCA:

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.¹⁵¹

This view has been criticised as failing to fully appreciate the customary land system. The courts accept the principles that the customary rights are dependent on the custom and practice of the natives but they refuse to give full effect to them.¹⁵²

Recent decisions have reversed this position. In *Mohamad Nohing*,¹⁵³ the High Court held that the customary land of the Semelai includes surrounding areas that they use to forage for resources. In *Director of Forest, Sarawak v TR Sandhak Tabau*,¹⁵⁴ the Court of Appeal held that the native customary rights include *pemakai menoa*, reversing the position in *Nor anak Nyawai*. This position is also affirmed in recent decisions.¹⁵⁵ It is not clear whether the rights to these lands are exclusive.

- (d) *Alienability: exchange and transfer: Adong (No 1)* held that the rights in land are limited in the sense that the land is inalienable. Mokhtar Sidin J stated that the

¹⁵⁰ *Pemakai Menoa* (also spelt as *Menua*) is an area of land held by a district longhouse or village community, and includes farms, garden, fruit groves, cemetery, water and forest within a defined boundary [*garis menua*]. *Pemakai menoa* also includes *temuda* [cultivated land that have been left to fallow], *tembawai* [old longhouse sites] and *pulau* [patches of virgin forest that have left uncultivated to provide the community with forest resources for domestic use]. In other words, *pemakai menoa* is a geographical extent of the territory of each longhouse: *Agi ak Bungkong v Ladang Sawit Bintulu Sdn Bhd* [2010] 4 MLJ 204, [11].

¹⁵¹ *Nor Anak Nyawai (No 2)* [2006] 1 MLJ 256, [28].

¹⁵² Bulan, Ramy and Amy Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak* (Suhakam (Human Rights Commission of Malaysia), 2009). See also, Subramaniam, above n 102.

¹⁵³ *Mohamad Nohing* [2013] MLJU 291.

¹⁵⁴ *Director of Forest, Sarawak v TR Sandhak Tabau* (Civil Appeal No Q-01-463-11) Court of Appeal (Unreported).

¹⁵⁵ *Luking anak Uding v Superintendent of Lands and Surveys of Kota Samarahan Division* High Court Suit No. 22-249-98-III(I) & *TR Nyutan ak Jami v Lembaga Pembangunan Dan Lindungan Tanah* (Court of Appeal, Date of decision 26 September 2013) (Unreported).

rights of the aborigines do not include 'the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein'.¹⁵⁶ In cases involving native customary land in Sabah and Sarawak, judges differed on matters of land disposition and acquisition. In some cases, it was held that native customary rights (NCR) could not be acquired or transferred by way of sale and purchase or for value even within the community themselves,¹⁵⁷ 'as this could not have formed part of their customary practices'.¹⁵⁸ Others suggested that transfer can only be made in accordance with customary law and within the same community.¹⁵⁹ This principle was rejected by David Wong J in *Mohamad Rambli bin Kawi v Superintendent of Lands Kuching* ('*Mohamad Rambli*')¹⁶⁰ as discriminatory as other non-natives have no impediments to the disposition of their land. He held that native customary land rights could be exchanged for consideration as long as this was not inconsistent with customary law. He also asserted that the issue of whether natives in Sarawak have the right of disposition of NCR in land must be considered in the context of their customs and traditions together with the *Federal Constitution* which guarantees the special position of the natives. The custom of the Malay communities in the case allows disposition of land with NCR among themselves.¹⁶¹

This legal position is different from other common law jurisdictions. The nature of native title in these jurisdictions is inalienable and communal (Chapter 8.I). The Royal Proclamation of 1763 specified that the king's Indian allies could only surrender title in a public ceremony to the king and not sell it to the king's subjects. Canadian law requires a treaty to cede title to the Crown. Similarly in New Zealand, the 1840 Treaty of Waitangi affirmed the Crown's right of pre-emption of Māori lands in New Zealand. In Australian common law, the native title attaches as a clog on the Crown's radical, root or residual title and so it does not derive from the Crown like all other titles to land. It also can only be transferred by surrender to the Crown.¹⁶²

¹⁵⁶ *Adong (No 1)* [1997] 1 MLJ 418, 430.

¹⁵⁷ *Chelingga ak Asuh @ Asu (f) v Wong Sew Yun* [2009] 7 MLJ 84 ('*Chelingga Asuh*'); *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Divisions* [2008] 4 MLJ 415 ('*Bisi Jinggot (No 2)*'); *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Divisions* (Civil Appeal No. 01(f)-11-05/2012(Q)) (Federal Court) Judgment date: 11 July 2013 (Unreported) ('*Bisi Jinggot (No 1)*').

¹⁵⁸ Hamid Sultan JC in *Chelingga Asuh* [2009] 7 MLJ, [10].

¹⁵⁹ Hamit Matusin in *Bisi Jinggot (No 1)* [2008] 4 MLJ 415 .

¹⁶⁰ [2010] 8 MLJ 441, 43.

¹⁶¹ *Ibid*, 37.

¹⁶² See below, Chapter 8.I.A.

The concept of inalienability has a jurisprudential basis which is connected to the nature of the interest in land. As the land is owned by a community, there is no single individual or group of individuals that has the right to dispose of the land. McNeil suggests that the Aboriginal title has jurisdictional dimensions that cannot be transferred to private persons, and only another government can acquire the title.¹⁶³ Apart from this issue, from a practical point of view, alienability of land may protect a community as many have lost community land as a result of the formalization or individualization of communal title which has allowed for alienation.¹⁶⁴

- (e) *Commercial use of resources*: Mokhtar Sidin JCA in *Adong (No 1)* held that similar to the land which is inalienable, the resources or produce of the land could not be dealt with commercially. He therefore treated the resources or produce of the land as similar to the rights in land. The custom of the community may not be the basis for the finding as it is well established in many anthropological studies that the Orang Asli communities have a long history of trading in forest produce.¹⁶⁵ To rule that the produce of the land could not be sold fails to take into account their practices and customs.
- (f) *Right to compensation on acquisition*: The courts have also held that customary land may be acquired by state authorities subject to payment of compensation.¹⁶⁶ In both *Sagong* and *Adong Kuwau*, compensation was granted as the land acquisition infringed proprietary rights. Specifically, in *Sagong No 1*, the compensation was ordered for the loss of the land at market values based on the *Land Acquisition Act 1960*. On the contrary,

¹⁶³ McNeil, above n 267.

¹⁶⁴ See, eg, RRI, *What Rights? A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights* (Rights and Resources Institution, 2012), 19-20.

¹⁶⁵ See eg, Lim Hin Fui, 'Aboriginal Communities and the International Trade in Non-Timber Forest Products: The Case of Peninsular Malaysia' in John Dargavel and Richard P Tucker (eds), *Changing Pacific Forests: Historical Perspectives on the Forest Economy of the Pacific Basin* (Forest History Society, 1992) 77; MN Tachimoto, *The Orang Hulu. A Report on Malaysian Orang Asli in the 1960s* (Center for Orang Asli Concerns, 2001).

¹⁶⁶ *Madeli* [2008] 2 MLJ 677, [16] citing Lord Denning sitting in the Privy Council in *Oyekan v Adele* [1957] 2 All ER 785 (Nigeria):

Laws enabling compulsory acquisition of land for public purpose can be made subject to award of proper compensation to every one of the inhabitants who by native law have an interest in it and 'the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.

This follows: *Amodu Tijani v Southern Nigeria (Secretary)* (3) [1921] 2 AC 399; *Sakariyawo Oshodi v Moriamo Dakolo* (4) [1930 AC 667].

in *Adong*, the compensation was ordered for 'loss of use of what is above the land' as that was the source of livelihood which the court held to be proprietary rights under Art 13 of the *Federal Constitution*.¹⁶⁷

Many have been critical of the common law that equated Orang Asli title with private and registered title to be compensated by its market value.¹⁶⁸ Cheah Wui Ling felt that it fails to accord adequate consideration to Orang Asli interests and to recognize the various spiritual, religious and communal dimensions of Orang Asli land. It also fails to consider the impact of the land's loss on the lives of the people.¹⁴ It conflicts with the right to equality protected by the *Federal Constitution* and international law that requires states to protect and give effect to the various rights in Orang Asli land.¹⁶⁹ Ramy also contended, on the basis of *Adong*, that the courts do have power to make orders beyond the 'straitjacket of the law' and to find more appropriate remedies. Compensation orders based on the infringement of property rights detracted from the protection of livelihood that the court established in the judgment. She raised a question of 'whether it is right to deprive a person of life, and then promptly to equate it with a proprietary right to be compensated by payment of money'. Both Wui Ling and Ramy proposed that certain substantive and procedural safeguards must be imposed on administrative actions that affect Orang Asli rights to land and livelihood to achieve both procedural and substantive fairness. This finds a basis in a 5(1) and a 8(1) of the *Federal Constitution* which respectively protect the right to life and livelihood and to equality.¹⁷⁰

Richard Malanjum FCJ in *Bato' Bagi*¹⁷¹ also raised doubts about the law in relation to payment of compensation under Art 13 of the *Federal Constitution* on extinguishment of title by the states. He points out that there is no principle in law

¹⁶⁷ The courts listed several interests that had been infringed by the land acquisition: heritage land, forests' produce, future living and freedom of inhabitation or movement protected under Art 9(2) of the *Federal Constitution*. Deprivation of these rights without compensation was held to be unlawful. For commentary on the assessment of compensation by the court in *Adong*, see Stephen Gray, 'Skeletal Principles in Malaysia's Common Law Cupboard: The Future of Indigenous Native Title in Malaysian Common Law' (2002) *LAWASIA Journal* 99, 115.

¹⁶⁸ See, eg, *ibid*; Cheah Wui Ling, 'Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestone or False Start?' (2004) 2 *Law, Social Justice and Global Development*; Ramy Bulan, 'Native Title as a Proprietary Right under the Constitution in Peninsula Malaysia: A Step in the Right Direction?' (2001) 9(1) *Asia Pacific Law Review* 83.

¹⁶⁹ Ling, above n 53, 1.

¹⁷⁰ Bulan, above n 168, 92-5; Wui Ling, above n 53, 13-14.

¹⁷¹ *Bato' Bagi* (2011) 6 MLJ 297.

that extinguishment is on the same footing as acquisition. He argued that extinguishment may not be intended by the legislation.¹⁷² He suggested that:

In considering the quantum of compensation, the relevant authority should not attempt to evaluate native customary rights purely from [a] monetary aspect. All relevant factors must be taken into account such as the natives belong to the land and are part and parcel of it instead of being the owners, their total dependency on the land and its surroundings, and how their daily livelihood depends on the land. These are factual issues. And most importantly, the amount of compensation must be reflective of the long term effect which the extinguishment is going to inflict upon the natives.¹⁷³

In my view, the compensation should not be merely adequate. It should also be sufficient and reasonable based on a long term scale.¹⁷⁴

C The Common Law vis-à-vis the Statutory Provisions

This section analyses the impact of forestry-related legislation on the common law rights of the Orang Asli including legislation providing restrictions on the use of forests and creating reserves. Common law recognition of customary rights may conflict with the legislation. If the Orang Asli have customary rights to forest land and resources, what is the effect of the forest-related legislation and executive actions on those rights? Does the legislation have the effect of extinguishing or restricting them? Equally, in what way is the power of a state to deal with the forest and natural resources impacted by the common law?

1 The Common Law Principle of Extinguishment

Common law recognition does not affect the state's power to extinguish the existing rights that were created prior to the change of sovereignty or law. Native title can be extinguished by clear and plain legislation or by an executive act authorised by such legislation, but compensation should be paid. This is an accepted principle in the Malaysian common law following the Australian position enunciated in *Mabo (No 2)*.¹⁷⁵ The principle is also upheld in leading cases in New Zealand, Canada and the United

¹⁷² He states

With due respect, I am of the view that it might very well be a misdirection made by the courts previously relying on art 13(2) of the FC to assert that adequate compensation must be paid in extinguishment cases. The article stipulates that no law shall provide for the compulsory acquisition or use of property without adequate compensation. The instant appeals involve extinguishment of native customary rights. There is no principle in law which states that extinguishment is on equal footing as acquisition. This, in my view gives rise to the issue of whether legislation intended at all that native customary rights could be extinguished in the first place! Perhaps this point requires thorough deliberations when the need arises. In any event perhaps the relevant factors relating to the amount of compensation payable could be addressed before the arbitrator ([121], [122]).

¹⁷³ Ibid, [123].

¹⁷⁴ Ibid, [124].

¹⁷⁵ *Sagong (No 2)* [2005] 6 MLJ 289; *Madeli* [2008] 2 MLJ 677; citing *Mabo (No 2)* (1992) 175 ALR 1, 3.

States although they have different juristic foundations for their common law for native title.¹⁷⁶

In the Australian common law principle on the extinguishment of native title, Brennan J in *Mabo (No 2)* stated that a sovereign has power to create and extinguish rights and interests in land created under its own regime or pre-existing legal systems prior to the change of sovereignty.¹⁷⁷ This action of the new sovereign must comply with any limitations on the power imposed by the law authorising extinguishment, although the merit of the actions is not subject to review by the courts.¹⁷⁸ The power of the sovereign is limited by the scope of authority granted to the organ of government by the municipal law including the matter of the rights and interests in land. The municipal law determines the legality and validity of the exercise of the power by the sovereign. The legality and validity of the exercise of this power in accordance with the law may be reviewed by the courts. Compensation must be paid at the federal level because of the 'just terms' provisions in the *Federal Constitution* and, since the coming into force of the *Racial Discrimination Act 1975* (Cth), by the states.¹⁷⁹

Arifin FCJ in *Madeli* suggested that the principle that extinguishment of title is subject to compensation is in line with an established 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'.¹⁸⁰ A statute also should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable from the language use.¹⁸¹

Extinguishment must be made by a clear and plain legislation or by an executive act authorised by such legislation. A survey of the legislation relating to forests creating various reserves and providing for conservation and legislation for regulating land found

¹⁷⁶ Proclamation, policy, treaty or occupation. See *Calder v Attorney-General of British Columbia* (1973) SCR 313; *Hamlet of Baker Lake v. Minister of Indian Affairs* (1979) 107 DLR (3d) 513, 552; *Reg. v. Sparrow* (1990) 1 SCR.1075, 1094; (1990) 70 DLR (4th) 385, 401; *United States v. Santa Fe Pacific Railroad Co.* (1941) 314 US, 353, 354; *Lipan Apache Tribe v. United States* (1967) 180 Ct Cl 487, 492 cited in *Mabo (No 2)* (1992) 107 ALR 1, [73]. McNeil, above n 127 analyses the jurisprudence of native title in different jurisdictions of the common law. See also below, Chapter 8.I.A.

¹⁷⁷ *Mabo (No 2)* (1992) 175 CLR 1, [73], following *Joint Tribal Council of the Passamaquoddy Tribe v. Morton* (1975) 528 Fed 2d 370, 376 n.6.

¹⁷⁸ *Mabo (No 2)* (1992) 175 CLR 1, [73].

¹⁷⁹ *Ibid.*

¹⁸⁰ *Madeli* [2008] 2 MLJ 677, 696 [31], following *Sugar Refining Co v Melbourne Harbour Trust Commissioners* [1927] AC 343.

¹⁸¹ *Yew Bon Tew & Anor v Kenderaan Bas MARA* [1983] 1 MLJ 1 cited in *Madeli* [2008] 2 MLJ 677, [33].

no express provisions providing for plain extinguishment of the existing customary rights of the Orang Asli communities.¹⁸² On this basis, the customary rights of the communities remain unextinguished.

The following forms of legislation and acts by state authorities have been held by the Malaysian courts to have no effect on extinguishing native title:

- (i) *Aboriginal Peoples Act 1954*: The enactment of the specific legislation that regulates the welfare and the rights of the Orang Asli communities does not by itself extinguish the communities' rights, interests and titles to their land. The legislation does not reveal any clear and plain intention to extinguish the pre-existing rights.¹⁸³
- (ii) Statutes created for the purpose of regulating land use including laws providing for the land registration system and giving in the state authority the ownership and control of land such as the National Land Code.¹⁸⁴
- (iii) Statutes providing for the classification of land and prohibiting the occupation of land without permit.¹⁸⁵

¹⁸² Current legislation includes *National Land Code*; *National Forestry Act 1984*; *Wildlife Conservation Act 2010* and its predecessor, *Protection of Wildlife Act 1974*; *National Parks Act 1980*; *Taman Negara Enactment (Kelantan) No. 14 of 1938*; *Taman Negara Enactment (Pahang) No.2 of 1939*; *Taman Negara Enactment (Terengganu) No.6 of 1939*. Past legislation includes *Registration of Title Enactments 1911 (FMS)*, reproduced in James Edward Hogg, *Registration of Title to Land Throughout the Empire* (Sweet & Maxwell, 1920).

¹⁸³ *Adong (No 1) [1997] 1 MLJ 418, 431*; *Adong (No 2) [1998] 2 MLJ 158, 164*; *Sagong (No 1) [2002] 2 MLJ 591, 613*.

¹⁸⁴ *Sagong (No 1) [2002] 2 MLJ 591, [13]*: The land which is vested to the State Authority under the National Land Code or the respective states' land codes is a radical title which can be burdened by the customary title. The National Land Code is a principal statute that regulates title and dealings in land and interests in land. There is nothing in the Code which strikes at the recognition of lands held under customary title. On the other hand, s 4 of the Code expressly provides that it does not apply to lands held under customary title. See also, *Nor Anak Nyawai (No 1) [2001] 6 MLJ 241, 292*, relating to various land orders and regulations in Sarawak; and *Madeli [2008] 2 MLJ 677*: which cited with agreement the following statement by Viscount Haldane in a Privy Council case: '*The introduction of the system of Crown grant must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing*'. (*Amodu Tijani v Southern Nigeria (Secretary) (3) [1921] 2 AC 399, 407*).

¹⁸⁵ An example is the *Land (Classification) Ordinance 1948* which prohibits the occupation of Interior Area Land by a native community without a permit in writing from a District Officer. In *Nor Anak Nyawai (No 2) [2001] 6 MLJ 241, 139, 281 [96]*, it was held that this regulation did not affect existing native customary rights on reason that it was not stated to apply retrospectively, and because it did not state clearly and unambiguously that its effect was to extinguish native customary rights. Such statute was taken to have objective to protect native customary rights in Interior Area Land. The Plaintiffs' native customary rights were unaffected by the legislation except that they can no longer claim new territory unless they obtain a permit under s 10 of that legislation.

- (iv) Statutes providing for forest reserves. Native title at common law is extinguished by a reservation only where the state has reserved land for purposes inconsistent with the continued enjoyment of native title. A forest reservation is unlikely to be inconsistent with the 'continued enjoyment' of native title.¹⁸⁶ Furthermore, as mentioned above, under the APA, regardless of the contrary provisions, the Orang Asli may continue to live within reserves such as the forest reserve and the land declared as the Malay reservation land.¹⁸⁷
- (v) Statutes providing for reserves for future use, made for a public purpose other than for the benefit of the indigenous inhabitants' rights to continued enjoyment of native title may be consistent with the specified purpose.¹⁸⁸
- (vi) Issuance of logging licences by a state authority. The interests of the natives co-exist with logging licences issued by the states.¹⁸⁹
- (vii) Regulations made by statutes on the use of land do not affect the rights that pre-existed the statute. They only affect interests created after the coming into force of the legislation.¹⁹⁰ In *TR Nyutan ak Jami*, the rights of the plaintiffs were not affected by the various land classification ordinances or orders declaring Mixed Zone Land, Native Area Land and Interior Area Land. These enactments and orders sought to regulate, restrict or prohibit the creation or exercise of native customary rights from the date made. The plaintiffs' rights were found to predate

¹⁸⁶ *Madeli* [2008] 2 MLJ 677, following the rule of extinguishment discussed in *Mabo (No 2)* (1992) 175 CLR 1, 68 (Brennan J); *Andawan bin Ansapi v Public Prosecutors* [2011] MLJU 224: David Wong J set aside conviction against six natives for cultivation and entry of any land under Forest Reserve without the necessary authority under the specific provisions. Following *Nor Anak Nyawai* and *Madeli* for the proposition that the State's rights or interests are subject to natives' rights over such land, Wong held that the word 'authority' in the *Forest Enactment 1968* cannot be limited to authority under the provisions of the *Forest Enactment*. If the appellants possess native customary rights to the land, they have the authority to be on the land to cultivate and do other things which their 'adat' (custom) allows them to do. The basic ingredient of 'authority' in the context of this offence is intertwined with native customary rights.

¹⁸⁷ Aboriginal Peoples Act 1954 s 10(1).

¹⁸⁸ In *Madeli* [2008] 2 MLJ 677, [16], [32], [34]: the Federal Court held that the 1921 Order which provides for reservation of land for future operation by Sarawak Oilfields Limited, is subject to all existing rights under the native customs of land tenure. The provision of the regulations if at all is only applicable to future occupation of the land in the reserved area but not to the existing occupiers. The Court found that the 1921 Order merely reserved the lands within the designated area for the operation of the Sarawak Oilfields Limited, it does not vest the lands concerned on the Sarawak Oilfields Limited. It was viewed that even though the land came to be reserved for the operation of the Sarawak Oilfields it was never taken possession by the Sarawak Oilfields for their purposes. There is nothing in the Act to affect rights acquired prior to its passing.

¹⁸⁹ *TR Nyutan ak Jami v Lembaga Pembangunan dan Lindungan Tanah* (Land Custody and Development Authority) (Unreported, Judgment date: 23 February 2012) Suit No: 22-249-98 III(I) High Court in Sabah and Sarawak, Clement Skinner): 'Neither did the logging operations cause the plaintiffs to lose control or occupation of their lands'.

¹⁹⁰ *Ibid.*

these enactments and orders. In *Nor anak Nyawai*, the *Land (Classification) Ordinance 1948* did not affect existing native customary rights unless specifically stated in the legislation.¹⁹¹

The same principle may also apply to legislation that regulates and restricts access to forests such as the NFA and the WLCA. It follows that the provisions restricting the access to forest by the Orang Asli in the NFA and the WLCA are not applicable to the existing customary rights exercised within their customary territories.¹⁹² Since the Orang Asli may have authorisation under the law by their custom, their access to forests should also be subject to their custom. The restrictions and regulations of access subjecting the Orang Asli to the legislation should only be interpreted as applicable to land outside their community territories. This argument rejects the view that regulations under the NFA limit or modify Orang Asli customary rights to forage over their traditional lands.¹⁹³

As will be seen from the comparative perspective of this issue in Chapter 8.I.A.2.c, the Malaysian common law in this aspect is coherent with the common law approach in other jurisdictions.

As it is common for the Orang Asli to be in the forests outside their settlement areas, or their traditional territories for economic resources, the right to resources may also be argued to exist on the basis of common law principles as well as the authority of *Adong*. But is this customary right subject to regulation by relevant statutes? If the answer is affirmative, as the Orang Asli have customary rights over the land and forests outside their customary territories, compared to the others who have no legal rights to the forest, wouldn't they have a higher priority?

2 The Extent of the States' Power to Extinguish Existing Rights

Another issue involving the relationship between the common law and statutes affecting customary rights is the extent of the power of states to extinguish those rights. The underlying assumption under the principle of extinguishment seems to be that the state authority has extensive unilateral power to pass any legislation providing for extinguishment of existing private rights.

Richard Malanjum CJ in *Bato' Bagi* had questioned whether specific legislation intended to extinguish native customary rights. He observed that,

¹⁹¹ *Nor Anak Nyawai (No 1)* [2001] 6 MLJ 241. See also, *Madeli* [2008] 2 MLJ 677, [16], [32], [34].

¹⁹² See the discussion above in section 6.II.B.4.

¹⁹³ Subramaniam, above n 102, 11.

The millions of natives whose livelihood and their future generations depend entirely on the land can be made landless by a stroke of the pen in any event. They may end up as squatters in their own lands where they and their ancestors have been living for generations, pre-existing even the impugned sections.

He also criticised the lower courts for their interpretation of the statutory provisions to permit the extinguishment of native customary rights without regard to fairness and fundamental rights safeguarded by the *Constitution*. He asserted that the courts should have been alert to the adverse effect of the impugned sections on the livelihood and the very existence of the natives.¹⁹⁴ He indicated that the executive discretion granted by the provision is not absolute but subject to limits.

Every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.¹⁹⁵

Under the present law, the state power to extinguish customary rights is by no means absolute. Apart from the principles discussed above, there are two elements that qualify the states' power to extinguish: first, the fiduciary duties of the states over the interests of the aborigines and the natives; and, second, procedural justice and fairness in the states' action.

(a) Fiduciary Duty as Restraint on State Power

The position of the state as a fiduciary of the Orang Asli is established by the common law.¹⁹⁶ The proposition that the government has fiduciary obligations to protect the interests of the indigenous peoples was also accepted as law by Richard Malanjum in the Federal Court decision in *Bato' Bagi*.¹⁹⁷ This duty restricts the state power to extinguish the interests of the indigenous peoples.

Mohd Noor J described the basic content of fiduciary duty as 'a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs'.¹⁹⁸ The duty arises from the nature of the relationship between the government and the Orang Asli. This is evident through the provisions, constitutional and statutory, that provide for the special position of the Orang Asli and the responsibility of the government to protect them; the government agency established to undertake that responsibility; and the policy

¹⁹⁴ *Bato' Bagi* (2011) 6 MLJ 297, [110].

¹⁹⁵ *Ibid.*

¹⁹⁶ *Sagong (No 1)* [2002] 2 MLJ 591; *Sagong (No 2)* [2005] 6 MLJ 298; *Pendor Bin Anger v Ketua Pengarah Jabatan Alam Sekitar*, High Court of Malaya, No. R2-25-292-2007, 11 April 2011 (Unreported), [36] (*'Pendor Anger'*), [35].

¹⁹⁷ *Bato' Bagi* (2011) 6 MLJ 297.

¹⁹⁸ *Sagong (No 1)* [2002] 2 MLJ 591, [49].

adopted by the government in dealing with the Orang Asli.¹⁹⁹ That governments owe a fiduciary duty was affirmed by the Court of Appeal.²⁰⁰

Considering the application of fiduciary relations between the government and indigenous peoples, Toohey J, dissenting on the issue, defined fiduciary relationships as those that involve one actor with authority to exercise discretion that could affect the interests of another party. It is an undertaking to act on behalf of, and the power to detrimentally affect, another.²⁰¹ Such relationships may arise as a result of an agreement, by statute, or it might also be assumed without the request of the other party.²⁰² For Toohey J, the nature of the government's obligation was as a constructive trustee.²⁰³ A fiduciary must act for the benefit of the beneficiaries. It follows that the procedures for reaching a decision and the content of the decision must be informed by the duty. Although the duty does not limit the legislative powers of the state, legislation that adversely affected native titleholders or established a process that ignored their interests breached the fiduciary obligation.²⁰⁴ Toohey J also considered that the requirement to obtain free consent of the Aboriginal communities ensues from the fiduciary obligation.

(b) Fairness in States' Action

(i) Right to be Heard and to Consent

Under the fiduciary obligation, the Orang Asli have rights to be consulted in decision making that affects them.²⁰⁵ *Sagong (No 1)* also cited Justice Toohey's argument in the Australian case of *Mabo (No 2)* in proposing that the consent of the titleholders is essential in an action that infringes or extinguishes native title.²⁰⁶ Toohey referred to *Worcester v State of Georgia*²⁰⁷ in which the US Supreme Court held that one aspect of Aboriginal title was the exclusive right of the state to purchase land that Indians were willing to sell. In the context of New Zealand, the Supreme Court in *R v Symonds*²⁰⁸ held that native title 'cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers'. Since the authority of the state to extinguish native title rests on its sovereignty, which is supported by many cases, Toohey J was critical

¹⁹⁹ Ibid, [50]. This position is also affirmed in *Pendor Anger* (High Court) No. R2-25-292-2007, 11 April 2011 (Unreported), 35.

²⁰⁰ *Sagong (No 2)* [2005] 6 MLJ 298, [53-58].

²⁰¹ *Mabo (No 2)* (1992) 175 CLR 1, Toohey J, 201.

²⁰² Ibid.

²⁰³ Ibid, 159.

²⁰⁴ Ibid, 160.

²⁰⁵ *Pendor Anger* (High Court) No. R2-25-292-2007, 11 April 2011 (Unreported), [41] (Zawawi J).

²⁰⁶ *Sagong (No 2)* [2005] 6 MLJ 298, [49].

²⁰⁷ 31 US (6 Pet) 515 (1832).

²⁰⁸ [1847] NZPCC 387, 390.

that the distinction would not support different treatment of native title and non-native interests in land.²⁰⁹ The colonial policy of protecting the interests of indigenous inhabitants is also inconsistent with the unilateral power to extinguish without the consent of the title owner. He was also critical that the rule supporting the unilateral power of government to extinguish without the consent of the owner treated native title as personal and usufructuary, rather than as a proprietary right. This characterisation was a result of applying Western notions of property to defining native title which he thought was undesirable.²¹⁰

Two other judges in *Mabo (No 2)*, Dean and Gaudron JJ, also criticised the implicit ability of the Crown to extinguish native title. This pointed to native title as 'no more than a permissive occupancy which the Crown was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for their traditional purposes'. They said if this characterisation were to be accepted, native title holders were deprived of any security 'since they would be liable to be dispossessed at the whim of Executive, however unjust'. Although it was acknowledged that there was some case law supporting a broad power to extinguish native title, they insisted that the 'weight of authority ... and considerations of justice seem to us to combine to compel its rejection.'²¹¹ Dean and Gaudron JJ also pointed out that Privy Council decisions explicitly reject the proposition that the state has unilateral power of extinguishment or describe native title in a manner inconsistent with such power.

Many judges in other jurisdictions also held the same view.²¹² In Canadian law, as discussed below in Chapter 8.I.A.3, it has been established that consultation is a major factor in determining whether an infringement is justifiable. In appropriate situations, the Aboriginal interest must be accommodated even in cases where Aboriginal rights are not yet established but asserted and supported by some evidence.

In arguing for the right to be heard prior to extinguishment, Richard Malanjum CJ asserted that the right is 'essential justice and procedural fairness which a public decision-maker should ensure as having been meted out before and when arriving at his decision'. As discussed in Chapter 3.II.C, the doctrine of procedural justice is legally

²⁰⁹ *Mabo (No 2)* (1992) 175 CLR 1, 151.

²¹⁰ *Ibid*, 152.

²¹¹ *Ibid*, 67.

²¹² See eg *Attorney General for Quebec v Attorney General for Canada* [1921] 1 AC 401; *Nireaha Tamaki v Baker* [1901] AC 561; *Amodu Tijani v Southern Nigeria (Secretary)* (3) [1921] 2 AC 399; *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 161, 165 ('*Delgamuukw*'); *R v Sparrow* [1990] 1 SCR 1075, 1119.

recognized as a safeguard to constitutional rights. In the process of the extinguishment of native title which results in adverse effects on the livelihood of the people, he argued, justice requires that the title holders are given the opportunity to be heard. He equated the extinguishment with the dismissal of employees which warrants the same process.²¹³ In a similar position to employment as a source of livelihood, extinguishment of native title results in the loss of their economic resources based on the way they live. Furthermore, it is also an accepted law that the 'life' protected by article 5(1) in the *Constitution* 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. It includes the right to live in a reasonably healthy and pollution-free environment.²¹⁴

(ii) Extinguishment for Public Purpose

Raus Sharif in *Bato' Bagi* expressed the view that the Minister's discretion in issuing the direction to extinguish native title is not absolute. The extinguishment must be for a public purpose. Any extinguishment which is not for a public purpose is open to challenge and may be struck down on the ground of *mala fides* [*bad faith*] or abuse of power, which must be shown by those challenging it. Similarly, Richard Malanjum CJ indicated that a constitutional validity issue arises in legal provisions permitting extinguishment without a public purpose being a prerequisite. This is because its 'implications are drastic as it would mean that native customary rights may be extinguished for ulterior purposes'.²¹⁵

However, the High Court in *Pendor Anger*²¹⁶ also held that certain kinds of developments are legitimate reasons for extinguishing Orang Asli land rights, following the controversial long list in the Canadian case of *Delgamuukw*.²¹⁷

III PROBLEMS AFFECTING THE REALIZATION OF THE ACKNOWLEDGED RIGHTS

A The Limit of the Common Law

There is a high possibility that not many Orang Asli communities could successfully make valid claims under the current common law. The requirements of long occupation and traditional connection to the land hamper the claims of certain groups: firstly, groups

²¹³ *Bato' Bagi* (2011) 6 MLJ 297, [103].

²¹⁴ *Ibid*, [102] citing *Tan Tek Seng* [1996] 1 MLJ 261; *Sivarasa Rasiah* [2010] 2 MLJ 333; *Badan Peguam* [2008] 2 MLJ 285; *Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor* [2011] HCA 32 (31 August 2011)).

²¹⁵ *Ibid*, [67].

²¹⁶ *Pendor Anger*, High Court of Malaya, No. R2-25-292-2007, 11 April 2011 (Unreported), [36].

²¹⁷ *Delgamuukw* [1997] 3 SCR 1010. See below, Chapter 8.I.A.1.(c.ii), fn 50.

which have been relocated from their traditional lands either by state authorities or for a variety of other reasons. In this situation, traditional connection with their traditional land has been severed. Many of their customary territories may be substantially changed by commercial use. They may also have been re-grouped with other communities so that they may not be able to establish their identity as an autonomous group having connections to any specific land.

Furthermore, many groups relocated under the state-sponsored development program are usually not given title or formal recognition that the land belongs to them. This includes the land on which they live and the land offered to them for plantations but managed by a government agency. As already mentioned above, in a case not related to land claims, *Pedik Busu*,²¹⁸ the High Court judge considered that the Orang Asli own the land that is given to them by the government through the resettlement scheme, although there is no title conferred. This view may find support in Nozick's argument on the acquisition of property by the right genealogy (Chapter 4.I.A.4.b). On this argument, the land given to the Orang Asli by the government is owned by them in exchange for their traditional land. This view is also consistent with the long practice of respect for the rights of peoples.

The second group affected comprises groups who still live on their traditional land but who have lost autonomy over land within their territory that they used to access resources. The control of their territories may be so weak that the communities may not be able to prove their connection. Part of the land may also have been converted to another use or alienated by the state.

The third group are communities that may have undergone considerable changes that weaken their customary law in respect to the forest and allocation of resources. They may only be entitled to rights in a settlement area as it may be the only land over which they have control. Furthermore, only those who are able to document their historical links to the land by long-standing occupation of a territory are likely able to assert their rights.

Fourthly, given the position of the common law, it is also difficult for groups practising mostly hunting and gathering, such as the Batek, to assert claims.²¹⁹ One reason is the resistance of courts to accept foraging areas as covered by customary title, although it is an established customary practice such as *Nor Anak Nyawai* (2006). The requirement

²¹⁸ [2010] 5 MLJ 849, [13].

²¹⁹ See discussion on the practice of the Batek in Chapter 5.II.A and B.

of occupation to establish control over certain territories of land fits awkwardly with the practice of nomadic peoples.

Besides, Yong highlighted the problem encountered by Orang Asli women in the current law. In most cases, women's access to land is still heavily reliant on group-specific rights to ancestral lands. When the state introduced individual title to land, Orang Asli collective rights to ancestral lands and access to resources were redefined, and most Orang Asli women have found it difficult to assert their claims. In effect, patriarchal tendencies and male-oriented bias within the state and Orang Asli society combine to marginalize women.²²⁰

B Restorative Justice

With respect to restorative justice, as seen above in Chapter 6.II.B.f, the restitutionary discourse on the common law rights of the native is restricted to the payment of compensation.

From an administrative approach, measures taken on acquisition of the land of the Orang Asli normally involve replacement of land for housing sites and orchards, payment of compensation including for buildings and trees, and a share in a plantation scheme. A proposal for similar schemes to be implemented to all Orang Asli was recently approved by the National Land Council, partly in response to the common law recognition of Orang Asli land rights. The scheme has been strongly opposed by Orang Asli representatives but the implementation is under way in some states. This is further discussed in Chapter 9.II.A.2

Analysed from a restorative justice perspective, the schemes are often made without prior consultation with the affected peoples. They are welfare initiatives which are not designed in recognition of Orang Asli rights. In many cases, they failed to respect their perspectives and identities as a community and do not address their needs. The lands allocated to them under these schemes are also not given formal grants of title. Many have also pointed out that such programs often failed to achieve their objectives to reduce poverty among Orang Asli communities.²²¹

²²⁰ Yong C, 'Forest Governance in Malaysia: An NGO Perspective' (JOANGO Hutan, 2006).

²²¹ There are many studies on these schemes. Among the problems identified in these schemes are: there is no formal recognition of ownership of lands allocated to the Orang Asli; the delivery of the development plan is unsatisfactory; lack of opportunity of the Orang Asli to participate directly in the plantation schemes which are managed by appointed corporations; no job opportunity within the scheme areas; and very low income received compared to the scale of lands involved. See, eg, SK Gill, WH Ross and O Panya, 'Moving Beyond Rhetoric: The Need for

C Issue of Procedural Justice

Apart from substantive difficulties under the law discussed above, there are several procedural barriers that may limit the Orang Asli from asserting their claims in court. At present, the court is the only legal mechanism in which the Orang Asli communities may bring their disputes. Many interviewees observed that the state authorities are so far unprepared to address their claims except in court.²²²

As already discussed in Chapter 4.II.C, difficulties faced by the indigenous peoples in their disputes with governments in litigation are not unusual. Informational and economic advantages that the government, as repeat player in litigation, has over the indigenous peoples are among the issues that adversely affect them.

Empirical research that analyses data from courts in several countries indicates that indigenous peoples face an uphill battle in the litigation process, from initiation of a suit to final adjudication in appellate courts.²²³ The lack of capacity of the indigenous peoples to bring claims to court, including the lack of financial and professional support, is only the first obstacle. Political and psychological pressure against indigenous minorities who bring cases against the government in societies in which litigation is not a norm should not be discounted. These problems could also be seen in Orang Asli claims.²²⁴ They

Participatory Forest Management with the Jakun of South-East Pahang, Malaysia' (2009) 21(2) *Journal of Tropical Forest Science* 123, 135 (study of Jakun in South-East Pahang); Abdullah, Azrina, Or Oi Ching and Kamal Solhaimi Fadzil, *Collectors and Traders: A Study of Orang Asli Involvement in the Belum-Temenggor Complex, Perak* (Center for Malaysian Indigenous Studies, 2011) (Belum-Temenggor Complex, Perak); Omar Mustafa, 'Rancangan Pengumpulan Semula (RPS) Masyarakat Orang Asli: Pencapaian dan Cabaran (Resettlement Scheme for the Orang Asli Communities: Achievement and Challenges)' in Ma'rof Redzuan and Sarjit S. Gill (eds), *Orang Asli: Isu, Transformasi dan Cabaran (Orang Asli: Issues, Transformation and Challenges)* (Putra University of Malaysia, 2008), 190, 191-2 (a study on various resettlement schemes throughout the Peninsula); Mustafa Omar, Zanisah Man and Ishak Yussof, 'Strategi Traditional Komuniti Jakun Tasik Chini, Pahang Mengurus Sumber Semulajadi Secara Lestari (The Jakun Traditional Strategy in Managing Natural Resource Sustainably Surrounding Tasik Chini Basin, Pahang)' (2011) 6(2) *Jurnal e-Bangi* 239 (Chini Lake, Pahang); Ma'rof Redzuan and Zahid Emby, 'Orang Asli: Pembangunan dan Ekologi Hutan (Orang Asli: Development and Forest Ecology)' in Ma'rof Redzuan and Sarjit S. Gill (eds), *Orang Asli: Isu, Transformasi dan Cabaran (Orang Asli: Issues, Transformation and Challenges)* (Putra University of Malaysia, 2008) 204 (a study on the resettlement schemes in Banun and Kemar, Perak).

²²² Interview data: an officer at timber-related office, two officers at Orang Asli Affairs Department and an Orang Asli activist.

²²³ Herbert M Kritzer and Susan S Silbey, 'The Government Gorilla: Why Does the Government Come Out Ahead in Appellate Courts?' in Herbert M Kritzer and Susan S Silbey (eds), *Litigation: Do the 'Haves' Still Come Out Ahead?* (Stanford University Press, 2003), cited in Fautsch, David, 'An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform' (2009–2010) 31 *Michigan Journal of International Law* 449, 458.

²²⁴ The case of *Sagong* illustrates this difficulty. See, eg, Idrus, above n 93. A court case recently initiated by Orang Asli community members involving the *Ladang Rakyat* project at Kelantan (eastern state of the peninsula) was discontinued and the litigants offered apology to the

represent continuing problems for the Orang Asli communities seeking a fair forum in which to address their grievances. This situation may also relate to the foreign nature of the adversarial system to the local culture. As Hickling points out 'the adversarial system is not a part of Asian culture, and is not a satisfactory way of seeking truth'.²²⁵

Other problems in court processes include the requirement to commence an action within 40 days of the states' action²²⁶ and the difficulty in obtaining standing.²²⁷ Well, Thang and Chen wrote,

The lack of adequate standards and mechanisms for resolution of claims may be one reason why parties have often had to resort to the civil courts where settlement might otherwise have been achieved through negotiation or arbitration. Not only is this highly inefficient, implying significant transaction costs for all parties involved, but the lack of a funded legal aid system also means that communities have to rely on pro bono legal assistance.²²⁸

There are also attempts, at least in the formulation of policies, to empower the communities through a human rights approach. The policies require participation and consultation with the communities in decision making in matters affecting them (see above in section 6.I.B.3.b). The practice is, however, questionable. As a recent Suhakam report reveals, the principle of free, prior and informed consent (FPIC) is not adhered to in most land matters involving the Orang Asli.²²⁹

In large-scale projects, such as dam construction and forestry, indigenous peoples may participate in official decision making which will affect them through the environmental impact assessments (EIA).²³⁰ A detailed EIA report may be required and in such circumstances, the public have a right to express their views. However, as Sharom commented, this mechanism provides a weak right as there is no obligation on the Department of Environment to take those views into consideration in the final decision making.²³¹

government for initiating the proceeding. M Yusri Amin, 'Saman: Orang Asli mohon maaf kepada MB (Suit: Orang Asli apologize to Chief Minister)', *HarakahDaily* 23 March 2012.

²²⁵ RH Hickling, 'Backwards and Forwards' (2002) 3 *Journal of Malaysian and Comparative Law*.

²²⁶ Order 53 of the Rules of the High Court, Malaysia, revised 21 September 2000. See also, Yeow Choy Choong and Sujata Baan, 'Class Actions in Malaysia: Principles and Procedural Obstacles': Paper presented at *The Globalization of Class Actions Conference* (Oxford, England) 12-14 December, 2007), 31.

²²⁷ In *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997] 3 MLJ 23, the court refused *locus standi* to natives from Sarawak who attempted to stop the construction of the Bakun Hydroelectric Project on reason of justiciability.

²²⁸ Wells, Thang and HK, above n 75, 190.

²²⁹ Human Rights Commission of Malaysia (Suhakam), above n 60, 137 [8.53].

²³⁰ *Environmental Quality Act 1974* s 34A.

²³¹ Sharom, above n 34, 63.

IV CONCLUSION

With the judicial recognition of the rights of the indigenous peoples in Malaysia, the law in this matter is moving from a protection to a rights-based approach. Rather than entrusting the powers to the states as their agents, this directly empowers the indigenous peoples including the Orang Asli. Nevertheless, conflicts, ambiguities and gaps remain that restrict the realization of the rights. There is still serious resistance to acknowledging their rights as a minority (Chapter 9).

PART 4: THE RIGHTS-BASED APPROACH TO ACCESS NATURAL RESOURCES BY INDIGENOUS PEOPLES: COMPARATIVE PERSPECTIVES

Part 4 identifies the approaches adopted in international law and other selected jurisdictions. The approaches seek to further develop issues and themes already referred to both in answering and further contextualising the research questions: the recognition and acknowledgement of rights to natural resources including the contents and extent of the rights; restorative measures; environmental justice; and mechanisms established to address claims from the perspectives of procedural justice. It also considers both the appropriateness of the foreign laws as sources of legal principles for Malaysia and its future direction towards a rights-based approach to recognizing Orang Asli forest rights.

This part comprises:

- Chapter 7: Rights to Natural Resources by Indigenous Peoples in International Law
- Chapter 8: Access to Forest Resources by Indigenous Peoples under the Law of Selected Jurisdictions
- Chapter 9: Towards Justice and Equality: The Way Forward for the Orang Asli?

CHAPTER 7: RIGHTS TO NATURAL RESOURCES BY INDIGENOUS PEOPLES IN INTERNATIONAL LAW

The rights of indigenous peoples are specifically affirmed in: the United Nations' Declaration on the Rights of Indigenous Peoples (UNDRIP);¹ and the International Labour Organisation's (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries in 1989 (the ILO Convention).² The two documents are the response to ongoing global historical discrimination against these communities that deny them their fundamental rights.³ They provide references for the elaboration of indigenous rights;⁴ affirm the legal existence of indigenous peoples;⁵ and set minimum standards for their recognition, participation and due process.⁶ Although the UNDRIP is soft law, being an instrument without legal force, it is endorsed by governments and forms part of accepted international law norms.⁷ The ILO Convention is a binding international legal instrument but its signatories are limited. As scholars have noted, both have significant roles for future legal development.⁸

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/RES/61/295, adopted 13 September 2007.

² Opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

³ UNDRIP, see, eg, Preamble 18th paragraph; art 2; art 46(3).

⁴ McHugh, PG, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011), 227; Athanasios Yupsanis, 'The ILO Convention No. 169 Concerning Indigenous and Tribal People in Independent Countries 1989–2009: An Overview' (2010) 79 *Nordic Journal of International Law* 433, 433: noting that the ILO Convention has proved to be a significant departure for the defence and strengthening of indigenous rights at national, regional (especially that of Latin America) and universal level.

⁵ Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observation' (2008) 30 *Michigan Journal of International Law* 177, 179: suggesting that the UNDRIP 'affirms the international legal existence of indigenous peoples by recognizing them as legal subjects, and it renders international law applicable to their relations with States.'

⁶ Fautsch, David, 'An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform' (2009–2010) 31 *Michigan Journal of International Law* 449, 450.

⁷ The UNDRIP was adopted by the UN General Assembly with 143 votes in favour including Malaysia, 4 against, and 11 abstentions. The four countries that voted against the adoption later endorsed the UNDRIP: Australia (2009); New Zealand, Canada and US (in 2010). Countries that endorse the UNDRIP recognize and affirm the rights articulated therein and pledge to work toward their realization. The last paragraph of the preamble proclaims that the UNDRIP is a standard of achievement 'to be pursued in a spirit of partnership and mutual respect'.

⁸ Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10(1) *Melbourne Journal of International Law* 27, 27–28; Claire Charters, 'Indigenous Peoples and International Law and Policy' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 161, 177–181; Anaya S James, 'International Human Rights And Indigenous Peoples: The Move Toward The Multicultural State' (2004) 21(1) *Arizona Journal of International & Comparative Law Vol 21, No. 1 2004*, 14–6.

The rights of indigenous peoples are also part of wider developments in international human rights law,⁹ particularly on individual and environmental rights. Human rights instruments confirm the equal dignity of human beings who possess certain inalienable rights against the state and society.¹⁰ The regional ASEAN Human Rights Declaration (AHRD) also accepts the same principle.¹¹ It is, however, highly criticised for its extensive reservations and lack of proper consultation on its drafting.¹² Nevertheless, it marks a new direction in the region in which leaders have shown opposition to the concept of human rights. For instance, provisions for mutual respect for diversity and the right of every people to 'take part in cultural life' may provide a starting point for the development of regional indigenous rights.¹³

Various international instruments¹⁴ related to environmental management and conservation have led to significant developments in various countries to decentralise their forest management to be more inclusive of forest communities of which many are

⁹ The World Conference on Human Rights specifically recognizes the inherent dignity and the unique contribution of indigenous peoples to the development and plurality of society and strongly reaffirms the commitment to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development: *Vienna Declaration and Programme of Action*, UN GAOR, UN Doc A/CONF.157/23 (12 July 1993), 20.

¹⁰ Eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, adopted and opened for signature 16 December 1966, GA res 2200A (XXI) (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA res 2200A (XXI) (entered into force 3 January 1976). On the basic concept of human rights, J Donnelly, 'What are Human Rights?' in G Clack (ed), *Introduction to Human Rights* (International Information Programs, US Department of State, 2001), 2.

¹¹ *ASEAN Human Rights Declaration*, Association of Southeast Asian Nations, (18 November 2012).

¹² See, eg, *UN Official Welcomes ASEAN Commitment to Human Rights, but Concerned over Declaration Wording*, UN News Centre <<http://www.un.org/apps/news/story.asp?NewsID=43536>>; Sam Campbell, 'ASEAN declaration allows Cambodia to flout human rights, warn campaigners', *The Guardian* 23 November 2012 <<http://www.guardian.co.uk/global-development/2012/nov/23/asean-declaration-cambodia-flout-human-rights>>.

¹³ Yogeswaran Subramaniam, 'The Asean Human Rights Declaration and Indigenous Rights' (2013) 8(4) *Indigenous Law Bulletin* 3, 5. See AHRD art 2(2) and art 32.

¹⁴ Eg, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) (13 June 1992); *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (Statement of Forest Principles) A/CONF.151/26 (Vol. III), (14 August 1992).

indigenous peoples.¹⁵ These international and national developments mandate legal recognition of indigenous rights.¹⁶

This chapter discusses the position in international law by:

- a. highlighting that justice by recognition of rights is the basic principle in international law relating to indigenous peoples;
- b. identifying the rights affirmed under international law; and
- c. exploring the relevance of this international law in Malaysia, its local perspectives and its applicability.

I JUSTICE AND FAIRNESS AS FOUNDING PRINCIPLES

As indicated in Chapter 3, international law and the recognition of indigenous rights may have a common origin. The laws established by western European states in the colonisation of the Americas continue to affect the development of international law on indigenous peoples. In the late 20th century, there was a more systematic attempt to clarify their rights to their traditional land and its resources. Numerous international instruments have led to a firmer recognition of indigenous peoples' rights to land and resources.

Underlying this development is an accepted principle that justice entails acknowledgement and recognition of the rights of human beings, individual and collective. This comprises the principle of respect and inclusion which is a key idea in various international instruments, both generally on human rights and specifically on those of indigenous peoples. It promotes states, and other entities such as corporations and organisations, acknowledging and respecting the indigenous communities — their identity, spirituality and culture, as well as their social and economic organisation.¹⁷ This includes respect for the unique relationship that indigenous peoples have with their traditional territories and resources and the significance of traditional land to them.

¹⁵ Anne M Larson and Ganga Ram Dahal, 'Forest Tenure Reform: New Resource Rights for Forest-based Communities' (2012) 10(2) *Conservation and Society* 77. See also, Rights and Resources Initiative, *Respecting Rights, Delivering Development* (Rights and Resources Initiative, 2012) <http://www.rightsandresources.org/publication_details.php?publicationID=4935>.

¹⁶ Owen J Lynch, *Mandating Recognition: International Law and Native/Aboriginal Title* (Rights and Resources Initiative (RRI), 2011), 20.

¹⁷ *International Labour Organisation's (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989*, opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991), (later referred to as 'the ILO Convention'). Art 7 promotes respect for the cultures and ways of life of indigenous and tribal peoples.

International law clearly endorses a rights-based approach as a strategy to build a new relationship between indigenous peoples and states by involving indigenous peoples in any programs affecting them. The UNDRIP¹⁸ specifically aims to 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'.¹⁹ It emphasizes a strategy that is based on both self-government²⁰ and participation as the key to reconciling the interests of states in national development.²¹ Therefore, the direction of international law is towards promoting the inclusion of peoples in governance rather than a top-bottom approach or centralisation traditionally practised by nation states that have inflicted historical injustices common to indigenous peoples throughout the world.

The same approach was also endorsed by the ILO Convention.²² It expressly rejects the assimilationist approach taken by the earlier instrument of the ILO, the ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957).²³ In contrast, the later Convention recognizes the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions.²⁴ Within this framework, the ILO Convention lays down a series of provisions establishing the right of indigenous peoples to maintain and develop their own societies.²⁵

Related to justice and fairness, other founding principles that have led to the specific recognition of the rights of indigenous peoples are the principles of equality and self-determination. Indigenous peoples and individuals are declared to be equal to all other peoples and individuals.²⁶ This means that they have the right to exist and to be

¹⁸ GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007).

¹⁹ UNDRIP, preamble 18.

²⁰ On self-government, they have right to determine and develop priorities and strategies for exercising their rights to development: UNDRIP art 23.

²¹ The States have duty to consult and cooperate with indigenous peoples 'in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources', (UNDRIP art 32(2)). For commentary on this provision, see Stefania Errico, 'The Draft Declaration on the Rights of Indigenous Peoples: An Overview' (2007) 7 *Human Rights Law Review* 741, 68.

²² Opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

²³ The ILO Convention, para [4], < www.ilo.org/ilolex/cgi-lex/convde.pl?C107>.

²⁴ The ILO Convention, para [5].

²⁵ For general commentary on the ILO Convention, see, eg, Yupsanis, above n 4.

²⁶ UNDRIP art 2.

different,²⁷ to be free of any kind of discrimination,²⁸ assimilation and destruction of their culture.²⁹ Any doctrines, policies and practices based on the notion of superiority, or ethnic, religious or cultural differences are rejected as unjust and discriminatory.³⁰ The existence of specific prescriptions on the rights of indigenous peoples does not aim to privilege them, but rather remedy the historical denial of their rights.³¹

The principle of equality also provides justification for the right to self-determination of the indigenous peoples, enjoyed alike by all other peoples and individuals.³² As Anaya highlighted, the fact points to the core values of freedom and equality that are relevant to all segments of humanity in relation to the political, economic and social configurations in which they live. He asserted that the rights affirmed are simply derived from human rights principles that are deemed universally applicable.³³ Self-determination means the right-holders freely determine their political status and freely pursue their economic, social and cultural development.³⁴ The conception, particularly in relation to indigenous peoples, does not necessarily include the right to separate from a state, but rather

a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance.³⁵

²⁷ UNDRIP art 2 expressly states that the indigenous peoples have the right to exercise their rights, 'in particular that based on their indigenous origin or identity'. Art 7 of the ILO Convention confirms the right to continued existence and to development along the lines that they themselves wish.

²⁸ UNDRIP art 2; art 7(2).

²⁹ UNDRIP art 8(1).

³⁰ UNDRIP preamble 4.

³¹ S James Anaya, 'Why there should not have to be a Declaration on the Right of Indigenous Peoples' (Keynote address to the 52nd Congress of Americanists, Seville, July 2006), reproduced in S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009), 59.

³² The right of to self-determination is affirmed in the basic human rights covenants: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA res 2200A (XXI) (entered into force 3 January 1976) (ICESCR).

³³ S James Anaya, 'Why there should not have to be a Declaration on the Right of Indigenous Peoples', Keynote address to the 52nd Congress of Americanists, Seville, July 2006, reproduced in Anaya, above n 31, 60.

³⁴ UNDRIP art 3.

³⁵ Erica-Irene A Daes, *Final Report of the Special Rapporteur on the Rights of Indigenous Peoples, Prevention of Discrimination and Protection of Indigenous Peoples' Permanent Sovereignty over Natural Resources*, 56th sess Agenda Item 5(b) (provisional agenda), UN Doc E/CN.4/Sub.2/2004/30 (13 July 2004) [17].

It includes economic self-determination, which ultimately involves the control over traditional lands, territories and resources.³⁶

The right of self-determination, which is based on freedom and equality, is accepted to extend to the internal relationship between states and indigenous peoples. It takes into account diverse cultural identities and co-existing political and social orders. It is accepted that peoples, including the indigenous peoples with their own organic social and political fabrics, are to be full and equal participants in the construction and functioning of governing institutions under which they live at all levels.³⁷ Erica-Irene Daes also pointed out that affirmation of self-determination specific for indigenous peoples, who are minorities commonly denied their voice and significance, enables them 'to join with all other peoples that make up the State on mutually agreed upon and just terms'.³⁸

Therefore, international law reflects the principles that justice requires the respect and recognition of rights and interests of human beings including indigenous peoples. Based on these principles, it establishes specific rights and the corresponding duties of states as special measures to build a new relationship between indigenous peoples and the states.

II RIGHTS TO RESOURCES

A The Concept of Indigenous Peoples

There is no accepted legal definition of indigenous peoples³⁹ but four criteria are considered essential:

- (a) priority in time, with respect to occupation and use of a specific territory; (b) the voluntary perpetuation of cultural distinctiveness ...; (c) self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and (d) an experience of subjugation,

³⁶ Ibid; Lisl Brunner, 'The Rise of Peoples' Rights in the Americas: The *Saramaka People* Decision of the Inter-American Court of Human Rights' (2008) 7(3) *Chinese Journal of International Law* 699.

³⁷ S James Anaya, 'Why there should not have to be a Declaration on the Right of Indigenous Peoples', (Keynote address to the 52nd Congress of Americanists, Seville, July 2006), reproduced in Anaya, above n 31, 60.

³⁸ Erica-Irene A Daes, 'Some Considerations on the Right of Indigenous Peoples to Self-determination' (1993) 3(1) *Transnational and Contemporary Problems* 1, 9.

³⁹ Macklem suggests that the deep cultural, geographic and historical diversities of communities that identify themselves as indigenous peoples and that structure the transnational politics of indigenous identity partly explain why drafters of the UNDRIP opted not to provide a definition: Macklem, above n 5, 203. See also the commentary on the dispute by Benedict Kingsbury, 'Indigenous Peoples in International Law: A Constructivist Approach to Asian Controversy' (1998) 92(3) *The American Journal of International Law* 414. Many states in the Asian region challenged the claim that there exist indigenous peoples in the region on the basis that their historical experiences of colonisation and conquest were radically different than those of indigenous populations in the Americas and elsewhere in the world.

marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.⁴⁰

Under both instruments, self-identification as indigenous is a fundamental criterion.⁴¹ In the UNDRIP, self-identification is qualified 'to determine their own identity or membership in accordance with their customs and traditions'. Apart from this, the ILO Convention emphasizes priority in time and distinct collectivity.⁴² The UNDRIP emphasizes common historic experiences or marginalization.⁴³ The term 'peoples' is used to convey recognition of the existence of organised societies with an identity of their own, rather than mere groupings sharing some racial or cultural characteristics.⁴⁴

Considering these characteristics, the position of the Orang Asli could correspond to the definition in all significant aspects. They are historically proven as the first inhabitants of the territories that they occupy. They remain culturally distinctive from the other groups in Malaysian society. They are politically marginalized and subject to dispossession of land and resources. Extensive control over their communities when it is no longer justified has discriminated against them and subjected them to exploitation.

B Collective and Individual Rights

With the historical resistance to collective rights (Chapter 4.I.A.3.(a)), the UNDRIP marks a significant departure in international human rights law with the recognition of the collective rights of the indigenous peoples.⁴⁵ The collective rights, as well as individual rights, extend to all human rights and fundamental freedoms protected by international

⁴⁰ Working Paper on the Concept of "Indigenous People" by the Chairperson/Rapporteur, Erica-Irene A Daes, E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996), on definition of indigenous peoples adopted by the United Nations Working Group of Indigenous Peoples cited in '*Communication on Human Rights: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, UN Doc E/CN.4/2003/90 (21 January 2003)', [99]. Under both instruments, self-identification as indigenous is a fundamental criterion: The ILO Convention art 1.2; UNDRIP art 33. In the UNDRIP, self-identification is qualified 'to determine their own identity or membership in accordance with their customs and traditions'. Apart from this, art 1.1(b) of the ILO Convention: emphasizes priority in time and distinct collectivity. Preamble 6, 7 of the UNDRIP: emphasizes common experience or marginalization rooted historically.

⁴¹ The ILO Convention art 1.2; UNDRIP art 33.

⁴² The ILO Convention art 1.1(b).

⁴³ UNDRIP preamble 6, 7.

⁴⁴ Eg of communities not included in the term are a group of people sharing the same religion like Muslim or Christian communities; and groups of people sharing the same origin like Vietnamese and European communities in Australia. Art 1(3) of the ILO Convention provides that, the 'use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'.

⁴⁵ Throughout the text of the UNDRIP, rights are attributed to both indigenous peoples as well as to indigenous individuals. See commentary, eg, Theo van Boven, 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010) 174, 177.

law.⁴⁶ The collective dimension is recognized as a prerequisite for the realization and enjoyment of individual rights. At the same time, they are indispensable for their existence, well-being and integral development as peoples.⁴⁷ States are to respect the collective aspect of the relationship of the indigenous peoples to their land which is important for their cultural and spiritual values.

C Right to Ownership and Possession of Land and Resources

1 Land Rights and Special Relationship to Land

Both instruments provide for strong protection of land and resource rights of the indigenous peoples.⁴⁸ They have the right to own and possess the lands and resources that they traditionally occupy or use. Their special relationship is acknowledged,⁴⁹ as the principal source of livelihood, social and cultural cohesion fundamental to their identity and spiritual welfare. For this reason, irrespective of the position of land rights of other people in a particular state, ownership of their lands needs to be established.⁵⁰ States have a duty to respect the special relationship with due regard for their traditional patterns of use and occupancy.⁵¹

2 Approach to Land Rights under the UNDRIP

The UNDRIP similarly treats the land, territories and resources traditionally occupied or used by indigenous peoples. This may include the land accessed for subsistence or swidden agriculture. The land rights are not limited to the traditional land claimed through long and continuous occupation but include the land that the communities currently

⁴⁶ UNDRIP art 1.

⁴⁷ UNDRIP preamble 22.

⁴⁸ The ILO Convention art 14(1); the UNDRIP comprises a cluster of articles relating to the land right: art 10, 11, 12, 20 and 25-31 read together with art 3. For the discussion, see eg, S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re Empowerment' (2007) 11 (3 October 2007) *Jurist Legal News and Research*, [3]. On the scope and extent of land rights under the instruments see, eg, Xanthaki, above n 8, 27, 31. Jeremie Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207, 223-9; Charters, above n 8, 168.

⁴⁹ The ILO Convention art 13, for instance, requires respect for the 'special importance ... of [indigenous peoples] relationship with the lands and territories ... and in particular the collective aspects of this relationship'.

⁵⁰ Xanthaki points out that the land right provisions in the ILO Convention encapsulate a powerful argument on indigenous land ownership. Irrespective of the land rights of other persons in the state, ownership of their lands must be established on reason of the special bond between indigenous peoples and their lands: Xanthaki, above n 8, 245.

⁵¹ UNDRIP art 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.*'

occupy or use and the lands that they acquired or used in the past.⁵² The contents of land rights affirmed are extensive and include ownership, use, development and control. In this respect, states have obligations to protect these rights and to facilitate their realization. The obligations include legally recognizing and protecting the lands, territories and resources.⁵³ Processes must be established and implemented to recognize and adjudicate on land rights. The process must be 'fair, independent, impartial, open and transparent' and give due consideration to the laws, traditions, customs and land tenure systems of the groups concerned. The indigenous peoples have the right to participate in the process.⁵⁴ In other words, the UNDRIP requires fair and mutually acceptable procedures to resolve conflicts between indigenous peoples and states. This may include procedures such as negotiations, mediation, arbitration and national courts as well as international and regional mechanisms as platforms for dispute resolution or as avenues of complaint.

Other key aspects in relation to resource protection are security in the enjoyment of the means of subsistence and development; free engagement in traditional economic activities;⁵⁵ conservation of 'vital medicinal plants, animals and minerals'⁵⁶ and of the local environment and of the productive capacity of the lands or territories and resources;⁵⁷ and determination and development of their own 'priorities and strategies for the development or use of their lands or territories and other resources'.⁵⁸

On whether the word 'resources' in the UNDRIP includes subsoil resources, one national court, the Supreme Court of the Philippines, in relation to its *Indigenous Peoples' Right Act 1997* (Philippines),⁵⁹ held that the resources should be interpreted as only encompassing the right to surface resources. This is based on a domestic constitutional norm that affirms state ownership to natural resources.⁶⁰

However, this view contradicts a recent report of a UN Expert Mechanism on the right to participate in decision making on extractive industries operating in or near indigenous

⁵² Ibid, art 26(2).

⁵³ Ibid, art 26(3).

⁵⁴ Ibid, art 27.

⁵⁵ Ibid, art 20.

⁵⁶ Ibid, art 24.

⁵⁷ Ibid, art 29.

⁵⁸ Ibid, art 32.

⁵⁹ Republic Act No. 8371.

⁶⁰ Asian Development Bank, *Indigenous Peoples or Ethnic Minorities and Poverty Reduction; Philippines* (Manila, 2002), 16 cited in Errico, above n 21, reproduced in Anaya, above n 31, 70.

territories.⁶¹ The committee suggested that international law has developed a clear principle on the right of indigenous peoples to permanent sovereignty over natural resources. This is based on the right to self-determination⁶² to which the principle of permanent sovereignty over natural resources is integral.⁶³ It suggested that, for any extractive activities to be conducted, the provision on self-determination read together with other relevant provisions on the protection of land, territories and resources in the UNDRIP,⁶⁴ mandates 'free, prior and informed consent (FPIC) of indigenous peoples prior to approval of the use by private industries of indigenous peoples' lands, territories and resources'.⁶⁵ This is out of concern that extractive activities often affect indigenous communities, their environment and the resources that they traditionally access including those with cultural significance such as sacred sites. It is worth noting that the same point was also made by the Woodward Royal Commission in its report on Australian Aboriginal land rights in 1973.⁶⁶

Furthermore, specific guiding principles were also endorsed by the UN Human Rights Council outlining the duties of states and corporations in relation to exploration and exploitation of natural resources in or near indigenous areas.⁶⁷ It is considered as an

⁶¹ Expert Mechanism on the Rights of Indigenous Peoples, UN Human Rights Council, *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, GE.12-13320, 5th sess, Item 4 of the provisional agenda, A/HCR/EMRIP/2012/2 (9-13 July 2012).

⁶² As discussed above, the right to self-determination is a human right affirmed at general human right level and specific instruments on the rights of indigenous peoples.

⁶³ Para 11 of the report, citing the Special Rapporteur on indigenous peoples who noted that nowadays the right to self-determination includes a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance. In order to be meaningful, this modern concept of self-determination must logically and legally carry with it the essential right of permanent sovereignty over natural resources.

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

⁶⁴ In particular: UNDRIP art 26, 28 and 32.

⁶⁵ Expert Mechanism on the Rights of Indigenous Peoples, UN Human Rights Council, *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, GE.12-13320, 5th sess, Item 4 of the provisional agenda, A/HCR/EMRIP/2012/2 (9-13 July 2012), [11].

⁶⁶ The Royal Commission report formed the basis for pioneering Northern Territory land rights legislation, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

⁶⁷ Resolution 17/4, the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework' (A/HRC/17/31). The Framework rests on three main pillars:

- (a) the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication;
- (b) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with

authoritative global standard addressing various issues of human rights involving extractive activities in indigenous territories.⁶⁸

3 Approach to Land Rights under the ILO Convention

In relation to the land traditionally occupied by indigenous peoples, the ILO Convention affirms that they have rights to own and possess this land.⁶⁹ Pursuant to these rights, governments have duties: to identify the land; to guarantee effective protection of the rights;⁷⁰ and, to establish adequate procedures to resolve land claims.⁷¹

In relation to the natural resources found not only in lands that they occupy but also that they traditionally use, the ILO Convention specifically affirms that the communities concerned have rights to participate in their use, management and conservation.⁷² The term 'land' in this provision includes the concept of territories, which covers the total environment of the areas occupied or otherwise used.⁷³

The ILO Convention also expressly affirms the rights of nomadic peoples and shifting cultivators as well as other indigenous peoples to use land for subsistence although they do not exclusively occupy it.⁷⁴ The governments have duties to take measures to safeguard these rights. This includes establishing adequate penalties for unauthorised intrusion or use, and preventive measures.⁷⁵

In jurisdictions in which the ownership of the resources is retained by the government, the communities concerned have rights: to be consulted prior to exploration and exploitation of the resources; to participate in the benefits of the activities; and to fair compensation for any damages resulting from the activities.⁷⁶ The consultation must be

which they are involved; and (c) the need for greater access to remedy, both judicial and non-judicial, for victims of business-related human rights abuse (A/HRC/17/31, para. 6)

⁶⁸ Expert Mechanism on the Rights of Indigenous Peoples, UN Human Rights Council, *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, GE.12-13320, 5th sess, Item 4 of the provisional agenda, A/HCR/EMRIP/2012/2 (9-13 July 2012), [21].

⁶⁹ The ILO Convention art 14(1).

⁷⁰ *Ibid*, art 14(2).

⁷¹ *Ibid*, art 14(3).

⁷² *Ibid*, art 15(1).

⁷³ *Ibid*, art 13(2).

⁷⁴ *Ibid*, art 14(1). Gilbert highlights that in this regard the ILO Convention stands as the leading treaty that provides express protection for nomadic peoples who are generally regarded as having no territorial right: Jereme Gilbert, 'Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights' (2007) *Human Rights Law Review* 1, 17.

⁷⁵ The ILO Convention art 18.

⁷⁶ *Ibid*, art 13(2).

undertaken before undertaking or permitting such activities with the purpose of measuring the impact of the activities on their interests.⁷⁷

Similar to the UNDRIP, the ILO Convention does not require continuous actual presence in the territory in question.⁷⁸

4 Right to Redress

The UNDRIP also attempts to address the matter of restorative justice in relation to indigenous peoples who commonly suffer from historic injustices.⁷⁹ Art 28 provides guidance on remedies for governments that create a functional process for recognizing indigenous communities and remedying land disputes.⁸⁰ It affirms that indigenous peoples have a right to redress for wrongs related to lands, territories and resources. It requires the restitution of land or resources equal in quality, monetary compensation or other appropriate redress. Redress other than restitution must be freely agreed to by the indigenous peoples concerned.⁸¹ This may include the traditional lands that have been taken or used without their free, prior and informed consent. It may also include land that they unwillingly left or of which they lost possession. If it has been transferred legitimately and in good faith to innocent third parties, the indigenous peoples may have the right to recover it or, alternatively, to obtain other lands of equal size and quality.⁸²

5 Environmental and Resource Conservation

In relation to environmental justice, the UNDRIP affirms the right to environmental and resource conservation which imposes on states a duty to establish and implement relevant programs.⁸³ The indigenous peoples are also protected from the siting of

⁷⁷ Ibid, art 15(2).

⁷⁸ Ibid, art 13; UNDRIP art 26.

⁷⁹ UNDRIP preamble [4].

⁸⁰ Fautsch, above n 6, 452: discussing the need to further clarification of the article to strengthen the protection.

⁸¹ UNDRIP art 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, equal in quality, size and legal status or of monetary compensation or other appropriate redress.

⁸² *Sawhoyamaya Indigenous Cmty v Paraguay*, 2006 Inter-American Court of Human Rights (ser C) No 146, 128 (Mar 29 2006), cited in Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27(1) *Wisconsin International Law Journal* 51, 70.

⁸³ UNDRIP art 29(1).

hazardous materials and use of their territories for military activities without their free, prior and informed consent.⁸⁴ States also have duties to take effective measures to address health issues for those affected by hazardous materials.

6 Right to Consultation and Free, Prior and Informed Consent

At a minimum, international standards call for consultation of the affected peoples before any projects, such as extractive activities, are conducted within the land or territories of the indigenous peoples and other projects capable of affecting the resources that they traditionally used.⁸⁵ The UNDRIP specifically requires 'free, prior and informed consent' (FPIC). The ILO Convention⁸⁶ merely requires consultation, but it must be undertaken in good faith with the goal of obtaining consent. However, consent is required if a project involves relocation of people.⁸⁷

⁸⁴ UNDRIP art 29(2),(3) and 30.

⁸⁵ Tara Ward, 'The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 54, 66: on the pattern of relevant international instruments and interpretation by the relevant committees and the regional court on the rights to free, prior and informed consent. For instance, the UN Treaty's supervisory bodies have increasingly interpreted existing conventions as requiring this minimum duty to consult indigenous peoples when decisions are being made regarding their lands and resources. More specifically, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on Social, Economic and Cultural Rights (CESCR) have increasingly recognized full FPIC by requiring States Parties to ensure that the consultation of indigenous peoples has the goal of reaching consent. These conclusions have largely been based around the right to culture and the right to non-discrimination, rather than on the right of indigenous peoples to self-determination.

⁸⁶ See also the subsequent interpretations by the relevant Committee of Experts on the Application of Conventions and Recommendations (CEACR).

⁸⁷ Ward, above n 85, 65. For example, a Committee established to examine Ecuador's non-compliance with the ILO Convention stated that 'the spirit of consultation and participation constitutes the cornerstone of ILO Convention No. 169 on which all its provisions are based.' (ILO, *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*, ILO Doc. GB.277/18/4, GB.282/14/2 (14 November 2001). The CEACR has repeatedly called on States Parties to respect their obligations to consult with indigenous peoples prior to exploration and exploitation of natural resources within their traditional territories, and has insisted on the adoption and implementation of domestic legislation in order to facilitate such consultations. (See, eg, CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ecuador, ILO Doc. 062010ECU169, 4 (2010); CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala, ILO Doc. 062006GTM169, 10, 13, and 15 (2006); CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Mexico, ILO Doc. 062006MEX169, 10 (2006). However, the absence of a requirement for real consent of people (right of veto), before taking measures affecting them directly, has been one of the main points of criticism against the ILO, stating that the absence of the consent requirement allows states to retain control over the indigenous peoples living within their territory: Yupsanis, above n 4, 445.

Similarly, the Supervisory Committee for the International Covenant on Economic, Social and Cultural Rights⁸⁸ has specifically referred to the participation rights of indigenous communities in relation to land as requiring consultation with the goal of obtaining consent.⁸⁹ In relation to cultural rights under Art 15 of the ICESCR, the participation right includes the FPIC.⁹⁰ The states parties are required to 'respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights'.⁹¹

Furthermore, a significant jurisprudence that strengthens indigenous land rights has also developed under Art 27 of the *International Covenant on Civil and Political Rights* (ICCPR) which provides for the cultural rights of minorities.⁹² The UN Human Rights Committee observed that the establishment of land ownership and protection of a 'way of life' that is connected to the control over, and use of, lands and resources is regarded as part of the cultural rights of the indigenous peoples.⁹³ When indigenous peoples have historical cultural attachment to the land,⁹⁴ adaptation to modern techniques and modern life in the use of the land does not affect their cultural rights.⁹⁵ Gilbert suggested that this

⁸⁸ Committee on Economic, Social and Cultural Rights, the supervisory body for the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA res 2200A (XXI) (entered into force 3 January 1976).

⁸⁹ UN High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights [CESCR], *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, [12] and [33], UN Doc. E/C.12/1/Add.74 (6 December 2007); CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, [12] and [35], UN Doc E/C.12/1/Add.100 (7 June 2004), cited in Ward, above n 85, 56.

⁹⁰ *Ibid*, 57. CESCR art 15(1)(a) provides: The States Parties to the present Covenant recognize the right of everyone to take part in cultural life.

⁹¹ CESCR, *General comment No. 21 Right of everyone to take part in cultural life (Art. 15, 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/21 (21 December 2009). 37, cited in *ibid*, 57.

⁹² Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27. It provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

⁹³ UN High Commissioner for Human Rights, *General Comment No. 23: The rights of minorities (Art 27)*, [3.2], UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994). On numerous occasions, the Human Rights Committee has included indigenous land rights in the right to culture. For discussion on this point, see Xanthaki, above n 8, 246.

⁹⁴ *Diergaardt v Namibia* (760/1997), CCPR/C/69/D/760/1997 (2000); 8 IHHR 46 (2001), [10.6], cited in Gilbert, above n 74, 19.

⁹⁵ *Länsman et al. v. Finland*, Communication No. 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994), [9.3]: The Committee observes that the practice of reindeer herding 'with the help of modern technology does not prevent them from invoking Art 27 of the Covenant. Furthermore, mountain Riutusvaara continues to have a spiritual significance relevant to their culture'. Another case is *Sara et al v. Finland*, Communication No. 431/1990, UN Doc CCPR/C/50/D/431/1990 (1994), [7.4]: the use of snow scooters for reindeer herding did not prevent them from claiming

protection extends to the situation of nomadic peoples exercising their way of life and the specific use of natural resources.⁹⁶ In this respect, states have a positive duty to ensure the 'effective participation of members of minority communities in decisions which affect them'.⁹⁷ Consultation with indigenous peoples must be made prior to any economic development or granting of any resource concessions within their traditional lands or territories.⁹⁸ However, pursuant to the cautious approach to collective rights, Art 27 of the ICCPR restricts its scope to individuals, that is, persons belonging to communities that it aims to protect.⁹⁹

7 Development at Regional Level

Human rights systems at regional levels, including the Inter-American Court on Human Rights (IAC) and the African Commission of Human Rights (ACHR), have also affirmed the indigenous peoples' rights to participate in decision making involving expropriation and exploitation of resources. The IAC requires FPIC if the project is large enough to have a profound impact on the survival of the affected peoples.¹⁰⁰ However, it takes the view that the land rights of the indigenous peoples do not prevent the state from authorising the extractive activities.¹⁰¹ This has been criticised as inconsistent with the whole protection of indigenous land.¹⁰² The ACHR requires the state to undertake

their right to use their lands in a traditional nomadic way, and thus to be entitled to the protection of their right to maintain such a lifestyle under Art 27 of the ICCPR.

⁹⁶ Gilbert, above n 74, 17.

⁹⁷ UN High Commissioner for Human Rights, *General Comment No. 23: The rights of minorities (Art 27)*, [3.2], UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994), 7.

⁹⁸ See, eg, UN High Commissioner for Human Rights, *Concluding observations of the Human Rights Committee: Chile*, 19, UN Doc CCPR/C/CHL/CO/5 (12-30 March 2007); UN High Commissioner for Human Rights, *Concluding observations of the Human Rights Committee: Panama*, 21, UN Doc CCPR/C/PAN/CO/3 (17 April 2008); UN High Commissioner for Human Rights, *Concluding observations of the Human Rights Committee: Nicaragua*, 21, UN Doc CCPR/C/NIC/CO/3 (12 December 2008), cited in Ward, above n 85, 56.

⁹⁹ Xanthaki, above n 8. The same approach that avoids the collective right is found in the UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, UN Doc A/Res/47/135 (18 December 1992). It specifically refers to 'persons belonging to minorities' rather than to the group itself.

¹⁰⁰ Ward, above n 85, 66.

¹⁰¹ *Saramaka People*, 2007 Inter-American Court of Human Rights (ser. C) No. 172, 126 cited in Pasqualucci, above n 82, 81.

¹⁰² As the Special Rapporteur on Human Rights observes, the issue of extractive resource development and human rights involves a relationship between indigenous peoples, Governments and the private sector which must be based on the full recognition of indigenous peoples' rights to their lands, territories and natural resources, which in turn implies the exercise of their right to self-determination

(Stavenhagen, Rodolfo, 'A Report on the Human Rights Situation of Indigenous Peoples in Asia (2007)' in *Peasants, Culture and Indigenous Peoples*, SpringerBriefs on Pioneers in Science and Practice (Springer Berlin Heidelberg, 2013) 95, 66, cited in *ibid* 82, 81).

scientifically and technically sound environmental and social impact assessments, to publicise these results and to provide meaningful opportunities for the affected peoples to be heard and participate in the decision-making process.¹⁰³

The IAC had also found for the recognition of collective property rights of the indigenous peoples 'even if the property has not been formally recognized by domestic law'.¹⁰⁴ The right to land is regarded as essential for their survival; as a way to provide them with the resources for livelihood and the geographic space necessary for cultural and social reproduction. The Court suggested that land titles must be issued to guarantee permanent use and enjoyment.¹⁰⁵ It required states to have effective mechanisms to delimit, demarcate and issue title to indigenous peoples' lands and territories.¹⁰⁶ Any changes to the title of indigenous peoples' lands cannot occur without the consent of the entire community affected.¹⁰⁷

D Instruments Related to Forest, Environment and Conservation

Indigenous rights are also recognized in environmental-related instruments in two ways: as instrumental rights effective in environmental conservation or sustainable development; and, as substantive rights of indigenous peoples recognizing the disproportionate effect of environmental degradation on them. The *Statement of Forest*

¹⁰³ *The Soc. and Econ. Rights Action Ctr. and the Ctr. for Econ. and Social Rights v. Nigeria*, Communication No. 155/96, African Commission on Human and Peoples Rights, 53 (October 2001) [*Ogoni People v. Nigeria*], (a communication filed with the African Commission of Human Rights on behalf of the Ogoni People of the Niger Delta), referring to Art 16 and 24 of the African Charter on Human and Peoples' Rights (on the rights to health and a clean environment).

¹⁰⁴ *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of August 31, 2001, Inter-American Court of Human Rights, (Ser. C) No. 79 (2001) ('*Awas Tingni*').

¹⁰⁵ *Yakye Axa Indigenous Cmty. v Paraguay*, 2005 Inter-American Court of Human Rights (Ser. C) No 125, 143 (June 17, 2005). In *Awas Tingni*, the IAC ordered Nicaragua to demarcate and title the lands of the Awas Tingni People of the Atlantic coast of Nicaragua. 2001 Inter-American Court of Human Rightst (Ser. C) No 79, 173. See also the discussion in Pasqualucci, above n 82, 63.

¹⁰⁶ *Awas Tingni*, Judgment of August 31, 2001, Inter-American Court of Human Rights, (Ser. C) No. 79 (2001). .

¹⁰⁷ *Ibid*, 179. See also the commentaries in Ward, above n 85, 65-6; Gilbert, above n 74, 19-20.

*Principles 1992*¹⁰⁸ declares that national forest policies should recognize and support indigenous peoples' rights and give them an economic stake in forest use.¹⁰⁹

However, the Earth Summit's two central outcomes, the *Rio Declaration on Environment and Development 1992*¹¹⁰ and *Agenda 21*,¹¹¹ avoid addressing land rights and merely recognize the role of indigenous peoples in environmental management and conservation. Both instruments require states to 'recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.'¹¹² The same direction was reconfirmed in the recent UN Rio+20 United Nations Conference on Sustainable Development.¹¹³ Nevertheless, the

¹⁰⁸ *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (Statement of Forest Principles) A/CONF.151/26 (Vol. III), (14 August 1992). This is a non-legally binding authoritative state of principles for a global consensus on the management, conservation and sustainable development of all types of forests, adopted at the United Nations Conference on Environment and Development, known as the Earth Summit, held at Rio De Janeiro, 3-14 June 1992.

¹⁰⁹ There are many international instruments that acknowledge the role of indigenous peoples in sustainable conservation and environment: See eg: *Agenda 21*, an action plan developed at the UN Conference on Environment and Development (UNCED), states that indigenous peoples 'have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment (26.1). The World Bank also recognizes the vital role that indigenous peoples play in sustainable development. (World Bank, Operational Manual, OP 4.10 – indigenous peoples, 2 (2005) (<http://go.worldbank.org/UBJJIRUDP0>) – accessed 9 October 2012; The preamble to the UNDRIP recognizes that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.

¹¹⁰ *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) (13 June 1992). The Rio Declaration is one of five agreements coming out of the United Nations Conference on Environment and Development (known as the 'Earth Summit') in Rio de Janeiro in June 1992. Although a non-binding, or 'soft law', instrument, the Rio Declaration sets forth important principles of international environmental law, especially sustainable development. (Source: http://www.eisil.org/index.php?sid=267276938&id=416&t=link_details&cat=418). The principle calls on states to recognize and support the interests of indigenous peoples in environmental management.

¹¹¹ *Agenda 21: Programme of Action for Sustainable Development*, UN GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (14 June 1992).

¹¹² Rio Declaration principle 22:

indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

In addition, Agenda 21 recognizes that efforts to combat deforestation require involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies. In addition, Art 8(j) of the *Convention on Biological Diversity* recognizes the relevance of the knowledge of indigenous peoples to conservation and sustainable use of biological diversity.

¹¹³ General Assembly, *The Future We Want: Resolution Adopted by the General Assembly*, 66/288, 66th sess Agenda Item 19, UN Doc A/RES/66/288 (11 September 2012), [16]. Developing nations rejected any agreement that would have established international standards, monitoring

requirement for effective participation in environmental management provides important mechanisms for the indigenous peoples to protect their resources. It imposes a duty on government to allow for effective participation.

With the global consensus, the challenge remaining is the implementation of the commitment undertaken by national governments.¹¹⁴ Governments were criticised as focusing on 'process rights' to satisfy their international commitments but obscuring substantive rights. The right to participation and consultation in decision-making processes involving resource exploitation is adopted by many jurisdictions including Malaysia but without recognizing that the peoples have significant rights as landowners and interests in the resources. This was also highlighted by the many Orang Asli representatives met during the fieldwork. In many cases, they were 'forced into discussion' on resource exploitation activities but were not seen as decision-makers. In effect, they were 'forced to agree' and the exploration activities were implemented without substantial benefit acquired by the indigenous peoples.¹¹⁵

The progress, although slow, is noteworthy. Studies by Rights and Resources Initiative (RRI) indicate that significant reform has occurred in forest tenure that is more inclusive of the rights of communities to forests in many countries with substantial forest coverage following the Earth Summit.¹¹⁶

or oversight. In effect, the central role in the control and conservation of forest remains at the hand of States that diminish the significance of land and resource rights of the indigenous peoples. The absence of clauses protecting land rights indicates a lack of appreciation of the critical need for recognition of land rights in achieving sustainable development. See, Rights and Resources Initiative, above n 15.

¹¹⁴ Permanent Forum on Indigenous Issues, *Report of the International Expert Group Meeting on Indigenous Peoples and Forests*, 10th sess, Item 3(b) of the provisional agenda, E/C.19/2011/5, (11 February 2011), [17]: The report notes that despite the developments in international law acknowledging the rights of indigenous peoples to land, territories and resources in forests, implementation at the national level has been slow or non-existent. The same finding was also recorded in the recent conference, Rio+20 Conference on Sustainable Development, held in Rio de Janeiro from 20-22 June 2013, which is a follow-up of the Earth Summit 20 years ago. It criticised that the national governments are incapacitated in detaching from dominant growth-oriented paradigms to allow for greater meaningful enjoyment of the indigenous rights: Forest Peoples Programmes, 'Rio+20: Mixed Outcomes Pose Significant Challenges for Rights and Sustainable Development' (23 July 2012) <<http://www.forestpeoples.org/topics/sustainable-livelihoods/news/2012/07/rio20-mixed-outcomes-pose-significant-challenges-rights>>.

¹¹⁵ Permanent Forum on Indigenous Issues, *Report of the International Expert Group Meeting on Indigenous Peoples and Forests*, 10th sess, Item 3(b) of the provisional agenda, E/C.19/2011/5, (11 February 2011), [18].

¹¹⁶ Rights and Resources Initiative, above n 15.

III INTERNATIONAL LAW IN THE MALAYSIAN LEGAL CONTEXT

As the evolution of indigenous peoples' rights is inevitably linked to the general principles of international human rights law, the consideration of their position within the domestic legal system is relevant. This section considers:

- a. the position of international human rights law in the legal system;
- b. the public and cultural perspectives, considered from executive practice, civil societies, academic writings, public media and personal opinions; and
- c. the values of human rights in Islam, as the majority of the population is Muslim, and are considered to be influenced by their beliefs.

The term 'international law' in this section is used particularly to refer to the international human rights law.

A The Status of International Human Rights Law in the Malaysian Legal System

From the aspect of formal ratification of international human rights instruments, Malaysia's participation is 'limited'.¹¹⁷ However, international law has a significant potential to influence the national legal system through the common law. Another aspect is the position of customary international law that has the potential to directly bind as domestic law. Yet, whether the international law will shape constitutional discourse and practice through national courts depends on the judges' receptivity to international law and foreign law.¹¹⁸

1 Customary International Law in Malaysia

Similar to other common law systems which received English law in the British Empire, Malaysia follows common law principles in recognizing international law. It adopts a dualist position in respect to treaties, that is, the international law is not part of the municipal law. Treaties only apply if they have been transformed into domestic law by a specific procedure under the domestic law, normally through an act of legislative authority. Non-binding resolutions such as the Universal Declaration of Human Rights (UDHR) have no legal force in domestic law. There is one significant exception to this which is similar to the monism found in some civil law systems. The exception is

¹¹⁷ The only international instruments on human rights are the *United Nations Convention on the Rights of the Child 1989* (ratified in 1995) and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). Opened for Signature 1 March 1980, Vol 1249, No 20378 (entered into force 3 September 1981).

¹¹⁸ Li-ann Thio, 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) 4(3) *National Taiwan University Law Review* 335 at p 359.

customary international law (CIL). It forms part of the common law and is a direct source of rules in municipal law. It is automatically incorporated into the domestic law without the need for express adaptation by the local courts or legislation.¹¹⁹

The applicability of CIL in domestic law is particularly relevant in respect to the rights of indigenous peoples. Some leading scholars have argued that a number of indigenous rights, especially on land and resources, have crystallised into CIL.¹²⁰ These include the rights to demarcation, ownership, development, control and the use of their traditional lands. The UNDRIP, they claim, reflects a growing consensus on the minimum legally enforceable rights.¹²¹

However, some writers observed that Malaysian practice in respect to the adoption of CIL into its common law is inconsistent.¹²² There are instances of courts recognizing the status of CIL as directly applicable in the jurisdiction.¹²³ But in other cases,¹²⁴ the courts have done so in a less direct way but still observing the basic principle. They have applied CIL through s 3(1) of the *Civil Law Act 1956* (Malaysia). Section 3(1) provides for incorporation into Malaysian common law of English common law on certain cut-off dates in the absence of any written law in Malaysia and subject to its suitability to Malaysia's local circumstances. The CIL is taken as part of English common law for the purposes

¹¹⁹ See, eg, Hamid, Abdul Ghafur @ Khin Maung Sein, 'Judicial Application of International Law in Malaysia: A Critical Analysis' (2005) 1 *Asia-Pacific Yearbook of International Humanitarian Law Quarterly Review* 196; Shuaib, Farid Suffian, 'The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse?' (2008) 16 *IJUM Law Journal* 181.

¹²⁰ Anaya and Wiessner, above n 48, [11]. Cf, Xanthaki, above n 8.

¹²¹ Wiessner, Siegfried, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57; Melissa Castan, 'DRIP feed: the slow reconstruction of self-determination for Indigenous peoples' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Edgar Publishing Ltd, 2010) 492, 498; Cf Xanthaki, above n 8, 35-37.

¹²² Hamid, above n 119; Shuaib, above n 119.

¹²³ In *Chung Chi Cheung v R* [1939] AC 160; [1939] 1 MLJ 1, Lord Atkin, delivering the judgment of the Privy Council, stated:

The court acknowledges the existence of a body of rules, which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

As the *Chung Chi Cheung's case* was decided by the Privy Council, it has a binding legal effect. Other cases are *Sockalingam Chettiar v Chan Moi* [1947] MLJ 154; and *PP v Oie Hee Koi* [1968] 1 MLJ 148.

¹²⁴ *Village Holdings Sdn Bhd v Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656 Shankar J; *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd* [1990] 1 MLJ 475, Gunn Chit Tuan SCJ.

of s 3(1) provided it is not in conflict with a statute or a judicial decision of final authority or with local public policy.¹²⁵ The second way clearly depends on local legislation.

2 International Law as an Aid to Statutory Interpretation and Persuasive Authority

International law, which is not CIL, is also an influence on developing Malaysian common law.¹²⁶ First, as an aid to statutory interpretation, international law is used in two ways:

- the contents of ratified international instruments may be referred to as an aid in interpreting legislation giving effect to treaty obligations; and
- international law may be used to resolve ambiguity in other legislation not related to any international instruments.¹²⁷

This interpretative and developmental role of treaties in municipal law is justified by rebuttable presumptions that the legislature does not intend to legislate inconsistently with the state's obligations in international law, and that the courts are agencies of the state and have their own responsibility for ensuring that the state complies with its international obligations.¹²⁸ In administrative law, courts have regard to relevant treaty obligations binding the state as part of the background against which the rationality of state actions or rules is assessed.¹²⁹ The more significant the right asserted, or the greater the interference, the stronger the justification needed.¹³⁰ Where a case involves fundamental rights, such as the right to life, judges have said that they would subject any interference with it to particularly anxious scrutiny.¹³¹ Its application depends on how

¹²⁵ *PP v Narogne Sookpavit* [1987] 2 MLJ 100 (High Court of Malaya). The applicability of the right of innocent passage as an established rule of CIL has been refused for being inconsistent with the local laws. It is suggested that the judiciary needs to adopt a consistent approach. Shanker J concluded:

Even if there was such a right of innocent passage and such right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened the Malaysian domestic legislation.

See also, Mohammad Naqib Ishan Jan, *Principles of Public International Law* (IIUM Press, 2008), 47.

¹²⁶ *Mabo (No 2)* (1992) 175 CLR 1, [29], [41]-[42] (Brennan J), also cited in *Sagong (No 1)* [2005] 2 MLJ 591, 615.

¹²⁷ David Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Year Book of International Law* 105, 105, citing *Saloman v Commissioners of Customs and Excise* [1967] 2 QB 116; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] UKHL 4; [1991] AC 696; M Hunt, *Using Human Rights Law in English Courts* (1996).

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, 105.

¹³⁰ *Ibid.*, citing *R v Ministry of Defence; Ex parte Smith* [1995] EWCA Civ 22; [1996] QB 517.

¹³¹ *Ibid.*, citing *Bugdaycay v Secretary of State for the Home Department* [1986] UKHL 3; [1987] AC 514.

recently the treaty was entered into, and statutes enacted in the interim which may negate its application.¹³²

Courts have also used the doctrine of legitimate expectation to suggest that a ratified international treaty may give rise to a legitimate expectation that state agencies will comply with the obligations imposed by the treaty in the exercise of a statutory discretion which is enforceable through judicial review.¹³³

Second, international law is also used by common law judges as a persuasive authority to justify the use of non-binding sources, and as a confirmation of the courts' approach to the matter.¹³⁴ Although its weight is weak in the normative hierarchy of the legal system, it may influence the direction of decisions or the reasoning of judges. It provides insights into the ethical and social values of contemporary society.¹³⁵ Michael Kirby suggested that the more subtle and indirect way that the international law has influence over the common law is through judicial culture and thinking about appropriate standards to be used in national systems of common law.¹³⁶

Scholars have noted a change in the perspectives of judges towards international human rights norms in common law jurisdictions, such as England and Wales,¹³⁷ Australia, New Zealand and Canada;¹³⁸ and more so in developing countries including India, Pakistan,

¹³² Feldman above n 127.

¹³³ UK case, *R v Secretary of State for the Home Department; Ex parte Ahmed and Patel* [1998] INLR 570, following the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh* 183 CLR 273 ('*Teoh*'). In Malaysia, *Teoh's* case was followed in *Noorfadilla* [2012] 1 MLJ 832 (see below III.A.2(b)).

¹³⁴ Carl Baudenbacher, 'Judicial Globalization: New Development or Old Wine in New Bottles?' (2003) 38 *Texas International Law Journal* 505, 523.

¹³⁵ Knop, Karen, 'Here and There: International Law in Domestic Court' (1999-2000) 32 *Journal of International Law and Politics* 501, 520.

¹³⁶ Michael Kirby, 'International Law and the Common Law: Conceptualising the New Relationship' (Paper presented at the Fourth James Crawford Biennial Lecture on International Law, University of Adelaide, 2009), 9. He stated

When a body of law becomes part of the daily concerns of a lawyer, it is inevitable that its provisions will influence the way other parts of the law will be viewed and interpreted. A new habit of mind is encouraged which cannot but influence the way lawyers and judges approach problems and discover and apply the law that is needed for the resolution of problems.

¹³⁷ The position in the UK is, however, influenced by the *Human Rights Act 1998*.

¹³⁸ Kirby, above n 136; René Provost, 'Judging in Splendid Isolation' (2008) 56(1) *American Journal of Comparative Law* 125; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102(2) *American Journal of International Law* 241; John D Smelcer, 'Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in US and Australian Domestic Courts' (2006) 15(1) *Pacific Rim Law and Policy Journal Association* 301, 320; Alison Duxbury, 'The impact and significance of *Teoh* and *Lam*' in Matthew Grove and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 299, 302.

Sri Lanka and Bangladesh.¹³⁹ Some of the highest courts of those jurisdictions have demonstrated a willingness to consider rulings in other jurisdictions and in international and regional courts and tribunals by using various common law techniques.¹⁴⁰ *Mabo (No 2)* is an example of the use of international law in an indirect way.¹⁴¹

Eyal suggested that judicial activism relying on foreign law is more visible in developing countries because of the failing democratic political process in those countries. He observed,

aggressive judicial activism is not required in countries, particularly developed ones, where public awareness of environmental issues translates into effective political action and modern environmental legislation replaces ancient doctrines of tort law. Where public demand prompts legislators to enact legislation, courts can take a back seat.

However, reference to international law may be contentious. Judges in the United States¹⁴² and Singapore¹⁴³ for instance continue to resist the use of international law as a source of domestic law. Opposition is mainly on the grounds of democratic deficit, that is, the concern of judges that they are not in a position to introduce into domestic law legal standards which have not received acceptance by the more representative legislative branch of government.¹⁴⁴ Another is the issue of separation of powers, that is, the desire of judges to protect the integrity of the constitutional balance of power between the executive, legislative and judiciary.¹⁴⁵ The reasoning of the majority in an Australian

¹³⁹ Benvenisti, above n 138, 260-2.

¹⁴⁰ Kirby, above n 136.

¹⁴¹ *Mabo (No 2)* (1992) 175 CLR 1, Toohey J, [126]: referring to International Convention on the Elimination of All Forms of Racial Discrimination for the protection of proprietary rights and right to inheritance; Brennan J, [42]: international law as 'legitimate and important influence on the development of the common law'.

¹⁴² Benvenisti, above n 138, 241.

¹⁴³ Li-Ann Thio, 'In the Courts: The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court – Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *Public Prosecutor v Nguyen Tuong Van*' (2004) *Oxford University Commonwealth Law Journal*, 215,

While readily borrowing from foreign commercial case law, Singapore courts display a distinct reticence in cases concerning public law values, where the emphasis is on localizing rather than globalizing case-law jurisprudence in favour of communitarian or collectivist Singapore or Asian values, in the name of cultural self-determination.

¹⁴⁴ For example, in the Canadian case, *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 855: Iacobucci J, concurred by Cory J, objected to the view stating that it allows the appellant to achieve indirectly what cannot be achieved directly, namely to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament. See discussion in David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 16.

¹⁴⁵ See the commentary in Feldman, above n 127.

case, *Teoh*,¹⁴⁶ for instance, was viewed by some as an ‘unsuccessful attempt to avoid the allegation of “back door” incorporation of treaty law by the judiciary’.¹⁴⁷ In *Teoh*, the majority of the Australian High Court judges held that the ratification by the executive of the *Convention on the Rights of the Child 1989* created a legitimate expectation in the applicant and his children that any decision relating to residency or deportation would be made in accordance with Art 3(1) of the Convention. The article requires treating the best interests of the children as a primary consideration.

McHugh J, in his dissenting judgment, described the reliance on the international law as ‘a funny sort of obligation’; ‘strange, almost comic’ argument based on the ground of separation of powers.¹⁴⁸ Others rested their criticism on the doctrinal and practical difficulties of using legitimate expectation through forms of procedural fairness.¹⁴⁹ The Australian Government also responded by issuing ministerial press statements to the effect that people should not expect government decision-makers to apply ratified but unincorporated treaties.¹⁵⁰

To this, Dyzenhaus, Hunt and Taggart proposed that the legitimacy of the reliance of judges on unincorporated conventions in interpreting domestic laws lies in the ‘principle of legality’. This principle is a fundamental value of the common law and includes values expressive of human rights. The international norms, they argued, add to the ‘repository of values’ upon which judges, lawyers and policy-makers draw. Seen from this aspect, it is the common law tradition in action that updates the ‘repository’ of fundamental values to which the administrative state may be subjected.¹⁵¹ The practice, they argued, is properly located within a particular conception of democratic legal culture, in which decision-makers are obliged to justify their decisions by showing either how the decisions conform to those values, or that they are justifiable departures from those values.¹⁵² The notion of justification implies that the reasons supporting a decision must be ‘good’ reasons and this, in turn, requires norms or rules for determining what counts as a ‘good’ reason.

The role of the international human rights law in the development of common law was also acknowledged by judges in their extra-judicial capacity in the Bangalore Principles

¹⁴⁶ (1995) 183 CLR 273.

¹⁴⁷ Dyzenhaus, Hunt and Taggart, above n 144, 11.

¹⁴⁸ McHugh J (dissenting), *Teoh*, (1995) 183 CLR 273, 314.

¹⁴⁹ Dyzenhaus, Hunt and Taggart, above n 144, 12.

¹⁵⁰ Duxbury, above n 138.

¹⁵¹ Dyzenhaus, Hunt and Taggart, above n 144, 32-4.

¹⁵² *Ibid*, 6, referred to as ‘culture of justification’.

of Judicial Conduct.¹⁵³ They acknowledged that it is legitimate to take international human rights norms into account in performing their judicial functions. This can be done in construing ambiguities in a constitutional text, in resolving uncertainties in the meaning of legislation and in filling gaps in the common law for which there is no exact applicable precedent.

At the regional level of Asia and the Pacific, the 1995 Beijing Statement of Principles of the Independence of the Judiciary also endorses the indispensable role of the regional judiciary to implementing the right to fair trials required by the UDHR and ICCPR.¹⁵⁴ It is also affirmed that the objective and function of the judiciary is also to 'promote, within the proper limits of the judicial function, the observance and the attainment of human rights'.¹⁵⁵

3 Malaysian Judicial Perspective

This section identifies the general perspective of the Malaysian judiciary and attempts to determine the pattern in cases in which reference to international law is made. This was introduced briefly in the methodology part, Chapter 2.III.C.3.c.(ii).

(a) General Perspective

A survey of cases shows that, in general, the Malaysian courts refrain from making direct references to international human rights law in the interpretation of the domestic law. They are also dismissive of arguments based on the international human right laws raised by counsel in seeking to persuade them to give primacy to the constitutional fundamental liberties' provisions in interpreting derogating statutory provisions.¹⁵⁶ In *Merdeka University Berhad v Government of Malaysia*,¹⁵⁷ Abdoolcader J appears to be dismissive of the usefulness of the UDHR as a point of reference for determining values in contemporary Malaysian law. He stated

It (*the UDHR*) is not a legally binding instrument ... and some of its provisions depart from existing and generally accepted rules. It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law ... The Declaration sets out fundamental rights in absolute and unqualified terms and does not contain any precise specification of the extent or ambit of these rights, but a general limitation is laid down in

¹⁵³ The Bangalore Principles were concluded in a Judicial Colloquium held in Bangalore, India in 1988. The document is published in (1998) 14 Commonwealth Law Bulletin 1196 and (1998) 62 Australian Law Journal 531. The Bangalore Principles were subsequently reaffirmed successively by the Harare Declaration of Human Rights 1989, the Banjul Affirmation 1990; the Abuja Confirmation 1991 and the Balliol Declaration 1992.

¹⁵⁴ Beijing Statement of Principles of the Independence of the Judiciary principle 2.

¹⁵⁵ *Ibid*, principle 10(b).

¹⁵⁶ Conversation among lawyers in Malaysia suggests that arguments based on international human rights law in courts are best avoided.

¹⁵⁷ [1981] 2 MLJ 356.

clause 2 of Article 29 that in the exercise of his rights and freedoms, everyone shall be subject to such limitations as are determined by law as specified therein, combining in effect the traditional concept of the sphere of individual liberty with the modern rule of social purpose and social utility ...

In the *Human Rights Commission of Malaysia Act 1999* (HRA), the UDHR, however, is used as a basis for the work of the Human Rights Commission of Malaysia.¹⁵⁸ Section 4(4) provides that regard shall be had to the UDHR for the purpose of the Act, subject to the *Federal Constitution*. Some suggested that this reference to the international instrument within a domestic statute provides for its applicability and enforceability in the jurisdiction. One suggested that the provision has the effect of importing the human rights enshrined in the UDHR into domestic law.¹⁵⁹

Attempts to persuade courts of this have failed. In *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara ('Ezam')*,¹⁶⁰ Siti Norma FCJ held that the provisions are only 'an invitation' to look at the UDHR if one is 'disposed to do so, consider the principles stated therein and be persuaded by them if need be'. The statute is not read as an obligation to adhere to the international instrument.¹⁶¹ The UDHR has been given no weight in interpreting the scope of human rights defined by domestic statutes. This is a similar position to that taken in Australia.¹⁶² The *SIS Forum*¹⁶³ also affirmed this position.

(b) Cases of Positive Reference to International Human Right Norms

Direct references made by judges to international law in interpreting the local laws in recent cases may signify a greater potential for its use. *Abd Malek bin Hussin v Borhan*

¹⁵⁸ The Act was enacted to establish the Human Rights Commission of Malaysia.

¹⁵⁹ B Lobo, 'Does the Law of Human Rights Pervade All Malaysian Law in View of Part II of the Federal Constitution' (2007) 7 *Malayan Law Journal* lxxxvi, lxxxvii.

¹⁶⁰ [2002] 4 MLJ 449: The cases involved five appeals against High Court decisions refusing *habeas corpus* for release from detention under s 73 of the *Internal Security Act 1960* on the ground that the exercise of power was mala fide and improper. The appellants' counsel argued that reference to the UDHR in a local statute has the effect that the approach taken by international communities and reliance on the international standards receive statutory recognition within the domestic law. It thus would be of persuasive value and assistance when defining the substantive right under the *Constitution*. They contended that in determining the extent and scope of Art 5(3) of the *Federal Constitution* (freedom of liberty), the court should have regard to the relevant international standards including the UDHR.

¹⁶¹ *Ibid*, 510-11 (Siti Norma Yaakob FCJ).

¹⁶² See eg *Dietrich v The Queen* (1992) 177 CLR 292 per Mason CJ and McHugh J [18]; cited in Dyzenhaus, Hunt and Taggart, above n 144, 34.

¹⁶³ [2010] 2 MLJ 377 (HC): It was an application for judicial review to quash the decision of the Minister banning a book published by the applicant under s 7(1) of the *Printing Presses and Publications Act 1984* on the ground of being prejudicial to public order. As part of the argument, counsel for the applicant suggested that the court rely on the doctrine of legitimate expectation in relation to international obligations assumed by the government and the Minister concerned on the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The court rejects the doctrine of legitimate expectation as an approach to consider the international norm as adopted in *Teoh* (1995) 183 CLR 273.

*bin Hj Daud ('Abdul Malek')*¹⁶⁴ and *Muhammad Hilman bin Idham v Kerajaan Malaysia ('Muhammad Hilman')*¹⁶⁵ are examples where international law is used to provide support for judges seeking to give primacy to the fundamental rights of liberty protected by the *Constitution*. In the former, failure to properly inform the person arrested of the ground of arrest under section 8 of the *Internal Security Act 1964* was found to be a breach of the constitutional provision protecting individual freedom of liberty.¹⁶⁶ In the latter, s 15(5)(a) of the *Universities and University College Act 1971* was declared invalid.¹⁶⁷ Hishamuddin J departed from the previous approach in constitutional interpretation involving fundamental liberties to take a more liberal and prismatic approach. He found that the position of fundamental liberties and any restrictions must be considered with care and subject to the question of reasonableness which the court has power to determine. Section 15(5)(a) was null for imposing unreasonable restrictions and thereby, unconstitutional. In both cases, the UDHR was referred to in order to provide support for the approach taken.¹⁶⁸ This case was decided in the context of indications from the executive government that former restrictions, including the *Internal Security Act 1964*, may be lifted.

In *Suzana Mat Aris v DSP Ishak bin Hussain ('Suzana')*,¹⁶⁹ for the first time in the jurisdiction, the UDHR was held to be part of the domestic law and binding. This was on

¹⁶⁴ [2008] 1 MLJ 368 – a claim for damages for false imprisonment and tort of assault and battery against police officers and the government.

¹⁶⁵ [2011] 6 MLJ 507.

¹⁶⁶ *Hishamudin J, Abd Malek* [2008] 1 MLJ 368.

¹⁶⁷ s 15(5)(a) provides

No student of the University and no organization, body or group of students of the University which is established by, under or in accordance with the Constitution, shall express or do anything which may reasonably be construed as expressing support for or sympathy with or opposition to (a) any political party, whether in or outside Malaysia.

¹⁶⁸ Hishamudin J stated in *Abd Malek* [2008] 1 MLJ 368

In dealing with art 5(3) of the Constitution, I am mindful of the fact that I am presently dealing with the fundamental liberty of the citizens. The preservation of the personal liberty of the individual is a sacred universal value of all civilised nations and is enshrined in the Universal Declaration of Human Rights and Fundamental Freedoms of 1948. Article 5(3) of the *Federal Constitution* guarantees every person in this country of his personal liberty and protection from arbitrary arrest particularly arbitrary arrest by the state. As I have said in *Abdul Ghani Haroon*, and I will say it again now, judges are protectors of the fundamental liberties of the citizens and that this is a sacred duty or trust which judges must constantly uphold.

In *Muhammad Hilman* [2011] 6 MLJ 507, [55] the same judge stated

Freedom of expression is one of the most fundamental rights that individuals enjoy. It is fundamental to the existence of democracy and the respect of human dignity. This basic right is recognized in numerous human rights documents such as article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

¹⁶⁹ [2011] 1 MLJ 107.

two grounds: first, s 4(4) of the HRA as discussed in the previous section; and second, the fact that Malaysia is a member of the United Nations. Lee Swee Seng JC found that the denial of medical attention and assistance in police custody amounted to a deprivation of life and liberty within the meaning of Art 5(1) of the *Federal Constitution*.¹⁷⁰ The protection of life and liberty within the constitutional provision, he found, extends to protection from 'torture or to cruel, inhuman or degrading treatment' as prohibited by Art 5 of the UDHR.¹⁷¹

Lee Swee Seng JC also affirmed this view in a recent case, *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak*.¹⁷² The case involves a conversion of children to Islam by their father, a newly Muslim convert without knowledge and consent of the Hindu mother. He views the international norms declared in the UDHR as binding on all member countries unless they are inconsistent with the countries' constitutions. The fundamental liberties' provisions in the *Constitution* are to be interpreted in line with the international norms. In reference to CEDAW and the Convention on the Rights of the Child (CRC), ratified by Malaysia, he suggested that

The principles propounded in these conventions are highly persuasive and should provide that guiding light to help us interpret the fundamental liberties enshrined in our constitution taking into consideration accepted norms of international law in these international conventions that have been widely accepted and ratified by countries across the world.¹⁷³

In *Noorfadilla Ahmad Saikin v Chayed Basirun ('Noorfadilla')*,¹⁷⁴ Zaleha J made several important observations which mark a departure from previous approaches. First, she held that the *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*, a treaty which is ratified but unincorporated, is part of the domestic law¹⁷⁵ and is binding on the Malaysian government which was a party to the case. Second, in interpreting the local laws, it is the obligation of the court to take into account the government's commitment and obligations at an international level. This followed an Indian precedent, *Vishaka v State of Rajasthan*.¹⁷⁶ *Vishaka* emphasized the obligations

¹⁷⁰ Art 5(1) provides for prohibition of deprivation of life or personal liberty except in accordance with the law.

¹⁷¹ *Suzana* [2011] 1 MLJ 107, 122, [27]. Lee Swee Seng JC held that

For the state to deprive a person of medical treatment promptly when a person is in police custody, especially when the person is in pain and has just vomited blood, is to subject the person to torture, cruel, inhuman or degrading treatment by default though not deliberately by design.

¹⁷² [2013] 7 CLJ 82.

¹⁷³ *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak* [2013] 7 CLJ 82, [91].

¹⁷⁴ [2012] 1 MLJ 832.

¹⁷⁵ *Ibid*, 841.

¹⁷⁶ AIR 1997 SC 3011

of the Indian Government under two international statements, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* and the Fourth World Conference on Women in Beijing. It is noted that Malaysia has also made the same commitment to achieve these statements. Third, Art 1 and Art 11 of CEDAW are used to clarify the terms 'equality' and 'gender discrimination' under Art 8(2) of the *Federal Constitution*.¹⁷⁷

These direct references to the international instruments and their use in interpreting domestic law to support the primacy of human rights suggest that international human rights norms are having an increasing influence on the judiciary.

(c) Indigenous Peoples' Rights' Claim

In cases involving indigenous land rights in Malaysia, the developments in international law on the rights of indigenous peoples are also instrumental in the judicial interpretation of the domestic law on their customary land. The landmark case of *Adong (No 1)*¹⁷⁸ takes cognisance of international human rights law in recognizing the common law rights of the aborigines to their land and resources.¹⁷⁹ The ruling has led to the development of a body of common law recognizing the existing rights arising from their traditional laws and custom.

*Nor Anak Nyawai*¹⁸⁰ had earlier made reference to the *Draft Declaration of the Rights of Indigenous Peoples*.¹⁸¹ Even though the trial judge observed that 'the draft declarations play no part' in his decisions 'since they do not form the law of our land,' he specifically said that the articles are reproduced to show how wrong the attitude of the first and second defendants in the case were towards the natives of Sarawak. He added that it is 'more so when the natives are supposed to enjoy the special position envisaged by Art 161A of the *Constitution*'. The judge in *Sagong (No 1)*¹⁸² similarly concluded his findings

¹⁷⁷ *Noorfadilla* [2012] 1 MLJ 832, 842. The judge also referred with approval to the case of *Teoh* (1995) 183 CLR 273; *Vishaka v State of Rajashtan* AIR 1997 SC 3011.

¹⁷⁸ [1997] 1 MLJ 418.

¹⁷⁹ *Ibid*, 427.

¹⁸⁰ [2001] 6 MLJ 241.

¹⁸¹ Ian Chin J:

They should be reminded of the global attitude towards natives and for this purpose I need only refer to the draft declaration on the Human Rights of Indigenous Peoples which declares the right of the natives to maintain their cultural characteristics, viz: ... [Referring to Art 4, 7-10 of the then Draft Declaration] stating that *the articles of the draft declaration provide valuable insight as to how we should approach matters concerning the natives.*

¹⁸² [2002] 2 MLJ 591.

by giving recognition to international law on indigenous land rights.¹⁸³ This was also acknowledged in *Mohamad Rambli*.¹⁸⁴ David Wong J stated,

The thinking of the legal profession, which includes the judiciary, has also changed to reflect the change in society. This change has seen the courts in this country recognising the relevance of international human rights protection to native title in Malaysia.¹⁸⁵

However, on a reference by counsel to the UNDRIP, Zaki FCJ in *Bato' Bagi*¹⁸⁶ held that international norms must be read in the context of the *Constitution*. Raus FCJ rejected the proposition that the UNDRIP should be used as a guide to interpret the *Constitution*.¹⁸⁷

The developments in international human rights law are also indirectly influencing changes in Malaysian common law through the Malaysian judiciary adopting persuasive precedents from other common law jurisdictions that make reference to international law. Holding that the proprietary interest of the Orang Asli in their customary and ancestral lands is an interest in, and to, the land, Mohd Noor J in *Sagong (No 1)*¹⁸⁸ cited with agreement the statement by Brennan J in *Mabo (No 2)* that places significant reliance on international law.¹⁸⁹

The development of international human rights law is a significant part in the reasoning by Brennan J that native title had survived the acquisition of sovereignty by the British Crown. The case challenged the then accepted understanding to the contrary. The *Racial Discrimination Act 1975* (Cth) played a pivotal part in the ultimate decision. The Act followed Australia's ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination*¹⁹⁰ and implements it in domestic law. However, the prohibition against racial discrimination forms part of the *jus cogens* of CIL. That is, the

¹⁸³ Ibid, 613. Mohd Noor J stated, '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.'

¹⁸⁴ [2010] 8 MLJ 441.

¹⁸⁵ Ibid, 473.

¹⁸⁶ (2011) 6 MLJ 297.

¹⁸⁷ Above 186, [180].

¹⁸⁸ [2002] 2 MLJ 591, 615.

¹⁸⁹ *Mabo (No 2)* (1992) 175 CLR 1, Brennan J stated,

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

¹⁹⁰ Opened for signature 4 January 1969, UNTS 660 (entered into force 4 January 1969).

prohibition against racial discrimination is a peremptory norm and fundamental principle of international law accepted as community of nation states from which no derogation is permitted.¹⁹¹

Therefore, although Malaysian law and its judiciary observe the dualist approach to international human rights norms found in common law jurisdictions, there are indications that the judges look to international human right laws as standards for acceptable principles for contemporary Malaysian values. It is apparent that standards found in international law are able to influence changes in domestic law involving human rights and indigenous peoples' rights in particular. The developments are also indirectly influenced through the Malaysian judiciary adopting persuasive precedents based on international human rights norms from other common law jurisdictions.

4 The Personal View of Judges

Personal interviews with two judges, one from the Federal Court and the other from the High Court, revealed a positive attitude towards international human rights law. Both believed that it is important for judges to interpret the law by taking into account the developments in international law and in common law countries, specifically the principles that it promotes, although subject to the law applicable within Malaysia.¹⁹² It is seen by them as a source of good principles of universal value which are persuasive in deciding cases. One suggested that it may be seen as reflective of public opinion and the social reality of current situations.¹⁹³ The other believed that the principles embodied in international law, specifically on protection of individual rights, are similarly safeguarded by domestic law. These two opinions may not be representative of the Malaysian judiciary as a whole.

Some other interviewees also considered that the judges must keep abreast of the developments in international law and consider the domestic law consistently with its principles.¹⁹⁴ One notes that the personal views and attitude of the judges, however, determines the extent of the influence that international law may have on the judiciary.¹⁹⁵

¹⁹¹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980), art 53.

¹⁹² Interview data: a Federal Court Judge; a High Court Judge.

¹⁹³ Interview data: a High Court Judge.

¹⁹⁴ Interview data: a lawyer focusing on Orang Asli matters, an academic in a forestry faculty, a law academic focusing on native issues, a researcher in the Forest Research Institute, a researcher focusing on Orang Asli development.

¹⁹⁵ Interview data: the Director of the Center for Orang Asli Concerns.

5 Indirect Internalisation

International principles have also been internalised through government policies and domestic implementation of the principles (Chapter 6 (I.B.3(b))). These include those related to economic development and international trade, logging practices, conservation and forest management created through various public and non-state regimes. There are many explicit written policies that require respect and consideration for the rights of the public including the Orang Asli.¹⁹⁶ A timber certification auditor, who was interviewed, suggested that international principles are given effect in the local context indirectly through the monitoring system adopted by certification regimes or international financiers in various local projects.¹⁹⁷ Although it has not so far involved amendment to legislation to expressly recognize the rights of the Orang Asli, many interviewees believed that it will gradually change the way the laws are interpreted and implemented.¹⁹⁸

B Local Perspectives on International Law

1 Perspectives on International Human Rights Law

Malaysian politicians have been seen as proponents of cultural relativism, arguing that law and its norms are products of particular societies and particular times. The concept of human rights has been previously rejected as a non-universalist and Western concept. It is argued that the conception of the individual is foreign to certain societies that emphasize the notion of the group or the community.¹⁹⁹ Human rights, it is claimed, are 'not only inapplicable and of limited validity, but even meaningless to Third World countries'. However, many Asian leaders have advocated for strong government which suppresses activities that may affect stability, limiting personal liberties for economic prosperity.²⁰⁰ It has been argued that only those authoritarian regimes are able to promote fast economic growth.²⁰¹ But others argued that these views are propagated to

¹⁹⁶ Interview data: a senior forestry enforcement officer, a law academic focusing on native issues, a researcher in the Forest Research Institute.

¹⁹⁷ Interview data: a researcher in in Forest Research Institute.

¹⁹⁸ Interview data: a law academic focusing on Orang Asli land transaction, a law academic focusing on native issues, an academic in a forestry faculty, a senior forestry enforcement officer.

¹⁹⁹ NN Chokr, *Human Rights: Beyond Universalism and Cultural Relativism – Toward a Contextual, Dynamic and Cross-Cultural Approach*: (R&D Consultants Associates, Inc., 1999) cited by Mohd Sani, Mohd Azizuddin, 'Mahathir Mohamad As A Cultural Relativist: Mahathirism On Human Rights' (Paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia, Melbourne, 1-3 July 2008) <http://arts.monash.edu.au/mai/asaa/mohdazizuddinmohdsani.pdf>, 3.

²⁰⁰ Mohd Sani, above n 199, 8.

²⁰¹ The concept of 'Asian values' are mainly propagated by leaders of Singapore, Malaysia, Indonesia and Myanmar. See eg, Aidila Razak, 'Democratic rights trigger vicious cycle of instability', *Malaysiakini.com* 26 November 2012 <<http://www.malaysiakini.com/news/215140>>;

maintain specific practices under threat from globalization and democratization.²⁰² Often they have been used to buttress politicians' own personal power.²⁰³ Indigenous peoples themselves as noted in Chapter 4.I.A.3 have faced problems in the recognition of their collective rights.

A brief survey of some Malaysian writing on international human rights law confirms the perception of the resistance to greater reliance on international law.²⁰⁴ One writer, pessimistic towards its influence on the law in Malaysia, pointed to the failure by the Malaysian State to even ratify international instruments.²⁰⁵

In contrast, within academic discourse, civil society and in the media, international law is seen as providing leverage for human rights in Malaysia. Shad Saleem, for example, suggested that international law could be employed to determine the horizons of Malaysian rights and duties including those which have been provided by the Bill of Rights in the *Constitution*.²⁰⁶ The Bar Council regarded the UDHR as a moral compass or benchmark in assessing domestic law.²⁰⁷ As noted, the national human rights institution, Suhakam, has also been established with the power to review domestic law against the standards of the UDHR.²⁰⁸ There are also increasing attempts made by

Mahathir Mohamed, 'Keynote Address' (unpublished) (Speech delivered at JUST International Conference 'Rethinking Human Rights' Kuala Lumpur, 1994), 9 in Jack Donnelly, 'Human Rights and Asian Values: A Defense of Western Universalism' in Jack Donnelly (ed), *The Concept of Human Rights* (60, 70; Kim Dae Jung, 'A Response to Lee Kuan Yew: Is Culture Destiny? The Myth of Asia's Anti-Democratic Values' (November–December 1994) 73 *Foreign Affairs*, 189-94 in Anwar Ibrahim, 'Universal Values and Muslim Democracy' (July 2006) 17(3) *Journal of Democracy* 5.

²⁰² WA Manan, 'A Nation in Distress: Human Rights, Authoritarianism, and Asian Values in Malaysia' (1999) 14(2) *SOJOURN: Journal of Social Issues in Southeast Asia* 359 cited by Mohd Sani, above n 199, 9.

²⁰³ Ibid.

²⁰⁴ See, eg, Shuaib, above n 119. The movement towards Malaysian common law rejecting reference to English common law may also influence the perspectives towards the international law. See, eg, Farid Suffian Shuaib, 'Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods' (2009) *Jurnal Undang-Undang*; Joshua Neoh, 'The Legitimacy of the Common Law in Post-Colonial Malaysia' (2010) *LAWASIA Journal* 59; Bhag Singh, 'Limited use of English common law', *The Star* 9 November 2010 <http://thestar.com.my/lifestyle/story.asp?file=/2010/11/9/lifefocus/7349548&sec=lifefocus>.

²⁰⁵ Nordin, Rohaida, 'Malaysian Perspective on Human Rights' (2011) *Jurnal Undang-Undang* 17. She observed that 'individual rights and freedoms of the peoples in Malaysia will be protected or violated because of what exists or what is lacking within the state and not because of what is said or done within international law and international institutions.

²⁰⁶ Shad Saleem Faruqi, 'New Thinking on Human Rights', *The Star Online* 16 November 2011 <<http://thestar.com.my/columnists/story.asp?file=/2011/11/16/columnists/reflectingonthelaw/9910599&sec=reflectingonthelaw>>.

²⁰⁷ Ambiga Sreenevasan, 'Malaysian Bar President's Speech on the 60th Anniversary of the UDHR' (2 January 2009) (16 June 2012) <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=20368>.

²⁰⁸ *Human Rights Commission of Malaysia Act 1999* s 4.

counsel in Malaysian courts to persuade presiding judges to interpret local laws by reference to international norms, especially those affirmed in the UDHR. These may all be seen as the increasing influence of international laws on Malaysian law which may shape the future course of its development.

In respect to specific indigenous principles in international law, these developments provide legitimacy for the claims by indigenous peoples. This also appears to be gaining support within Malaysia. A recent public inquiry by the Human Rights Commission on the land right issues of the natives and the Orang Asli used the standards provided by the UNDRIP. In October 2012, the Cabinet agreed to form a committee to review the present laws on human rights from the perspective of international law. The aim is to establish a National Human Rights Action Plan as proposed by the *Vienna Declaration and Program of Action* (Vienna Declaration) 1993. One of the main focuses of the committee is to examine the legal position of Orang Asli land.²⁰⁹

(a) Perspectives from the Fieldwork

Data from the interviews conducted during the fieldwork revealed the same clash in the perspectives of international human rights law and the specific law on indigenous peoples. Most interviewees are positive that international law should be the standard used to measure the domestic law and, in part, its future direction. Some also suggested that the fact that Malaysia voted for the adoption of the UNDRIP will be significant in influencing the development direction of the local law.²¹⁰

Some public officials and an academic who were interviewed had negative perceptions of the impact of international law.²¹¹ All raised the issue of state sovereignty; the different context of Malaysia; the need to consider the interests of the country and public at large; and, the belief that 'only we' know how to deal with our own society.²¹² One saw the claims by the Orang Asli to their land as motivated by the opposition parties or NGOs which have ulterior motives in opposing the federal government.²¹³ Another felt that Malaysia is reluctantly adopting international law in its policies because of pressure from

²⁰⁹ Personal communication with a researcher involved in the project.

²¹⁰ Interview data: the Director of the Center for Orang Asli Concerns, a lawyer focusing on Orang Asli matters, a law academic focusing on Orang Asli land transactions.

²¹¹ Interview data: officers from a government department on wildlife protection at federal level; officers from forestry offices, both at federal and state level; officers of the Orang Asli Department from both federal and state branches; and an academic focusing on Orang Asli development.

²¹² Interview data: an officer from the wildlife department from state level, an officer from the forestry office at state office level, an officer from the Orang Asli Department at federal branch level and an officer from a timber industry-related organisation.

²¹³ Interview data: an officer from the Orang Asli Department at a state branch.

the international community.²¹⁴ One academic, who works in Orang Asli development issues, challenged the position of the Orang Asli as indigenous peoples of the country believing that the Malays, who are dominant in the peninsula, could better claim that position.²¹⁵ He also believed that Malaysian law is better in protecting the Orang Asli than the law in other jurisdictions.

2 Perspectives on the Rights of the Orang Asli

The interviews also sought to ascertain the interviewees' opinion on international law and the rights of the indigenous peoples from the perspective of the interviewees. Opinions were also solicited of their general views on the rights of the Orang Asli, in particular the international recognition of indigenous rights.

Many interviewees, who otherwise had different and conflicting perspectives, believed generally that the developments in international law have not so far changed public opinion about the rights of the Orang Asli. Some Orang Asli activists and representatives of civil societies suggested that the public, including the officials dealing with them, are not aware of the content of international law on these rights. They are also seen by these interviewees as not aware of Malaysian common law recognizing the land rights of minorities. One suggested that some public officials, like the academic previously referred to, consider that the indigenous peoples referred to in the UNDRIP are the indigenous group dominant in the country, the Malays, rather than the Orang Asli.²¹⁶

Some interviewees suggested that these perspectives may be related to the lack of political commitment to endorsing these rights locally as well as resistance by some powerful local groups to any change.²¹⁷ The lack of political will, that is, the commitment of the political elite to undertake the necessary action, is considered by many as the main barrier to changes in the law. The dismissive views of public officials towards the influence of international law on the land rights of the Orang Asli may also have a close relationship to the resistance within the political elite.

However, one Orang Asli activist²¹⁸ and a number of academics and researchers observed that there is a gradual change in public opinions concerning the Orang Asli.

²¹⁴ Interview data: an officer from Orang Asli Department at a federal branch.

²¹⁵ Interview data: An academic, focusing on Orang Asli development.

²¹⁶ This was also testified by the Deputy General of the Department of the Orang Asli Advancement in Inkuiri Tanah SUHAKAM, 30 May 2012. See the note by the Center for Orang Asli Concerns available in <http://www.facebook.com/#!/notes/center-for-orang-asli-concerns-coac/orang-asli-bukan-orang-asal/361350330575566>, (Accessed on 20 October 2012).

²¹⁷ Interview data: the Director of the Center for Orang Asli Concerns, Orang Asli representatives.

²¹⁸ Interview data: the Director of the Center for Orang Asli Concerns.

The general public is now more receptive to Orang Asli rights than they were 10 years ago. The activist believed that the current political situation in Malaysia helps to highlight the issue.²¹⁹ The opposition parties have used international law as an issue to counter the parties in government. This has helped to engender more publicity for international law.²²⁰ He also revealed that the civil societies concerned with the issue work hard on disseminating knowledge of international law among the Orang Asli and the public at large.

3 Islamic Values and International Human Rights Law

In the Malaysian context, Islamic views on human rights are relevant as Muslims represent 61.3% of the Malaysian population. Baderin divided Muslim scholars' responses to the universality of human rights into four categories: first, that the international law is inherently incompatible with Islamic law; second, that human rights as properly understood can only be fully realized within Islamic law; third, that human rights are cultural imperialism and should be rejected; and fourth, that human rights are represented by Islamic basic principles [*Maqaasid-al-Syariah*] (compatibility view).

Many contemporary Muslim scholars, including Baderin, support the compatibility view that although there are differences of scope and application, there is no fundamental incompatibility between the two bodies of law.²²¹ Many seek to enhance the rights protection through the Islamic principles of public interest. Berween, for instance, argued that respect and protection of the rights of all minorities are the obligations of Islamic states.²²² In another study on Muslim states practices, Javaid Rehman found that the protection of the rights of religious minorities, associated with the Western paradigm of freedom of religion, is not inherently antithetical to the Islamic law. He suggested that

²¹⁹ Interview data: the Director of the Center for Orang Asli Concerns.

²²⁰ Interview data: the Director of the Center for Orang Asli Concerns.

²²¹ Abul A'la Mawdudi in his book *Human Rights in Islam*, described three categories of human rights: 1. basic human rights for all human beings Muslim and non-Muslim to include right to life, safety of life, respect for the chastity of women, basic standard of life, freedom of the individual and right to justice; 2. rights of citizens in the Islamic state to include security of life and property, protection of honour, to protest against tyranny, freedom of conscience and conviction, protection from arbitrary imprisonment and right to basic necessities of life; and 3. rights of enemies at war. See Mawdudi, Abul A'la, *Human Rights in Islam* (Islamic Publication Ltd, 1995). Therefore, in the matter of basic principles, Islam shares the concept that human beings equally have basic rights regardless of race, religion, citizenship and gender. These rights are to be respected by political authorities. As these rights are seen to be granted by God, no human power can abrogate or withdraw them. Any violation of a person's rights for the benefit of the wider community is not tolerated. In fact, protection of human rights and the rights of minorities is for the interests of the public as a whole, as conflict will affect the wider community as well.

²²² Berween, Mohamed, 'Non-Muslims in the Islamic State: Majority Rule and Minority Rights' in Mashood A Baderin (ed), *International Law and Islamic Law* (2008) 600.

violations of the rights of religious minorities in Islamic countries are embedded in the political and constitutional inadequacies and the urgency to enforce a national identity based exclusively on the religion of the dominant majority.²²³ Another study similarly suggested that the only dispute between the two blocs lies in social and cultural issues²²⁴ rather than in political and ideological attitudes.²²⁵

This view also explained the position in post-colonial Malaysia, some of whose leaders are known to have rejected the universality of human rights as a form of neo-colonialism. Some highlighted the concept as one promoted by Christianity and point to issues of sexual freedom²²⁶ to reject the concept of human rights wholesale.²²⁷ The fact that international human rights law is predominantly based on Western political and social ideas may justify their opposition. This may not be the view of the majority²²⁸ but may affect the position of human rights in Malaysia and the way it is contextualized by Malay society. Martinez suggested that the view may have been further supported by the Malay cultural tradition which legitimises feudal absolutism through promoting the culture of absolute leadership and blind loyalty to the ruler. This has been further sanctified and justified by Islamic authorities which are part of the state establishment.²²⁹ Nevertheless, as Weiss pointed out, the political culture of the Malays is changing. They are politically

²²³ Rehman, Javaid, 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' (2008) 7 *International Journal on Minority and Group Rights* 139, 594. Similar view is also taken in Sait, Siraj and Hilary Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World* (Zed Books, 2006), 97: stating that

While the tolerance and rights of non-Muslim minorities under Muslim rule is widely acknowledged by most historians, the religious zeal of particular individuals and communities has had an adverse impact on access to full land rights of non-Muslims and Muslim minorities in some contexts.

See also, Baderin, Mashood A, *International Human Rights and Islamic Law* (Oxford University Press, 2003); Anwar Ibrahim, 'Universal Values and Muslim Democracy' (2006) 17(3) *Journal of Democracy* 5.

²²⁴ Eg, gender equality, homosexuality and abortion.

²²⁵ Inglehart, Ronald and Pippa Norris, 'The True Clash of Civilizations' (2003) *Foreign Policy* 62.

²²⁶ This allegation disregarded the fact that sexual freedom is also contentious within Western society.

²²⁷ Martinez, Patricia A, 'Is it Always Islam versus Civil Society?' in K S Nathan and M Hashim Kamali (eds), *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century* (Institute of Southeast Asian Studies, 2005) 135, 140.

²²⁸ Ibid.

²²⁹ Ibid, 141-2: Her study looked into Malay culture and plurality of voices which is paramount in democracy. A recent example is a ruling by the National Fatwa Committee that public protest is prohibited by Islam including any activities with 'intention to topple a duly elected government by organising such demonstrations', ('Haram' for Muslims to join unlawful assemblies, Fatwa Council declares', *Malaysian Insider* 6 May 2012 2012 <<http://www.themalaysianinsider.com/litee/malaysia/article/haram-for-muslims-to-join-unlawful-assemblies-fatwa-council-declares>>.

far more open than in the past and are demanding a higher level of accountability and transparency than before.²³⁰

C The Potential Influence of International Law

Under globalization, the potential of international law and transnational law to influence indirect change in domestic laws is undeniable.²³¹ Reforms have taken place in many jurisdictions following international law principles.²³² The vast numbers of treaties, conventions, and codes of practice and regulation that regulate government-to-government relationships, transnational corporations and civil societies have incorporated principles laid down under international instruments. In resources such as timber, which often involve global trading, the regulations adopted at the international level frequently require changes of policy at the national level.²³³ As pointed out in section III.A.4(b), international norms and standards have already been internalized within Malaysia through various policies in the timber industry.

This represents international law as soft law as a source of moral and political authority. Although not strictly binding, it is 'not [a] completely irrelevant political maxim'.²³⁴ As Higgins states,

International law is not rules. It is a normative system ... harnessed to the achievement of common values – values that speak to us all.²³⁵

While there is no definite way for securing compliance, international law provides a powerful tool for groups, such as indigenous peoples, to engage in 'the politics of shame',

²³⁰ Weiss, Meredith L, 'What Will Become of Reformasi? Ethnicity and Changing Political Norms in Malaysia' (1999) 21(3) *Contemporary Southeast Asia*.

²³¹ David J Bederman, *International Law Frameworks* (Foundation Press, 2001), 7: stating that, 'the domestic legal systems have been obliged to transform themselves in the face of this process of globalization'.

²³² Eg, The *Philippines Indigenous Peoples' Rights Act 1997* and the *Cambodian Land Law 2001* were drafted by making reference to the ILO Convention and the then Draft Declaration. See also the reform in Japan of policy on the Ainu. Substantial reference was made to the UNDRIP in the formulation of the substantive policy: Advisory Council for Future Ainu Policy, 'Final Report' (Advisory Council for Future Ainu Policy, July 2009) <http://www.kantei.go.jp/jp/singi/ainu/pdf/090629report_e.pdf>, 21. Following the report, the Council for Ainu Policy Promotion was established in December 2009 to realize the recommendation made in the Final Report: http://www.kantei.go.jp/jp/singi/ainusuishin/index_e.html.

²³³ Charters, above n 88, 175; Xanthaki, above n 8, 30; Megan Davis, 'Indigenous Struggles in Standard Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439, 466-8; Graeme Neate, 'Land Rights, Native Title and the 'Limits' of Recognition: Getting the Balance Right?' (2009) 11 *Flinders Journal of Law Reform* 1, 170.

²³⁴ Jan, above n 125, 47.

²³⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994), 1-2.

which has been described as 'the only effective way of sanctioning breaches by states of universal standards of justice'.²³⁶

IV CONCLUSION

There is a systematic theme in all of the international instruments that the issue of the indigenous peoples and their access to forests needs to be dealt with from a rights-based approach. The concepts of justice and fairness which emphasize the recognition of rights are the anchoring subject of international law. The relevant instruments, specifically the UNDRIP, seek to achieve substantive justice that focuses on thematic ideas of fairness and respect; equality and non-discrimination; and inclusion and participation. In the instruments especially specific to the indigenous peoples, important aspects of justice are addressed, both substantive and procedural. The instruments specifically affirm the contents of rights and their corresponding obligations.

International law's impact on Malaysian domestic law and local perspectives remains limited but it has a greater potential to influence Malaysian law. The principles of international law inform the study on the appropriate standards to be adopted in Malaysia relating to the rights of the Orang Asli in forest resources. They are also useful in defining the scope and nature of the rights of Orang Asli communities.

²³⁶ Emmi Okada, 'The Indigenous, the Imperial and the International: A Contextual Comparison of Laws Concerning the Ainu of Japan and Australian Aborigines' (2009) 27 *Singapore Law Review* 63, 89.

CHAPTER 8: ACCESS TO FOREST RESOURCES BY INDIGENOUS PEOPLES UNDER THE LAW OF SELECTED JURISDICTIONS

There are a growing number of states that recognize the rights of indigenous peoples in their traditional lands including forests. This development conflicts with the existing law and practice in Malaysia which has tended to deny such rights. Approaches vary between states but are based on a rights approach.

This chapter identifies:

- a. The rights of indigenous peoples recognized in various jurisdictions and the contents of those rights relating to land and resources.
- b. The process adopted to address claims.
- c. The restitutionary or compensatory measures adopted.
- d. How issues of environmental justice are addressed.

It examines the common law and legislative provisions established in some common law jurisdictions, Canada, Australia, New Zealand and the United States (collectively referred to as CANZUS) as well as India and the Philippines which are among the developing countries in Asia. These latter jurisdictions are considered more relevant for comparison because of their similarities to Malaysia and as a possible source for policies and law for the Malaysian legal system.

I THE INDIGENOUS PEOPLES' RIGHTS IN COMMON LAW JURISDICTIONS

A Common Law Native Title

Common law states have developed legal doctrines in relation to indigenous land rights. Part of that historic development has been discussed in Chapter 3, particularly the influence of North American common law. While there are significant divergences which indicate the different economic, political and social contexts of these jurisdictions, there are principles underlying the law which indicate a strong family resemblance. As indicated in Chapter 6.II.A, cases on indigenous peoples' rights in Malaysia have followed Canadian and Australian common law principles. The common law principles in these two jurisdictions are also interconnected with the same common law principles as developed in the US and New Zealand.

Table 1 in the following section provides a comparative overview of the common law in the United States, Canada, New Zealand and Australia. This is followed by a

comparative analysis of these jurisdictions. The focus on procedural justice in Canada and New Zealand is also discussed.

1 Table 3: Indigenous Land and Resource Rights in Common Law Jurisdictions

a. SOURCE AND LEGAL BASIS FOR RECOGNITION	United States	Canada	New Zealand	Australia
a.i. Source of title	<p>Long occupation of land or long use of land on a regular basis in accordance with their ways of life (such as nomadism) is sufficient to give rise to title. Occupation can be physical control or dominion over the land.</p> <p>It is not necessary to prove occupation of land at the time of the advent of Spanish, British or United States sovereignty.¹</p> <p>Title can be acquired by occupying vacant land or acquired from another tribe after acquisition of sovereignty.</p>	<p>Prior occupation of land by the Aborigines at the time of the Crown's acquisition of sovereignty.² For the Metis, at the time of effective British and French control.³</p>	<p>Indigenous customary law (Tikanga Māori).⁴</p>	<p>Indigenous law,⁵ ie, the traditional law and custom of the indigenous peoples providing a basis for the occupation and use of land at the time the Crown acquired sovereignty.</p> <p>Strict proof is required of indigenous laws and customs supporting land rights claimed at the time of the Crown's acquisition of sovereignty, and that they have been maintained up to the present day.⁶</p>

¹ McNeil, Kent, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 257, 275 citing *Confederated Tribes of the Warm Springs Reservation of Oregon v United States* 177 Ct Cl 184, 26.

² *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [114] ('*Delgamuukw*'). McNeil points out that there is possibility that Aboriginal law can be relied upon to establish the exclusive occupation at the time of Crown assertion of sovereignty to establish title: McNeil, above n 1 261.

³ *R v Powley* [2003] 2 SCR 207, [40].

⁴ *R v Symonds* [1847] NZPCC 387 ('*Symonds*'); *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 ('*Ngati Apa*'). Jacinta Ruru, 'The Māori Encounter with Aotearoa: New Zealand's Legal System' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 111, 113: Tikanga is the customary laws and values of the Māori. It has a broad meaning that extends to laws and custom, practice and usage. It involves an obligation to do things they perceive as the 'right' way according to their custom.

⁵ *Mabo (No 2)* (1992) 175 CLR 1.

⁶ *Fejo v Northern Territory* (1998) 195 CLR 96 ('*Fejo*'); *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*'); *Members of the Yorta Yorta Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*').

<p>a.ii. The legal basis relied on by the courts that gives rise to the title</p>	<p>The doctrine of discovery in international law between European nation states. 'Discovery' by a subject under the authority of a government gave title to the government against other European states.</p> <p>On discovery, the rights of the inhabitants of the soil who occupied the land to the land continue.⁷</p>	<p>The common law property rule that physical occupation of land is proof of possession and title.⁸</p>	<p>The common law principle that pre-existing rights on acquisition of sovereignty by the Crown continue unless extinguished. It is based on the doctrine of continuity under international law and British colonial practice.</p> <p>The principle was acknowledged by the British Crown in the 1840 Treaty of Waitangi.⁹</p>	<p>The common law principle that the pre-existing rights on acquisition of sovereignty by the Crown continue unless extinguished. It is based on the doctrine of continuity under international law and British colonial practice.¹⁰</p>
<p>b. NATURE AND CONTENT OF RIGHTS: b.i. Nature of right</p>	<p>Title to territory (territorial sovereignty) – including both governmental and proprietary land rights.¹¹ The indigenous polity constitutes a 'domestic dependent nation' within the United States.</p>	<p>Proprietary land rights. There is also a right to territory recognized but treated separately from proprietary land rights.</p>	<p>Proprietary land rights.</p>	<p>Proprietary land rights.</p>

⁷ *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823), 574, 603 ('*Johnson*'), Marshall CJ describes the rights as the 'rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion' (574). McNeil, above n 1, 263 highlights the difference between the basis of recognition relied on by the Canadian Supreme Court and the US Supreme Court.

⁸ *Delgamuukw* [1997] 3 SCR 1010, [114].

⁹ *R v Symonds* [1847] NZPCC 387; *Nireaha Tamaki v Baker* [1901] AC 561 ('*Nireaha Tamaki*'), 577-8; *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20, 23, 24 ('*Te Runanganui*'); *Ngati Apa* [2003] 3 NZLR 643, [14].

¹⁰ *Mabo (No 2)* (1992) 175 CLR 1.

¹¹ *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831), 17; *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

b.ii. Nature of title and its alienability	Communal and inalienable. ¹² Title cannot be sold or transferred except to the United States.	Communal and inalienable. ¹³ Title cannot be sold or transferred except to the Crown.	Communal and inalienable. ¹⁴ Title cannot be sold or transferred except to the Crown.	Communal and inalienable. ¹⁵ Title cannot be sold or transferred except to the Crown.
b.iii. Content of right to land and natural resources	Territorial rights. Native American nations have plenary, collective interests in their lands that include all surface and subsurface rights. ¹⁶ Native American nations exercise jurisdiction over their tribal lands in the same way other sovereigns exercise jurisdiction over lands within their territories. ¹⁷ They can make laws for the creation of individual and other property rights within their territories. There is no limit to the use of land – except that the land cannot be transferred other than	Proprietary rights. The content of the rights is explained below.	Proprietary rights. The contents of the rights depend on the tikanga [customary law]. ¹⁸	Proprietary rights. The content of rights depends on the laws and custom of the communities unless the native title has been extinguished.

¹² *Johnson* 21 US (8 Wheat) 543 (1823).

¹³ *Delgamuukw* [1997] 3 SCR 1010, [115]; *Campbell v British Columbia* [2000] 4 CNLR 1, [137-8].

¹⁴ *Nireaha Tamaki* [1901] AC 561, 24: the titles 'are usually, although not always, communal or collective'.

¹⁵ *Mabo (No 2)* (1992) 175 CLR 1.

¹⁶ McNeil, above n 1, 268 citing: *US v Shoshone Tribe*, 304 US 111, 115-18 (1938); *US v Klamath and Moodoc Tribes*, 304 US 119, 122-3 (1938); *Otoe and Missouri Tribe v US*, 131 F Supp 265, 290-1 (1955), cert denied 350 US 848 (1955); *US v Northern Paiute Nation*, 393 F2 d 786, 796 (1968); *US ex rel Chunie v Ringrose*, 788 F 2d 638, 642 (1986).

¹⁷ *Ibid*, 268.

¹⁸ *Ngati Apa* [2003] 3 NZLR 643, [49].

	to the government of the United States.			
b.iv. Right to land exclusively occupied: land and natural resources found within the land.	As explained above, the right is both proprietary and territorial with interest to both land and natural resources.	<p>Right to land or territory is termed 'Aboriginal title'.</p> <p>This is a right to exclusive use and occupation of land exclusively occupied by the Aboriginal peoples.¹⁹</p> <p>The land may be used for various purposes not limited to traditional practices except those that are inconsistent with the group's attachment to the land.²⁰</p> <p>There are rights to access and sell natural resources on and under the land, including standing timber, fish and oil and gas, regardless of whether the Aboriginal titleholders used</p>	<p>Exclusive interests over specific territories are specifically acknowledged by the Treaty of Waitangi as: 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess' (Art 2).</p> <p>It may include rights to standing timber and mineral resources.²²</p> <p>However, most Māori customary lands were converted to individualized freehold fee simple by the Māori Land Court under <i>Māori Land Acts</i> since 1862 and lost through purchase by non-Māori.</p>	<p>Native title may comprise exclusive possession, occupation, use and enjoyment of the land if it is sanctioned by traditional law and custom.²³</p> <p>Unlike Canadian and New Zealand law that treat exclusive right to land as ownership to territory (territorial title), the right to exclude others in Australian common law is treated as another kind of right in a 'bundle of rights', ie, it is one stick amongst many which are capable of disaggregation'.²⁴</p> <p>This approach exposes the rights to 'easier diminution or disappearance by force of conflict or variance with other rights over the land later</p>

¹⁹ *R v Marshall; R v Bernard* [2005] 2 SCR 220, [54], [61], [77].

²⁰ *Delgamuukw* [1997] 3 SCR 1010, 124, [117]: the content of Aboriginal title is not restricted to practices, customs, and traditions which are integral to distinctive Aboriginal cultures.

²² *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142; *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513, per Cooke P, 527-30.

²³ *Mabo (No 2)* (1992) 175 CLR 1, 217. In *Griffiths v Northern Territory* (2007) FCAFC 178, [127]: the question of exclusivity depended upon the ability of the native title holders effectively to exclude from their country people not of their community. The court cautions that 'it is not a necessary condition of the exclusivity of native title rights and interests in land or waters that the native title holders should, in their testimony, frame their claim to exclusivity as some sort of analogue of a proprietary right'.

²⁴ McHugh, PG, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011), 159.

		these in the past. They also have the right to sell them commercially. ²¹		granted by the Crown'. ²⁵ The ownership approach with the right to exclude is comparable to freehold title that invokes compensation and equality of treatment provisions of Australian constitutional law. ²⁶ The rights and interests can co-exist with non-exclusive third party interests, such as some pastoral leasehold. In the event of conflict, the third party interests generally prevail. ²⁷
b.v. Right to natural resources in land not exclusively occupied.	(See above)	The rights to resources located in territories not exclusively occupied are part of 'Aboriginal rights'. Aboriginal rights are practices, traditions and customs which are central	Customary rights which are non-territorial to access and take resources according to their traditional practices and usage. The customary rights prevail over general legislation prohibiting access where there is no plain and clear provision extinguishing	Native title may also comprise non-exclusive right to access land for minerals and resources for which there existed some specific customary association, eg, ochre, ³⁶ fishing, hunting and gathering. ³⁷

²¹ *Ahousaht Indian Band and Nation v Canada (Attorney General)* 2009 BCSC 1494, [483] ('Ahousaht') on the rights to fish and to sell the fish commercially. See also, McNeil, above n 1, 266, citing *Delgamuukw* [1997] 3 SCR 1010, [119-24]; *Tsilhqot'in Nation v British Columbia* [2008] 1 CNLR 112 (BCSC), [971-81].

²⁵ Brian Slattery, 'The Nature of Aboriginal Title', in Owen Lippert (ed), *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Fraser Institute, 2000) 11, 14-15 and Sean Brennan, 'Native Title in the High Court: A Decade after Mabo' (2003) 14 *Public Law Review* 209', 211 cited in *ibid*, 159.

²⁶ *Ibid*, 159.

²⁷ *Wik Peoples v Queensland* (1996) 141 ALR 129. But in *Wilson v Anderson* (2002) 213 CLR 401 (HC): grant of perpetual lease for grazing extinguishes native title.

³⁶ *Yorta Yorta* (2002) 214 CLR 422: set out the connection test to the traditional law as practised during the acquisition of sovereignty. In *Ward* (2002) 213 CLR 1, the High Court accepted the finding that there had been no traditional laws and custom relevant to the use of minerals or petroleum, except perhaps ochre.

³⁷ *Yanner v Eaton* (1999) 166 ALR 258: (HC Aust): the aborigine was held to have the right to take estuarine crocodiles according to their custom and traditional laws.

		<p>and significant to the Aboriginal societies' distinctive culture that existed prior to contact with Europeans:²⁸ for the Metis, at the time of effective British and French control.²⁹</p> <p>The rights may include the right to harvest resources – such as fish, game and timber for domestic use including constructing a contemporary house – from specific lands that are not owned or possessed by the communities (Crown land).</p>	<p>the customary rights,³¹ eg, right to fishing for personal consumption.³²</p> <p>The rights may extend to river, and lake and sea beds, and foreshore.³³</p> <p>Limitations: The rights are limited to traditional practice, eg, the right to freshwater fish is species-specific and does not extend to exotic trout;³⁴ and Māori do not have a right under the common law or the Treaty to generate electricity by the use of water power.³⁵</p>	
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²⁸ *R v Van der Peet*, [1996] 2 SCR 507, [44].

²⁹ McNeil, above n 1, 262 citing *R v Powley* [2003] 2 SCR 207.

³¹ *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 682 ('*Te Weehi*'): The case involves a criminal charge of possessing undersized paua in contravention of *Fishing (Amateur Fishing) Regulations 1983*. The High Court held that a Māori person has a right to take undersized paua (abalone). S 88(2) of the Fisheries Act provides exemption for existing Maori customary right. As the customary right claimed had not been expressly extinguished by statute, it continued to exist and thus fell within the exemption.

³² *Ibid*: members of the Ngai Tahu tribe have customary rights to fishing – in this case, collecting undersized paua (abalone), for his own consumption.

³³ *Ngati Apa* [2003] 3 NZLR 643; *Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321 and *Re the Bed of the Wanganui River* [1962] NZLR 600: on the title to lake bed and river bed.

³⁴ *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA), 147.

³⁵ *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20, 25.

		A right must be 'site-specific', ie, practiced in a particular location. ³⁰		
<p>c. Extinguishment and infringement of rights</p> <p><u>c.i. Extinguishment:</u> Permanent removal or cessation of the right in law</p>	<p>The territorial right is subject to the plenary power of the Congress – and therefore it may be terminated unilaterally by the US government.³⁸</p> <p>No compensation is required upon extinguishment of the right, unless subject to a previous treaty or agreement.³⁹</p>	<p>Canadian common law expressly distinguishes between permanent extinguishment of the Aboriginal title and infringement.</p> <p>Infringement refers to legislative provisions that have a mere effect of regulating Aboriginal rights.</p> <p>Both extinguishment and infringement are subject to constitutional safeguards.</p>	<p>Legislative act or executive action authorised by clear and plain statutory authority.⁴¹</p>	<p>Legislative act;⁴² or executive action authorised by clear and plain statutory authority.</p> <p>Native title is also extinguished by the creation of rights inconsistent to the native title. This includes grant of fee simple.⁴³</p> <p>Prior to the <i>Racial Discrimination Act 1975</i> (Cth), unilateral extinguishment of native title (Crown grant or Crown appropriation of land for its own use)</p>

³⁰ Eg of cases that the Canadian courts rule to the effect are *R v Adams* [1996] 3 SCR 101: Aboriginal rights may exist independently of Aboriginal title; *R v Côté*, [1996] 3 SCR 139: 'An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory of location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land'; *R v Sappier*; *R v Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54: The Mi'kmaq and Maliseet peoples have an Aboriginal right to harvest wood for domestic purposes.

³⁸ McNeil, above n 1, 269, citing *Lone Wolf v Hitchcock*, 187 US 553 (1903); *US v Wheeler*, 435 US 313, 323 (1978); *Cotton Petroleum Corporation v New Mexico*, 490 US 163, 192 (1989); *South Dakota v Yankton Sioux Tribe*, 522 US 329, 343 (1998).

³⁹ *Tee-Hit-Ton Indians v United States* 348 US 272 (1955): This is on the reason that Indian title is not a property right compensable under the American Constitution. The Fifth Amendment of the Constitution provides for compensation for private property only upon acquisition.

⁴¹ *Ngati Apa* [2003] 3 NZLR 643, [49]

⁴² Eg, *Native Title Act 1993* (Cth).

⁴³ *Fejo* (1998) 195 CLR 96.

		<p>The constitutional provisions of 1982 prevent the rights from being unilaterally extinguished including by legislation passed by the Canadian Parliament.⁴⁰</p> <p>Extinguishment is effected by legislative act; or Executive action authorised by clear and plain statutory authority which is subject, since 1982, to the constitutional safeguards.</p>		by executive action without clear and plain statutory authority was legal. ⁴⁴
c.ii. Infringement – Effect of legislation regulating resources.	(Not relevant)	<p><u>Infringement</u> may be effected by regulatory action.⁴⁵ It is subject to the following conditions:</p> <p>1. It must be reasonable to pursue a ‘valid legislative</p>	Mere regulation of fishing and collection of natural resources does not extinguish customary rights of Māori. ⁵⁰ The rights may include access to resources for both non-commercial and commercial purposes exclusive or	Regulatory legislation of access to natural resources which is not inconsistent with the enjoyment of native title does not extinguish native title unless clearly specified so. ⁵¹

⁴⁰ S 35(1) of the *Constitution Act 1982 (Can)* recognizes and affirms the ‘existing aboriginal and treaty rights of the aboriginal people of Canada’; S 91(24) of the *Constitution Act 1867*, 30 and 31 Vict, c 3 (UK) places Indians and lands reserved for the Indians within exclusive jurisdiction of the Parliament of Canada. *R v Morris* [2006] 2 SCR 915: treaty rights are immune from provincial laws that would infringe them.

⁴⁴ *Mabo (No 2)* (1992) 175 CLR 1; *Fejo v Northern Territory* (1998), 195 CLR 96.

⁴⁵ In *R v Sparrow* [1990] 1 SCR 1075: held that the *Fisheries Act* (BC) has the effect of regulating the Aboriginal right rather than extinguishment. Extinguishment requires ‘clear and plain intention’.

⁵⁰ *Te Weehi* (1986) 1 NZLR 682.

⁵¹ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 (‘*Akiba*’); *Karpany v Dietman* [2013] HCA 46: This is an appeal against the finding by the Supreme Court of South Australia that the native title rights to take undersize abalone had been extinguished by the *Fisheries Act 1971 (FA 1971)*. The High Court found that the *FA 1971* allows access according to the Act. It therefore regulates the taking of fish rather than prohibiting it. It is not inconsistent with the continued enjoyment of native title rights and therefore it does not extinguish the applicants’ native title right to take fish. See also, *Yanner v Eaton* (1999) 166 ALR 258: a licensing regime was insufficient to extinguish the native title right to hunt.

<p>(Infringement: Reduction in the extent of the customary right.)</p>		<p>objective' and uphold 'the honour of the Crown';⁴⁶ and</p> <p>2. The duty to accommodate Aboriginal rights. It must be shown that:</p> <p>a. the limitation does not impose undue hardship;</p> <p>b. it is an appropriate limitation with the minimal infringement possible and prioritizing Aboriginal interests;⁴⁷</p> <p>c. the group was consulted in the decision making.⁴⁸</p>	<p>non-exclusive subject to the customary practice.</p>	<p>In a very recent case, the High Court of Australia held that the native title includes a native title right to fish commercially.⁵² The rights are non-exclusive. This ruling rejects earlier decisions to the contrary.</p>
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⁴⁶ Ibid, 1114; *R v Marshall* [1999] 3 SCR 456, 177 [49]. The objectives of the regulation of rights are commonly conservation and environmental management. The Court has suggested other objectives considered to be valid, ie: 'historical reliance on a resource by non-aboriginal peoples and regional economic fairness' (Lamer CJ in *R v Gladstone* [98]; 'development of agriculture, forestry, mining and hydroelectric power and the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims' (Lamer CJ in *Delgamuukw* (1997)). These long series of objectives suggested as valid were controversially criticised by: McLachlin J in her dissent in *Van der Peet*, [306]; Kent McNeil, 'Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin' (2003) 2 *Indigenous Law Journal* 1.

⁴⁷ *R v Sparrow* [1990] 1 SCR 1075: If conservation is the regulatory objective, prioritisation suggests that Aboriginal subsistence would rank ahead of other interests (commercial and recreation) but behind the conservation interest.

⁴⁸ *Haida Nation v BC (Minister of Forests)*, 2004] 3 SCR 511: governments, and the government of British Columbia in particular, have a legal duty to consult with Aboriginal peoples when the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

⁵² *Akiba* [2013] HCA 33: The High Court reverses the earlier position taken in *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25. The Full Federal Court held that regulatory laws which prohibit the unlicensed taking of fish for commercial purposes has the effect of extinguishing the native right to take fish and other aquatic life for commercial purposes (Keane CJ and Dowsett J, [87]). Mansfield J dissents on the point. The decision reversed the earlier ruling made by Justice Finn that native title rights may include the right to access, take and use resources for trading or commercial purposes in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v*

		Regulation affecting Aboriginal rights associated with Aboriginal title may require the right holders' consent. ⁴⁹		
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Commonwealth of Australia [2010] FCA 643 (2 July 2010). For commentary, see, Lauren Butterly, 'Clear Choices in Murky Waters: Leo Akiba on behalf of the *Torres Strait Regional Seas Claim Group v Commonwealth of Australia*' (2013) 35 *Sydney Law Review* 237.

⁴⁹ This is suggested by Lamer CJ in *Delgamuukw* [1997] 3 SCR 1010, [168]. He suggests that the nature and scope of the consultation depend on the circumstances. Where the key Aboriginal interests were involved, it must be 'significantly deeper than mere consultation'. In *Ahousaht* 2009 BCSC 1494, [483]: Garson J requires the parties to consult and negotiate, within two years, the regulatory regime for Nuu-chah-nulth to accommodate their Aboriginal rights to sell fish commercially.

2 Brief Comparison of Common Law Rights of Indigenous Peoples in the CANZUS

(a) Sources and Legal Basis for Recognition

The sources and legal basis for recognition of indigenous land rights have varied. However, they conform to the basic common law principles that, on discovery and acquisition of sovereignty of a territory by the nation states, the existing rights of the indigenous peoples are respected. In Canada and the US, occupation of land gives rise to indigenous rights. The common law in Canada requires prior occupation at the time of the Crown's acquisition of sovereignty, or before effective European control in the case of the Metis. Indigenous title in the US can be acquired by Native Americans after the acquisition of sovereignty by a European power or the US (Table 1.a.i)

In contrast, indigenous rights in New Zealand and Australia originate in indigenous law and custom. The traditional law and custom of the indigenous peoples provide the basis for the occupation and use of land at the time the Crown acquired sovereignty. However, in Australia, strict proof is required of the traditional custom and law being practised at the time of the Crown's acquisition of sovereignty.¹ This has resulted in a restricted scope for Aboriginal peoples' rights in the jurisdiction (Table 1.a.i).

Courts in Canada rely on the common law property rule that physical occupation of land is proof of title for the First Nations' land rights. On the contrary, the courts in other jurisdictions preferred the rules of international law between European nation states (Table 1.a.ii). The New Zealand and Australian courts based their finding on the doctrine of continuity that pre-existing rights on acquisition of sovereignty by the Crown continue unless extinguished. The US courts have adopted the doctrine of discovery which held that discovery by a subject under the authority of a government gave title to that government against other European states. But the application of the doctrine of discovery, concerned with sovereign rights between the European states subjected to the law of nations, does not affect the proprietary rights of the existing inhabitants. With

¹ *Yorta Yorta v Victoria* (2002) 194 ALR 538. The case has restricted the meaning of traditional law and custom suggesting that the term 'traditional' refers to laws and custom acknowledged and observed by the ancestors of the claimants at the time of acquisition of European sovereignty and that continue to be observed. Tehan observed that the requirement contradicts the approach taken in *Mabo (No 2)* which suggested that these issues should not be viewed from the perspective of the settler's law: Maureen Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 562.

respect to the sovereign or territorial rights of the Native Americans, they were reduced to the status of a sovereign within the sovereignty of the United States (Chapter 3.I.B.4).

(b) Nature and Contents of Indigenous Common Law Rights

(i) Nature of Rights

The nature of indigenous land rights in all these jurisdictions is proprietary, communal and inalienable. They belong to the communities and are not individual although the concept of individual control may exist within the communal land. Title cannot be sold or transferred except to the Crown, and in the case of the US, to the US government (Table 1.b.i-iii). In New Zealand and Australia, the indigenous peoples' rights to natural resources are generally subject to their customary laws.

Indigenous land rights in Canada and the US are also territorial (Table 1.b.i-ii). This allows for self-government but to a limited extent in Canada although it is growing in significance (See below, table 3.b – Canada). In the US, Native Americans are domestic dependent nations. They have sovereign rights to govern themselves within the sovereignty of the US. The relationship between the Native American nations and the US is government-to-government, with the US having fiduciary duty over the Native American nations. On the other hand, the First Nations in Canada have a relatively more limited self-government in certain areas which are also defined by agreements.

(ii) Rights to Land and Resources in Land Exclusively Occupied

To facilitate comparison, this analysis divides the resource rights into those found within the land exclusively occupied by the indigenous peoples and those found within the land not exclusively occupied by them. This division, however, has a risk of error as the meaning of occupation may vary according to different perspectives, especially between those of indigenous peoples and non-indigenous peoples. The courts in Malaysia employ occupation to mean a sufficient degree of control by the indigenous peoples (Chapter 6.1.2.A). Courts in Canada, in its later development, have taken a stricter approach by requiring exclusivity of possession similar to the title acquired under the common law.² Nomadic indigenous peoples, for example, are usually not regarded as occupying their traditional land which may be in conflict with their perspective of their relationship with

² In *R v Marshall; R v Bernard* [2005] 2 SCR 220, [54], [61], [77]: the Canadian Supreme Court concluded that the First Nations' rights of exclusivity could only be upheld where indigenous practices 'indicate possession similar to that associated with title at common law.' In that case, the majority held that if Aboriginal practices do not indicate a type of control commensurate with exclusivity, title could not be conferred because this would 'transform the ancient right into a new and different right'.

the land. Therefore, in this analysis, exclusive occupation is taken to mean that the indigenous peoples live within the area and have sufficient control over the territory that allows them to exclude others from entering their land. Land not exclusively occupied is taken to mean as the land over which they do not have control but which they customarily or regularly access for resources.

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

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

(iii) Rights to Natural Resources in Land Not Exclusively Occupied by the Indigenous Peoples (Non-territorial)

In Canada and New Zealand, the rights of the indigenous peoples are subject to their traditional practices and usage prior to contact and the Crown's acquisition of sovereignty (Table 1.b.v). The rights, referred to as Aboriginal rights, in Canada, similar to the position in the New Zealand, are practices, traditions and customs which are central and significant to the Aboriginal societies' distinctive culture prior to contact with European power. They may harvest resources including fish, game and timber for domestic use. Canadian courts have held that domestic use is not limited to traditional practice but also contemporary practice such as constructing contemporary houses. In New Zealand, the rights extend to rivers, lakes, seabeds and foreshores. Similar to Australian common law, these customary rights in Canada and New Zealand prevail over legislation regulating access to resources unless the legislation expressly provides for extinguishment of the indigenous rights. But in Canada, the rights are site-specific, that is, particular to certain identified territories to which they customarily have access.

There is no distinction between whether or not the lands are exclusively occupied in the Australian and US common law in relation to access to natural resources.

(c) Extinguishment of Indigenous Rights

In all of the jurisdictions, except the US, the states may only extinguish the indigenous land rights by legislative provisions to that effect or by executive acts under authorities provided for by clear and plain statutory provisions. In the US, extinguishment can be made by the unilateral act of Congress. In Canada and the US, extinguishment and infringement of Aboriginal rights are subject to the fiduciary duty owed by the government to the indigenous peoples. The First Nations in Canada have greater protection against extinguishment and infringement of the rights as their rights are constitutionally recognized under s 35 of the *Constitution Act 1982*. Under the concept of honour of the Crown, the courts in Canada have stipulated certain conditions which prevent the rights from being unilaterally extinguished or infringed (Table 1.c.i-ii – Canada). See also the discussion on procedural justice in Canada in the following section.

In Australia and New Zealand, regulation of access to natural resources does not extinguish the customary rights of the indigenous peoples. In Australia, in *Akiba*, a recent judgment, the High Court affirmed that the native title includes the native title right to fish commercially but the exercise of the rights must be made in accordance with the relevant legislation such as the requirement to obtain a licence.³ In Canada, infringement of Aboriginal rights (access to resources not within their exclusive territory) is subject to the constitutional safeguards and strict legal restrictions including consultation.

As mentioned in Chapter 6.II.C.1, the ruling that regulatory laws on access to natural resources by requiring permit or licence is not inconsistent with the indigenous common law right is similar to the position in Malaysian law.

3 Procedural Justice in Canada and New Zealand

(a) Canada

In Canada, there has been a shift to a focus on procedural approaches.⁴ The principle has become significant as part of its legal framework in protecting indigenous peoples' rights. In recent years, the courts in Canada have developed a 'duty to consult and accommodate' on the part of the Crown to address the claims of Aboriginal communities

³ [2013] HCA 33.

⁴ Lorne Sossin, 'The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights' (2010) 23 *Canadian Journal of Administrative Law & Practice* 93, 93.

even prior to their determination. This principle is rooted in the 'honour of the Crown', and the *sui generis* fiduciary obligation owed by the Crown to Aboriginal peoples.⁵ It has also been linked to the broader common law duty of fairness owed to those affected by government decision making.⁶ The focus on judicial determination is not on the outcomes but on the process of consultation and accommodation.

Pursuant to this duty, Aboriginal communities have the right to participate in the management and disposition of land and resources over which they have asserted claims, even if those claims may not be finally resolved for years.⁷ The legal obligation does not compel a particular substantive outcome, but requires a 'meaningful' and 'good faith' consultation, being attentive to the concern of the aborigines and providing for their participation. It also means the willingness on the part of the Crown to make changes based on information that emerges during the process.⁸

In *Haida Nation v BC (Minister of Forests)*,⁹ governments, and the government of British Columbia in particular, have a legal duty to consult with Aboriginal peoples when the duty arises ie when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This test is re-affirmed by the Supreme Court in a recent case, *Tsilhqot'in Nation v British Columbia*.¹⁰

In *Wii'litswx v. British Columbia (Minister of Forests)* ('Wii'litswx'),¹¹ the BC Supreme Court set a standard of reasonableness for both consultative procedures and their outcomes. Following an earlier decision, *Taku River Tlingit First Nation v. British Columbia*,¹² the judicial determination involved a two-stage analysis with each stage governed by a standard of reasonableness:

First, it addressed the adequacy of the process of consultation. Second, having found it to be reasonable, it examined the end result by considering whether that

⁵ Ibid, 98 citing *R v Sparrow* [1990] 1 SCR 1075; *R v Van der Peet*, [1996] 2 SCR 507; and *Guerin v Canada* [1984] 2 SCR 335: which developed the fiduciary relationship between the Crown and Aboriginal peoples and provided remedies against the application of laws that infringe that obligation without justification.

⁶ Ibid, 98.

⁷ Ibid.

⁸ Ibid, 98-102.

⁹ [2004] 3 SCR 511.

¹⁰ [2014] SCC 44.

¹¹ 2008 BCSC 1139.

¹² *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, 2004 SCC 74.

consultation had identified a duty to accommodate aboriginal concerns, and the adequacy of any resulting accommodations.¹³

Compared with the procedural fairness found in administrative law, in the Aboriginal context, the duty to consult and accommodate imposes greater constraints on the Crown. Sossin suggested that it is a positive and proactive duty. It is necessary to show that the government's substantive position has been modified as a result. Furthermore, the duty may also include the requirement to provide Aboriginal communities with the capacity to participate in the consultation process.¹⁴ The duty has arisen as a key element in the overall achievement of the protection of Aboriginal and treaty rights.

(b) New Zealand

The common law of New Zealand has also established that the relationship between the Māori and Pakeha is a kind of partnership which imposes on the partners the duty to act towards each other reasonably and with the good faith.¹⁵ The principle derives from the *Treaty of Waitangi*, commonly accepted as New Zealand's constitutional '*founding document*'.¹⁶ The treaty relationship gives rise to responsibilities analogous to fiduciary duties which are not merely passive. It includes active protection by the Crown of the Māori use of their land and water 'to the fullest extent reasonably practicable'.¹⁷ The duty may also impose on the Crown an obligation to remedy past breaches.¹⁸

An important element of good faith is the duty of the Crown to consult where there may be major changes. This includes the transfer of land to state-owned enterprise as in *New Zealand Maori Council v Attorney-General*.¹⁹ Decisions must be made with sufficient information of 'the relevant facts and law to be able to say that it has had proper regard to the impact of the principles of the Treaty'.²⁰

However, it was held that the principles of the Treaty do not authorise unreasonable restrictions on the elected government in its policy and law making.²¹ But, there is a

¹³ *Wii'litswx* 2008 BCSC 1139, [17].

¹⁴ Sossin, above n 4, 106-7.

¹⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 667 (President Cooke). See also, *New Zealand Maori Council v Attorney-General* HC Wellington CIV-2007-485-95, 4 May 2007 ('Te Arawa Cross Claim HC'); *New Zealand Maori Council v Attorney General* [2007] NZCA 269 ('Te Arawa Cross Claim (CA)'),

¹⁶ Ling Yan Pang, 'A Relational Duty of Good Faith: Reconceptualising the Crown-Maori Relationship' (2011) *Auckland University Law Review* 249, 249.

¹⁷ *Ibid*, 664.

¹⁸ *Ibid*, Justice Richard, 683 and Justice Somers, 693.

¹⁹ [1987] 1 NZLR 641.

²⁰ *Ibid*, 683.

²¹ *Ibid*, 665.

strong argument that the Crown's duty of good faith requires some justification for statutes that affect Māori interests.²²

However, in all of the jurisdictions, the tendency of the common law has been to be restrictive of the rights of the indigenous peoples. In Australia, its relatively harsh rule on extinguishment has restricted the contemporary economic value of native title.²³ Even with constitutional safeguards since 1982 for indigenous rights in Canada, indigenous common law rights are still susceptible to extinguishment.²⁴

However, various mechanisms to address the injustice suffered by indigenous peoples have been established. The following section compares the main approaches to identify possible effective mechanisms which could be adopted in Malaysia.

B Out-of-Court Settlement Process: Agreement Making

Negotiated agreements have been a mechanism to settle disputes over land rights and access to resources in all four jurisdictions.²⁵ Studies have shown that agreement making has the capacity to recognize past and continuing injustices which are not limited by pre-existing strict provisions of the law.²⁶ It also has the capacity to identify possible restitution that accommodates the needs of particular communities. It can potentially redefine future interactions between the dispossessed and the dispossessors, and also attempt to negotiate remedies for existing social injustices. It potentially allows indigenous peoples a genuine decision-making role in a range of issues affecting their lives and territories.²⁷

The judicial recognition of the rights of the indigenous peoples has been instrumental in underpinning the contemporary negotiated settlements relating to rights in their ancestral property. In the US, the Marshall trilogy of judicial decisions, although marginalized for

²² Pang, above n 16, 265-6, arguing, among others, based on *New Zealand Bill of Rights Act 1990* which provides for court power to scrutinise and interpret statutes so as to minimise their infringement of the Act.

²³ Sean Brennan, 'Commercial native title fishing rights in the Torres Strait and the question of regulation versus extinguishment' (2012) 8(2) *Indigenous Law Bulletin*

²⁴ Kent McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42(2) *Osgoode Hall Law Journal* 271.

²⁵ Langton, Marcia and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 34

²⁶ Sue Jackson, 'Maritime Agreements and the Recognition of Customary Marine Tenure in the Northern Territory' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 220; Bruce Harvey, 'Rio Tinto's Agreement Making in Australia in a Context of Globalisation' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 237.

²⁷ Marcia Langton, Maureen Tehan and Lisa Palmer, 'Introduction' in Marcia Langton et al (eds), *Honour Among Nations?* (Melbourne University Press, 2004) 1, 20.

about a century, provides the conceptual foundation for a later policy shift in the 1930s and post-1970s to promote Native American interests.²⁸ In Canada, the current settlement process began in response mainly to judicial affirmation of the existence of native title in *Calder*.²⁹ The existing Aboriginal rights and rights existing under treaties received constitutional protection in 1982.³⁰ In both the US and Canada, treaties played an important role in mediating political and economic relations between the indigenous peoples and settlers since early settlement.

In New Zealand, the Treaty of Waitangi signed in 1840 by the Crown representative and over 500 Māori chiefs became the foundation for the development of the present settlement process in relation to entitlement to Māori land and resources.³¹ The Treaty was recognized, after almost a century of being suppressed, by the *Treaty of Waitangi Act 1975* (TWA). The revitalization of the Treaty developed into a jurisprudence of Treaty principles. It has become the framework for defining the relationship between the Māori and the Crown as well as non-Māori New Zealanders who came to New Zealand under the Crown's protection.

The principles include the active protection of Māori interests by the Crown, the tribal right to self-regulation, the right of redress for past breaches and the duty to consult in good faith.³² The Treaty principles and Tikanga Māori [customary law and practices] in the exercise of public duties are incorporated into various statutes³³ and various government policy statements.

²⁸ Benjamin J Richardson, Shin Imai and Kent McNeil, 'Indigenous Peoples and the Law – Historical, Comparative and Contextual Issues' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 3, 9.

²⁹ *Calder v Attorney-General of British Columbia* [1973] SCR 313.

³⁰ S 35 was inserted into the *Constitution Act*. It provides that 'the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognize and affirmed'. The existing Aboriginal and treaty rights include common law Aboriginal rights and title.

³¹ In the English version of the Treaty, the Māori ceded to the Crown, absolutely and without reservation, all the right and powers of sovereignty, but retained full exclusive and undisturbed possession of their lands and estates, forest, fisheries and other properties: Ruru, Jacinta, 'The Māori Encounter with Aotearoa: New Zealand's Legal System' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 111, 114.

³² Alan Ward, 'Rangahaua Whanui National Overview Report' (Waitangi Tribunal, 1997) <http://www.waitangi-tribunal.govt.nz/resources/researchreports/rangahaua_whanui_reports/overview.asp>. In *NZ Māori Council v AG* [1987] 1 NZLR 641 (CA), 661, the Court, however, refuses to accept that the duty to consult is part of the Treaty principles.

³³ Over 60 statutes incorporate the reference to the Treaty. Eg, *Conservation Act 1987* (s 4: This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi); *Crown Minerals Act 1991* (s 4: All persons exercising functions and powers under this

Australia differs from the three other jurisdictions which have laws based in negotiated settlements or treaties relating to the cession of sovereignty. In Australia, there is no treaty or agreement ceding sovereignty or territories.³⁴ Also, unlike the US and Canada where exclusive powers in respect to indigenous peoples were vested in the federal governments, in Australia, state governments had responsibilities for indigenous issues except in the federal territories. An amendment to the *Constitution* in 1967 gave concurrent legislative power with respect to Aboriginal affairs to the federal parliament.³⁵

The result of the exclusive state responsibility for indigenous affairs until 1967 and a concurrent power in the federal parliament since 1967 is a complex body of legislative law which varies across the country. Before the federal land rights legislation for the Northern Territory in 1978, there had been some very limited rights in land previously recognized in South Australia and Victoria.³⁶ This was followed by land rights legislation in other states.³⁷ The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was enacted after a report of the Aboriginal Land Rights Commission.³⁸ That commission was established following the Yolngu's loss in having native title recognized in *Milirrpum v*

Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)); the *Resource Management Act 1991* (s 8: In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)). Other legislation are the *Hazardous Substances and New Organisms Act 1996* (s 8) and the *Energy Efficiency and Conservation Act 2000* (s 6(d)). Examples of Tikanga being incorporated in statutes: the *Resource Management Act 1991* requires regard to the relationship of the Māori and their culture and traditions with their ancestral lands, water, sites, *waahi tapu* (sacred place), and other *taonga* (treasure) [s 6(e)]; and *kaitiakitanga* [7(a)] in the use, development, and protection of natural and physical resources. *Kaitiakitanga* means the exercise of guardianship by the *tangata whenua* of an area in accordance with *tikanga* Māori in relation to natural and physical resource; and includes the ethic of stewardship (s 2). Some settlement legislation describe the tribal world view about specific association of the group with specific sites and physical resources: eg, *Ngati Awa Claims Settlement Act 2005*, Schedule 4-14.

³⁴ One of the effects of the Treaty of Waitangi was to make New Zealand a dependency of the British colony of New South Wales so in one sense the treaty was an Australian treaty.

³⁵ *Constitution Alteration (Aboriginals) 1967 Act No. 55 of 1967* (assented to 10 August 1967).

³⁶ *Aboriginal Lands Trust Act 1966* (SA) and *Aboriginal Lands Act 1970* (VIC).

³⁷ *Local Government (Aboriginal Lands) Act 1978* (Qld); *Pitjantjatjara Lands Rights Act 1981* (SA); *Aboriginal Land Rights Act 1983* (NSW); *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld); *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Land (Northcote Land) Act 1989* (VIC); *Aboriginal Lands Act 1991* (VIC); *Aboriginal Land Act and Torres Strait Islander Land Act 1991* (Qld); *Aboriginal Land (Manatunga Land) Act 1992* (VIC); *Aboriginal Lands Act 1995* (Tas).

³⁸ Also known as Woodward Royal Commission.

*Nabalco Pty Ltd.*³⁹ The legislation provides for statutory titles granted on the basis of Aboriginal customary land tenure.⁴⁰

The decision by the High Court of Australia in *Mabo (No 2)* led to the federal parliament enacting legislation to validate otherwise invalid titles to land, and to set up a framework for recognizing native title and dealing with developments on native title land or land under claim. Again, the concurrent legislative power between the federal and state governments and the political negotiations around it led to complementary state legislation which gave state bodies some roles in determining and administering native title and associated rights.⁴¹ The loss by native title claimants in *Yorta Yorta*⁴² led the government of Victoria to explore other ways to recognize Aboriginal rights including the Victorian Native Title Settlement Framework which is supported by the *Traditional Owner Settlement Act 2010 (Vic)*.⁴³ This has added to the complexity of Australian law compared with the US and Canada.

The processes developed under both the land rights and native titles schemes promote agreement making. Both the NTA and land rights legislation set out processes for the negotiation of exploration for natural resources, for agreements on mining as well as other activities that might be undertaken on Aboriginal or native title land by governments or developers. The determination of native title under the NTA also requires a negotiation process.

In all four jurisdictions, negotiations to achieve agreement are a central element that marks contemporary and future relationships between indigenous peoples, the government and the wider society. Increasingly, all four jurisdictions appear to recognize in alternative dispute resolution (ADR) the importance of negotiations in avoiding the time, expense and frustration of litigation.

³⁹ (1971) 17 FLR 141 (known as the *Gove Land Right Case*). The Milirrpum people launched a lawsuit against Nabalco, mining bauxite on Gove Peninsula. The case was settled in 1971 with the concept of native title being rejected. However, Aboriginal traditional laws and customs were recognized as a system of laws.

⁴⁰ Other legislation that provides for the same process for grants of land and procedures relating to access to and use of land in State land rights legislation are: *Pitjantjatjara Land Rights Act 1981 (SA)*, *Maralinga Tjarutja Land Rights Act 1984 (SA)*, *New South Wales (Aboriginal Land Rights Act 1982 (NSW)*, *Aboriginal Land Act 1991 (Qld)*, *Torres Strait Islander Act 1991 (Qld)* and *Aboriginal Lands Act 1995 (Tas)*.

⁴¹ *Native Title Act 1993 (Qld)*; *Native Title Act 1994 (ACT)*; *Native Title (New South Wales) Act 1994 (NSW)*; *Native Title (South Australia) Act 1994 (SA)*; *Native Title (Tasmania) Act 1994 (Tas)*; *Native Title Amendment Act 1998 (Cth)*; *Native Title (State Provisions) Act 1999 (WA)*.

⁴² *Yorta Yorta* (2002) 214 CLR 422.

⁴³ Katie O'Bryan, 'The Gunaikurnai Consent Determination: Is This the High Water Mark for Native Title in Victoria?' (2011) 7(24) *Indigenous Law Bulletin* 7, 7.

The modern settlement processes adopted in Canada and New Zealand were partly inspired by the now defunct system of claims in the US, an Indian Claim Commission (ICC) established in 1946.⁴⁴ The ICC provided a new process outside the courts for resolution of outstanding Native American grievances. It was a significant forum in which Native Americans made claims against the federal government as the constitutional structure insulated the federal government from legal suits by Native Americans in a US court, except those that were selectively waived by legislation.⁴⁵ Its jurisdiction was to hear and determine various claims including: claims arising from treaties and agreements between tribes and the US based on fraud, duress, unconscionable consideration, and mutual or unilateral mistake; and claims arising from the taking of Indian lands without compensations.⁴⁶ Over 30 years, the ICC made 274 monetary awards worth about \$818 million as final settlements discharging other claims.⁴⁷ However, it was criticised as failing to address the injustice represented by the claims. The ICC could only award monetary compensation in place of land, precluding the claimants from recovering lands. Another serious flaw was the legitimacy of tribal representation at the ICC. Claims could be presented by individuals or small groups on behalf of a whole nation without requiring proof of the consent of the nation. There was no provision permitting the intervention of interested persons in proceedings.⁴⁸ This issue of adequate representation was ruled by the IACHR to be a violation of human rights under the international law.⁴⁹

The following table briefly compares the processes of agreement making and restorative measures adopted in Canada, Australia, New Zealand and the US at present. The table on the Australian position focuses on the native title scheme only unless specifically stated. Other processes adopted in Australia are in the next section.

⁴⁴ Under the *Indian Claims Commission Act 1946*. It was abolished in 1978.

⁴⁵ Richardson, Benjamin J, 'The Dyadic Character of US Indian Law' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 51, 66.

⁴⁶ *Ibid*, 66.

⁴⁷ s 22 ICCA provides: '[t]he payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy'.

⁴⁸ Richardson, above n 45, 67.

⁴⁹ *Mary and Carrie Dann v United States* (2002) IACHR No. 75/02, cited in *ibid*, 67.

1 Table 4: Out-of-court Settlement Process in the CANZUS

Process	US	Canada	New Zealand	Australia
<p>a. Overview on the basis for contemporary agreement making</p>	<p>Royal Proclamation of 1763 had effect on territories now in the US until their independence from Britain in 1776.</p> <p>It influenced the approach to treaty making by the Continental Congress (later the US government) in relation with Native American nations (1778–1871). Agreement making continued after the 1870s through Acts of Congress. The focus varied from creation of reservations to extinguishment of existing rights and compensation.</p> <p>The Native American nations are domestic dependent nations. They have inherent sovereignty within the US acknowledging their political status of government-to-government with the US federal government.</p>	<p>The relationship between the Indian tribes and the Canadian government was determined by the Royal Proclamation of 1763 and other treaties.</p> <p>Under the 1763 Royal Proclamation only the Crown could acquire the First Nations' lands with their consent.</p> <p>The practice of entering into treaties and agreements with the Aboriginal peoples with respect to their traditional land continued until 1930.²</p> <p>The current settlement process began in response mainly to the common law recognition of aboriginal title beginning in the case of <i>Calder</i>.³</p>	<p>The Treaty of Waitangi 1840 was concluded between the Crown representatives and Māori chiefs.</p>	<p>There was no treaty concluded with the Aboriginal peoples on British settlement in Australia.</p> <p>The current native title scheme is based on common law native title.</p> <p>Land rights schemes of land grants to the indigenous peoples was introduced by statute and varies between states and territories (Part I.B)</p>

² Early treaties and agreement (1783–1930) provided initially for payment of compensation upon surrender of land by the Indians, and later included provisions for reserves and the full beneficial interest in the land and the resources; the right to hunt, trap and fish throughout the tract surrendered until occupied; and promises of social and economic development aid (Richard Bartlett, 'Canada: Indigenous Land Claims and Settlements' in Bryan Keon-Cohen (ed), *Native Title in the Millenium* (Aboriginal Studies Press, 2001) 355, 355-6).

³ *Calder v Attorney-General of British Columbia* [1973] SCR 313.

	<p>From the 1960s, US Native American policy has been based on the principle of self-determination. The federal government supports a policy of respect for tribal rights.</p> <p>It committed itself to protecting and enhancing inherent tribal resources, rights and the ability of tribes to manage their own governments.¹</p>			
b. Mechanisms	<p>Negotiated settlement agreements are adopted for purposes of:</p> <ol style="list-style-type: none"> 1. Indian Self Governance Program. The US government returns decision-making authority and provides financial resources directly to the Native American nation level.⁴ The Native American nation governments have authority to make laws over land and mineral resources. Legislation is passed to enhance and protect Native 	<p>Contemporary Canadian government policy provides for direct negotiation for settlement of land claims in areas not covered by historic land cession treaties on behalf of the Aboriginal peoples (First Nations, the Inuit and the Metis). The federal government is a party in the Yukon and the Northwest Territories. In the provinces, the provincial governments are also a party to the negotiations.</p> <p>The agreement is either a comprehensive land claim</p>	<p>The <i>Treaty of Waitangi Act 1975</i> (NZ) establishes a process for investigation of claims of breaches of the Treaty by the Crown and establishes a framework of Treaty principles.</p>	<p>The native title scheme provided by the <i>Native Title Act 1993</i> (Cth) (NTA) requires mediation to achieve agreement over:</p> <ol style="list-style-type: none"> 1. Determination of unextinguished native title claims filed in the Federal Court. The requirement for mediation is mandatory. <p>Agreement making has become the usual way to resolve native title claims and most determinations of native title have been made by consent of the parties, sometimes after evidence</p>

¹ C L Henson, 'From War to Self-Determination: A History of the Bureau of Indian Affairs' (2013) *On-line resources from the American Studies Resources Centre* <<http://www.americansc.org.uk/Online/indians.htm>>.

⁴ Prior to this policy, guidelines, policies and regulations were prepared for national application by the federal bureaucracy and were not tailored to a specific tribe, reservation or to local conditions. Funds were given through federal agencies such the Bureau of Indian Affairs. They also took over the management and delivery of programs formerly provided by the federal government.

	<p>American rights and interests.⁵</p> <p>2. Settlement of land claims to correct previous wrongful takings.⁶</p> <p>3. Settlement of resource claims particularly water rights.⁷</p>	<p>settlement or specific settlement on a particular matter.⁸</p> <p>Canada has also begun implementing tribal self-government policy on some matters including the points below under (c).</p>		<p>has been given to the Federal Court.⁹</p> <p>2. Acts which may infringe native title;¹⁰</p> <p>3. Future acts that involve the use of land subject to native title.¹¹</p> <p>If mediation is not successful, or if the Federal Court feels that it is not appropriate to mediate or to continue mediation, the matter may be litigated in the Federal Court.¹²</p> <p>It should be noted that some land rights legislation provides for land grants as a result of</p>
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⁵ Eg, *Public Law 93-638 Contracting and Compacting (Indian Trust Self-Governance and Self-Determination Programs)* encourage tribes to assume the management of eligible programs through self-governance compacts or self-determination contracts including appraisal services in relation to real estate and financial trust services: (http://www.doi.gov/ost/tribal_beneficiaries/contracting.cfm). *Indian Self-Determination and Educational Assistance Act of 1975* 25 USC § 450A – Congressional Declaration of Policy states the Congress’s commitment for self-determination of the Indian tribes. Under this policy, the Indian nations become the primary policy-makers for programs and services, funding allocations and administrative structures on reservations. They have the flexibility to re-design and re-prioritize federal programs and to reallocate federally-appropriated funds to programs that best meet their priorities.

⁶ Eg *Rhode Island Indian Settlement Act 1978; Maine Indian Claims Settlement Act 1980; Mashantucket Pequot Indian Claims Settlement Act 1983.*

⁷ Eg, *Southern Arizona Water Rights Settlement Act 1982; Zuni Indian Tribe Water Rights Settlement Act 2003.*

⁸ Eg, the James Bay and Northern Quebec Agreement (1975), the Nunavut Land Claims Agreement (1993), the Nisga’a Final Agreement (1999), and two final agreements ratified under the British Columbia treaty process.

⁹ Neate, Graeme, 'Land Rights, Native Title and the 'Limits' of Recognition: Getting the Balance Right?' (2009) 11 *Flinders Journal of Law Reform* 1, 128.

¹⁰ These include the grant or renewal of mining rights or the compulsory acquisition of interests for the benefit of third parties (ss 35-9 NTA) The negotiation if required by the aborigines affected must be made in good faith with the aim to secure the agreement of the aborigines and interested third parties regarding the terms by which the government may proceed (ss 28, 29, 30A, 31 NTA). Any party may also require the process to be resolved through mediation. Failure of any process to reach agreement will permit for arbitration.

¹¹ See below, section I.B.2 of this chapter, on future acts and indigenous land use agreement (ILUA).

¹² McRae, Heather et al, *Indigenous Legal Issues, Commentary and Materials* (Thomson Reuters, 2009), 360.

				negotiated settlements between the government and indigenous peoples. ¹³
c. Process and institution	<p>Process to establish self-governance programs involves negotiation between Native American and federal agencies (such as the Bureau of Indian Affairs) representatives. Negotiations are managed by the Office of Self Governance or the Office of Tribal Self Governance.¹⁴</p> <p>Process for negotiations for land or resource claim settlements can involve direct negotiation between the Native American nations and the Congress or the Bureau of Indian Affairs.</p>	<p>a. A claim of traditional use and occupation is made to the Minister of Indian Affairs and Northern Development.</p> <p>b. The claim is reviewed by the Minister for acceptability according to certain legal criteria.</p> <p>c. Preliminary negotiations on the framework and scope of the negotiations.</p> <p>d. Negotiation towards agreement-in-principle, which must be endorsed by assemblies or band councils, and by the federal government.</p>	<p>The process involves negotiation between the Crown and the Māori claimants on historical claims concerning the breach by the Crown of Treaty principles. The process seeks to reach settlement between the parties.</p> <p>The claim may be lodged in the Waitangi Tribunal¹⁵ for inquiry, report and recommendation. Recommendations are processed by the Office of Treaty Settlement.¹⁶</p> <p>Breaches of treaty by the Crown can take the form of legislation, policy or practice, action or</p>	<p>All native title applications are lodged with and determined by the Federal Court (ss 13 and 61 NTA).</p> <p>The Federal Court refers the application to the Native Title Registrar in the National Native Title Tribunal (NNTT), an independent administrative agency, for notification to the public and to defined parties.</p> <p>The matter will be referred for mediation (ordinarily to the NNTT) unless it is 'unopposed'.¹⁹</p> <p>If the parties reach agreement in relation to all or part of a claim, then the parties may apply to the</p>

¹³ Eg, *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)* which originated in a Parliamentary Select Committee report in 1979 and the *Maralinga Land Rights Act 1984 (SA)*.

¹⁴ The settlement agreements are referred to as 'Compact of Self-Governance' and 'Annual Funding Agreement'. They define the future relationship between the tribes and the federal government agencies involved. Governmental structures are established within the participating tribes which vary depending on the activities undertaken. Programs or activities involved under tribal self-governance include levy taxes, plan land use, and control of hunting.

¹⁵ S 6 TWA. The TWA establishes Waitangi Tribunal – a permanent commission of inquiry to receive reports or claims on alleged Crown breaches of the principles of the Treaty post-1975. See also, Ruru, Jacinta, 'The Māori Encounter with Aotearoa: New Zealand's Legal System' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 111, 120.

¹⁶ The Office of Treaty Settlement is a separate unit within the Ministry of Justice. It has the mandate to resolve historical Treaty claims, ie, claims arising from (i) actions or omissions by or on behalf of the Crown; or (ii) by or under legislation on or before 21 September 1992. Reports and progress of settlements are available at the office's website: <http://www.ots.govt.nz/>.

¹⁹ s 86B NTA.

		<p>e. Final agreement such as land selection and implementation plans. This requires formal approval by Aboriginal claimants and the federal government before passing of legislation.</p>	<p>inaction, on or after 6 February 1840.</p> <p>The Tribunal considers the claims based on the principles of the Treaty.</p> <p>The Tribunal may make recommendations on redress to the Crown for claims considered to be valid. The recommendation by the Tribunal is not binding.</p> <p>The agreement reached is recorded in the form of deed of settlement. The deed will be ratified in the form of legislation.¹⁷ Ratification requires approval of the members of the claimant group obtained through postal ballot.</p> <p>A governance entity is appointed to hold and manage the settlement assets transferred through the settlement package. The entity appointed must be approved by the group</p>	<p>court and the court may make such an order if it is within its power and if it considers it appropriate to do so.²⁰</p> <p>If the parties fail to reach agreement, the claim returns for trial and final determination by the Federal Court.²¹</p>
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¹⁷ The process and report on the progress of settlements are available at: Office of Treaty Settlements, *Claims Progress* (29 October 2012) <<http://www.ots.govt.nz/>>. Eg of settlement legislation: *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* and *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010*. The list of completed settlement legislation is available at Office of Treaty Settlements, *Completed Settlements with Legislation* <<http://www.ots.govt.nz/>>.

²⁰ s 87 NTA.

²¹ ss 86B, 86C NTA.

			members, also obtained through the postal ballot. ¹⁸	
d. Scope of settlements	<p>The land and resource rights of the Native Americans are defined by treaties, agreements or the common law. Most of the lands and resources of the Native Americans are subject to treaties or agreements. Common law rights exist independently of treaties unless they are extinguished.</p> <p>There has been a shift in the subject matter of settlement agreements in current policy which commenced in the 1970s.²² Previously, settlement agreements extinguished existing land rights in exchange for other government lands and compensation.²³</p> <p>Current settlement agreements are mainly used for:</p> <ol style="list-style-type: none"> 1. Recognition of existing land rights. 	<p>Generally settlement agreements include:</p> <ul style="list-style-type: none"> - Extinguishment of native title in exchange for the grant of title and various other compensatory measures; or, - Recognition of title to land in the form of freehold land. - Many grants include minerals in some portion of the land.²⁵ - Where entitlements to minerals were excluded, payment of compensation is made. - Right to exercise customary rights. Some provide for exclusive access within the granted land and give priority to the First Nation to access the other traditional land which was surrendered to the government. Some others provide for annual allocation (quota) of resources. 	<p>Settlements commonly contain recognition of rights, Crown apologies for wrongs done, return of or vesting of land to the iwi [tribes], financial and commercial redress, and redress recognizing the claimant group's spiritual, cultural, historical or traditional associations with the natural environment.²⁸</p>	<p>a. The scope of rights depends on the determinations in the native title process.</p> <p>It may comprise right to exclusive ownership, use, control and management of land.</p> <p>It may also be in the form of rights to access certain natural resources either for subsistence only or including commercial interests; and the right to access the land for cultural practices.</p> <p>b. the native title holders have the right to negotiate acts which may infringe native title.</p> <p>c. Future use of land subject to native title is subject to agreement of the native title holder.</p>

¹⁸ As at September 2009, there was approximately 1.47 million hectares of Māori land (including customary land) which comprises less than 5% of land in New Zealand (<http://www.justice.govt.nz/courts/Māori-land-court>).

²² Kevin Gover, 'An Indian Trust for the Twenty-First Century' (2006) 46 *Natural Resources Journal* 317, 333.

²³ Eg, *Alaska Native Claims Settlement Act (ANCSA) 1971* involves extinguishment of Indian title to almost all of Alaska in exchange for a tract of state's land and payment of compensation managed by 12 new regional corporations.

²⁵ Eg in Nunavut Land Claim Agreement 1993, whilst 2% (14 000 square miles) of traditional land was granted including minerals, another 15% (122 000 square miles) granted exclude entitlement to minerals. The status of grant is freehold title.

²⁸ Ruru, above n 15, 121; Reports made to the Tribunal are available on the Tribunal's website at www.waitangi-tribunal.govt.nz/reports

	<p>2. Acquisition of additional land in trust for the Native Americans.</p> <p>3. Settlements of resource claims particularly water rights to assure adequate supplies to meet the nations' needs.</p> <p>Mineral resources in reservations are held by the Native American governments.²⁴</p>	<ul style="list-style-type: none"> - Social and economic funding: eg, assistance in the development of training, employment and business.²⁶ - Existing third party interests are protected and given effect.²⁷ 		
<p>e. Environmental interests</p>	<p>Negotiated agreements are also used for legislative delegation of power in areas including environmental policy.²⁹</p> <p>Following the self-governance policy, a significant improvement</p>	<p>Settlement agreements normally contain mechanisms for the co-management of natural resources within the territories.</p>	<p>The Māori concept of stewardship to land is incorporated into statutes.³¹</p>	<p>1. There are provisions under both native title and land right schemes that allow for lease to the federal, state and territory governments of the maintenance or creation of protected areas.³²</p>

²⁴ *The Indian Mineral Development Act 1982* authorised creative transactions by tribes, abandoned the outdated and exploitative model of leasing to outsiders in return for insufficient royalties, and reduced federal intrusion into tribal decision making regarding tribal mineral resources.

²⁶ Eg: A land claim settlement agreement in involving the Inuit in the Nunavut settlement area (1993) laid down the basis for the creation of new territory, Nunavut in 1999. Under the terms of the agreement, jurisdiction over some territorial matters was transferred to a new public government. It includes wildlife management, natural resource management, land use planning and development and property taxation. Normally, payment is made in the form of payment over a period of time to community governments or corporations.

²⁷ Bartlett, Richard, 'Canada: Indigenous Land Claims and Settlements' in Bryan Keon-Cohen (ed), *Native Title in the Millenium* (Aboriginal Studies Press, 2001) 355, 361.

²⁹ Richardson, Benjamin J, 'The Dyadic Character of US Indian Law' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 51, 74.

The Federal Environmental Protection Agency (EPA) recognizes Indian tribal governments as the appropriate non-federal party in setting environmental standards and managing environmental programmes within reservation boundaries.

³¹ Ruru, above n 15, 124.

³² Eg, *The Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) has led to the establishment, through long-term leases on rental to the State by the traditional owners, of two national parks on Aboriginal land in the Northern Territory. This permits the conservation of both the environment and cultural landscapes. The park management boards have Aboriginal majorities. Eg are the Uluru-Kata Juta and Kakadu National Parks, the Commonwealth

	has been made in resource management. ³⁰			2. There are many indigenous protected areas established by Aboriginal representatives within land areas recognized as land subject to native title. ³³
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Reserves under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Director of National Parks, Uluru-Kata Tjuta National Park Management Plan 2010-2020 (Canberra: Director of National Parks 2010), 25. <http://www.environment.gov.au/parks/publications/uluru/pubs/management-plan.pdf>; Director of National Parks, Kakadu National Park, Plan of Management 2007-2014 (Canberra; Director of National Parks, 2007), 22.); The Trust established under *Aboriginal Lands Trust Act 1966 (SA)* is also used to supervise natural resource management programs to improve the conditions of the land.

³⁰ US Senate Committee on Indian Affairs, 'The Success and Shortfall of Self-Governance under the Indian Self-Determination and Education Assistance Act after Twenty Years: Hearing before the Committee on Indian Affairs, United States Senate, 110th Congress, Second Session' (S HRG. 110-450, US Senate, 13 May 2008) <http://www.indian.senate.gov/public/files/May132008.pdf>.

³³ Apart from its environmental service, the indigenous protected areas (IPAs) have delivered both economic and social benefits to the communities. Source: <http://www.environment.gov.au/indigenous/ipa/index.html>.

2 Multiple Processes Adopted in Australia

Compared to other common law jurisdictions in the table above, Australian common law and the native title scheme have a narrower approach. The native title scheme is more closely tied to litigation, for example, native title claims. There are also fewer rights to access resources and fewer environmental issues recognized. The process has been criticised as 'too complex, litigious and time-consuming'. This has disadvantaged the indigenous peoples who may not have sufficient financial resources to fully participate. The right to negotiate in future activities on indigenous land is also limited by provisions that allow governments to effectively override indigenous interests.¹

On the other hand, there are multiple processes in Australia that may address some of the limitations of the native title scheme.

(a) Land Rights Scheme

As noted, a legislative land rights scheme was first introduced in the Northern Territory in 1976. Such schemes provide for: grant of title on a successful claim and transfer of existing reserves;² or direct grants;³ or return of land to communities or organisations representing the traditional owners.⁴ Generally, the form of title is inalienable freehold title providing for ownership, use, enjoyment, control and management of land. All

¹ Michael Coyle, 'ADR Process and Indigenous Rights: A Comparative Analysis of Australia, Canada and New Zealand' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 371, 393-4.

² The *Aboriginal Land Rights (Northern Territory) Act 1976* provides for, first, transfer of all Aboriginal reserves in the NT to inalienable, communally-held freehold title; second, a mechanism was established whereby Aboriginal people who could prove the existence of traditional links to unalienated Crown land or, initially, to pastoral leases in which all beneficial interests were held by Aboriginal people, could present a claim to such land to a land Commissioner. The Commissioner makes a recommendation to the responsible federal minister on whether or not the title under the Act should be granted. The title is held by an Aboriginal Land Trust for the benefit of the Aboriginal communities. Administrative works concerning management and control of the land are conducted by Aboriginal Land Councils, funded by consolidated revenue mainly from royalties received for mining on the Aboriginal land. The Council also performs a liaison role between government, the traditional owners of land and the general public.

³ In Victoria, the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)*, for instance, vested specified land in Lake Condah and Framlingham Forest in their traditional owners. The Act also sets up procedures for management of the land by a corporation of Aboriginal elders, the Kerrup-Jmara Elders Aboriginal Corporation. The Corporation has the right to manage, control and enjoy the land, as well as to transfer its interest and to make lease subject to conditions specified.

⁴ The return of Yatala Reserve to the Aboriginal people was made in 1975 under the *Aboriginal Lands Trust Act 1966 (SA)*; *Maralinga Tjarutja Land Rights Act 1984 (SA)* provides for return or grant of inalienable title to an area of 76 420 square km to its traditional owners, the Southern Pitjantjatjara who were moved from their traditional territories as a result of the British atomic weapons testing programs: Neate, Graeme, 'Land Rights, Native Title and the 'Limits' of Recognition: Getting the Balance Right?' (2009) 11 *Flinders Journal of Law Reform* 1, 68.

legislation provides for mechanisms for management, control and enjoyment of the land granted but to varying degrees.

Under the land rights legislation for the Northern Territory, Aboriginal peoples may have a right to veto mining activity but not at the mining stage.⁵ The legislation allows traditional owners to receive the equivalent of mining royalties and other compensation for the extraction of minerals from Aboriginal land.⁶ The fund established for this purpose also provides income to meet the basic administrative expenses of land councils which undertake administrative and management matters in respect to Aboriginal land.⁷ Aboriginal landowners may also receive compensation for surface disturbance as specified in the *Mining Act 1992 (NSW)*.⁸

(b) *Other Mechanisms*

- (i) Land purchases or land acquisitions for the benefit of the Aboriginal peoples.⁹ The Aboriginal and Torres Straits Islander Fund and the Indigenous Land Corporation (ILC) were established to purchase land on behalf of indigenous people. It was a compensatory response to the NTA which validated otherwise

⁵ Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976*: Negotiation with the mining companies is conducted by the Aboriginal Land Councils on behalf of the indigenous land owners. If agreement could not be reached on the terms and conditions of access, the matter would be referred to a tribunal. If the nature of the mining project changed, the access agreement could be re-negotiated. See also, *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981*, s 20; *Aboriginal Land Rights Act 1983 (NSW)* s 45(4).

⁶ Under the *Aboriginal Land Rights Act 1983 (NSW)*, for 15 years after the commencement of the Act, the NSW government paid compensation for land lost by the Aboriginal people of that state, an amount equivalent to 7.5% of the state land tax on the transfer of title to non-residential land, to the NSW Aboriginal Land Council. See, also, Jennifer Clarke, 'Australia: The White House with Lovely Dot Paintings whose Inhabitants have 'Moved on' from History?' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 81, 106-7.

⁷ Neate, above n 4, 85.

⁸ s 262 *Mining Act 1992 (NSW)*. In the Northern Territory, the Aboriginal Benefit Trust Account (ABTA) receives equivalents to all royalties, except uranium royalties, paid on Aboriginal land. Aboriginal interests in the NT are also able to negotiate royalties and receive land rentals beyond statutory royalties. Negotiated payments are generally made to land-owning groups, whereas statutory royalty equivalents are paid to the ABTA (Jon Altman, 'Land Rights and Aboriginal Economic Development: Lessons from the Northern Territory' (1995) 2(3) *Agenda* 291). In South Australia, the *Aboriginal Land Trust Act (SA)* allows royalty rights from any mining undertaking on trust lands payable to Aboriginal interests. In *Pitjantjatjara Land Rights Act 1981 (SA)*, *Maralinga Tjarutja Land Rights Act 1984*: only 2/3 of statutory royalties are payable to Aboriginal interest, divided equally to local and state-wide Aboriginal interests. The remainder is the revenue of the state. Negotiated compensation can also be paid to the Anangu Pitjantjatjara or Maralinga Tjarutja to compensate for land disturbance and disturbance to Pitjantjara people.

⁹ This is to address: (i) the problem of the lack of land available for native title claim especially in major cities and regional areas; (ii) difficulty in proving native title; and (iii) the lands successfully claimed lack economic significance.

invalid titles to land and to the recognition that large numbers of indigenous peoples had been dispossessed of their lands. It has purchased substantial areas.¹⁰

- (ii) Victorian state legislation, the *Traditional Owner Settlement Act 2010 (Vic)* also provides for direct negotiation between the state and traditional owners. It enables groups to negotiate their framework and subsidiary agreements to establish rights and the manner by which the groups can be involved in the management of state lands.¹¹
- (iii) New South Wales state legislation, the *National Parks and Wildlife Act 1974 (NSW)*, ss 71B-90R, and the *Aboriginal Land Rights Act 1983 (NSW)*, s 52, provide a legislative framework for some national parks to be returned to a local Aboriginal Land Council to hold on behalf of the Aboriginal owners. It may then be leased back to the NSW government to be used as a national park. A Board of Management, with a majority of Aboriginal members, manage the park.

3 Comparative Analysis of Non-Judicial Processes taken by the CANZUS

Except for Australia, the processes taken by these jurisdictions trace their origin to treaties that define their relationship in the past and are also influential on the contemporary redress. In Australia, the current native title scheme is based on common law native title (table 2.a). However, the process to address Aboriginal injustice had begun about 20 years ahead of the native title recognition with the establishment of land rights schemes (section 2.a. above).

¹⁰ The ILC was established under the *Aboriginal and Torres Strait Islander Act (2005)* (Cth) to assist in acquisition of land for the indigenous groups and its management. See also, *Aboriginal Land Fund Act 1974* (Cth) established the Aboriginal Land Fund Commission (1974–1980) for this purpose; *Aboriginal Lands Trust Act 1966 (SA)* created a trust fund: to secure title in the existing Aboriginal reserves to Aboriginal peoples by land purchase; to have a body to which statutory royalties from mineral exploitation on reserve land could be paid and used for the acquiring of further land; and to have a body from which funds could be provided so that the lands vested in it could be developed.

¹¹ Among options are: grant of freehold title to public lands, joint management title, land use agreements, natural resource agreements and funding agreements. The first settlement agreement reached under the legislation is the Gunaikurnai Settlement Agreement. It formally recognized the Gunaikurnai people as the traditional owners of an area in Gippsland in Victoria's east. The agreement provides for: return of some national parks and reserves to the Gunaikurnai to be jointly managed with the State; rights for Gunaikurnai people to access and use Crown land for traditional purposes, including hunting, fishing, camping and gathering in accordance with existing laws; and funding for the Gunaikurnai to manage their affairs, including responding to their obligations under the settlement: <<http://www.dse.vic.gov.au/land-management/indigenous-and-native-title/agreements-with-traditional-owners>>.

As highlighted above, negotiations to achieve agreements have been the main mechanism adopted by these jurisdictions to address indigenous claims. The US and Canada provide for direct negotiation between the indigenous peoples and the governments. New Zealand and Australia have established specific institutions in the form of tribunals to provide the avenue to resolve claims mainly by way of negotiation. As explained above, various other mechanisms have also been adopted in Australia which are also based on negotiation. In New Zealand, the settlements reached are recorded in deeds of settlement and ratified in the form of legislation. The Australian native title scheme, which is focused on litigation, records settlements reached through mediation by way of Federal Court order. Applications for determinations also begin in, and are finally determined by, the Federal Court, but may proceed by way of mediation (table 2.b-c).

The subjects of disputes covered by the processes are diverse (table.2.b-d). They range from historical disputes about claims to land and resources to contemporary claims for, and management of, land and resources. In Australia, for example, the processes also extend to acts or actions which may infringe native title and future acts that involve the use of land subject to native title or pending the determination. Use of land subject to native title requires agreement of the native title holder. As a result of these processes, a considerable number of agreements, referred to as indigenous land use agreements (ILUAs) have been concluded on the use of native title land, even on land where the claims are pending determination. They are normally made between the native title group and others such as companies, governments, groups and individuals. The agreements are made for wide-ranging subject matters including management of protected areas, mining and compensation, community living areas, right to hunt and fish, access to and use of pastoral lease land and heritage protection.¹² Such agreements benefit all parties involved including the traditional owners through the establishment of a trust fund receiving contributions through the use of land.¹³ In some areas, the landowners effectively have a veto over the activities. In all of the processes, negotiation must be

¹² Neate, above n 9, 128; Maureen Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law* 523, 564-70. See also, Commonwealth Government of Australia, *Traditional Use of Marine Resources Agreements* Great Barrier Reef Marine Park Authority <<http://www.gbrmpa.gov.au/our-partners/traditional-owners/traditional-use-of-marine-resources-agreements>>; Commonwealth Government of Australia, *Sea Country Indigenous Protected Areas* Department of Sustainability, Environment, Water, Population and Communities <<http://www.environment.gov.au/indigenous/ipa/sea.html>>.

¹³ Among key elements involved are employment and youth education programs and other economic opportunities: Neate, above n 9, 129; Clarke, above n 6, 106.

conducted in good faith with a view to obtaining the agreement of each party and the Tribunal has a role in the process which can safeguard the indigenous group.¹⁴

The scope of settlements following negotiations in these jurisdictions reflects the growing significance of achieving restorative justice. Among the important elements found are recognition for indigenous peoples' rights in land and resources, providing for a secure land base by way of recognizing or grant of existing land rights; return of their land; land acquisition for the indigenous peoples; providing ownership and access to natural resources not limited to their traditional use (the US and Canada); control and management of land by the indigenous peoples; and enhancing the capacity of the indigenous peoples by providing social and economic funding. In Canada, many settlements also include priority of access to resources in land surrendered to the government. In Australia, although there is no access to natural resources beyond their traditional use, the land rights scheme provides for a share of benefits in the form of royalties and other compensation to the Aboriginal peoples from minerals extracted from their land. In NSW, as noted above, some national parks have been returned to their traditional owners and leased back to the government with boards comprising a majority of Aboriginal members co-managing the national park. In New Zealand, acknowledgement of wrong and apology has been a key element in settlement legislation (table 2.c).

Some consideration of environmental interests may also achieve environmental justice as is outlined in table 2.e.

II RECENT DEVELOPMENTS IN DEVELOPING COUNTRIES: INDIA AND PHILIPPINES

From 1992 to the present, there has been a dramatic increase in legislation around the world recognizing the rights of indigenous peoples and communities to forest lands and resources.¹⁵ The surge is seen as a response to the 1992 Earth Summit and its Convention on Biological Diversity that emphasizes the preservation of forests for halting biodiversity loss.¹⁶ This section focuses on approaches taken in India and the

¹⁴ Eg, Procedural Direction No 2 of 2007 issued by the President of the National Native Title Tribunal sets out procedures to be followed by Tribunal members when considering whether a person is not acting in good faith and whether to make a report.

¹⁵ RRI, 'What Rights? A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights' (Rights and Resources Institution, 2012), 43.

¹⁶ Ibid, 43.

Philippines. Both are relevant to Malaysia. Apart from being common law jurisdictions, they are developing Asian countries with a sizable tropical forest cover.

A India

India is relevant as a comparison to Malaysia as both share some common political and legal features. India also directly influenced the development of law in Malaysia (Chapter 3.I.B.4). As former colonies or indirectly ruled territories of Britain, forestry institutions and related management practices have experienced similar imperatives of British imperialism as well as the globalizing economy over the past two centuries.¹⁷ India has a comparable differentiation of indigenous ethnic groups to Malaysia. In relation to the category of 'natives',¹⁸ groups considered as indigenous to the land, the aboriginal peoples in Malaysia are in a similar position to the 'tribes' or 'tribal groups' in India who commonly live within or near forest areas. The tribes, along with the territories they occupied, were subject to customary law that governed their access to productive resources and territorial organisation.¹⁹ Analogous to the experience of the Orang Asli in Malaysia but on a greater scale, the *Forest Act 1927*, the *Wildlife (Protection) Act 1972* and the *Forest Conservation Act 1980* created various reserves without proper recognition of the interests of the tribal groups, criminalized their livelihoods and contributed to the marginalization of millions.²⁰ In effect, similar to the position in Malaysia and the Philippines, the tribal people are considered as having no legal rights to the land and resources. As in Malaysia, although the English legal system was meant to preserve customary law, the colonial courts altered processes for the expressions of conflict and litigation. As Bose described,

¹⁷ Haripriya Rangan and Marcus B Lane, 'Indigenous Peoples and Forest Management: Comparative Analysis of Institutional Approaches in Australia and India' (2001) 14 *Society and Natural Resources* 145; Kathirithamby-Wells, Jeyamalar, *Nature and Nation: Forests and Development in Peninsular Malaysia* (NIAS Press, 2005). In both regions, forests became the object of formal management around the beginning of the 19th century so as to prevent shortages of timber and other commercially valuable forest resources. Forests were managed for a variety of needs ranging from subsistence requirements for native inhabitants, to regional climate stability, infrastructure development and commercial demand.

¹⁸ In Malaysia, from the British construct during the colonial period, the term 'natives' in Malaysia refers to the Malays. In the *Federal Constitution*, however, the word 'native' specifically refers to the natives in Sabah and Sarawak specified in the *Federal Constitution*.

¹⁹ Rangan and Lane, above n 17, 148.

²⁰ Kundan Kumar and John M Kerr, 'Democratic Assertions: The Making of India' Recognition of Forest Rights Act' (2012) 43(3) *Development and Change* 751, 754-5.

the idea of land *ownership* was enforced in place of complex communal relationships as a means of isolating tax revenue responsibility and proprietary privilege with respect to the means of agriculture production.²¹

1 Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006

In its reform of forest tenure in 2006, India specifically acknowledged the rights of the tribal groups in the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006* (FRA).²² Enacted in response to a nationwide mobilization of marginalized forest dwellers and their advocates, the legislation emerged out of a

rights-based development strategy that challenges duty-bearers (eg government officials) to reinstate the rights of marginalised tribal people – the rights holders – and empowers them to claim their rights and responsibilities.²³

The rationales for recognition are long occupation of the tribes within the forests, the need to address historical injustice and the acknowledgement of the significance of security of tenure for sustainable forest ecology.²⁴ This initiative was mainly to counter the growing threat of the Naxalite movement as part of a government engagement with the tribal people similar to the strategy adopted by the Malaysian colonial regime and governments in the early years of independence with the Orang Asli.²⁵ It provides for a framework within which to record the rights of forest dwellers; allowing them to continue occupying and cultivating forest land; guaranteeing them the right to collect, use and dispose of minor forest produce; and protecting traditional and customary rights including grazing and maintaining homesteads.

The beneficiaries of the Act are forest dwellers who primarily reside within, and depend on, forests for their livelihood. They can be Scheduled Tribes, that is, tribes listed as such

²¹ Purabi Bose, 'Individual tenure rights, citizenship, and conflicts: Outcomes from tribal India's forest governance' (2012) *Forest Policy and Economics*, 2 citing Kidder, RL, 'Western Law in India: External Law and Local Response. In: Johnson, HM (Ed.), *Social System and Legal Process* (1978), 155-80.

²² No. 2 of 2007 (came into force on 31 December 2007). It extends to the whole of India except the states of Jammu and Kashmir. The Act is supplemented by *Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007* (came into force on 1 January 2008).

²³ Bose, above n 21, 2.

²⁴ The preamble of the FRA.

²⁵ Indranil Bose, 'How did the Indian Forest Rights Act, 2006, emerge?' (2010) 39 *Discussion Paper Series Thirty Nine* 1, 23.

under s 342 of the *Constitution of India*;²⁶ and other forest dwellers that are not identified as Scheduled Tribes but who have occupied the forest for at least three generations.²⁷

The Act recognizes 12 types of rights of the Scheduled Tribes living in forests and other traditional forest dwellers.²⁸ The rights, which can be individual or communal, include rights over forest land, rights over non-timber forest products, rights to protect and manage community forest reserves and 'community tenures of habitat for primitive tribal groups and pre-agricultural communities'.²⁹ The rights are 'heritable but not alienable'.³⁰ In relation to forest land, a community has the right to hold, live on and cultivate the land.³¹ However, the extent of the land area allowed for claim is limited to not more than four hectares regardless of individual or communal holdings.³² In relation to forest produce, they have rights to own and access and to collect, use and dispose of non-timber forest produce that they traditionally collect within or outside village boundaries,³³ and to fish, graze and other resource access,³⁴ but excluding rights to specified wild animals.³⁵

In an effort to balance the interests of the holders of these rights in the forest and the environment, the rights holders are also held responsible under the legislation for the sustainable use of forests and the conservation of biodiversity.³⁶ The *Gram Sabha*, a local village level authority, is responsible for environmental protection and regulates access to community forest resources and prevents any activity which 'adversely affects

²⁶ The *Constitution of India* provides for reservation of seats for the Scheduled Tribes in both legislative assemblies of states and parliament, ie, in the House of People (Lok Sabha) according to the proportion of the total population: (s 330, 332 the *Constitution of India*). A National Commission for Scheduled Tribes is also established under the s 338A of the *Constitution* (inserted in 2003) to investigate into matters and complaints relating to the Scheduled Tribes.

²⁷ S 2(c), (o) FRA.

²⁸ S 4, FRA: 'Forest dwelling Scheduled Tribes' refers to members or community of the Scheduled Tribes who primarily reside in and depend for their livelihood on the forest. It also includes pastoralist communities. 'Other traditional forest dweller' refers to members or community who have lived in and depended for their livelihood on forest land for at least three generations (S 2 FRA).

²⁹ Section 3(1), FRA; Kumar and Kerr, above n 20, 758.

³⁰ S 4(3), FRA.

³¹ S 3(a) FRA. For the Scheduled Tribes, they must have occupied the forest land prior to 13 December 2005 (s 4(3)). In the case of forest dwellers other than Scheduled Tribes, the conditions for the entitlement are: they primarily reside in and depend on the forest land; and have occupied the land for three generations, ie, 75 years (s 2 FRA).

³² S 4 (6) FRA.

³³ S 3(1)(c) FRA.

³⁴ S 3(1)(d) FRA.

³⁵ S 3(1)(l). S 2(q) explains that the wild animals prohibited for hunting are the animals which are found wild in nature as specified under Schedules I to IV of the *Wildlife Protection Act 1971*.

³⁶ These include the responsibility to protect wildlife, forests and biodiversity (S 5(d) and 5(d) FRA), adjoining catchments, water sources and other sensitive ecological resources (S 5(b) FRA).

the wild animals, forest and the biodiversity'.³⁷ The guarantee of communities' right to manage, protect and conserve forests³⁸ is another measure that may promote environmental interests for the benefit of both the communities themselves as well as the wider community.

Resettlement of the forest dwellers from areas considered as critical wildlife habitats in protected areas is allowed. This is subject to the free and informed consent of the *Gram Sabha* in the area and a written compensation package offered to secure the community's livelihoods.³⁹

2 The Process

The FRA and the Rule passed in 2007 under the FRA create a framework for claim determinations. Parts of the Rule, however, contradict its parent Act and some provisions violate the rights protected by the Act.⁴⁰

Generally, the process of determination is to be initiated at the community level by the *Gram Sabha*.⁴¹ It has to adequately represent different sections of the communities.⁴² It is to determine the nature and extent of the rights within the limits of its local jurisdiction. It is also to receive claims, consolidate and verify them and prepare a map delineating the area of a claim. It is then to pass a resolution on its determination. The resolution is to be notified to the Sub-Divisional Level Committee under the relevant state government. This process allows for direct claim by *Gram Sabhas* to state authorities.

By contrast, the Rule requires establishment of a Committee of the *Gram Sabha*, namely the Forest Rights Committee (FRC). The Committee of 10 to 15 members is drawn from

³⁷ S 5(a)-(d) FRA.

³⁸ S 3(1)(i) and 5 FRA.

³⁹ S 4(2) (a)-(e) FRA.

⁴⁰ *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007* was notified on 1 January 2008. An instance of its contradictory provision to the FRA is, under Rule 14(3), the Sub-Divisional Level Committee has been empowered to reject the claims without any explanation.

⁴¹ Section 6(1) FRA. S 2(g) FRA specifies that the *Gram Sabha* is 'a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women'. The *Gram Sabha* is the village council comprising the assembly of all adult residents of a village) as the primary centre of tribal governance. In 1996, the *Panchayats (Extension to the Scheduled Areas) Act 1996*, was enacted by the Indian Parliament. The legislation recognized the rights of tribes to self-governance. However, the actual implementation of the PESA has been far from satisfactory: Lovleen Bhullar, 'The Indian Forest Rights Act 2006: A Critical Appraisal' (2008) 4(1) *Law, Environment and Development Journal* 20, 22.

⁴² S 4(2) of the 2007 Rule: '... where there is a heterogeneous population of Scheduled Tribes and non Scheduled Tribes in any village, the members of the Scheduled Tribe, primitive tribal groups (PTGs) and pre-agricultural communities shall be adequately represented'.

the representatives of the *Gram Sabha*. The meeting for the election is to be convened by the *Gram Panchayat*, a higher authority for several villages.⁴³ The FRC, under the Rule, has broad powers including handling and verifying the claim process by *Gram Sabhas*.

In many states, the Forest Rights Committees (FRCs) have not been constituted at village level or habitat level but at the Panchayat level. Bose suggested that the *Gram Sabhas* required by this Act should be at the level of the actual settlements, that is, the hamlets or, at most, the revenue villages, small administrative regions which consist of several hamlets.⁴⁴ The constitution of a FRC under the influence of the *Gram Panchayat*, the higher authority with a broader territorial jurisdiction, allows interference by interested parties, with better connections to state governments, to exploit the procedures for their own interests.⁴⁵ Consequently the process has failed to provide adequate representation from the village level.⁴⁶

Under the FRA, as noted, any resolution reached at the *Gram Sabha* level is brought to a higher-level committee, the Sub-Divisional Level Committee (SDLC).⁴⁷ The Committee comprises forest and tribal welfare officers and representatives of the communities at the level of the *Gram Panchayat* appointed by the relevant state government. It should have broad powers including settling disputes between *Gram Sabhas*; in respect to any claims, to examine and collate resolutions in their areas; and to prepare a record of the resolutions to be forwarded to the District Level Committees⁴⁸ for final determination and preparation of records.⁴⁹

⁴³ S3(1) of the 2007 Rule. There are three levels of *Gram Sabhas*: the assembly of all voters in a *Gram Panchayat*; as the assembly of all the residents of a revenue village, or as the assembly of the residents of a hamlet. A typical *Gram Panchayat* includes multiple revenue villages, which in turn include multiple hamlets.

⁴⁴ Bose, above n 21.

⁴⁵ Ibid. Bose found that the majority of officials met in the study of the implementation of the FRA expressed the view that individual forest tenure claims were marred with corruption. A report by the Asian Indigenous & Tribal Peoples Network (AITPN) also found that the appointment of the Committee is dominated and influenced by political persons who are working under the influence of vested interests; some FRC constituted at *Gram Sabha* level are rejected: Asian Indigenous & Tribal Peoples Network (AITPN), *The State of the Forest Rights Act: Undoing of Historical Injustice Withered* (Asian Indigenous & Tribal Peoples Network, 2012), 8.

⁴⁶ Asian Indigenous & Tribal Peoples Network (AITPN), above n 45: Many hamlets and villages are not represented within the FRC established at Panchayat level. See also, Campaign for Survival and Dignity, *The Current Situation* <<http://forestrightsact.com/current-situation>>.

⁴⁷ S 6(2) FRA.

⁴⁸ S 6 of the 2007 Rule.

⁴⁹ S 6(3) to s 6(9) FRA 2006.

The District Level Committee (DLC) comprises the District Collector, forest and tribal welfare officials and representatives of the communities from the *Panchayat* level.⁵⁰ The decision of the DLC is final and binding.⁵¹ A record of any rights will be made in the relevant government records.⁵² A state-level Monitoring Committee is also to be established by the state, among others, to monitor the whole process of recognition and vesting of rights.⁵³

In September 2012, a guideline was issued by the Ministry of Tribal Affairs, among others, defining community forest rights and making clarifications that support decentralisation of non-timber forest produce governance. The new guideline also provides a standard claims and title format for recognition of rights pertaining to protection and conservation of community forest resource.⁵⁴

3 *The FRA in Practice*

As of 31 January 2012, individual claims to forest land numbering 3 168 million had been filed under the law in different states and were being processed and 1 251 490 titles have been issued.⁵⁵ However, the reform has many limitations. It is poorly implemented in most states, with the forest bureaucracy maintaining control.⁵⁶ The local democratic processes of rights settlement involving the *Gram Sabha* seem to have been bypassed in most cases.⁵⁷ This is seen as a failure to empower and involve local communities as equal partners.⁵⁸ The meaningful participation of peoples with a real stake in all forest matters affecting the community is an important element in achieving the law's objective, both for the interests of the community affected as well as the wider society.

⁵⁰ S 7 of the 2007 Rule.

⁵¹ S 6(6) FRA; S 8 of the 2007 Rule.

⁵² S 8(f) of the 2007 Rule.

⁵³ S 9-10 of the 2007 Rule.

⁵⁴ Pune Kalpavriksh and Bhubaneshwar Vasundhara, 'Community Forest Rights under Forest Rights Act: Citizens' Report' (Oxfam India, Delhi, on behalf of Community Forest Rights Learning and Advocacy Process, 2013), 18.

⁵⁵ Asian Indigenous & Tribal Peoples Network (AITPN), above n 45, 1.

⁵⁶ Kinsuk Mitra and Radhika Gupta, 'Indigenous Peoples' Forest Tenure in India' in Jayantha Perera (ed), *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia* (Asian Development Bank, 2009) 193, 204; Kumar and Kerr, above n 20, 759; Bhullar, above n 41, 24; Asian Indigenous & Tribal Peoples Network (AITPN), above n 45, 9.

⁵⁷ Kumar and Kerr, above n 20, 759. AITPN also reports that in many cases neither the Forest Rights Committee (FRC) nor *Gram Sabhas* were found to be involved significantly at any stage in the implementation of the FRA (Asian Indigenous & Tribal Peoples Network (AITPN), above n 45, 7).

⁵⁸ Dinesh Pratap, 'Community Participation and Forest Policies in India: An Overview' (2010) 40(3) *Social Change* 235, 235; Bose, above n 21.

A number of states have not implemented the Act.⁵⁹ Actions by other states have frustrated the objective of the legislation in protecting the tribal peoples' rights. They include: issuance of rules in violation of the legislation; interference in the claims process; harassment; and, active discouragement of claims.⁶⁰ There are also a high rejection of claims; disposal of petitions without proper hearings; denial of opportunities to appeal against the decision; and, improper issuance of titles.⁶¹ Studies indicate that the implementation of forest tenure reform has promoted the individualization of forest right claims. The state governments emphasize individual rights in occupied lands rather than communal rights in community-controlled forest areas vested in the states. This has resulted in an increase in tribal inter-household-level conflicts and further breaches of the customary rights of the marginalized tribal communities.⁶² As a recent report remarks, the implementation of the reform process has ended up perpetuating historical injustices in the loss of more land by tribal people.⁶³ Furthermore, the forest rights of hunter-gatherers,⁶⁴ shifting cultivators and nomadic pastoralists continue to be neglected.⁶⁵ There is also lack of implementation of the FRA in protected areas.⁶⁶

Furthermore, interventions by Indian courts to protect tribal rights from violation from executive action appear to have been very unsuccessful.⁶⁷ There has also been considerable political violence about the rights of tribal people with the Communist Party

⁵⁹ Asian Indigenous & Tribal Peoples Network (AITPN), above n 45, 12.

⁶⁰ Bose, above n 21: In India, reports and summary on implementation of the law is available in <http://forestrightsact.com/current-situation>. See also, the Council for Social Development's Summary Report on the Implementation of the Forest Rights Act (September 2010), available in <http://forestrightsact.com/component/k2/item/15>; Charge Sheet on Government's Violations of Forest Rights, available in <http://forestrightsact.com/current-situation/75-chargesheet-on-governments-violations-of-forest-rights-act>. Access date: 5 November 2012.

⁶¹ Asian Indigenous & Tribal Peoples Network (AITPN), above n 45, 8-9.

⁶² Kumar and Kerr, above n 20, 758. See, also, Campaign for Survival and Dignity, above n 46: it highlighted that, in most areas the state and central governments have made concerted efforts to deny or ignore these community rights and to instead treat the Act as if it is purely about individual land rights; Bose, above n 21: research on Bhil tribal villages in Rajasthan found that the forest tenure reform promoted the individualisation of forest right claims – thereby increasing Bhil tribal inter-household-level conflicts – and that households' forest land tenure claims relate primarily to the formal recognition of their citizenship rights.

⁶³ Asian Indigenous & Tribal Peoples Network (AITPN), above n 45, 15.

⁶⁴ In India, hunter-gatherers are known as a 'particularly vulnerable tribal group' (PTG) or earlier referred to as 'primitive tribal group'.

⁶⁵ Kalpavriksh and Vasundhara, above n 54, 10.

⁶⁶ *Ibid*, 10.

⁶⁷ Gethin Chamberlain, 'Human safaris' to end for Andaman tribe', *The Guardian* 27 January 2013 <<http://www.guardian.co.uk/world/2013/jan/27/jarawa-tribe-andaman-islands-human-safaris-to-end>>.

of India (Maoist) engaged in armed resistance to developments which have threatened to dispossess tribal people particularly in north eastern India.⁶⁸

Nevertheless, the legislation represents a significant change in Indian law and practice on tribal peoples' rights.⁶⁹ It provides a foundation on which to build. In a recent Supreme Court decision, drawing upon the FRA, it was held that the indigenous peoples have the final decisions on plans for mining on their land.⁷⁰ In a public interest litigation filed by a group of NGOs, the Gujarat High Court ordered the state government to strictly adhere to the FRA and its rules.⁷¹ At an executive government level, the Ministry of Tribal Affairs has also taken up a proactive role in advocacy and promoting the FRA for better implementation of the new legislation.⁷²

B The Philippines

In the Philippines, since *Mateo Carino v Insular Government of the Philippine Islands*⁷³ (*Carino*) in 1909, the common law has consistently upheld the rights of indigenous peoples over the land that they have continuously occupied. In *Carino*, the United States Supreme Court overruled a 1904 decision, *Valenton v Murciano*.⁷⁴ The earlier decision had endorsed the Regalian doctrine (*jure regalia*) that all lands that have not been acquired by purchase or grant from the government belong to the public domain. This was based on the Spanish Crown's rights of discovery, discussed in the context of North America in Chapter 3.I.B.1. A person holding a title to property had to show an original grant from the Crown. The effect was that the indigenous peoples who customarily lived

⁶⁸ See, eg, Arundhati Roy, *Broken Republic* (Penguin Books, 2011); Aditya Nigam, *To break a siege: Justin Podur* Kafila.org <<http://kafila.org/2013/04/03/to-break-a-siege-justin-podur/>>.

⁶⁹ Kalpavriksh and Vasundhara, above n 54, 10; Jayantha Perera, 'Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006: A Charter of Forest Dwellers' Rights?' in Jayantha Perera (ed), *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia* (Asian Development Bank, 2009) 213, 213.

⁷⁰ *Orissa Mining Corporation Ltd v Ministry of Environment & Forest* [2013] INSC 459 .

⁷¹ *Action Research in Community Health & Development (ARCH) v State of Gujarat* (unreported) Gujarat High Court 3 May 2013 <http://indiankanoon.org/doc/34942419/>. See also 'State must follow Act for forest rights of tribals: HC', *Indian Express* 4 May 2013 4 May 2013 <<http://www.indianexpress.com/news/state-must-follow-act-for-forest-rights-of-tribals-hc/1111390/>>.

⁷² Kalpavriksh and Vasundhara, above n 54, 18.

⁷³ No. 72 212 U.S. 449, 29 S.Ct 594, 53 L.Ed. 594.

⁷⁴ *Andres Valenton v Manuel Murciano* G.R. No. 1413, 30 March 1904 (Supreme Court, Manila). The case is available online at http://www.lawphil.net/judjuris/juri1904/mar1904/gr_1413_1904.html (Accessed 20 October 2013).

in an area became 'squatters' on the land.⁷⁵ The court held that land that has been held by individuals under a claim of private ownership is 'presumed to have been held in the same way from before the Spanish conquest, and never to have been public land'.⁷⁶

Despite a series of cases⁷⁷ that have upheld the principle established in *Carino*, the perception remains that the Regalian doctrine pre-empts any indigenous rights to land. This is perpetuated by government policies that conflict with the law.⁷⁸ This reflects the same position as Orang Asli land rights in Malaysia.

Following reforms in 1987, the indigenous peoples in the Philippines have constitutional safeguards for their rights. Section 5 of Art XII of the *Constitution of the Philippines* imposes an obligation on the state to protect the right of indigenous communities to their ancestral lands to ensure their economic, social, and cultural well-being.⁷⁹

1 *The Indigenous Peoples Rights Act*

In 1997, the *Indigenous Peoples Rights Act* (IPRA)⁸⁰ was enacted with substantial references made to the then Draft Declaration on the Rights of Indigenous Peoples. Considered as 'the most enlightened law dealing with indigenous peoples' rights',⁸¹ it provides for a wide range of indigenous peoples'⁸² rights and government responsibilities

⁷⁵ William Holden and Allan Ingelson, 'Disconnect between the Philippine Mining Investment Policy and Indigenous Peoples' Rights' 24(4) *Journal of Energy & Natural Resources Law* 375, 377.

⁷⁶ *Mateo Carino v Insular Government of the Philippine Islands* No. 72 212 U.S. 449, 29 S.Ct 594, 53 L.Ed. 594, [10].

⁷⁷ Holden and Ingelson, above n 75, 377. Other decisions that uphold the principle in *Carino* are: *Oh Chov Director of Lands*, 75 Phil 890 (1946), *Suzi v Razon* 48 Phil 424 (1925), *Director of Lands v Buyco*, 216 SCRA 79 (1992); *Republic v Court of Appeals and Lapna*, 235 SCRA 567 (1994); *Director of Lands v Intermediate Appellate Court and Acme Plywood and Veneer* 146 SCRA 509 (1986).

⁷⁸ *Ibid*, 377-378. There were efforts, however, made to accommodate the indigenous peoples' access to landholding and to secure access for indigenous peoples to forest resources under the control of the state. An example is the Integrated Social Forestry Programme which involves the people's cooperation in agroforestry and other soil and water conservation measures. But this program did not address the access to land and resources on the basis that the people have the right to their land.

⁷⁹ Section 5 of Art XII: 'The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.'

⁸⁰ Republic Act No. 8371. Under the authority of the Act, an Administrative Order No. 1 Series of 1998 Rules and Regulations Implementing Republic Act No. 8371 (Order 1998) is issued by the National Commission of Indigenous Peoples.

⁸¹ Philippines Indigenous Peoples Link (Piplink), *Indigenous Peoples Rights Act* <[http://www.piplinks.org/indigenous_rights/Indigenous+People's+Rights+Act+\(IPRA\)](http://www.piplinks.org/indigenous_rights/Indigenous+People's+Rights+Act+(IPRA))>.

⁸² The term indigenous peoples in this part refers to both the indigenous peoples and the groups referred to as the Indigenous Cultural Communities (ICC). The Act defines 'Indigenous Cultural Communities/Indigenous Peoples' (ICCs/IPs) as being: 'A group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as

in relation to the rights. The customary laws of the communities are acknowledged to be applicable in governing their property rights or relations over the ownership and extent of those domains and lands.⁸³ The indigenous conception of land and territory is also expressly incorporated within the term of the 'ancestral domain' used in the legislation.⁸⁴

The law recognizes the rights of the indigenous peoples to land and resources,⁸⁵ self-governance⁸⁶ and cultural integrity.⁸⁷ It specifically requires the government to 'respect, recognize, and protect the right' of the indigenous peoples to preserve and protect their culture, traditions, and institutions. The rights must be considered in the formulation and application of national plans and policies.⁸⁸

There are two classifications of land under the IPRA that the indigenous peoples are entitled to claim: the 'ancestral domain' (AD)⁸⁹ and 'ancestral land' (AL).⁹⁰ The right to AD is communal in nature.⁹¹ It includes the rights:

to claim ownership over lands, bodies of water traditionally and actually occupied ... [by the communities], sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains.⁹²

The creation of AD is not to affect any property rights existing within the ancestral domains.⁹³

organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial occupied, possessed, and utilized such territories, sharing common bonds of language, customs, traditions, and other distinctive cultural traits, or who have, through resistance to political, social, and cultural inroads of colonization, nonindigenous religions and cultures, become historically differentiated from the majority of Filipinos.' (s 3(g) IPRA).

⁸³ S 2(b) IPRA.

⁸⁴ Ss 4, 5 IPRA.

⁸⁵ Ss 4 to 12 IPRA.

⁸⁶ Ss 13 to 20 IPRA.

⁸⁷ Ss 29 to 37 IPRA.

⁸⁸ S 29 IPRA.

⁸⁹ Ancestral domain is 'the areas belonging to indigenous cultural communities/indigenous peoples held under a claim of ownership, occupied or possessed by themselves or through their ancestors, communally or individually, since time immemorial, continuously until the present except when interrupted by war, force majeure, or displacement by force, deceit, stealth, or as a consequence of government projects or any other voluntary dealings with government and/or private individuals or corporations' (s 3(a) IPRA).

⁹⁰ Ancestral land is 'land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots' (s 3(b) IPRA).

⁹¹ S 5 IPRA.

⁹² S 7(a) IPRA.

⁹³ S 56 IPRA. The concept of ownership is further explained in Order 1998. S 3: Ancestral domains/lands and all the resources are considered as the material bases of the groups' cultural

AL comprises areas that are not merely occupied and possessed but also utilized by indigenous cultural communities or indigenous peoples under claims of individual or traditional group ownership.⁹⁴ Certificates of Ancestral Domain Title (CADT) are issued to the owners. They permit the transfer of land or property to and among members of the same indigenous cultural communities subject to their customary laws.⁹⁵ The interests are 'private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed'.⁹⁶ There is nothing in the legislation stipulating that the land could only be surrendered to the government.

The Act provides for strong protection for the indigenous peoples in natural resource exploitation. The meaning of natural resources is broad. They are defined as 'life support systems' which may include lakes, rivers, forests, minerals and soil, and scenic sites.⁹⁷ The rights to natural resources include the rights:⁹⁸

- a. To manage and conserve natural resources within the AD and 'uphold the responsibilities for generations', that is, under the concept of stewardship to the environment;⁹⁹
- b. To benefit from and share in the profits from their allocation and utilization;
- c. To negotiate the terms and conditions for exploration projects to ensure ecological and environmental protection;
- d. To participate in the decision making of any project that will affect their AD;¹⁰⁰
- e. To receive just and fair compensation for any damages sustained as a result of exploration projects.

integrity. The concept of ownership generally holds that ancestral domains are the groups' private rights. They are communal property of the communities which belongs to all generations. It is inalienable; it could not be sold, disposed or destroyed. The present generation occupying the Ancestral Domain have the responsibility to conserve the land and its natural resources for future generations. S 4 of the Order 1998 further reinforces the inalienability of the land.

⁹⁴S 3(b) IPRA.

⁹⁵ McHugh, PG, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011), 218.

⁹⁶ S 5 IPRA.

⁹⁷ S 1(t) Order 1998.

⁹⁸ S 7(b) IPRA.

⁹⁹ S 58 provides for the duties of the indigenous peoples concerned to maintain, manage and develop areas within the AD which are considered as critical watershed, mangroves, wildlife sanctuaries, protected areas, forest cover and protected areas. The relevant government agencies are under duty to provide 'full and effective assistance' to the work. Transfer of the responsibilities is allowed made in writing upon consent of the communities obtained through their own process of decision making.

¹⁰⁰ NCIP Regulation, AO No 98-1, Part III, s 7 requires free prior informed consent of all members of the communities as a prerequisite to exploration, development, exploitation and utilisation of natural resources' within the ancestral domain. See, Holden and Ingelson, above n 75, 380.

The indigenous peoples are entitled to effective measures by the government to prevent any interference with their rights. The Act provides that the indigenous peoples have priority in the harvesting, extraction, development or exploitation of the natural resources in their ancestral domains.¹⁰¹ If the exploration project is conducted by a non-community member, it is subject to a time-period restriction.¹⁰² The Act also establishes a special fund for monetary compensation for expropriated land, development and delineation of AD.¹⁰³

2 The Process

(a) Identification of AD and AL

An independent body, the National Commission on Indigenous Peoples (NCIP), was established with broad powers to oversee the determination of the ancestral domains and lands as well as to formulate and implement policies, plans, and programs to recognize, protect and promote the rights.¹⁰⁴ The Act requires representation on the NCIP from members of different indigenous communities from each region specified. Other prerequisites include representation from women and persons with legal qualifications.¹⁰⁵

There are specific procedures specified for identification, recognition and delineation of AD and AL.¹⁰⁶ Both kinds of claims are implemented by the Ancestral Domains Office (ADO) created under the NCIP.¹⁰⁷ They require petitions with the required proof by relevant parties.¹⁰⁸ The ADO is to conduct the inquiry which includes public notification,¹⁰⁹ investigation and submission of reports¹¹⁰ to the NCIP on claims considered as sufficiently proved. There are also provisions for the notification to the applicant of the ground of the decision and public notification of the decision and for appeals by aggrieved parties or others affected by the decisions.¹¹¹

¹⁰¹ S 57 IPRA.

¹⁰² NCIP Regulation, AO No 98-1, Part II, s 2, cited in Holden and Ingelson, above n 75, 380.

¹⁰³ S 71 IPRA.

¹⁰⁴ Chapter VII IPRA.

¹⁰⁵ S 40 IPRA.

¹⁰⁶ S 51, 52 (procedure for delineation, identification and recognition of AD); S 53 (AL).

¹⁰⁷ S 46(a) IPRA.

¹⁰⁸ S 51, 52(b), (d), (e) for AD; S 53(b),(c) for AL.

¹⁰⁹ S 52(g) – for AD application; S 53(d) IPRA (for AL application).

¹¹⁰ S 52(e)-(f) for AD application; S 53(f) for AL application.

¹¹¹ S 52(h) for AD application; S 53(f) for AL application.

The process for AD allows for two forms of petitions, either from the indigenous peoples concerned or by the NCIP with the consent of the indigenous peoples concerned.¹¹² Petitions by the indigenous peoples also comprise a sworn statement by group elders on the scope of their territories and agreements with neighbouring groups.¹¹³ Any conflicting claims found at the ADO level are also to be resolved by agreement making between the contending parties with facilitation by the ADO.¹¹⁴ This procedure may avoid conflicts over others' interests in overlapping areas, a problem encountered in India.

With respect to claims for AL, the IPRA provides for the allocation of AL to be made in accordance with the custom and traditions of the groups concerned.¹¹⁵

On the submission of a report by the ADO to the NCIP, the NCIP will issue a Certificate of Ancestral Domain Title (CADT) and Certificate of Ancestral Lands Title (CALT) for successful claims of AD and AL respectively.¹¹⁶ The CADTs are to be registered in the local Register of Deeds.¹¹⁷ Notification is to be made to the relevant government agencies that manage the relevant areas which has the effect of terminating their jurisdictions over the land.¹¹⁸ In matters of disputes over property rights, claims and ownership, the customary laws, traditions and practices of the indigenous peoples where the conflict arises have precedence in any resolution.¹¹⁹

The government is also responsible for identifying the lands traditionally occupied by the indigenous peoples.¹²⁰ The Act also requires the government to take necessary measures to safeguard the indigenous peoples who do not exclusively occupy particular land but practise traditional subsistence activities including as shifting cultivators and hunter-gatherers.¹²¹

¹¹² S 52(b) IPRA. Stavenhagen, Rodolfo, 'A Report on the Human Rights Situation of Indigenous Peoples in Asia (2007)' in *Peasants, Culture and Indigenous Peoples*, SpringerBriefs on Pioneers in Science and Practice (Springer Berlin Heidelberg, 2013) 95, 99: estimated that the National Commission on Indigenous Peoples will take almost 25 years to issue titles over the existing applications. Among the reasons for the slowness of the titling process are the existence of overlap between ancestral domain areas and existing leases for mining, agro-forest, logging and pasture.

¹¹³ S 51 IPRA. Other proof required is specified in S 52(d).

¹¹⁴ S 52(h) IPRA.

¹¹⁵ S 53 IPRA.

¹¹⁶ S 52(j) for AD; S 53(g) for AL.

¹¹⁷ S 52(j) IPRA.

¹¹⁸ S 52(i).

¹¹⁹ S 63 IPRA

¹²⁰ S 51 IPRA.

¹²¹ S 51 IPRA.

(b) Exploitation of Natural Resources

Similar to other common law jurisdictions, the IPRA promotes agreement making. Exploration of natural resources within the AD is subject to free and prior informed consent (FPIC)¹²² of the indigenous peoples concerned. A formal and written agreement must be entered into in accordance with the decision-making process of the particular communities. In this respect, the ADO, under the authority of the NCIP, is responsible for issuing certification on the consent of the communities prior to the grant of a licence or permit.¹²³

3 The IPRA in Practice

In spite of extensive legal protection, as in India, there has been continuous resistance from various interested parties and groups and a lack of political will among the Philippines' authorities to enforce the legislation.¹²⁴ The implementation of free, prior and informed consent of the indigenous peoples required under the IPRA as precondition for any extractive projects on their land has failed in terms of processes and outcomes. Minter et al reported that

Consent is manipulated, the role of the National Commission as facilitator is problematic, and the agreements are culturally inappropriate, weakly operationalized, and poorly realized.¹²⁵

III POLITICAL MEANS OF RECONCILIATION

Increasingly, official or political apologies are used to acknowledge past wrongs and open dialogue to address larger issues including cultural integrity, national memory and the future of indigenous communities.¹²⁶ Recently in Australia, in a ceremony to hand over land title to the traditional land at Archer River in Cape York, the Queensland Premier, Campbell Newman, apologized for the actions of earlier governments in

¹²² The Order 1998 defines the FPIC as the consensus of all members of the ICCs/IPs which is to be determined in accordance with their respective customary laws and practices. It must be free from any external manipulation, interference and coercion. It could only be obtained after full disclosure of the intent and scope of an activity, in a language and process understandable to the community. (Part I S1(k)); Part III S 3.

¹²³ S 46(a); 57 IPRA. Detailed procedure to obtain consent of the communities is in Part III S 5 and 6 Order 1998.

¹²⁴ As to conflict in the Philippines, see, Titia Schippers, 'Securing Land Rights through Indigenism: A Case from the Philippine Cordillera Highlands' (2010) 38 *Asian Journal of Social Science* 220; Holden and Ingelson, above n 75; Tessa Minter et al, 'Whose Consent: Hunter-Gatherers and Extractive Industries in the Northeastern Philippines' (2012) 25 *Society and Natural Resources* 1241.

¹²⁵ Minter et al, above n 124, 1241.

¹²⁶ Richardson, Benjamin J, Shin Imai and Kent McNeil, 'Indigenous Peoples and the Law – Historical, Comparative and Contextual Issues' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 3, 12.

frustrating attempts to acquire title to the land. The apology was meant to correct injustices perpetrated against the community and to restore to them their due.¹²⁷ Earlier in 2008, Kevin Rudd, as Prime Minister of Australia, read a formal apology before the opening of a new federal parliament to the Stolen Generation for the forced removal of indigenous children.¹²⁸

In New Zealand, an Act of Parliament containing an extensive formal apology was delivered by Queen Elizabeth II, in person, to the Māori people of Tainui during her visit in 1995. In the apology in the legislation the Crown apologized for the invasion of the Waikato and the subsequent indiscriminate confiscation of land.¹²⁹ It has been the practice in New Zealand to write a formal apology in settlement legislation.¹³⁰ Both the Canadian and the US governments have also formally apologized over land issues, although apologies in the US are not as conspicuous.¹³¹

The Canadian government officially apologized for past discriminatory policies to the Aboriginal peoples. As part of the apology, Canada's Truth and Reconciliation Commission was established to investigate the truth of residential school system. Although it concerns the issue of stolen children, the impact on the children and families

¹²⁷ Sarah Elks, 'Great injustice' at last put right for Cape York Aborigines' (23 May 2012) <<http://www.theaustralian.com.au/national-affairs/policy/great-injustice-at-last-put-right-for-cape-york-aborigines/story-fn9hm1pm-1226363960904>>.

¹²⁸ Parliament of Australia, 'House Notice Paper No. 1 – 13/02/2008' (Parliament of Australia, 2008) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fnoticer%2F2008-02-13%2F0002%22>>.

¹²⁹ The full text of the form of apology from the Deed of Settlement between Her Majesty and Waikato-Tainui which was signed in the 22 May 1995 may be read in the Maori Law Review, Vol May 1995. See: <http://maorilawreview.co.nz/1995/05/may-1995-contents/>. See also David Barber, 'The Queen says sorry to wronged Maoris', *Independent* (2 November 1995) <<http://www.independent.co.uk/news/world/the-queen-says-sorry-to-wronged-maoris-1536901.html>>.

¹³⁰ Eg, *Waikato Raupatu Claims Settlement Act 1995* (NZ); *Ngāti Pāhauwera Treaty Claims Settlement Act 2012* (NZ); *Ngāti Awa Claims Settlement Act 2005* (NZ).

¹³¹ John Duncan, *Apology for the Inuit Arctic Relocation* Tunngavik.com (28 August 2010) <<http://www.tunngavik.com/current-initiatives/past-projects/arctic-exile-monument-project/apology-for-the-inuit-high-arctic-relocationmamiahugiyait-inuit-kutinikpaami-kimakhimayut%E1%92%AA%E1%92%A5%E1%90%8A%E1%93%90%E1%93%82%E1%92%BB-%E1%90%85%E1%91%AF%E1%93%84%E1%96%93-%E1%90%83%E1%93%84/>>; John D McKinnon, *US Offers an Official Apology to Native Americans* The Wall Street Journal (22 December 2009) <<http://blogs.wsj.com/washwire/2009/12/22/us-offers-an-official-apology-to-native-americans/>>; Moni Basu, *Navajo man wants the nation to hear its official apology* CNN.com <http://inamerica.blogs.cnn.com/2012/12/19/native-american-apology/?hpt=us_c2>; Anthony DePalma, 'Canada's Indigenous Tribes Receive Formal Apology', *New York Times* 8 January 1998 <<http://www.nytimes.com/1998/01/08/world/canada-s-indigenous-tribes-receive-formal-apology.html>>; and to the Hawaiians by the Congress of the United States (Joint Resolution 19, 1993).

was also directly exacerbated by the loss of traditional lands and erasure of custom and customary land use.¹³²

Apologies may be useful to correct injustice inflicted upon groups such as indigenous peoples who have suffered racial discrimination and racist policies under past actions by governments.¹³³ Hook suggests that political apologies occupy a critical nexus between the original transgressions and the ultimate goal of reconciliation and forgiveness. To this end, apologies must include acceptance of responsibility, an expression of sorrow and a promise not to repeat the action. Without acceptance of responsibility, progress will not be made. Reconciliation might lead to forgiveness, although the relationship between the two is complex. Apologies made in goodwill may lead to some form of restitution. Ultimately, apologies, reconciliation and forgiveness are significant in promoting ethnic harmony in a society.¹³⁴

IV CONCLUSION

This chapter surveys the approaches taken in various jurisdictions using the principles of justice that guide the analysis in the thesis. Comparative analyses of the common law and out-of-court settlement processes to address land rights issues of the indigenous peoples in CANZUS jurisdictions are provided in sections 8.I.A.2 and 8.I.B.3. Section II identifies the approaches taken by India and Philippines.

The framework used in this comparative exercise emphasizes the recognition of the rights and interests of the indigenous peoples as having an equal status with the interests of other sections of society, and that this, and an acknowledgement of injustice, are the starting points for considering appropriate processes and redress. In evaluating these measures which involve re-distributive justice, it is commonly accepted that the rights of indigenous peoples, similarly to others' rights, need to be balanced against existing rights and competing values. This perspective is supported in international law. It is also almost unanimously agreed by states that indigenous peoples' rights should be subject to limitations determined by law in accordance with international human rights obligations to accommodate legitimate rights and freedoms of others in a democratic society.¹³⁵ Such a position reduces the risk of conflicts that may be barriers to reform. However, in

¹³² Stephen Harper, *Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools system* <http://www.pm.gc.ca/eng/media.asp?id=2149>.

¹³³ G. Raumaty Hook, 'The Road to Reconciliation Begins with an Apology' (2008) 2 *MAI Review*, 8.

¹³⁴ *Ibid*, 8-9.

¹³⁵ Art 46.2 of the UNDRIP

this balancing exercise, how is it to be ensured that the rights of indigenous peoples are not made subservient to the rights of others? Hook suggests two elements are required: that sufficient opportunities are given to indigenous peoples to negotiate outcomes in relation to land or its uses and that they have sufficient status to achieve just and enduring outcomes.¹³⁶ These two elements may only be achieved by, firstly, giving proper recognition to the aborigines as the owner of their customary land and, secondly, adopting processes that are fair and just not only to the indigenous peoples but also to the other parties affected. This is in line with the framework of distributive justice that emphasizes recognition of, and respect for, the rights and interests of all with equal status and with proper processes.

This analysis found significant unifying elements in all of the jurisdictions that conform to the framework of justice used, that is, towards achieving all three forms of justice identified.

A Rights Approach and the Contents

First, all of the jurisdictions have taken a rights-based approach. The rights of the indigenous peoples in these jurisdictions are recognized and processes have been established in line with the concept of procedural justice. In CANZUS especially, the judicial recognition of indigenous land rights has been instrumental in shaping the contemporary legal developments which seek to address the injustice suffered by the indigenous peoples. The cases from these jurisdictions are also influential in the common law recognition of the Orang Asli and other indigenous peoples' rights in Malaysia (Chapter 6.II).

In some jurisdictions, the indigenous land rights have been subject to constitutional safeguards. In Canada and the Philippines, these rights have constitutional protection which provides greater status than other legal rights and protects them against unilateral extinguishment as states are under constitutional obligations to protect them. In New Zealand, the Treaty of Waitangi that governs the relationship between the Māori and the Crown is statutorily recognized, elaborated and developed into a jurisprudence of Treaty principles. One principle requires the active protection of Māori interests by the Crown. The First Nations in Canada are given constitutional safeguards that affirm their existing common law and treaty rights, although the rights are restricted to what judicial

¹³⁶ Neate, Graeme, 'Land Rights, Native Title and the 'Limits' of Recognition: Getting the Balance Right?' (2009) 11 *Flinders Journal of Law Reform* 1.

precedents determine to be 'Aboriginal rights'.¹³⁷ However, older legislation that promotes assimilation remains.¹³⁸

Apart from the common law, legislation is used in all of the jurisdictions to recognize, provide for or elaborate the indigenous rights and establish mechanisms and processes for their recognition and protection. The Philippines' legislation has specific provisions imposing an active duty on governments to protect the indigenous peoples' rights. Positive duty on government is also found in the common law in the US, Canada and New Zealand on the basis of the treaties in each jurisdiction.

Second, the mechanisms established generally give a role to indigenous perspectives, including their customs and customary law, in defining the scope and content of their rights. Common to many indigenous communities is an integral connection between customary lands, group membership and spiritual values.¹³⁹ This is also seen in the approaches taken in all of these jurisdictions. In the Philippines and New Zealand, for instance, the concept of responsibilities towards the environment for future generations is incorporated into legislative schemes. The concept of communal land and its inalienability is also recognized. This is also observed in Australia in both land rights schemes and native title systems, although there have been tendencies to narrowly interpret what is Aboriginal property.¹⁴⁰ In New Zealand, the *Treaty of Waitangi Act 1975* (NZ) makes reference to the principles of the Treaty of Waitangi and certain components of tikanga Māori [Māori custom].¹⁴¹ In the US, the Native American nations' self-determination policy, which emphasizes the Native American nations' cultural perspectives, has seen major improvement in the social and economic aspects of these nations.¹⁴²

¹³⁷ Eg *R v Pamajewon* [1996] 2 SCR 821 cited in Mark D Walters, 'The Emergence of Indigenous Rights Law in Canada' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 21, 47.

¹³⁸ *Ibid*, 30.

¹³⁹ Marcia Langton, 'The estate as duration: "Being in place" and Aboriginal property relations in areas of Cape York Peninsula in north Australia' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 75.

¹⁴⁰ See above, section 8.I.A.2.

¹⁴¹ Ruru, Jacinta, 'The Māori Encounter with Aotearoa: New Zealand's Legal System' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 111, 121.

¹⁴² S Cornell, "The Importance and Power of Indigenous Self-Governance: Evidence from the United States", paper presented at the Indigenous Governance Conference, Canberra 2002, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2003' (Human Rights and Equal Opportunity Commission, 2004)

Third, the contents of indigenous rights in these jurisdictions vary. In most jurisdictions, they are extensive. As the Philippines' legislation has been directly influenced by the then draft UNDRIP, the contents are wide-ranging. The land rights of the indigenous peoples extend to lands that they occupy, possess and utilize which can be individual or communal. The resource rights are also extensive and include any natural resources useful for the indigenous peoples' livelihood. The same is also seen in CANZUS where indigenous peoples have rights not only to use and occupy their traditional land, but also to exploit the natural resources, including minerals and timber. In Australia, although direct access to natural resources is limited to those customarily accessed, various statutory schemes and provision for consent of the traditional owners to use land subject to land right or native title, for instance, has given rise to a wide range of benefits for the Aboriginal peoples, economically, socially and culturally.

The forest rights reform by India on the other hand has been restrictive in scope as it merely affirms and protects existing customary rights. The resource rights recognized by the legislation are restricted to non-timber forest produce traditionally accessed. Some specified wild animals are also excluded for conservation and environmental reasons.

B Processes and Procedural Justice

With respect to the processes established to address indigenous land rights disputes, all of the jurisdictions reviewed have established a non-judicial process to address claims by indigenous peoples. The non-judicial processes focus on negotiation with the objective being to achieve agreement between the state and the indigenous peoples. They cover various subject matters affecting indigenous land and resources. See the comparative analysis in section 8.I.B.3.

The approaches in Canada and New Zealand have been directly influenced by treaty obligations. Australia, by giving emphasis to negotiations in policy making, and determination of native title and future acts on land subject to native title, has also developed a similar but narrower and more legalistic mechanism that gives important credence to the views of the indigenous peoples in the policy. This may have also been influenced by the growth in ADR in Australia's litigation practices. The development of legislation has seen comprehensive processes of inquiry or consultation, and regular

<http://www.humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport03/PDF/ntr_report.pdf>, 201.

scrutiny,¹⁴³ involving various parties in the development of policy on both land rights and native title.¹⁴⁴

Solutions reached through negotiation have the potential to advance indigenous communities' standing in the wider society and their socio-economic well-being. In all of these common law jurisdictions, the outcomes achieved through the ADR processes have seen acknowledgement of indigenous rights to land and resources.¹⁴⁵ For example, through the modern claim settlement process in Canada since 1973,¹⁴⁶ treaty making or agreements between the governments and Aboriginal communities typically recognize Aboriginal ownership of designated tracts of lands, and provide financial compensation and mechanisms for co-management of natural resources within the provinces and territories. Recent agreements in Canada have followed the US in recognizing the power of the communities to self-government in certain specified matters such as use and management of land and resources, culture and language.¹⁴⁷

However, there are many issues that affect equality in agreement making. Among the issues are disparities in resources and the gap in expectations between the two parties on the timing and outcomes of the process.¹⁴⁸ In Canada, support funding for 'interest-based negotiation' is provided to correct the imbalance but criticism continues about inequities.¹⁴⁹ Some agreements fail to deliver promised benefits or fail to resolve implementation issues.¹⁵⁰ In some regions, the common law recognition of Aboriginal rights and title appears to have been inadequate in producing meaningful negotiations or agreements.¹⁵¹ In the context of British Columbia, the law has been unable to transform the attitudes of the federal and provincial governments to produce agreements

¹⁴³ The NTA has undergone regular scrutiny since its inception through the Parliamentary Joint Committee on Native Title statutorily established under the NTA (s 204) – Neate, above n 136, 132.

¹⁴⁴ Ibid.

¹⁴⁵ Coyle, above n 1, 398.

¹⁴⁶ The settlement of dispute through negotiation was in practice since the beginning of British occupation in North America until it was stopped in early 20th century.

¹⁴⁷ Walters, above n 137, 35.

¹⁴⁸ Langton, Marcia, Maureen Tehan and Lisa Palmer, 'Introduction' in Marcia Langton et al (eds), *Honour Among Nations?* (Melbourne University Press, 2004) 1, 20; Ravi de Costa, 'Treaties in British Columbia: Comprehensive Agreement Making in a Democratic Context' in Marcia Langton et al (eds), *Honour Among Nations* (Melbourne University Press, 2004) 133, 133.

¹⁴⁹ de Costa, above n 148, 138.

¹⁵⁰ Langton, Marcia and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 34, 20.

¹⁵¹ Lisa Palmer, 'Introduction: Agreement Making, Outcomes, Constraints and Possibilities' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 251, 252; de Costa, above n 148, 146.

that adequately protect Aboriginal rights and title and that engage the Aboriginal nations.¹⁵² This highlights the need for institutional support to promote the greater awareness of indigenous rights and their significance to the whole society.¹⁵³

The situation appears worse in India and the Philippines where the implementation of reform perpetuates injustice rather than redresses it. The conflicts in India over the introduction of the FRA highlight the need for careful planning of an institutional and policy framework as well as capacity building of the indigenous communities. In both countries, bureaucratic resistance, lack of political will and corruption have marred the processes. This is a lesson for any law reform proposal, especially in Malaysia which shares many similarities with these jurisdictions.

Therefore, as part of the process which also seeks the reparation of historical injustice, efforts to develop institutional capacity for good governance are required. Good and legitimate governance is considered as one of key factors necessary for successful indigenous economic development. Others are cultural autonomy and legitimacy.¹⁵⁴

Courts have also played important role in promoting processes based on procedural justice. This is especially seen in Canada where the principle that the Crown has the duty to consult and accommodate the Aboriginal interests has developed. It has now become a significant principle that governs not only the courts' determination but is also a basis for engagement with the Aboriginal communities in Canada (section 8.1.A.3).

C Restorative Measures

The scope of settlements following negotiations in these jurisdictions reflects the growing significance of achieving restorative justice. Various means have been undertaken to repair the past wrongs inflicted on indigenous peoples. Both land rights and natural resources issues are usually addressed. They include measures that are restitutionary (eg, formal recognition or grant of existing land occupied or possessed by the indigenous peoples, land returns, creating of mechanisms to purchase or acquire other land for the

¹⁵² de Costa, above n 148, 146. See also Parry Agius et al, 'Comprehensive Native Title Negotiations in South Australia' in Marcia Langton et al (eds), *Honour Among Nations?* (Melbourne University Press, 2004) 203.

¹⁵³ Paul LAH Chartrand, 'Towards Justice and Reconciliation: Treaty Recommendations of Canada's Royal Commission on Aboriginal Peoples (1996)' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 120.

¹⁵⁴ Palmer, above n 151, 252.

benefit of a particular indigenous community); and compensatory (eg, payment of compensation and royalties).

In some jurisdictions, the lands returned to the indigenous peoples are leased back to the government for its use particularly for conservation and tourism, and have been a source of income to communities. Some settlements have extinguished existing land rights in exchange for land grants. The form of title is normally communal title which is held by a body corporate or trust representing the interests of each indigenous group. Thus, there is a growing trend towards providing a secure land base for the indigenous peoples. US and New Zealand history, for instance, reveal the significance of providing indigenous peoples with a secure land base and control over their resources as the basis for land and resource claim settlements. The transfer of communal land to individual titles resulted in loss of a significant amount of Māori and Native American nations' land and impoverished the communities.¹⁵⁵

With respect to resource rights, in many jurisdictions, the settlements are not limited to those customarily used and include mineral resources. They could be both for subsistence and commercial use. In Canada, some provide for exclusive access within the granted land and give priority to the relevant First Nation to access other traditional land surrendered to the government. Some others provide for an annual allocation or quota of particular resources. In Australia, the provision of the right to negotiate for future acts or use of land in the native title scheme has opened a range of economic opportunities for titleholders to receive benefits from resulting projects.

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

In most jurisdictions, the issues subject to these processes were decided through mechanisms that allow for participation and thereby may be resolved according to their contexts and details. At the same time, they do not only seek to rectify past wrongs but to also open opportunities to participate in viable economic activities. Economic empowerment on their own term allows communities to be able to retain their autonomy and their cultural and social integrity

¹⁵⁵ *The General Allotment Law (Dawes Act) of 1887.*

Increasingly, apart from the above processes, official or political apologies have also been used to acknowledge past wrongs as part of reconciliation processes to achieve ethnic harmony. Apologies for wrongs in the context of indigenous peoples are acknowledgements that injustice exists. Both acknowledgements and apologies are increasingly seen as significant in providing for reconciliation over past injustices and to move nations to new relationships. They may empower the indigenous peoples who have been marginalized for generations. They may also be able to provide leverage for them in negotiating their rights as groups with interests equal with others in the wider society.

D Environmental Interests and Environmental Justice

Approaches taken could also be seen from the perspective of environmental justice. There is increasing support for the view that giving secure rights to peoples dependent on the forests is necessary both to properly articulate environmental issues and the need for corrective justice for indigenous peoples.¹⁵⁶ From an economic perspective, property rights with appropriate restrictions would give these communities an incentive to provide environmental management and other services and enable them to better integrate those services with their other uses of the forests. The indigenous peoples would share the costs accrued in, and share income produced from, the use of the forests.¹⁵⁷ A reform of forest property rights and management systems would not only increase their gain from the forests but also lead to more sustainable systems of forest management.

Ownership, control and management of land by indigenous peoples also provides safeguards against arbitrary decisions by states to disadvantage them by siting near them activities with high risks to health and the environment. This may allow for more equal sharing of burdens and benefits in societies. As well, the rights to negotiate and consent over use of indigenous peoples' land may provide means to achieve environmental justice.

F Concluding Remarks

In all of these jurisdictions, indigenous peoples have faced legal setbacks. In New Zealand, for instance, the government controversially overturned judicial recognition of Māori proprietary interests in coastal areas through the *Foreshore and Seabed Act 2004*

¹⁵⁶ Dev Nathan, 'Environmental Services and the Case for Local Forest Management' in Dev Nathan, Govind Kelkar and Pierre Walter (eds), *Globalization and Indigenous Peoples in Asia: Changing the Local Global Inter-face* (Sage India, 2004) 41

¹⁵⁷ Ibid, 28.

(NZ).¹⁵⁸ This controversial Act was later replaced by *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ). The 2011 Act restores any customary interests in the common marine and coastal area (CMCA) that were extinguished by the former Act. In Australia, amendments have watered down protections in the NTA¹⁵⁹ and subsequent judicial decisions have diminished the potential and effect of common law native title.¹⁶⁰ In India and the Philippines, the authorities are reluctant to implement, or are hostile to the implications of, the legislation that recognizes and regulates the land and resource rights of the indigenous peoples. Nonetheless, the benefits or potential of benefits from the arrangements are undeniable.

Comparative perspectives provide models for practical applications of indigenous peoples' rights. They help to provide ideas for mechanisms that can be used in Malaysia. They assist policy analysis through learning from the successes and failures of other jurisdictions in improving legal reform.

But the question is: could any framework or variations on them be readily replicated in a Malaysian context? As India and the Philippines have much in common with Malaysia in their legal and historical contexts, economic status and bureaucratic cultures, the experience of the two jurisdictions indicates the need for careful planning and proper institutional capacity building. As Lund observes, any reform brings changes in the relationship between actors within and between communities, as well as between the government and communities, because it changes relationships around authority.¹⁶¹ The next chapter considers the possibility of reforms in Malaysia which would give greater recognition to the rights of the Orang Asli in the highly contested areas of the ownership of forests and the control of their resources.

¹⁵⁸ Richardson, Imai and McNeil, above n 126, 11, citing C Charters and A Erueti (eds), *Māori Property Rights in the Foreshore and Seabed: The Last Frontier* (Victoria University Press, 2007).

¹⁵⁹ Ibid, 11, citing L Behrendt, *Mabo: Ten Years On*, Occasional Paper (Australian National University, Faculty of Law, 2002).

¹⁶⁰ See, eg, Tehan, above n 12.

¹⁶¹ Lund, C, 2008. *Local Politics and Dynamics of Property in Africa*. Cambridge University Press, Cambridge and New York, cited in Bose, Purabi, 'Individual tenure rights, citizenship, and conflicts: Outcomes from tribal India's forest governance' (2012) *Forest Policy and Economics*, 8.

CHAPTER 9: TOWARDS JUSTICE AND EQUALITY: THE WAY FORWARD FOR THE ORANG ASLI?

This chapter considers the local conditions for Orang Asli rights to resources to be sustained within the Malaysian legal system, that is, towards a rights-based approach as found in international law and in some other jurisdictions (Chapters 7 and 8). The comparative law concept of legal transplant is employed to consider the appropriateness of the foreign laws as sources of legal principles for Malaysia and the future direction of its law.

Over the last two decades, development or changes in laws and policies in Malaysia in favour of the indigenous peoples such as the Orang Asli are evident in relation to access to land and forest resources. There are two routes by which this change is taking place in the Malaysian legal system:

- (a) First, the change made by judges in the common law (Chapter 6.II.A). The common law principles on Orang Asli land and resource rights are not a direct transfer of new law from other jurisdictions. It is a reformulation of existing legal authorities in Malaysian common law through the influence of: (1) other common law jurisdictions including Australia and Canada; and, (2) the international law on indigenous peoples. Using common law methodology, the judiciary has constructed new concepts and meanings in Malaysian common law. It is now established under Malaysian common law that the Orang Asli have rights to the land and resources under their own law and custom unless extinguished (Chapter 6.II).
- (b) Second, indirect changes made at a policy and legislative level through the influence of international and transnational law. These changes have acknowledged and incorporated into practice greater rights of the indigenous peoples such as the right to participate in decision making and 'to own, use and manage' the resources (Chapter 6.I.B.3(b)). This development at a policy level has been generated either by international market pressure or Malaysia's international commitments (Chapter 6.I.B.3). However, the implementation of this policy on the ground is not apparent although it suggests the greater influence of international law on the domestic law on the rights of indigenous peoples.

The first section of this chapter explores the conceptual debate on legal change and its implications in a society in comparative law literature. In the light of this framework, the second section considers the 'environment' of the social system in Malaysia, the impact of legal change in the resource rights of the Orang Asli in practice and perspectives of peoples and the potential for greater recognition and protection of their rights in a rights-based approach. The role of legal elites and other actors in promoting an 'environment' for greater justice and fairness is also discussed.

The chapter concludes that the Orang Asli resource legal rights established by the judiciary and policy development are part of the co-evolution of various social systems influenced by changes from within and outside the systems. The common law-based legal rights of the Orang Asli provide for better protection of Orang Asli resource rights. But the resistance to these rights presents obstacles which are difficult for them to sustain. On the other hand, from the perspective of legal elites, the system is evolving towards an environment for a more inclusive society consistent with greater recognition of the legal rights of minorities.

I TRANSFER OF LEGAL INSTITUTION: THE THEORETICAL DISCOURSE

A The Debate on Legal Transplant

The term 'legal transplants', as proposed by Watson,¹ challenges the view that laws are peculiar to a people or a nation because of their unique cultural identities.² Watson argues that transplants of law are common mechanisms for legal changes that transpose legal ideas from one legal system to another or from different areas to another within the same system. This presumes that the law is autonomous from its social structure in non-legal domains, but the opinions and activities of the legal elites may influence its transplanting. These elites, lawyers and legislators³⁴ are those who handle 'the technical job of importing or adapting foreign law, or ... smoothing the process of moulding local

¹ Alan Watson, 'Legal Transplant and Law Reform' (1976) 92 *Law Quarterly Review* 79; Alan Watson, *Legal Transplant: An Approach to Comparative Law* (The University of Georgia Press, 2003).

² The idea was originally proposed by Charles de Secondat Montesquieu, baron de, *Spirit of Laws* (Thomas Nugent trans, 1914), 316. It suggests that there is a complex link between law and its environment. The spirit of a people was influenced by 'various causes: by the climate, by the religion, by the laws, by the maxims of government, by precedents, morals and customs'. See also, O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1.

³ Alan Watson, 'Comparative Law and Legal Change' (1978) 37 *Cambridge Law Journal* 314, 314-5.

⁴ Watson, above n 1, 21-3. (2003)

law to suit new needs and new social desires'.⁵ Watson suggests it is the idea which is appropriated so that different stages of economic development or different political traditions may not impede the effectiveness of the transplant.⁶

In a similar way, in relation to transfer of international human right laws to domestic legal systems, Risse et al argue that changes in the international environment are ultimately more important than a country's specific features and economics in explaining the spread of human rights norms around the world. The spread of these norms, in the form of persuasion, sanctions, coalition building and domestic institutions generates domestic political change. The international system – increasingly dense in human rights groups, multilateral agreements and entangling norms – can isolate illiberal regimes and push them to reform.⁷

Other scholars, by contrast, dismiss the possibility of the movement of laws through transplants. In this view, as originally argued by Montesquieu,⁸ law is closely connected to its original society as it develops out of its historical experiences and contexts.⁹ Rules which are transferred change by constructing new meanings in their new locations. Disagreeing with claims that the law is autonomous, Kahn-Freund contended that the success of legal transplants depends on local factors, the most important being their political conditions¹⁰ and organised interests in the making and in the maintenance of legal institutions. These include political elites, corporate sectors, trade unions, and, cultural and religious groups.¹¹ A transferred law that adversely affects the interests of these groups may face strong obstacles. Markesinis and Fedtka also observed that the borrowed rule must be adequately adapted to the local political, cultural, social, historical,

⁵ Lawrence Friedman, 'Some Comments on Cotterrell and Legal Transplants' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing, 2001) 282, 96.

⁶ Watson, above n 1, 79 (1976); Watson, above n 3, 315.

⁷ Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms Into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 318).

⁸ Montesquieu, above n 2, 316.

⁹ Kahn-Freund, above n 2. See also, Pierre Legrand, 'Comparatists-at-Law and the Contrarian Challenge' (1995) *Inaugural Lecture*, Tilburg; Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, cited in Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11, 14.

¹⁰ Kahn-Freund, above n 2, 6, 8, 27.

¹¹ *Ibid*, 11-3.

economic, constitutional and legal backgrounds of the host jurisdiction.¹² This view points to the significance of the domestic context.¹³

B Teubner, Legal Irritants and System Theory

Teubner seeks to revise the understanding of the relationship between system and environment in modern highly differentiated societies.¹⁴ On the one hand, he asserts that 'since contemporary legal rule production is institutionally separate from culture norm production, large areas of law are only in loose, non-systematic contact with social processes'. But on the other hand, he also insists on what he calls 'law's binding arrangements' to other social subsystems and discourses.¹⁵

Teubner suggests that a transferred rule 'irritates' existing systems. It irritates both legal discourse and social discourse to which the law is connected to recreate something else. In other words, the transferred law triggers a whole series of new and unexpected events:

it irritates law's 'binding arrangements'. It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. 'Legal irritants' cannot be domesticated¹⁶

Teubner's argument is based on system theory which models law as an 'autopoietic system'.¹⁷ In this model, law is viewed as a self-reproducing system in a social system, autonomous from other social subsystems in the society. The theory was developed by Niklas Luhmann and was adopted from biological descriptions about living systems. It suggests that law, similar to a living system, also produces and reproduces the components, that is, meaning, which constitute the system. It is operationally closed, that is, exclusively determined by its own system or its own bipolar code.¹⁸

¹² Sir Basil Markesinis and Jorg Fedtka, *Engaging with Foreign Law* (Hart Publishing, 2009), 127-9.

¹³ See also, Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39(1) *The American Journal of Comparative Law* 1, 26-34; Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39(2) *The American Journal of Comparative Law* 343, 343-8, 390-1, 395-6: Sacco identifies the 'legal formants' that are constituent elements of a domestic legal system. These legal formants co-exist in harmony or not to each other within a legal system; Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic development, legality, and the transplant effect' (2003) 47(1) *European Economic Review* 165, 174, 174-5: suggesting that the transferred rule would adapt to the local legal practices or conditions to settle into its place in the system.

¹⁴ David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing, 2001) 7, 15.

¹⁵ Teubner, above n 9.

¹⁶ *Ibid*, 26-8.

¹⁷ Gunther Teubner, *Law as an Autopoietic System* (Blackwell, 1993).

¹⁸ *Ibid*, 103:

Linkages to other subsystems within the society are through the 'communication' or interpretation that one system makes of the 'state' or 'change' of its environment which is made up of other subsystems. This interchange between systems' environments is known as coupling.¹⁹ The outcome of continued interchange, of continued selection of information from the information produced by the environment allows the system to operate without disintegrating. This is known as 'structural coupling'.²⁰

In effect, it is a system's internal organisation according to a system-specific code which determines what changes can occur. The only changes allowed are those which maintain the autopoiesis of the system, those which can be translated into system-specific terms. In this theory, the environment cannot be directly shaped by the law. But the relationship between a system and its environment is highly selective depending on its own code.²¹ This relationship forms the law's 'binding arrangement' with other social systems.²²

Teubner argues that success in the transfer of law varies in accordance with the nature of the connection with its social system. This connection ranges between 'loose coupling to tight interwovenness'.²³ Transfers are relatively easy in areas of law that have only loose contact with social processes, although it

has to be assimilated to the deep structure of the new law, to the social world constructions that are unique to the different legal culture.²⁴

On the other hand, a transferred rule that belongs to the category that has tight 'structural coupling', that is, closely connected to 'social process',²⁵ is prone to meet resistance from the recipient legal system. Kahn-Freund's observations in comparative law would suggest that politics is a significant resistant factor as it is the law's primary link to society.²⁶ Teubner suggests that, in addition to politics, other discourses in the social system are similarly significant depending on the nature of their structural coupling to the

The influences and the demands from the environment are constructed internally through the bipolar code specific for each system. The economy, for example, constructs its 'society' through the language of prices. Law features in economic calculations not as a binding guide to conduct, but as a cost factor (the severity of the sanction involved and the likelihood of its being applied). Politics constructs its 'public' through the language of power, law its 'legal reality' through the distinction between legal and illegal, and so on.

¹⁹ D K Bailey, *Sociology and the New Systems Theory: Toward a Theoretical Synthesis* (State University of New York Press, 1994), 289.

²⁰ *Ibid.*

²¹ Teubner, above n 17.

²² Teubner, above n 9.

²³ *Ibid.*, 18.

²⁴ *Ibid.*, 19.

²⁵ *Ibid.*, 18-20.

²⁶ *Ibid.*, 22.

law. They include the economy, technology, health, science and culture, the multiple discourses in a society that make up its social systems.²⁷ These will vary between societies. The discussion of common law and constitutional and statutory interpretation in Malaysia in the methodology section, Chapter 2, indicated this. These discourses are different from the US and the UK, for example, as economic, political and social factors vary between Malaysia and those of the other jurisdictions. They, of course, also vary between the US and the UK.

The connection of the social discourse to law, that is, the structural coupling, forms the 'law's binding arrangement'. The arrangement

does not develop in one single historical trajectory but in two separate and qualitatively different evolutionary paths of the two sides which are re-connected via co-evolution. Their legal side takes part in the evolutionary logics of law while the social side obeys a different logic of development. Their changes however interact insofar as due to their close cultural coupling they permanently perturb each other and provoke change on the other side.²⁸

In a legal transfer, the 'compatibility' of the arrangement will be affected:

it would have to be recreated in the new context which is a difficult and time-consuming process. It would involve a double transformation, a change on both sides of the distinction of the transferred institution, not only the recontextualisation of its legal side within the new network of legal distinctions but also the recontextualisation of its social side in the other discourse. ...²⁹

This discussion provides a framework in which the future developments in Malaysian common law on native title may be considered. It may also be used to explore the possibility of transposition of international principles on the rights of indigenous peoples into Malaysian legislation. It helps to explain the position of the Orang Asli resource rights both in the Malaysian legal system and other social discourses in this domestic setting.

II IMPLICATION OF THE ORANG ASLI RESOURCE RIGHTS ON THE EXISTING 'LAW'S BINDING ARRANGEMENT'

The question to ask in this context of legal irritants is what kind of transformation of meaning will the transplanted law undergo in its new social system?³⁰ Will the new rule trigger change within the other social discourses to provide an appropriate environment for the Orang Asli resource rights? Is the environment, constituted by other social subsystems, providing an appropriate atmosphere in which the new institution may grow?

²⁷ Ibid, 22.

²⁸ Ibid, 28.

²⁹ Ibid, 28.

³⁰ Ibid.

A Orang Asli Resource Rights as a New Institution: Indifference to Change?

Considering the impact that the new legal rules may already have had in Malaysia, at present, the current 'environment' demonstrates indifference towards the legal rights of the Orang Asli to land and resources. This is shown by: the continuing state-sponsored encroachment on the Orang Asli land;³¹ the perspective of public officials, according to data from the interviews conducted for this study; and the continued practice of individual land grants by state authorities. The latter two are discussed below.

1 Perspectives from the Fieldwork

In the relevant civil service areas, the impact of the common law rulings on Orang Asli rights seems minimal. Most of the public officials interviewed disagreed that the communities have legal rights to their customary land. Some were unaware of the changes in the common law or uncertain about their implications.³² Others suggested that: the decisions are inappropriate for the Orang Asli and they should change their lifestyles;³³ determining the extent of the claims would be difficult;³⁴ any claims are simply unacceptable; or any claim must be invalid and that the Orang Asli should not get land for free.³⁵ One expressed anxiety that the recognition of a fixed territory for a community will affect the well-being of the Malaysian state.³⁶

On responses by the government to the common law rulings, one interviewee suggested that the government takes a 'wait and see' approach.³⁷ One senior officer in the forestry department felt that the rulings created problems in the enforcement of the existing laws;³⁸ the government is disadvantaged as the rulings would limit the power of

³¹ See Chapter 1.I.B, fn 36.

³² Interview data: Information by a legal advisor of the land and mineral resource development, two forestry officers, an officer from the Orang Asli Affairs Department, an Orang Asli representative in Perak. A forestry officer believes that the ruling has no implication to the law in Pahang. Some officers even believe that the *Aboriginal Peoples Act 1957*, which is a federal legislation, has no effect on the state authorities.

³³ Interview data: a Federal Court judge, a senior forestry officer, an officer at a timber-related office; a legal advisor at the office of land and mineral resource development. The senator representing the Orang Asli reportedly stating that: 'the community cannot expect to stay on the land forever as there will be a time when they need to accept development': 'TI-M: Listen to Orang Asli community on Tasik Chini', *The Star Online* 23 August 2012 23 August 2012 <<http://thestar.com.my/news/story.asp?file=/2012/8/23/nation/11897211&sec=nation>>.

³⁴ Interview data: information from officers from the wildlife protection department.

³⁵ Interview data: wildlife protection officers, an officer from the Orang Asli Affairs Department.

³⁶ Interview data: a Human Rights Commissioner, an officer at a timber-related office.

³⁷ Interview data: information from an officer from the Orang Asli Affairs Department; officer at a timber-related office.

³⁸ Interview data: information from a legal advisor at the office of land and mineral resource development; an officer from the Orang Asli Affairs Department.

government to use land for state development;³⁹ and that the Orang Asli could apply for land to be alienated to them using the existing system like other citizens.⁴⁰ For the authorities, the rights only crystallise when ruled on by courts in a specific case.⁴¹ They are not seen as creating legal principles that apply generally. This requires the relevant Orang Asli to sue which, as identified in Chapter 6.III, is a significant obstacle for them. An Orang Asli representative interviewed believed that the state authorities are reluctant to accept the application of any judicial ruling in situations other than cases of land acquisition or payment of compensation.⁴²

Despite reaffirming support to the UNDRIP, it is apparent that the government is not prepared to take specific action to address Orang Asli resource issues. The Malaysian representative in the Human Rights Council in its 21st session in representation on indigenous issues suggested that the government believes that the overall improvement of the Malaysian society as a whole will also improve the position of the Orang Asli.⁴³

Only judges and lawyers who were interviewed were confident that the decisions have had an impact on the interpretation and implementation of the laws that affect the Orang Asli.⁴⁴ They believed that the Orang Asli are the legal owners of their traditional land and that the Attorney General has a duty to advise the civil service and administrators of the forests on the effect of the rulings. An academic who was interviewed observed that there is no legal barrier to making the rulings effective but a political one; that the authorities are not willing to accept the concept of communal land as understood by the traditional communities.⁴⁵

2 Individual Land Grant Policy

The approval of the policy of individual land grants to the Orang Asli by the National Land Council is another indication of the government's refusal to acknowledge the resource

³⁹ Interview data: information from a legal advisor at the office of land and mineral resource development; a researcher.

⁴⁰ Interview data: a Federal Court judge.

⁴¹ Interview data: information from an Orang Asli lawyer, a lawyer representing an Orang Asli land rights case and two Orang Asli representatives.

⁴² Interview data: an Orang Asli representative, Selangor.

⁴³ Mohd Hasril, Speech by Malaysian representative, 21st Session Human Rights Council, United Nations, 18 September 2012.

⁴⁴ Interview data: a Federal Court judge; a High Court judge; lawyers representing the Orang Asli cases.

⁴⁵ Interview data: an Orang Asli lawyer, a researcher studying land transaction involving Orang Asli.

rights of the Orang Asli.⁴⁶ Under the land disposal policy, individual heads of family are issued land title for housing sites and orchards,⁴⁷ and are given participation as shareholders in a development project (normally a rubber or oil palm plantation) conducted by a government agency. In return, any claims for ancestral or foraging areas are relinquished. To implement this project, amendments to the *APA* are proposed which will corporatize the government department in charge of Orang Asli affairs to better enable it to implement these development projects.⁴⁸

The statement of policy was approved by the Council allegedly without proper consultation with communities.⁴⁹ Despite widespread disagreement by Orang Asli representatives⁵⁰ and under criticism by the National Human Rights Commission (Suhakam),⁵¹ some states continue to implement the policy.⁵² The Orang Asli communities allege that their lands are being surveyed and that individual Orang Asli are being approached to sign agreements.⁵³ As revealed by an official interviewed, the

⁴⁶ Idrus, Rusalina, 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) 29(Suppl. 1) *Malaysian Studies* 53; Interview data: information by an Orang Asli lawyer, an academic, Orang Asli representatives and an activist.

⁴⁷ In *Arahan Pentadbiran Tanah Negeri Bil 3/2010: Dasar Tambahan kepada Pemberimilikan Tanah Orang Asli di Negeri Pahang [State Land Administrative Order No 3/2010: Supplementary Policy of the Land Disposal to Orang Asli at the State of Pahang]*, [3.1.(a).1.(d)]: the width for the orchard land is stated as between 2–6 acres 'according to the state's capacity'; and the width for housing site is 5000 ft²–¼ acre.

⁴⁸ Interview data: a senator and Orang Asli representatives. The government department is the Department of Advancement of the Orang Asli [Jabatan Kemajuan Orang Asli (JAKOA)]. It is specifically established for the welfare of the Orang Asli communities in Malaysia. The aim of the corporatization of the government agency is to allow land holding for development projects to be conducted by the agency itself. The current practice is the lands of the Orang Asli are handed over to a government agency for rubber or oil palm plantations. See, eg: Deborah Loh, 'Corporatising JHEOA: Its Impact on Indigenous Rights', *The Nutgraph* 20 July 2010 20 July 2010 <<http://www.thenutgraph.com/corporatising-jheoa-its-impact-on-indigenous-rights/>>.

⁴⁹ Idrus, above n 46; interview data: legal advisor of a land and resource development office at federal level and senior officer of the Orang Asli Affairs Department.

⁵⁰ Azizul Rahman Ismail, 'Crying Foul Over Land Alienation', *The Sun Daily* (online), 30 September 2012 <<http://www.thesundaily.my/news/503217>>; Woon, above n 31; Marc Jitab, 'Orang Asli in protest march over land rights', *Free Malaysia Today* (online) 17 March 2010 <<http://archive.freemalaysiatoday.com/fmt-english/news/general/3400-orang-asli-want-new-land-laws-reviewed>>. See also, Idrus, above n 46.

⁵¹ Azizul Rahman Ismail, 'Suhakam: Keep your Word, Jakoa', *The Sun Daily* (online), 2 October 2012 <<http://www.thesundaily.my/news/504377>>: Suhakam has recently conducted an inquiry to address the issue of land rights, part of it relating to the Orang Asli in the Peninsular Malaysia.

⁵² Idrus, above n 46; Shashi Kala, 'Orang Asli to Get Land Titles', *The Nutgraph* (online), 18 November 2008 <<http://www.thenutgraph.com/orang-asli-heads-get-land-titles>>; Zulaikha Zulkifli, 'Orang Asli upset with land alienation works', *Malaysiakini.com* (online) 2012 <<http://www.malaysiakini.com/news/210182>>; Interview data: a legal officer at the land and development office; Orang Asli representatives; Director of the Center for Orang Asli Concerns.

⁵³ Interview data: Orang Asli representatives. See also, Shafie Dris, *JAKOA Kempen Pemberimilikan Tanah Orang Asli (JAKOA campaigns for Orang Asli Land Grant)* (Youtube video) <http://www.youtube.com/watch?v=jZ94CgaBrSk&list=UUJ6qJveTiHZACfqSvr_nf_A&index=6>.

Orang Asli in Pahang saw the start of the practice of individual land grants in some communities in 1992.⁵⁴ The practice ignores their customary rights, affects the autonomy of their community over the land and results in serious disadvantages to them through the loss of their collective customary land. These practices may also be an attempt to resist or reverse common law rulings, or to restrict their effect, a view shared by many interviewees.⁵⁵

B Understanding the Paradox: Legal Discourse and Its Environment

1 The Legal Discourse

In relation to the internal dynamic of the evolution of autopoietic law, changes may be 'triggered off' from outside (such as social norms) but are no longer directly caused.⁵⁶ Autopoietic law evolves through its own internal filter mechanism provided by the normative structures for the variation process: institutional structures determine its selection and the doctrinal structures decide the retention.⁵⁷

The developments in the common law of other jurisdictions and in international law on human rights and indigenous peoples may be imagined as elements that 'triggered off' changes within the Malaysian common law system with respect to Orang Asli land rights. The relation that the Malaysian common law system has with these other systems, in the form of persuasive authority or *ius cogens* as seen in Chapter 7.III, models the structural coupling that provides input for change within the Malaysian common law system. The adaptation within this system is made by it using its own interpretive mechanisms.

On the other hand, the lack of structural coupling between the Malaysian common law system and other systems within Malaysia, that is, the legislative and administrative or executive subsystems may explain the indifference or resistance towards the changes occurring within the common law system. The following section seeks to explore this.

⁵⁴ Interview data: a legal officer at the land and development office; *Arahan Pentadbiran Tanah Negeri Pahang Darul Makmur Bil 4/2006: Kajian Semua Dasar dan Kaedah Pemilikan Tanah Orang Asli di Negeri Pahang (Pahang Land Administrative Order No 4/2006: Revision on Policy and Order of Land Ownership by Orang Asli in State of Pahang)*; *Arahan Pentadbiran Tanah Negeri Bil 3/2010: Dasar Tambahan kepada Pemberimilikan Tanah Orang Asli di Negeri Pahang (State Land Administrative Order No 3/2010: Supplementary Policy of the Land Disposal to Orang Asli at the State of Pahang)*.

⁵⁵ Interview data: Orang Asli representatives, activists and some politicians.

⁵⁶ Gunther Teubner and Bremen Firenze, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (European University Institute, 1988) 1, 233.

⁵⁷ *Ibid*, 228.

The positions of the legislature and the executive are also discussed under the political system considering their close connection.

(a) The Position of the Common Law in Malaysian Legal Discourse

As creations of the local common law, principles and rules may struggle to take hold in Malaysian legal discourse in ways not seen in the common law of England and Wales or of Canada. Within post-colonial states, the common law itself may be resisted or ignored, both as a tradition and in respect to its more specific case law. As the law is derived from judicial decisions, its implications are not immediately apparent in administrative practice. Asked about the common law rulings on Orang Asli land rights, a senior official interviewed stressed that 'the common law is not our law'.⁵⁸ This indicates the lack of attention given to the judge-made law in the country's administration. A legal advisor interviewed also resisted the possibility that common law decisions could impact on the position of other land customarily occupied by the Orang Asli.⁵⁹ Bhag Singh, a lawyer, places comments like this in another wider context. He points out that in a former colony, such as Malaysia, where codification of laws was introduced, 'it is felt that the law would be better appreciated and understood if it were organized into sections in a statute'.⁶⁰ This is different from England and some other common law jurisdictions where more fields of law continue to be in common law form. Malaysia inherited from the Indian Empire a number of codified bodies of law created by the British administration including the *Contracts Act 1950*, the *Penal Code* and the *Evidence Act 1950*. These and other legislation are easier to reduce to administrative policies and manuals used in government departments and agencies. It is also much easier than judicial decisions for an official without legal training to read and understand legislation. This in part explains the difficulty of common law rulings being followed in practice in post-colonial countries. With respect to the position of the common law as a tradition, Neoh raised a much wider problem of the common law's legitimacy:

its validity is increasingly suspect in the post-colonial period. Given that the common law was a colonial imposition upon a colonised society, its legitimacy has been called into question in different ways in different parts of the Commonwealth. The common law is forced into a defensive position; its defenders are made to justify the legitimacy of the continued operation in the post-colonial era of a legal tradition that was the

⁵⁸ Interview data: officer at the Orang Asli Affairs Department.

⁵⁹ Interview data: legal advisor at a land and development office.

⁶⁰ Singh, Bhag, 'Limited use of English common law', *The Star* (online) 9 November 2010 <<http://thestar.com.my/lifestyle/story.asp?file=/2010/11/9/lifefocus/7349548&sec=lifefocus>>.

product of an alien culture and history, disseminated and introduced by the agency of imperial British rule.⁶¹

The movement for a Malaysian common law as opposed to continuing reliance on English and Wales common law principles is evidence of such resistance. There has been call to use Islamic law instead in considering and interpreting local law.⁶² In this discourse, the common law ideas including constitutionalism (rule of law, supremacy of constitution, separation of powers, etc) have been argued to be colonialist tools and thus alien to Malaysian society.⁶³ In the case of *Kok Wah Kuan (No 2)*, rejecting the doctrine of separation of powers as an integral part of the *Constitution*, the majority of the Federal Court judges appear to see the court as a mere interpreter of the laws passed by the legislature and subservient to the other two branches of the government.⁶⁴ The majority of the judges in the Federal Court are considered to be inclined towards 'legal positivism' and often avoid consideration of morality, justice and reasonableness of laws in accordance with common law principles or the practices of constitutional courts in other common law jurisdictions.⁶⁵

(b) Resistance against the International Human Rights Law

Considering the vulnerable position of human rights in Malaysia and resistance to the international human rights law (seen in Chapter 7.III), the concept of indigenous peoples' rights, as understood within the international law, may face greater difficulty. The principles are created through negotiations between states and international bodies, representatives of indigenous peoples and legal experts from various backgrounds which may be significantly different from the Malaysian legal system and its legal culture.⁶⁶ The way international human rights law is viewed and, the sensitivities of the

⁶¹ Neoh, Joshua, 'The Legitimacy of the Common Law in Post-Colonial Malaysia' (2010) *LAWASIA Journal* 59, 59 citing also, Andrew Harding, 'Editorial Preface' in Andrew Harding (ed), *The Common Law in Singapore and Malaysia* (1985) iii, iii.

⁶² Shuaib, Farid Suffian, 'Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods' (2009) *Jurnal Undang-Undang*; Neoh, above n 61; Singh, above n 60. See also press release by the Malaysian Bar Council in defence of the common law: Ambiga Sreenevasan, *Press Release: Common Law Malaysian Bar Council* <http://www.malaysianbar.org.my/press_statements/press_release_common_law.html>.

⁶³ Shuaib, above n 62; Neoh, above n 61 citing Ahmad Ibrahim, 'Islamic Law in Malaysia' (1981) 8 *Journal of Malaysian and Comparative Law* 21, Abdul Hamid Omar, *Off the Bench* (1995) 143; 'Is Common Law Still Needed?', *The Star* (Kuala Lumpur), 22 August 2007, 6, 8; 'Time to Malaysianize Common Law System', *The Star* (Kuala Lumpur), 18 September 2007, 3.

⁶⁴ [2008] 1 MLJ 1.

⁶⁵ Balasubramaniam, Ratna Rueban, 'Has Rule by Law Killed the Rule of Law in Malaysia?' (2008) 8(2) *Oxford University Commonwealth Law Journal* 211; Balasubramaniam, Ratna Rueban, 'Judicial Politics in Authoritarian Regimes' (2009) 59(3) *University of Toronto Law Journal* 405.

⁶⁶ Claudio Corradetti, 'Can Human Rights be Exported? On the Very Idea of Human Rights Transplantability' in Bakardjieva Engelbrekt Antoni (ed), *New Directions in Comparative Law* (Edward Elgar Publishing Ltd, 2010) 40, 51. Cf: Joachim Zekoll, 'Kant and Comparative Law –

local culture itself⁶⁷ inevitably influence the 'meaning' of the new institution produced within the domestic institution. Success may depend on allowances for further differentiation in national *Constitutions* and legislation.⁶⁸

In view of this resistance, it should also be recognized that the international regimes may not all fit with the domestic context. Justice in translation, discussed in Chapter 4.II.D, requires respect for the differences between these systems as well as the aspiration and value of the national jurisdictions. Simultaneously, mechanisms proposed by the framework of procedural justice, which is provided by both the Malaysian law (Chapter 3.II.C) as well as the international instruments (Chapter 7.II.C.6), require parties to negotiate an appropriate outcome which is just for all sections in the society including the minorities.

2 The External Discourses: Politics, Economic and Social Conditions

In relation to the broader social development, Teubner observes,

Autopoietic law is separated from the general evolution of its social environment and develops internal legal mechanisms for the evolutionary functions of variation, selection and retention. At the same time, legal development is coupled to broader social developments by specific mechanisms of co-evolution.⁶⁹

Corresponding to the interconnection of subsystems in the social system, it could be suggested that the resource rights of the indigenous minorities have direct influences on various subsystems within the society: the legal discourse itself; politics; the economy; and social conditions. Practising a global open economy, the Malaysian economy also has tight structural coupling in key resource areas with the international legal system with its provisions on the environment and indigenous peoples' rights.

Law, in the autopoietic model, is separated from the general evolution of its social environment. At the same time, it is also coupled to broader social developments by specific mechanisms of co-evolution.⁷⁰ Each subsystem receives inputs and outputs in various ways in their operations. The data received and processed by each subsystem reproduce meaning from the received data through its own operation. The different meaning produced in turn influences the other subsystems which process the data

Some Reflections on a Reform Effort' (1996) 70 *Tulane Law Review* 2718, 2730: observes that changes made through the international instruments, treaties and declarations are easier as they are commonly agreed to by the signatories.

⁶⁷ Corradetti, above n 66, 51.

⁶⁸ *Ibid*, 51.

⁶⁹ Teubner and Firenze, above n 56, 8.

⁷⁰ *Ibid*, 8.

according to their own codes. These structural interconnections contribute towards the meaning of the transferred law within the Malaysian domestic setting. As Teubner wrote,

The influences and the demands from the environment are constructed internally through the bipolar code specific for each system. The economy, for example, constructs its 'society' through the language of prices. Law features in economic calculations not as a binding guide to conduct, but as a cost factor (the severity of the sanction involved and the likelihood of its being applied). Politics constructs its 'public' through the language of power, law its 'legal reality' through the distinction between legal and illegal, and so on.⁷¹

Touching politics and the economy suggests another difficulty. Within a theoretical framework derived from the work of Pierre Bourdieu, Dezalay and Garth argue that the 'fields' of economic and state power determine the value of legal transfers. These fields may both facilitate or block reforms, although the fate of legal transfers will also depend on the way they are taken up by local elites.⁷²

The resource rights of indigenous minorities have different meanings in different discourses. The legal code outlaws encroachment of the resources in the absence of proper processes. In economic discourse, it may mean greater costs for resource exploitation. As natural resources have been subject to state controls, it constrains the state's capacity to exploit the resources that are popularly considered to be in the public domain. In the Malaysian economy, where the struggle for wealth has been closely related to racial dynamics, the resource rights of the other indigenous peoples challenges the power of the indigenous Malay majority.

The legal system's links to the political system and economic system, including the distribution of resources and the social environment, may adversely affect the Orang Asli as a minority in a racially diverse society.

(a) Political Discourse and Related Systems

Political power is the law's primary link to society.⁷³ It is significant in shaping the meaning of legal transfers and how they may influence the other subsystems in the society. However, politics, as practised in Malaysia, may impede greater recognition of human rights and of the rights of the Orang Asli. The political system's tight structural coupling with the legislative and executive systems suggests that political conditions would determine factors around a legal transfer, or the creation of a new institution in legal

⁷¹ Teubner, above n 17, 103.

⁷² Yves Dezalay and Bryant Garth, 'The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing, 2001) 282, 243.

⁷³ Kahn-Freund, above n 2.

discourse, being taken up by these systems. This section considers these political conditions.

(i) Electoral System and Connection to Other Systems

Although Malaysia has the strong basic political structures of a democracy,⁷⁴ the freedom and fairness of its electoral practices have been undermined by various procedural problems.⁷⁵ This is relevant because the electoral system in a non-democratic regime may have a direct relationship with macroeconomic policy and resource distribution. It has been suggested that the electoral–economic connection in Malaysia is strong, that is, elections are important determinants of fiscal policy choices.⁷⁶ Resource distribution depends more on political considerations than the rightful interests of communities. The electoral system also allows for the manipulation of official government positions including using fiscal policy to ensure electoral victory.⁷⁷

(ii) Authoritarian Practice in the Executive and Legislative Systems

Under the Westminster system, Malaysia has a fused relationship between the executive and legislative powers with an executive drawn from and responsible to the popularly elected house of the legislature. Self-proclaimed by the ruling party as a democracy, in practice, Malaysia's political and government systems are often described as authoritarian or illiberal for lacking elements found in Western democracies.⁷⁸ With one

⁷⁴ Brown, Graham K, 'Legible Pluralism: The Politics of Ethnic and Religious Identification in Malaysia' (2010) 9(1) *Ethnopolitics: Formerly Global Review of Ethnopolitics* 31; Thomas Pepinsky, 'Autocracy, Elections, and Fiscal Policy: Evidence from Malaysia' (2007) 42 *Studies in Comparative International Development* 136; Huat, Wong Chin and Noraini Othman, 'Malaysia at 50 – An "Electoral One-Party State"?' in Abdul Razak Baginda (ed), *Governing Malaysia* (Malaysian Strategic Research Centre, 2009) 1.

⁷⁵ Eg: gerrymandering of the electoral constituencies to the incumbent; irregularities in voter registration rolls; allegations of phantom voters; selective repression of political opponents; control over the local mass media; campaign media blitzes. Violation of that law that bans campaigns before the official campaign period is common: Pepinsky, above n 74; Brown, above n 74; Mustafa K Anuar, 'Politics and the Media in Malaysia' (2005) 20(1) *Kasarinlan: Philippine Journal of Third World Studies* 25; Tricia Yeoh, 'The Pakatan Rakyat Selangor State Administration: Present and Future Challenges on the Road to Reform' (2010) 99(407) *The Round Table* 177, 186; Wong Chin Huat and Soon Li Tsin (eds), *Democracy At Stake: Examining 16 By-elections in Malaysia 2008–2011* (Strategic Information and Research Development Center (SIRD), 2012); Kee Thuan Chye, 'How our Democracy is Damaged', *Free Malaysia Today* (online) 17 December 2012 <<http://www.freemalaysiatoday.com/category/opinion/2012/12/17/how-our-democracy-is-damaged/>>.

⁷⁶ Pepinsky, above n 74, 155.

⁷⁷ Ibid.

⁷⁸ Some label the system as a 'competitive authoritarian regime' or 'electoral authoritarian': ibid, 138. It is called 'competitive' as it is 'widely viewed as the principal means of obtaining and exercising political authority'. But democratic rules are often violated creating an 'uneven playing field between government and opposition': Steven Levitsky and Lucan A Way, 'Why Democracy Needs a Level Playing Field' (2010) 21(1) *Journal of Democracy* 57. Others have referred to

party dominating the legislature and executive since independence in 1957,⁷⁹ the constitutional provisions for civil and political rights have been seriously undermined by various amendments to the *Constitution* and enactment of extensive statutory exceptions.⁸⁰ The 'harsh and politically selective enforcement'⁸¹ of laws has stifled dissent. Critical discussion of government policy has been criminalized. Questions about, and criticism of, the implementation of the New Economic Policy and racial rights, for instance, are considered as 'sensitive' and a threat to social stability and national security.⁸²

Also related to this is the issue of representation of the Orang Asli. On paper, they are proportionately represented in both the legislature and executive systems. In the legislature, they are represented by a member of the Senate or the Upper House, appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister. The current representation is by an Orang Asli who is a member of United Malays National Organisation (UMNO), a Malay political party. In the executive, one of the top positions in the Orang Asli Advancement Department is held by an Orang Asli. However, whether these representations can effectively serve Orang Asli interests are questionable. The capability of the Senate has often been subjected to criticism.⁸³ The representations are made under the assumption that the Orang Asli communities are one single collective. They are also not made through the Orang Asli's own institutions.

(iii) Ethnicity, Religion and the Exclusion of the Orang Asli

The key elements in the Malaysian political system are ethnicity, or 'ethnicity-and-class'⁸⁴ and increasingly religion.⁸⁵ The most successful political parties are organised along

Malaysia as quasi-, semi-democracy or pseudo-democracy: Ahmad, Zakaria, 'Malaysia: Quasi Democracy in a Divided Society' in Larry Diamond, Juan J Linz and Seymour Martin Lipset (eds), *Democracy in Developing Countries* (Lynne Rienner, 1989).

⁷⁹ Political power in Malaysia has always been held by United Malays National Organisation (UMNO) with six UMNO prime ministers.

⁸⁰ Bari, Abdul Aziz, *Malaysian Constitution: A Critical Introduction* (The Other Press, 2003)

⁸¹ Harding, Andrew and Amanda Whiting, 'Custodian of Civil Liberties and Justice in Malaysia: The Malaysian Bar and the Moderate State' in Terence C Halliday, Lucien Karpik and Malcolm M Feeley (eds), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge University Press, 2012) 247, 254.

⁸² *Ibid*, 249.

⁸³ See, eg, 'Is it Time to Do Away with the Senate?', *Malaysia-Today.net* (online) 23 May 2013 <<http://www.malaysia-today.net/mtcolumns/newscommentaries/56952-is-it-time-to-do-away-with-the-senate>>.

⁸⁴ Pepinsky, above n 74.

⁸⁵ Brown, above n 74, 32: suggested that as Islam as a religion has increasingly become an important feature for identification in the society particularly among urban Malays, the legal and bureaucratic structures associated with Islam provide a more tenable mechanism of control for the Malay/Muslim population; Zainah Anwar, 'State intervention in personal faith: The case of

communal lines.⁸⁶ Although there are signs of change evidenced in the outcome of the 2008 general election, historically non-communal parties receive few votes from urban Malaysians.⁸⁷ The political framework is consociational, that is, the coalition and the government represent a grand coalition of political elites from different dominant ethnic groups, Malay, Chinese and Indian.⁸⁸ The number of seats allocated to each ethnic group is decided on the basis of their numerical strength in the country. The idea of proportional representation has facilitated Malay dominance over the political and economic discourses given their numerical majority.⁸⁹

In the continuous ethnic struggle over political and economic interests,⁹⁰ political culture in Malaysia in the last three decades has inclined towards religious divisions.⁹¹ As Islam is increasingly considered as an essential element of Malay identity, it has become politically strategic as a mechanism of control for the Malay/Muslim population.⁹² Capitalisation on Islam by UMNO in particular has intensified by: its need to surpass its close competitor, Malaysian Islamic Party (PAS);⁹³ the global resurgence of Islam; and domestic revivalist groups.⁹⁴ As a result the country's political culture has gravitated

Malaysia' in Lim Teck Ghee, Alberto Gomes and Azly Rahman (eds), *Multiethnic Malaysia: Past, present and future* (Strategic Information and Research Development Centre (SIRD) and Malaysia Institute of Development and Asian Studies (MiDAS), 2009) 530: observed that the increasing Islamisation or politicisation of Islam in the country has given rise to a host of problems, particularly in terms of Muslim–non-Muslim relations.

⁸⁶ Three main communal parties make up the majority of the ruling Barisan Nasional (BN) [National Coalition]. The largest of these is the United Malays National Organisation (UMNO).

⁸⁷ Pepinsky, above n 74, 144. A shift away from the communal politics, although uneven, has also been seen post the 2013 general election: see, eg, Yang Razali Kassim, 'The de-racialisation of the Barisan Nasional?', *Today Online* (online) 20 May 2013 <<http://www.todayonline.com/commentary/de-racialisation-barisan-nasional>>; Aparupa Bhattacharjee, 'Malaysia Elections 2013: Vote for Change?' (10 June 2013) *Institute of Peace and Conflict Studies* <<http://www.ipcs.org/article/southeast-asia/malaysia-elections-2013-vote-for-change-3985.html>>. Some others disagreed suggesting that the debates that emerged post the general election reveal a daunting prospect on ethnic relations in Malaysia: See, eg, Abdillah Noh, 'Malaysia 13th General Election: A Short Note on Malaysia's Continuing Battle with Ethnic Politics' (2013) xxx *Electoral Studies* 1

⁸⁸ Vibhanshu Shekhar, 'Malay Majoritarianism and Marginalised Indians' (23 February 2008) *Economic & Political Weekly* 22; Pepinsky, above n 74; Levitsky and Way, above n 88.

⁸⁹ Shekhar, above n 88.

⁹⁰ As Wu Min Aun observed, the Malays require constant reassurance of their special position whilst non-Malays need equal assurance that their legitimate interests are not forgotten and that they are able to continue with their way of life: Aun, Wu Min, *Malaysian Legal System* (Pearson Malaysia, 2005).

⁹¹ Brown, above n 74; N Ganesan, 'Liberal and Structural Ethnic Political Accommodation in Malaysia' in Will Kymlicka and Baogang He (eds), *Multiculturalism in Asia* (Oxford University Press, 2005) .

⁹² Brown, above n 74; Ben Thirkell-White, 'Political Islam and Malaysian Democracy' (2006) 13(3) *Democratization* 421, 321.

⁹³ Malaysian Islamic Party [*Parti Islam Se-Malaysia*].

⁹⁴ Ganesan, above n 91, 145.

further towards a Malay-Muslim hegemony⁹⁵ further entrenching UMNO's political and economic hegemony.⁹⁶ This phenomenon of Islamic politics, Thirkell-White observed, has been a key intervening variable in preventing the emergence of a more liberal opposition to the ruling political coalition and has become a barrier to greater democratization.⁹⁷

The Malay political hegemony and its identity may have direct consequences for the position of the Orang Asli as indigenous peoples and their claim to land rights. As Manickam-Khattab argued, the ethnic Malay are mostly migrants from diverse origins and comprise a political construct. The construction of the Malay identity as an 'indigenous, pure, national, non-diasporic, *bumiputera* community', was engineered through colonial and historical experiences of fear and threats to political economic dominance especially from the migration of Chinese and Indians in the 19th and early 20th centuries.⁹⁸ The political objective of wanting to be the majority and the need to keep Malay privileges inaccessible to those regarded as outsiders led to the mediatizing of the Malay identity by the state essentialising the peninsula Malays as both territorial and indigenous.⁹⁹ With Islam being increasingly emphasized as an essential element in this identity, the ethnic and religiously demarcated politics of identity inevitably lead to the process of 'othering' or 'exclusion' of others such as the Orang Asli who also claim indigenous relation to the land.

(iv) Controversy and Problematic Nature of Identifying Indigenous Peoples

The impact of this political racial dynamic on the Orang Asli can be seen from the resistance to acknowledging the Orang Asli as indigenous peoples of equal status to the Malays. Identifying who are indigenous people could be controversial and problematic as the dominant racial group is politically dependent on its status of indigenous peoples for legitimacy of their special rights. Some have shown hostility to references to the

⁹⁵ See, eg: Alberto Gomes, 'Superlative syndrome, cultural politics and neoliberalism in Malaysia' in Alberto Gomes and Azly Rahman Lim Teck Ghee (ed), *Multiethnic Malaysia: Past, present and future* (Strategic Information and Research Development Centre (SIRD) and Malaysia Institute of Development and Asian Studies (MiDAS), 2009) 360: observed that divisive policies and politics, such as the New Economic Policy (NEP) and the National Cultural Policy (NCP), which were perceived to be overtly and overly preferential towards the Malays resulted in scenarios where the non-Malays became defensive, and subsequently engaged in cultural activities that only enhanced differences and, at times, also 'triggered off' conflicts between the Malays and non-Malays.

⁹⁶ Ganesan, above n 91.

⁹⁷ Thirkell-White, above n 92, 437.

⁹⁸ Umi Manickam-Khattab, 'Who are the Diasporas in Malaysia? The Discourse of Ethnicity and Malay(sian) Identity' (2010) 3(2) *Sosiohumanika* 157, 158.

⁹⁹ *Ibid*, 171.

Orang Asli as a people having better claim to the title and privileges. This was also indicated by interviewees, as mentioned above in Chapter 7.III.B.¹⁰⁰ When the Orang Asli were acknowledged as indigenous peoples as one measure to win over the Orang Asli during the communist insurgency, a writer for Utusan Melayu wrote in 1946:

The people who pretend that Malaya belongs to the Sakais¹⁰¹ are trying to deny that Malaya belongs to the Malays.¹⁰²

Tunku Abdul Rahman, the first Prime Minister, commented in 1986:

There could be no doubt that the Malays were the indigenous people of this country because the original inhabitants did not have any form of civilization compared with the Malays ... [These] inhabitants also had no direction and lived like primitives in mountains and jungles.¹⁰³

The same position was also reiterated by another former Prime Minister, Mahathir, in his book in 1970¹⁰⁴ and a blog post in March 2011.¹⁰⁵

The land rights of the indigenous Orang Asli are in tension with the privileged position of the Malay ethnic group which has attempted to position itself as the 'sons of the soil' in order to maintain its political dominance over the descendants of Chinese and Indian immigrants.¹⁰⁶ Endicott and Dentan also note that relations between the Malay state and the Orang Asli have been characterised by attempts to assimilate the latter into the former.¹⁰⁷ Orang Asli villages are ruled by government-appointed leaders rather than by heads selected according to Orang Asli custom; and the official state policy is to convert the Orang Asli to Islam.¹⁰⁸

¹⁰⁰ Interview data: an academic, focusing on Orang Asli development.

¹⁰¹ The word 'Sakai' was used in the past to refer to the Orang Asli, especially the Sen'oi subgroups.

¹⁰² Nah, Alice M, '(Re) Mapping Indigenous 'Race'/Place in Postcolonial Peninsular Malaysia' (2006) 88(3) *Human Geography* 285, 290 quoting Harper, TN, *The End of Empire and the Making of Malaya* (Cambridge University Press, 1999), 86.

¹⁰³ *The Star*, 6 November 1986 quoted in Nicholas, C, Organizing Orang Asli identity, in Benjamin, G and Chou, C (eds): *Tribal Communities in the Malay World: Historical, Social and Cultural Perspectives* (IIAS & ISEAS, 2002), 119–137, 122.

¹⁰⁴ Mahathir Mohamad, *The Malay Dilemma* (Marshall Cavendish, 1970).

¹⁰⁵ Mahathir Mohamad, *Semenanjung Tanah Melayu (Malay Peninsula)* <<http://chedet.cc/?p=511>>.

¹⁰⁶ Baogang He, 'The Contested Politics of Asian Responses to Indigenous Rights' (2011) 18 *International Journal on Minority and Group Rights* 461, 468.

¹⁰⁷ K Endicott and R K Dentan, 'Into the Mainstream or into the Backwater? Malaysian Assimilation of Orang Asli', in C R Duncan (ed), *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities* (Cornell University Press, Ithaca, 2004) 50-1.

¹⁰⁸ The writings on government control of the Orang Asli are numerous. See, eg, Idrus, above n 46; Nobuta, Toshihiro 'Orang Asli History and Policy' in *Living on the Periphery: Development and the Islamization of the Orang Asli* (Trans Pacific Press, 2008) 23; Nicholas, Colin, *The Orang Asli and the Contest for Resources* (International Work Group for Indigenous Affairs, 2000); Dentan, Robert Knox et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, 1997).

(b) Political Economy and Resistance against the Rights of the Local Communities

The economy has a close connection with most other subsystems. It has a high impact on the fate of any legal transfer of Orang Asli rights which will represent a different distribution of resources. The present distribution of resources is a hurdle to any effective legal transfer.

(i) Economic Development Shaped by Communal and Elite-based Politics

Communal politics has a close relationship with economic development in Malaysia. As with political discourse, strong ethnic and religious cleavages are also mirrored in Malaysia's economic system.¹⁰⁹ As Brown observes, the modernist, developmental project in Malaysia is 'inextricably tied to a legitimising discourse based explicitly on the plural fabric of society'. In this discourse, termed as the 'ethnic leviathan',

individuals are defined first and foremost by their group affiliation and political order is derived therefrom in a form of 'authoritarian consociationalism', which posits the suppression of liberal democratic rights and norms and a concomitant submissive dedication to a modernist project of 'development' as the necessary price to pay in a Hobbesian bargain to obviate ethnic conflict. Increasingly, however, religion rather than ethnicity has proved more salient in this respect.¹¹⁰

(ii) Political Patronage, Forest Resources and Effect on Bureaucratic Behaviour

Malaysia has also been described as a highly politicised state, a kind often created by a long period of one-party government. Such regimes 'tend to fuse the state and ruling party' – 'bureaucrats are also party cadres, state properties (businesses, media outlets) are also party properties, and resources from various state agencies are systematically deployed for partisan use'.¹¹¹ Resource distribution and re-distribution are dominated by political patronage or clientelism, cronyism, systemic corruption and rent seeking through various racial-based affirmative action policies.¹¹² Appropriation of state resources, concessions and licences are partisan and politicised. The incumbents use the state to

¹⁰⁹ Brown, above n 74; Joan M Nelson, 'Political Challenges in Economic Upgrading: Malaysia Compared with South Korea and Taiwan' in Hal Hill, Tham Siew Yean and Ragayah Haji Mat Zin (eds), *Malaysia's Development Challenges: Graduating from the Middle* (Routledge, 2012) 43; Edmund Terence Gomez, 'The Politics and Policies of Corporate Development: Race, Rent and Redistribution in Malaysia' in Hal Hill, Tham Siew Yean and Ragayah Haji Mat Zin (eds), *Malaysia's Development Challenges: Graduating from the Middle* (Routledge, 2012) 63.

¹¹⁰ Brown, above n 74, 45.

¹¹¹ Levitsky and Way, above n 78, 64.

¹¹² Hwok-Aun Lee, Edmund Terence Gomez and Shakila Yacob, 'Ethnicity, Economy, and Affirmative Action in Malaysia' in Edmund Terence Gomez and Ralph Premdas (eds), *Affirmative Action, Ethnicity and Conflict* (Taylor and Francis, 2012) 67; Gomez, above n 109; Fadzilah Majid-Cooke, *The Challenge of Sustainable Forests: Forest Resource Policy in Malaysia, 1970–1995* (Allen & Unwin University of Hawaii Press, 1999); Gomez & Jomo 1999: extensive use of political patronage in redistributive policies; Nelson, above n 109, 52.

skew access to private sector finance by using public credit, concessions, licensing, privatization and other policy instruments to enrich party- or proxy-owned enterprises.¹¹³ Political patronage and corruption in forestry and the distribution of forest resources have also been well documented elsewhere.¹¹⁴ In the allocation of timber, licence holders are often politically connected;¹¹⁵ and the allocation of incentives sourced from logging licences to reward political supporters remain as an issue talked about in politics.¹¹⁶

Political patronage in a politicised state has a close relationship with bureaucratic behaviour. According to Dan Slater, Malaysian Prime Ministers have used political institutions to concentrate executive power.¹¹⁷ Top-level positions in ministries, the judiciary and universities are filled by people who are believed to be able to accommodate the ruling party's mission. The judiciary has often been under criticism for lack of independence in its decisions.¹¹⁸ The executive's reputation has also been smeared with countless allegations of nepotism and corruption.¹¹⁹ Awarding government contracts without open tenders, limited access to information and a close connection between businesses and politics are common practices. The key institutions, large corporations and the civil service consist of those having deep interests in preventing change.¹²⁰

¹¹³ Levitsky and Way, above n 78, 58.

¹¹⁴ Majid-Cooke, above n 112.

¹¹⁵ Ibid, 112. This is infamously termed as the *Ali Baba* arrangement. 'Ali Baba' is an arrangement where the Malay 'Ali' receives the contract through connections, then subcontracts it to the Chinese 'Baba'. These Chinese Malaysians eventually built up their own connections themselves among the Malay elite, and built their companies into major Malaysian conglomerates with prominent Malay and Chinese directors: Helena Varkkey, 'Malaysian Investors in the Indonesian Oil Palm Plantation Sector: Home State Facilitation and Transboundary Haze' (2012) *Asia Pacific Business Review* 21, 8 citing Naguib, R, and J Smucker. 'When Economic Growth Rhymes With Social Development: The Malaysia Experience.' (2009) *Journal of Business Ethics* 89: 99-113.

¹¹⁶ Some blogs and alternative media reports: this issue, however, may be too much of a sensitive issue to receive required scrutiny. This issue was also discussed in Majid-Cooke, above n 112, 96-112.

¹¹⁷ Cited in Pepinsky, above n 74.

¹¹⁸ For example, in 1988, a packed judiciary ensured that a schism in the ruling UMNO was resolved in favour of Prime Minister Mahathir bin Mohamad and a decade later it allowed Mahathir to imprison his main rival, Anwar Ibrahim, on dubious charges: Levitsky and Way, above n 78, 60.

¹¹⁹ A recent National Feedlot Corporation (NFC) scandal sheds light on a 2007 government allocation of RM250 million (approximately US\$80 million) for a cattle rearing project which lost millions of ringgit every year. Beyond the monetary wastage, the scandal became yet another symbol of the nepotism that runs rife in the tender for government projects—the NFC was chaired by Dr Mohamed Salleh, the husband of Women, Family and Community Development Minister, Datuk Seri Shahrizat Abdul Jalil. See, eg, 'My Sinchew/ National Feedlot Centre Scandal' (23 May 2013) *MySinchew.com* (online) <<http://www.mysin Chew.com/taxonomy/term/169>>.

¹²⁰ Justina Chen, 'Political Reforms in Malaysia: Wind of Change or Hot Air?' (24 May 2012) (165) *Asia Pacific Bulletin* (online), <http://www.eastwestcenter.org/sites/default/files/private/apb165.pdf>. Edmund Terence Gomez,

These characteristics lead to the marginalization of the interests of certain sections of society including the Orang Asli. Because of the need to retain political hegemony over resources, minority groups have been drastically denied their rights in them.¹²¹ The law is used as a tool to deny their rights and to concentrate the power to access the resources in the elites. The emphasis on capital and trade since the colonial era has effectively overlooked rural populations that have little, if any, of the capital required if they are to be effective players in market economies. In the post-colonial era, economic strategies that focused on the advancement of certain majority races marginalized the minority groups.¹²²

(iii) Priority of the Economy and 'Civilizing Mission'

Since independence, Malaysia's governments have consistently placed economic development before social and political rights and civil liberties. It is argued that economic growth must take precedence in such a multicultural and multiracial society. With a fast-growing economy, especially before the 1997 crisis, Malaysia is often held up as a country that has 'successfully combined prudent ethnic balancing in the political realm with a relatively effective program of ethnic restructuring'.¹²³ In this way, socio-political concerns are cast aside to promote the country's economic growth.¹²⁴ The legitimate interests of groups and individuals are ignored in favour of general public

'Politics, Business and Ethnicity in Malaysia: A State in Transition?' in Edmund Terence Gomez (ed), *The State of Malaysia: Ethnicity, Equity and Reform* (RoutledgeCurzon, 2004) 258, 1 states
The monarchy, judiciary and Parliament are reputed to have lost the capacity to check the executive, while the bureaucracy, military and police have apparently become extremely subservient to the office of prime minister where enormous power has come to be concentrated.

¹²¹ See eg, Kathirithamby-Wells, Jeyamalar, *Nature and Nation: Forests and Development in Peninsular Malaysia* (NIAS Press, 2005); Peluso, Nancy Lee and Peter Vandergeest, 'Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand' (2001) 60(3) *The Journal of Asian Studies* 761, describing how economic development and the policy adopted to further it resulted in marginalization of the interests of the Orang Asli and other groups.

¹²² See eg, K S Jomo, 'Colonial Land Law and the Transformation of Malay Peasant Agriculture' in Jomo K S and Wong Sau Ngan (eds), *Law, Institutions and Malaysian Economic Development* (Singapore University Press, 2008) 129; K S Jomo, Y T Chang and K J Khoo, *Deforesting Malaysia – The Political Economy and Social Ecology of Agricultural Expansion and Commercial Logging* (Zed Books and UNRISD, 2004).

¹²³ Brown, above n 74.

¹²⁴ Sandra Smeltzer and Douglas Keddy, 'Won't You Be My (Political) Friend? The Changing Face(book) of Socio-Political Contestation in Malaysia' (2010) 30(3-4) *Canadian Journal of Development Studies* 421.

interests. Welsh suggests that for many Malaysians the suppression of rights is a reasonable price to pay for stability and development.¹²⁵

The development policy also continues to employ the idea of 'civilizing the margins' rooted in a mix of pre-colonial hierarchies and post-colonial developmentalist ideologies.¹²⁶ In consequence, economic development has been used to justify the domination of state administrative power.¹²⁷

(iv) International Law as Another System Influencing the Economic System

The system of international human rights norms has already signalled changes within domestic systems through its coupling with various other systems. One is the common law as seen in Chapter 7.III. Others include the civil society and other institutions within national systems. It appears that these institutions directly receive inputs from the international system. Their roles in changes, especially in the matter of indigenous peoples' rights, are discussed below in section III.

The international norms also have direct influence over the economic system in Malaysia. Malaysia is one of the most open economies in the developing world.¹²⁸ In the global network, it receives direct input from international law or transnational regulations, in particular, those related to its resources (timber, rubber, palm oil, etc.). Following the trend of international law and commitments created through treaties or conventions, Malaysian domestic policies relevant to these areas accept many principles agreed in international law and transnational practice that are significant in protecting the rights of indigenous peoples (Chapter 6.I.B.3.b).

Forestry reform, induced by international law discourse, is an example. In line with the global direction, various policy statements confirm commitments to several principles vital to the protection of the rights of the indigenous peoples (Chapter 6.I.B.3.b). The principles include: opportunities for participation by local communities in the benefit received from forestry management and production activities; acknowledgement of the role of local traditional knowledge in sustainable forest management; public consultation; equitable distribution of opportunities amongst the diverse ethnic groups in the agenda

¹²⁵ Bridget Welsh, 'Attitudes toward Democracy in Malaysia: Challenges to the Regime?' (1996) 36(9) *Asian Survey* 882, 899.

¹²⁶ He, above n 106, 463.

¹²⁷ *Ibid*, 472.

¹²⁸ Hal Hill, Tham S Yean and Ragayah H M Zin, 'Malaysia: A Success Story Stuck in the Middle?' (2012) *World Economy* 1687, 1692.

of development;¹²⁹ and, recognition and respect for the 'legal and customary rights of indigenous peoples to own, use and manage their lands, territories and resources'.¹³⁰

Nevertheless, resistance against the rights of indigenous peoples is apparent. In practice, government policy continues to view forests as an 'economic resource' of the 'state',¹³¹ ignoring the fact that they are also the economic and cultural resources of local inhabitants. The National Forestry Policy 1992, for instance, aims to further the state's economic growth and address concerns over the sustainability of its forestry resources. It pledges to manage 'effectively and profitably' according to 'scientific forestry'. As Majid-Cooke highlights, this perspective is very much rooted in colonial forestry practices. It is centred on 'privileging industrial over subsistence production'.¹³² In this discourse, 'forest as a habitat disappears and is replaced by the forest as an economic resource to be managed'.¹³³ In effect, the present policy sustains the old colonial paradigm on forests which is hostile towards the recognition of the rights of the forest inhabitants such as the Orang Asli. As a result, Lewis argued, what is being sustained appears not to be the forest resources, but the country's economic growth.¹³⁴ Such a direction continues to promote state agendas at the expense of local communities and other less powerful actors.¹³⁵

States also remain impervious to the ideas, promoted by the global discourse, of 'sustainability' practised by the indigenous peoples in the use of their customary land and the role of their traditional knowledge in sustainable forest management. In the National Forestry Policy, reference to 'local community' is made to the public as a whole instead of the local inhabitants of the particular forest as is implied within the global discourse. This local community is constructed as a homogenous group in need of re-education on the value of the forest.¹³⁶ This entrenches existing beliefs popular in forestry in the 1970s that the local community is perceived as 'illogical and inefficient environmental managers'.¹³⁷ There is no acknowledgement of the traditional knowledge

¹²⁹ Robin A Lewis, *The Politics of Sustainability: A Case Study of Forestry Policies in Peninsular Malaysia* (Master of Arts Thesis, Faculty of Miami University, 2006), 42.

¹³⁰ Malaysian Criteria and Indicators for Forest Management Certification (MC&I 2011) principle 3. See Chapter 6.I.B.3.

¹³¹ Lewis, above n 129, 42.

¹³² Majid-Cooke, Fadzilah, *The Challenge of Sustainable Forests: Forest Resource Policy in Malaysia, 1970-1995* (Allen & Unwin University of Hawaii Press, 1999), 207.

¹³³ Scott, JC, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998), 13 quoted in Lewis, above n 129, 42.

¹³⁴ Ibid.

¹³⁵ Ibid, 42.

¹³⁶ Ibid, 71.

¹³⁷ Ibid.

of the indigenous peoples in forest management. In contrast, the government prioritises 'expert knowledge' and marginalizes the local community from its own knowledge.¹³⁸

As a consequence, although the forest reform introduced decentralisation or diffusion of power among the actors and local community, the top-down approach in forest policies and implementation remains and marginalizes the position of local communities. As Sharom pointed out, as public consultation promoted by the new policy is not a normal part of the Malaysian legal system, it appears that the promotion of indigenous knowledge and practices within the policy related to national biodiversity, with their consent, is only likely to occur, in an ad hoc and disjointed manner, if at all.¹³⁹ Many also perceived that neglect and violations of forest management remain despite reform to the forestry and environmental law.¹⁴⁰ This problem has a direct impact on the Orang Asli apart from the continuing encroachment of Orang Asli lands.¹⁴¹

(c) Demographic Condition and Social Attitudes

(i) The Size of the Indigenous Population, Its Diversity and Types of Resource Use

Baogang He suggested that the small size of indigenous populations affects their ability to negotiate with the state power.¹⁴² This may also explain the stronger political position of the Māori in New Zealand compared with the Australian Aborigines. The situation of the Orang Asli suggests other critical factors apart from its population size: the multiplicity of the indigenous group and the manner of their land use. They comprise less than 1% of the population and are heterogeneous, with more than 16 groups. Most are settled in fixed locations and practise mixed economic activities including small-scale agriculture.

¹³⁸ Ibid.

¹³⁹ Sharom, Azmi, 'A Critical Study of the Laws Relating to the Indigenous Peoples of Malaysia in the Context of Article 8(j) of the Biodiversity Convention' (2006) 13 *International Journal on Minority and Group Rights* 53, 63-64. Sharom also pointed out that the National Policy on the Environment (Ministry of Science Technology and the Environment, 1998) has no provisions for public participation and no mention of indigenous peoples. The *Convention on Biological Diversity* sets out principles governing access to genetic resources and the knowledge associated with them, and the sharing of benefits arising from such access.

¹⁴⁰ Ramon Navaratnam, 'The Rio Agenda and Implication for Malaysia' (ASLI Center for Public Policy Studies, 8 June 2012) <<http://www.cpps.org.my/upload/CPPS%20Press%20Release.pdf>>. Examples cited were the issues surrounding Tasik Chini and the impact of timber logging and mining on the ecology, biodiversity and livelihood in that region. See, also, Tuck-Po, Lye, *Changing Pathways: Forest Degradation and the Batek of Pahang, Malaysia* (Strategic Information Research Development, 2005); Abdullah, Azrina, Or Oi Ching and Kamal Solhaimi Fadzil, *Collectors and Traders: A Study of Orang Asli Involvement in the Belum-Temenggor Complex, Perak* (Center for Malaysian Indigenous Studies, 2011); Harun, Rosta, Yip Hin Wai and M Kamil Yusoff, 'Socio-economic Survey of the Orang Asli In and Around Royal Belum State Park, Perak' (2010).

¹⁴¹ See Chapter 1.I.B, fn 36.

¹⁴² He, above n 106, 475: considering the position of indigenous peoples in China, Taiwan and Thailand.

Settlement in a fixed location and the use of land for agriculture gives them a better position to assert their land rights. They are also in a better position to bargain for their interests over government proposals for their relocation.

On the other hand, the hunter-gatherers, eg, the Batek Semang in the National Park forest, are too small in number to attract serious attention.¹⁴³ Their situation as hunter-gatherers, in the official perspective, is 'nomadic' without ties to any territory, has 'yet to civilize' and needs to change.¹⁴⁴

Nevertheless the small size of an indigenous population may encourage the state to recognize their rights as it involves less cost.¹⁴⁵

(ii) Social Attitude

The social attitude of the majority is also significant in addressing indigenous issues. It often reflects 'historically formed prejudice, intolerance, lack of moral conscience and hierarchical categorisation of people'.¹⁴⁶

Racist stereotyping of the Orang Asli has existed casting them as being 'backward', 'uncivilized', 'lazy', 'stupid', 'pagan' and 'inferior'.¹⁴⁷ They were also perceived as being dirty especially by Malay Muslims who regard eating pigs, monkeys and mice, and drinking alcohol as sinful. The reference to them as 'aborigines' is a 'signifier' of their status as 'pagan races' or 'wild tribes'¹⁴⁸ which is different from the dominant groups. Nah suggests that most, if not all, Orang Asli have struggled to overcome feelings of shame and inferiority.¹⁴⁹ This reflects how they were viewed and treated in the eyes of the other

¹⁴³ Lye Tuck Po believed that the total Batek population is unlikely to exceed 700-900, ie, roughly 0.73% of all Orang Asli or less than 0.004% of all Malaysian citizens in the 2000 census. The Batek of Pahang are the only state-wide Semang population who remain as full-time mobile hunter-gatherers: Tuck-Po, above n 140, 6.

¹⁴⁴ Ibid 140: She argued that as forest is a complex landscape, the Batek's mobility is not 'nomadic' in the sense of being utterly free of ties to the land. In contrast their attachment, bonds and sentiments to the territories develop with topographic and resources knowledge fostered over generations within a 'fixed territory'. The mode of dwelling in the forest that they practise is thus pragmatic based on resources for social and economic strategies. They live in a camp and this camp is connected to other camps by extensive series of pathways of walking trails, rivers and logging roads. Similar to other hunter-gatherers, they do not habitually move into other people's territories except for justifiable reasons including land loss, displacement and government resettlement.

¹⁴⁵ He, above n 106, 474.

¹⁴⁶ Ibid, 474.

¹⁴⁷ Nah, above n 102, 286-7.

¹⁴⁸ Ibid, 288.

¹⁴⁹ Ibid, 132: suggesting the Orang Asli behaviour is 'ashamed', 'scared', 'fearful', 'lost a belief in themselves', 'lack of confidence', 'lose their spirit', feel 'powerless' and 'stupid'.

local communities and the officials.¹⁵⁰ This perception remains widespread and continues today.¹⁵¹

The experience of other countries such as Australia and Japan has shown that changing public attitudes towards indigenous peoples has contributed to securing greater indigenous rights. Protest and resistance by the indigenous peoples as well as institutional changes may have helped to enhance their position.¹⁵² As Behrendt argued, shaping a new national identity for the Australian people that is inclusive of indigenous peoples contributes to improving indigenous rights' protection in Australia.¹⁵³ Japan has also taken steps to promote public understanding about the Ainu culture as part of building a national image deemed necessary for ethnic harmony.¹⁵⁴

III ENVIRONMENT FOR CHANGE?

Is the environment in the Malaysian society moving towards providing support for the minorities? The conditions, as reflected in the above section, seem hostile to change.

However, there are indications that Malaysia's politics are moving to a more pluralist and inclusive system.¹⁵⁵ The signals of this change could be seen from the following: a series

¹⁵⁰ Noone, for instance, referred to these people as 'indigenous people of certain sort, the kind of primitive people' different to the Malays whose 'inevitable fact' was cultural extinction': Ibid, 288 quoting Noone, H D, 'Report on the settlements and welfare of the Ple-Temiar Senoi of the Perak-Kelantan watershed' (1936) 19(1) *Journal of the Federated Malay States Museums* 1.

¹⁵¹ A recent example, widely chastised by Orang Asli friends was a public speech by a famous religious teacher referring to the Orang Asli as 'stupid people who live in the forest and do not know how to take care of and teach their children': http://www.youtube.com/watch?v=1PtCZ-wb_gM (the video is in Malay). Another instance is a remark uttered by a Chief Minister that the Orang Asli are 'the indigenous people who are stupid but the other group is the indigenous peoples who are cleverer': See, eg, Khairil Abdul Rahim, 'Bodoh, bangang: Adnan dituntut mohon maaf (*Stupid remark: Adnan was demanded apology*)', *Harakah Daily* 18 Oktober 2012 <<http://bm.harakahdaily.net/index.php/berita-utama/13973-bodoh-bangang-adnan-dituntut-mohon-maaf>>.

¹⁵² He, above n 106, 474

¹⁵³ Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (The Federation Press, 2003), 133.

¹⁵⁴ Advisory Council for Future Ainu Policy, 'Final Report' (Advisory Council for Future Ainu Policy, July 2009) http://www.kantei.go.jp/jp/singi/ainu/pdf/090629report_e.pdf.

¹⁵⁵ See, eg, analysis of recent development in Malaysian politic: Greg Lopez, *KL 1112 and a New Malaysian Identity?* Australian National University (ANU) College of Asia and the Pacific <<http://asiapacific.anu.edu.au/newmandala/2013/01/20/kl112-and-a-new-malaysia-identity/>>; Chen, above n 120; Azmil Tayeb, 'The Big, Bad Indonesian Bogeyman' (2013) *New Mandala* <http://asiapacific.anu.edu.au/newmandala/2013/01/07/the-big-bad-indonesian-bogeyman/?utm_source=rss&utm_medium=rss&utm_campaign=the-big-bad-indonesian-bogeyman>: Tayeb suggested 'the cracks in the political and religious hegemony are already apparent, and the roaring prospect of the democratic wave breaching through this shaky authoritarian wall is simply too terrifying to be contemplated by the supporters of status quo'; Surain Subramaniam, 'Assessing Political Dynamics in Contemporary Malaysia: Implications for Democratic Change' (2011) 19(1) *ASIANetwork Exchange* 42.

of legislative and policy reforms undertaken by the government to address criticism of its bad track record on human rights;¹⁵⁶ the increasing influence of non-communal parties such as the People's Justice Party and the Democratic Action Party; the strength and influence of opposition coalition parties competing with the incumbent coalition; the growing force of civil society actors' unprecedented responses by the public to political issues evident by a series of large street protests;¹⁵⁷ and an emerging vibrant 'public sphere' discussing issues of public life allowed by the internet-based new media.¹⁵⁸ Malaysians previously were generally considered as reticent about their political views.¹⁵⁹ The shift towards the primacy of people rather than the supremacy of a dominant race or certain races is significant in a more inclusive approach to social minorities.

On the other hand, the sincerity of the government in implementing lasting reforms has repeatedly been called into question. Critics suggested that reforms are merely political ploys designed solely to gain traction with voters¹⁶⁰ citing issues such as: lack of consultation; the short time frame within which legislative processes have taken place; the absence of structural changes; and government conduct in dealing with demonstrators in recent rallies.¹⁶¹ The deep-rooted culture of corruption and rent seeking in the upper levels of government make changes difficult.¹⁶²

¹⁵⁶ A record number of legislative reforms including repeal of the infamous *Internal Security Act 1960*; amendments to the *University and University Colleges Act 1971* and the *Printing Presses and Publications Act 1984* in 2012; announcement of a minimum wage policy as well as the passing of the *Security Offences Bill* and *Peaceful Assembly Act 2012*.

¹⁵⁷ Chen, above n 120: Chen suggests that the public pressure exerted by ordinary Malaysians is slowly changing the political landscape of Malaysia.

¹⁵⁸ Syamsul Anuar Ismail and Hasmah Zanuddin, 'Aktiviti Blogging dan Kandungan Blog Sosiopolitik Sebelum dan Selepas Pilihan Raya Umum ke-12: Satu Analisis (Blogging Activities and the Contents of Sociopolitical Blog Before and After 12th General Election: An Analysis)' (2008) 10(1) *Jurnal Pengajian Media Malaysia (Journal of Media Studies Malaysia)*; Syahrudin Awg Ahmad, Nik Norma Nik Hassan and Adnan Hussien, 'Laman Blog: Platform Mencanai Pendapat, Memprojeksi Nilai dan Juri Awam terhadap Kerajaan (Blog page: A Platform to Shape Opinion, Projecting Values and Public Jury of the Government)' (2012) 14(1) *Jurnal Pengajian Media Malaysia*.

¹⁵⁹ Amanda Whiting, 'Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission' (2003) 39 *Stanford Journal of International Law* 59.

¹⁶⁰ Chen, above n 120, [2]; Kim Quek, 'PSC Report: An Illusion of Real Electoral Reform', *Malaysian Insider* (online), 5 April 2013.

¹⁶¹ Chen, above n 120, [2].; For a report on a recent rally for free and fair elections Bersih 3.0, see: Bar Council Malaysia, 'Final Report of the Malaysian Bar on Bersih 3.0 Rally Held on 28 April 2012 in Kuala Lumpur' (Bar Council Malaysia, 2012) <http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=3709&Itemid=332>.

¹⁶² See above, fn 155.

Placing this in the context of systems theory, the political system may be pressured to be seen to change according to norms that most appeal to the public. Public acceptance is an essential element in the code used by a political system to sustain itself. Changes are made on inputs that it receives from other systems with which it has coupling including the economic system, the civil society and the legal system both national and international. These inputs are processed within its own operations to produce its own meanings.

Nevertheless, a further question is, will political changes benefit the Orang Asli, the smallest minority in Malaysian society? This section considers the capacity of the overall environment to accommodate the rights of indigenous peoples.

A Local Legal Elites

Based on systems theory but also seen in the work of comparative lawyers such as Kahn-Freund, local elites have a significant impact on changes in their respective subsystems. On the introduction of laws, they are influential in shaping the meaning of the adopted rules as a possible source of effective legal change.¹⁶³ Local elites include the policy and law makers (including the legislators and civil servants responsible for drafting policies as well as their implementation and interpretation), lawyers and judges. Other groups are discussed in the next section, Part III.B.

1 Policymakers and Public Officials

There are emerging signs that some younger civil servants and politicians are more sensitive to the need to protect the rights of the Orang Asli. On taking over government in 2008, the People's Coalition in Perak and Selangor has taken significant steps to address the issue of land rights of the Orang Asli. Perak has returned land earmarked for logging and other prospective projects to the local Orang Asli communities and efforts have been undertaken to gazette their lands.¹⁶⁴ The Selangor government has also

¹⁶³ Watson, above n 1; Berkowitz, Pistor and Richard, above n 13, 167; Esin Örucü, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205, 205-6; Dezalay and Garth, above n 72, 243. See also, Kahn-Freund, above n 2: on powerful interest groups in effecting change.

¹⁶⁴ Other actions undertaken include cancellation of logging and plantations in Orang Asli settlements; setting up a special task force on Orang Asli land rights with representation by the Orang Asli and a space for that purpose in the state secretariat building provided for its use; a special Orang Asli officer appointed to look into Orang Asli matters: Ambiga Sreenevasan, 'Letter to the editor: Protection of the rights of the underprivileged must continue' (Malaysian Bar Council, 11 February 2009)

formed an Orang Asli (Indigenous People) Land Taskforce with the function of preserving Orang Asli ancestral land, much of which had been seized from them in recent years, and to expedite the identification and gazetting of the remaining Orang Asli land. The states' commitment is also evident by the withdrawal of a pending appeal by the former government against the Orang Asli respondents in *Sagong's* case.¹⁶⁵ The coalition's manifesto for the 2013 election also promised to preserve the Orang Asli's ancestral land.¹⁶⁶

But Kelantan's record, led by PAS, a party in the same People's Coalition, has been different. Its sponsored plantation projects have denied the land claims by the local Orang Asli. Its Deputy Chief Minister has denied the existence of Orang Asli customary land.¹⁶⁷ The President of PAS has also recently criticised the Orang Asli for not changing their way of life and for demanding that land be provided for them by the government.¹⁶⁸

2 The Judiciary

The Malaysian judiciary has been criticised over its independence and integrity.¹⁶⁹ As discussed in the methodology section, Chapter 2.III.C.3.b, it is 'widely perceived as more willing to accommodate the government'.¹⁷⁰ Judges are considered as 'markedly

<http://www.malaysianbar.org.my/press_statements/letter_to_the_editor_protection_of_the_rights_of_the_underprivileged_must_continue.html>;

¹⁶⁵ [2005] 6 MLJ 289. Yeoh, Tricia, 'The Pakatan Rakyat Selangor State Administration: Present and Future Challenges on the Road to Reform' (2010) 99(407) *The Round Table* 177, 181; Interview data: information by a lawyer representing an Orang Asli case and two parliamentary representatives.

¹⁶⁶ Pakatan Rakyat, 'Manifesto Rakyat' (Pakatan Rakyat, 2013) <<http://www.pakatanrakyat.my/files/ENG-Manifesto-LEAFLET.pdf>>.

¹⁶⁷ Deputy Menteri Besar [Chief Minister] Datuk Ahmad Yakob said that other than forest reserves, government land and privately-owned land, there is no customary land in Kelantan: 'Kelantan told to solve Orang Asli problems', *The Sun Daily* (online), 31 January 2012 <<http://www.thesundaily.my/news/281419>>; Leven Woon, 'Kelantan Orang Asli slams MB, demands apology', *Malaysiakini.com* (online), 20 April 2012; Isabelle Lai, 'Bar Council: Not Right to Leave Orang Asli in the Lurch for Profits', *The Star Online* (online), 29 December 2012; Aw, Nigel, 'Mega Plantations Gobble Up Kelantan Orang Asli Land', *Malaysiakini* (online), 28 December 2012. See also the avoidance of the subject by a prominent leader of the incumbent party in the state: Bernama, 'Nik Aziz won't respond to Orang Asli protest', *Malaysiakini* (online), 17 April 2012 <<http://www.malaysiakini.com/news/195246>>.

¹⁶⁸ Diyana Ibrahim, 'Orang asal sampai bila nak merayau, kata Abdul Hadi (Until when the indigenous peoples would want to roam [in the forests], said Abdul Hadi)', *Malaysian Insider* (online), 20 October 2013 <<http://www.themalaysianinsider.com/bahasa/article/orang-asal-sampai-bila-nak-merayau-kata-abdul-hadi>>.

¹⁶⁹ There is a widespread view that the independence and integrity of the judicial system has been weakened: Wain, B, *Malaysian Maverick: Mahathir Mohamad in Turbulent Times* (Palgrave Macmillan, 2009), cited in Hill, Yean and Zin, above n 128, 1708. Examples: Judicial Crisis of 1988 that led to removal of the Lord President and five Supreme Court judges for judicial misconduct by a tribunal which proceeding was described as 'despicable'.

¹⁷⁰ Harding and Whiting, above n 81, 247.

reluctant' to embrace an activist role and tend to adopt a deferential attitude towards the executive and to narrowly construe rights.¹⁷¹ They have also declined to accept the 'basic framework' doctrine, elaborated by the Indian Supreme Court, as a constitutional principle and have refused to invalidate constitutional amendments that arguably fracture the liberal-democratic nature of the *Constitution*.¹⁷² There are also serious allegations of political and corporate interference with the court processes.¹⁷³ Consequently, they have only weakly protected the constitutional rights of citizens and individuals.

Despite the apparent weaknesses of the judiciary in defending the core principles of liberalism, there are signs in recent cases, as indicated in Chapter 3.II.B, that give greater significance to the rights of citizens.¹⁷⁴ There is a growing trend for the constitutional provisions involving fundamental liberties to be more 'generously interpreted'. Restrictions on fundamental rights in constitutional provisions imposed by statutes must be reasonable.¹⁷⁵ As discussed in Chapter 7.III.A.3, there are an increasing number of cases in which the judges are willing to consider the position of international human rights law in deciding the meaning of domestic legislation.¹⁷⁶ This more liberal interpretation allows the consideration of the reasonableness and expediency of statutory provisions that derogate from the fundamental liberties protected by the *Constitution*.

In relation to the rights of the Orang Asli and natives in the country, the judiciary has also taken a significant role in the development of common law precedents (Chapter 6). Although their impact remains to be seen, the precedents provide legitimacy in Malaysian law for the Orang Asli's resource claims.

The shift in judicial perspectives has likely been influenced by the structural coupling that the common law has with developments in other jurisdictions as well as with international law as mentioned above. As the judicial system has a tight structural coupling with the

¹⁷¹ Ibid, 255.

¹⁷² Ibid, 81, 255. Cf *Sivarasa Rasiah* [2010] 2 MLJ 333 – where the Court held that the fundamental liberties provided by the *Constitution* are part of the basic features of the *Constitution* (refer to Chapter 3.II.B fn 189).

¹⁷³ See, eg, Hoong Phun Lee, 'Judiciaries in Crisis – Some Comparative Perspectives' (2011) *Federal Law Review*, Vol. 38, No. 3, p. 371, 2010, 380-1; Farid Suffian Shuaib, 'Malaysian Judicial Appointment Process: An Overview of the Reform' (2011) 7(3) *Journal of Applied Sciences Research* 2273, 2274; Harding and Whiting, above n 81.

¹⁷⁴ Eg of cases: *Abdul Ghani Haroon v Ketua Polis Negara* (2001) 2 MLJ 689; *Ayer Molek Rubber Company Berhad v Insas Berhad* [1995] 3 CLJ 359; *Badan Peguam* [2008] 2 MLJ 285.

¹⁷⁵ See Chapter 3.II.B.

¹⁷⁶ Izawati Wook, 'The Role of the International Human Rights Norms in Malaysian Courts' (2011) 5 *Malayan Law Journal* cxlviii.

political system, the signals sent by the political system which are positive to human rights in Malaysia may have allowed the changes.

3 The Bar

There are also increasing numbers of advocates for Orang Asli rights from within the legal elites. The Malaysian Bar Council has established a special committee that undertakes to provide research to promote public awareness, as well as to provide legal assistance and pro bono lawyers for the Orang Asli, specifically in land rights claims.¹⁷⁷ The committee, which consists of experts from various disciplines, is instrumental in bringing cases to court, that otherwise would not proceed because of the numerous obstacles faced by the Orang Asli.

This defence of minority rights has a close connection with the wider protection of human rights. In this aspect, the Bar Council has played an important role in the defence of civil and political rights, supporting the supremacy of the secular *Constitution* and opposing movement towards theocratic government. Harding and Whiting suggest that the role is facilitated by 'the cultural orientation of common lawyers to liberal "legalism"' that seeks to achieve a moderate state that assigns important roles to lawyers as civil actors.¹⁷⁸ This position may also be explained by the fact that many Malaysian lawyers are graduates from English law schools.¹⁷⁹ Prior to, and for about two decades after independence, many judges and legal practitioners were of British origin. This was instrumental in importing both the common law and the rule of law traditions.

B Other Actors

1 National Human Rights Institutions

National human rights institutions have become increasingly prominent actors in the promotion of human rights norms within both government and civil society.¹⁸⁰ The Malaysian Human Rights Commission, Suhakam, has taken up Orang Asli issues. It has issued public statements urging state governments to address Orang Asli land rights.¹⁸¹

¹⁷⁷ Information and activities of the Committee on Orang Asli Rights are available here: http://www.malaysianbar.org.my/committee_on_orang_asli/.

¹⁷⁸ Harding and Whiting, above n 81, 249.

¹⁷⁹ The first law school in Malaysia was only established in 1972, ie, in the Malaya University.

¹⁸⁰ Andrew Wolman, 'National Human Rights Commissions and Asian Human Rights Norms' (2013) 3 *Asian Journal of International Law* 77, 77.

¹⁸¹ 'Kelantan told to solve Orang Asli problems', *The Sun Daily* (online), 31 January 2012 <http://www.thesundaily.my/news/281419>.

In 2011, it held a national inquiry on the land rights of the Orang Asli.¹⁸² The report of the inquiry which was published recently in July 2013 exposed numerous incidents of exploitation involving the Orang Asli land. It revealed clear evidence of disregard towards the land rights of the Orang Asli by the authorities.

However, the commission's proposals are often not implemented by the government. Its annual reports submitted to Parliament have never been discussed.¹⁸³ Submission by Suhakam of the national inquiry report in Parliament scheduled in July 2013 was also cancelled. Instead, it was handed over to another institution for further deliberation. The efforts of the institution are seen as having failed to have a significant impact on the improvement of the human rights situation in Malaysia.¹⁸⁴

2 Civil Society and the Role of Media

Civil society is another subsystem that is important in promoting or hindering changes in law and its implementation. It is 'an intermediate realm between the private sphere, the market and the state' where actors formulate and organise interests, values and demands of public concern.¹⁸⁵ It generates pressures to initiate reform and, in its implementation and enforcement, for the law to be 'actually used in practice and legal intermediaries responsible for developing the law are responsive to this demand'.¹⁸⁶ Its impact is substantial even when the activities of political organisations and elites are taken into account.¹⁸⁷

Important democratic agents for public awareness are civic actors¹⁸⁸ and the media, both public and social.¹⁸⁹ They play an important role in creating public awareness on issues

¹⁸² Human Rights Commission of Malaysia (Suhakam), 'Report of the National Inquiry into the Land Rights of Indigenous Peoples' (Suhakam, 2013) <<http://www.suhakam.org.my/documents/10124/1326477/SUHAKAM+BI+FINAL.CD.pdf>>.

¹⁸³ Bernama, 'Suhakam wants its annual report to be tabled and discussed in Parliament', *The Malay Mail Online* (online), 10 July 2013 <<http://www.themalaymailonline.com/malaysia/article/suhakam-wants-its-annual-report-to-be-tabled-and-discussed-in-parliament>>.

¹⁸⁴ Stephan Giersdorf and Aurel Croissant, 'Civil Society and Competitive Authoritarianism in Malaysia' (2011) 7(1) *Journal of Civil Society* 1. See also Whiting, above n 159.

¹⁸⁵ Giersdorf and Croissant, above n 184, 4.

¹⁸⁶ Daniel Berkowitz, Katarina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163, 167-8.

¹⁸⁷ Paul Burstein, 'The Impact of Public Opinion on Public Policy: A Review and an Agenda' (2003) 56(1) *Political Research Quarterly* 29.

¹⁸⁸ Giersdorf and Croissant, above n 184, 1.

¹⁸⁹ Philip N Howard and Malcolm R Parks, 'Social Media and Political Change: Capacity, Constraint, and Consequence' (2012) 62(2) *Journal of Communication* 359.

such as human rights and social justice, promoting increased equality among citizens, participation and the empowerment of people in public life and decision making.

The advance in digital media has also provided avenues for members of the public to connect and provide alternative information to that controlled by mainstream media.¹⁹⁰ New digital social media¹⁹¹ has an important role as a tool of social and political change in Malaysia.¹⁹² The domestic blogosphere and other Web 2.0 applications, especially Facebook,¹⁹³ have become increasingly popular with citizens wanting to discuss and share political information in its politically restricted environment.¹⁹⁴

Social media are generally thought to be democratizing and good for democratic institutions; however, it is more complicated.¹⁹⁵ It is incorrect to assume that social media are automatically democratizing or that the political discussion they engender is necessarily in line with idealized conceptions of civic discourse.¹⁹⁶ Although online political activities will not be the impetus for political change, they can play a significant and collaborative role in supporting political efforts.¹⁹⁷ As Sen asserted, critical political

¹⁹⁰ Repressive laws limit press freedom. Press ownerships are concentrated among a limited group of pro-National Coalition individuals. All four major newspapers are pro-state. The Malaysian government also exercises control over the mass media. Any oppositional and independent media outlets face the possibility of harassment by police, extended legal wrangling, detention and imprisonment for publishing speeches critical of the state. Public harassment of politically contentious individuals and groups is common; politically problematic materials are often officially banned: Giersdorf and Croissant, above n 184, 12; Anuar, above n 75, 25; Sandra Smeltzer, 'Asking Tough Questions: The Ethics of Studying Activism in Democratically Restricted Environments' (2012) 11(2) *Social Movement Studies: Journal of Social, Cultural and Political Protest* 255, 258.

¹⁹¹ Howard and Parks, above n 189, 359 defined social media to consist of:

(a) the information infrastructure and tools used to produce and distribute content that has individual value but reflects shared values; (b) the content that takes the digital form of personal messages, news, ideas, that becomes cultural products; and (c) the people, organizations, and industries that produce and consume both the tools and the content ...

¹⁹² Ibid, 361.

¹⁹³ Facebook ranks second next to Google of the most used websites in Malaysia: Alexa, *Top Sites in Malaysia* (2013) <<http://www.alexa.com/topsites/countries/MY>>.

¹⁹⁴ Smeltzer, above n 190.

¹⁹⁵ Howard and Parks, above n 189. See, eg, Murray Hunter, 'Who makes public policy in Malaysia?' (19 February 2013) *New Mandala* <http://asiapacific.anu.edu.au/newmandala/2013/02/19/who-makes-public-policy-in-malaysia/#comments>, commenting on the public sphere that

if one scans the media in Malaysia, news and comment are almost totally focused upon scandals, who has or doesn't have the right to use the word 'Allah', Hudud laws, and who should have citizenship, etc. Emotional issues emerge without much informed discussion. Both sides of politics are campaigning hard, but without much, if any debate on public policy issues. At public meetings locally known as *ceramah* certain politicians are famous for what they say about their political adversaries and attract large crowds.

¹⁹⁶ Howard and Parks, above n 189.

¹⁹⁷ Smeltzer and Keddy, above n 124, 429.

discussions exercised through freedom of expression are necessary for a functioning democracy and for socio-political and economic development.¹⁹⁸

In Malaysia, social movements have been active in the promotion of social justice, equality, human rights and the rights of the indigenous peoples. Some NGOs have been participating actively in movements at the international level such as the Asian Forum for Human Rights and Development.¹⁹⁹ However, analysts observed that, due to repressive laws and government actions,²⁰⁰ compounded by a weak judiciary,²⁰¹ the social movements have not been successful in reaching the mainstream of public opinion and the government does not generally heed them.²⁰² Furthermore, they are 'structurally, functionally and operatively limited' in terms of number and membership.²⁰³

3 Orang Asli Organisations

There are increasing numbers of movements that give voice to these marginalized groups. Many are representatives of the Orang Asli communities including the Orang Asli Associations of Peninsular Malaysia and the Orang Asli Village Network Malaysia. There are also many emerging activists whose voices have increasingly brought the Orang Asli cause to public attention. The Center for Orang Asli Concerns has become a prominent NGO specifically for Orang Asli causes. It has also collaborated with like-minded associations both at national, regional and international levels. There are also many NGOs that have played an active role in environmental politics which have worked closely with indigenous groups. These include the World Wide Fund for Nature (WWF

¹⁹⁸ Sen, Amartya, *Development as Freedom* (Oxford University Press, 1999).

¹⁹⁹ Asian Forum for Human Rights and Development, 'First Regional Workshop on Minority Issues in Southeast Asia' (2008) 9(2) *Asia-Pacific Journal on Human Rights and the Law* 77.

²⁰⁰ Harassment and prosecution of social activists are common. Eg Suaram and Malaysiakini have been subject to police investigations and the threat of being deregistered (Anil Netto, *Stop persecution of Suaram* <<http://anilnetto.com/democracy/human-rights/stop-persecution-of-suaram/>>; Aliran, *Stop intimidation, violence against social and political activism* <<http://aliran.com/8505.html>>). Irene Fernandez, a migrant-worker advocate had been subjected to a 13-year dragged trial under charge of publishing false news for revealing appalling treatment of undocumented migrants in detention camps. She was acquitted in 2008. In 'Operation Lalang' in 1987, the government launched a nationwide political crackdown and detained more than 100 people, most of them being members of the opposition and ruling parties and civil society. Several newspapers were temporarily banned with the *Printing Presses and Publication Act* being enacted and the right to assembly restricted: See eg, Giersdorf and Croissant, above n 184; Vidhu Verma, 'Debating Rights in Malaysia: Contradictions and Challenges' (2002) 32(1) *Journal of Contemporary Asia* 108, 153; Weiss, Meredith L, 'What Will Become of Reformasi? Ethnicity and Changing Political Norms in Malaysia' (1999) 21(3) *Contemporary Southeast Asia*.

²⁰¹ Giersdorf and Croissant, above n 184, 13.

²⁰² Harding and Whiting, above n 81, 257.

²⁰³ Ibid.

Malaysia)²⁰⁴ and Malayan Nature Society.²⁰⁵ Both have helped to highlight the plight of the Orang Asli communities and the need to protect their resources.

The Orang Asli struggle for land rights is gaining strength. Through this activism, countless demonstrations have been led and numerous memorandums submitted to governments and corporations protesting against encroachment on their land or demanding an acknowledgement of their land.²⁰⁶ A series of road blockades were held protesting against land clearance and logging.²⁰⁷ They have also actively mapped and documented their territories as a means to protect their land rights.²⁰⁸

Their voices are more widely heard through their use of digital social media. They provide information about the Orang Asli, connect their members and highlight their plight through the personal experience of the authors.²⁰⁹

²⁰⁴ In the WWF Malaysia's commitment to promote environmental conservation, they adopt international legal principles with respect to the rights of the indigenous peoples: personal communication with a WWF Malaysia's representative on 29 June 2011. She referred to WWF International, 'Indigenous Peoples and Conservation: WWF Statement of Principles' (WWF International, 2008) and the International Union for Conservation of Nature WCPA, World Commission on Protected Areas (WCPA) and World Wide Fund for Nature (WWF), 'Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas: Joint Policy Statement'. The principles that respect the rights of indigenous peoples have been the guideline for the organisation's work.

²⁰⁵ Interview data with the Malaysian Nature Society's (MNS) representative. See also, the MNS's website: <http://www.mns.my/index.php>.

²⁰⁶ See, eg, Zulkifli, above n 31; Koh Jun Lin, 'Orang Asli go on 'memo marathon' over dam projects', *Malaysiakini* (online), 21 February 2013 21 February 2013.

²⁰⁷ 'Kelantan told to solve Orang Asli problems', *Sun Daily* (online), 31 January 2012 <<http://www.thesundaily.my/news/281419#>>; Aw, above n 167. In a road blockade involving about 800 people protesting against encroachment on their ancestral land for logging and opening of plantations in Kelantan in 2012, 13 Orang Asli of the Temiar community were arrested.

²⁰⁸ Nigel Aw, 'Orang Asli landmark legal battle with Kelantan government soon', *Malaysiakini* (online), 10 January 2013 <<http://www.malaysiakini.com/news/218558>>; Adrian Lasimbang, 'Community Mapping in Malaysia: The use of Community Maps in resources management & protecting rights over Indigenous Peoples' territory' (PACOS Trust Indigenous Network of Malaysia, <http://www.mengo.org/Statement/community_mapping_in_malaysia.pdf>); Gan Pei Ling, 'Community mapping for Orang Asli', *Selangor Times* (online), 29 April 2011 <<http://www.selangortimes.com/index.php?section=insight&permalink=20111215100649-community-mapping-for-orang-asli>>.

²⁰⁹ See, eg, Facebook page by the COAC: <http://www.facebook.com/#!/pages/Center-for-Orang-Asli-Concerns-COAC/144623915576639?fref=ts>; Facebook page by Orang Asli Village Network: <http://www.facebook.com/#!/groups/193242570768340/?fref=ts>; Blogs in <http://adatjahutmy.blogspot.com.au/>; <http://www.magicriver.org/>. Examples of the posts in Magickriver that highlight the Orang Asli land rights issues: <http://www.magicriver.org/2013/01/orang-asli-turned-into-temporary.html>; <http://www.magicriver.org/2011/03/colonialism-empire-and-neo-darwinism.html>; <http://www.magicriver.org/2010/08/curse-of-tempurungitis.html>. Videos are also available in Youtube (<https://www.youtube.com/user/adatjahut>) and EngageMedia (eg, Andrew, *Royal Belum 'Orang Asli'* <http://www.engagemedia.org/Members/indra05/videos/RoyalBelum_OrgAsli.avi>; <http://www.youtube.com/user/ColinCOAC?feature=watch>; <http://www.engagemedia.org/Members/adatjahutvideo/videos>).

The growing activism of these actors, the national human rights institution, NGOs and of Orang Asli movements, have been influenced by exchanges of information with various other systems. They include international law and international activism which support national movements, as well as the development in other jurisdictions positive to the rights of the indigenous peoples. These circumstances suggest an increasing number of structural couplings which potentially lead to a greater impact of Orang Asli rights in practice.

IV CONCLUSION

The chapter seeks to understand the effectiveness of legal change that recognizes the rights of the Orang Asli in the Malaysian common law under the influence of the common law jurisdictions and the international law on indigenous peoples. It considers the possibility of reforms in Malaysia towards greater recognition of Orang Asli rights. This discussion is based on the framework of legal irritants which was built on the concept of law as an autopoietic system.

Understanding the law as an autopoietic system suggests the need to consider the social subsystems affected by the law that was, or is to be, transferred and the nature of their connections. It suggests that legal transfer brought in within the legal discourse irritates both the legal discourse and the discourses external to the legal system. The subsystems select and re-produce the information passed through their structural coupling according to their own processes. It follows that legal transfers could not directly change the legal system and the other subsystems. Instead, these subsystems are part of an evolutionary dynamic in which each reconstructs internal changes affecting them with their own rules.²¹⁰

Within the Malaysian legal discourse, the connection that the common law has with international law and the other common law jurisdictions explains the information that is received and selectively processed into Malaysian common law by taking into account the domestic legal environment. However, the position of the common law in Malaysia itself explains its lack of influence on other domestic legal discourses including the executive and the legislative, which are significant for effective recognition of Orang Asli rights.

Nevertheless, this also suggests that the introduction of the new or modified principles by judges using the common law technique of persuasive foreign precedents to consider

²¹⁰ Teubner, above n 9.

new legal issues may be more effective as the changes are internalised within judicial law and practice. The common law is better able to respond by incremental changes and potentially more adaptive to changing social and economic requirements.²¹¹ The common law allows for flexibility that takes into account the consideration of justice in the construction of the laws. As Teubner observed,

It is the inner logics of the legal discourse itself that builds on normative self-reference and recursivity and thus creates a preference for internal transfer within the global legal system as opposed to the difficult new invention of legal rules out of social issues.²¹²

In the discourse external to the legal system, consideration of politics and economic subsystems reveals the difficulty in relation to the rights of the indigenous minority for elements of fairness and justice to take a central position in resource distribution. The political and economic systems are characterised by social elements that have direct implication upon the economy and resource distribution. These factors challenge further recognition of the rights of the minorities.

Nevertheless, there are signs within the local legal elites of forces that are moving towards justice and equality for the minorities. This provides a greater potential for an 'environment' that better promotes justice, equality and inclusion for the indigenous minorities.

²¹¹ Ralf Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57(4) *American Journal of Comparative Law* 765, 769: Through its 'adaptability channel', the common law, with its foundation in the development of case law rather than in legislative texts, is deemed more adaptive to changing societal requirements.

²¹² Teubner, above n 9, 16.

PART 5: SUMMARY AND CONCLUSION
CHAPTER 10: SUMMARY AND CONCLUSION

I INTRODUCTION

The thesis sets out to explore the key issues relating to the reform of Malaysian law on Orang Asli rights in forests. It seeks to argue that principles of justice and fairness, equality and non-discrimination are normative in the framing of the relevant laws and policies. These principles influenced the development of the present law in Malaysia affecting peoples' rights and interests providing the background against which the present law is interpreted. They also shape the future law. These principles provide the theoretical framework for the study, constructed in Part 2, under which the research questions are framed and answered.

Part 3 maps out the rights and interests of the Orang Asli under their customary laws and the way with which they are dealt under Malaysian law. In Chapter 5, the extent of the rights and interests of the Orang Asli in land and forest resources under their customs and traditional laws is examined using available anthropological resources. These rights are compared with the relevant existing laws and policies in Chapter 6. That chapter examines the emerging common law rights of the Orang Asli, forest-related legislation and the legal powers of the states vis-à-vis their fiduciary duties to the Orang Asli. The problems affecting the security of those rights and the limitations of the current position from the aspects of justice and fairness are also discussed.

Part 4 of the thesis considers the appropriate ways to balance the conflicting interests according to the thematic concepts identified in the theoretical framework. Chapter 7 analyses the international law relating to human rights in general and the rights of indigenous peoples and minority groups in particular. In Chapter 8, the approaches to indigenous legal rights and processes taken by the selected jurisdictions are also examined. Drawing from concepts in comparative law, both chapters also involve analyses of the appropriateness of international law as a source of legal principles, and the appropriateness to Malaysia of principles from the selected foreign jurisdictions.

Chapter 9 assesses legal reform in Malaysia should the principles and approaches be transferred to Malaysia. It also considers legal change in Malaysia through the impact of both the common law and international law on the Malaysian policy by using concepts from comparative law including legal transplants and a model of law as an autopoietic system.

This chapter provides an overview of the approach to the research; the methodology adopted in the study; and the theoretical framework used in the study to analyse the issues relating to access to forests by the Orang Asli. It also provides the conclusions drawn from the findings and analysis presented in the previous chapters. It then addresses the implications and the limitations of the study and concludes with suggestions for future research.

II THE RESEARCH METHODOLOGY

Chapter 2 in Part 1 provides an overview of the methodology adopted in the study. The methodology was designed to answer the research questions identified. It adopted various methodologies with a law reform-oriented approach ranging from theoretical and doctrinal research to comparative law. It also employed empirical data collection by way of interviews and analysis of various studies in the literature to understand the practices around the law and the perspectives of the relevant actors.

With respect to the doctrinal research employed to analyse the relevant laws, their applications and interpretations, the thesis found that studies on common law methodology in Malaysia have been limited especially in the interpretation of legal authorities. It draws from the analyses made by scholars in other jurisdictions, to understand the legal texts and factors that influence the evolution of the common law in Malaysia. One of these factors is different views of the scope of the common law. One limits it to the law in Malaysia at the date of the *Constitution* and subsequently developed by Malaysian judges. The other sees it as a system of fundamental principles although not specifically referred to by the Malaysian courts at that date (Chapter 2.III.B). More extended research is needed to understand the views of judges and the reasons for these conflicting views and their implications.

The survey of the constitutional interpretations by Malaysian judges suggests that they reflect Fallon's differences as discussed. Various techniques are used, resulting in different meanings for legal texts. There is a growing trend to a liberal approach in constitutional interpretation especially involving fundamental liberties. An exception to Fallon's typology is the use of a comparative approach in considering case law from other jurisdictions and principles of international law in the Malaysian *Constitution*. The method of statutory interpretation by the Malaysian judges is also considered.

III JUSTICE AS THE THEORETICAL FRAMEWORK

Part 2 sought to establish a theoretical framework for the analysis of Orang Asli resource rights in Malaysian law and proposals for reform. The discussion relies on various sources, including historical and legal texts, as well as philosophical debates on justice and religious perspectives as normative values contributing to expectations of laws. This framework establishes the basis on which the rights of the Orang Asli in Malaysia are examined, interpreted and will be shaped in future.

A Principles of Justice as the Foundation of Law in Malaysia

Chapter 3 considers the forest rights of the Orang Asli from broader historical and legal perspectives. The first part of the chapter surveys the historical development of laws relating to land and resources in Malaysia. It suggests that the present laws in Malaysia are directly influenced by the long-standing practices of respect for the existing rights of peoples. This is also evident in the current framework of laws and the *Constitution*, discussed in the second part.

Prior to British colonisation, the autonomy and control of the Orang Asli communities over their territories were not denied by the Malays, regardless of hostile relationships between them (Chapter 3.I.A). The same perspective is also seen during British colonisation which was influential in the development of contemporary official law in the Malay Peninsula. The colonial practices traced their origin to the writings of early theorists including those of Vitoria, Las Casas, Grotius and Vattel. These writings share the same focus on the universality of humanity and the rights of people. They contributed to the development of the law of nations that regulated the conduct of states during the colonisation era. They also laid the basis for the development of contemporary international human rights law (Chapter 3.I.B.1).

The chapter also discussed the origin of the British colonial practices in the Malay states in the practices in North America, and also followed in other jurisdictions (Chapter 3.I.B). Treaty making with indigenous peoples recognized their political autonomy and their rights to property. The practice developed into a body of global political practices and common law. In Australia, where no treaty was concluded with the Aboriginal peoples, it was also found that the original practice respected the possession and use of land by them (Chapter 3.I.B.3). Various factors that hampered the recognition of the rights of indigenous peoples were also discussed (Chapter 3.I.B.1-4).

The same pattern was also followed by the British in India and directly influenced the practice in the Malay states (Chapter 3.I.B.5). Treaties were largely used to define the relationship between the British and local peoples. Customary laws and local practices continued. They were studied by the British administrators and applied as they understood them. But the customary laws were often misunderstood by the alien officials, unwritten, varied between districts and were changed gradually by local judicial procedures and time. New laws that were introduced in the form of legislation also had regard for the existing rights and interests of the inhabitants, their customs and religions. There is nothing in the legislation introducing the Torrens system of registered title or relating to forestry in the Malay states which denies existing local rights. Various laws protecting the position and rights of local people were also introduced (Chapter 3.I.C-D).

The same principle also applies to the land of the Orang Asli. Records indicated that the lands occupied by them were acknowledged in law and administrative practices as belonging to them. They were left to be governed by their own laws. However, they were regarded as less civilized and subjected to greater government control with the stated objective of protecting them from exploitation. Many factors have led to the continued loss of land by the aborigines including conflicting economic interests and cultural attitudes towards them (Chapter 3.I.D.3-4).

In the second part of the chapter, it is also argued that the Malaysian legal systems rest on the same principles of justice which respect the rights of peoples. This is entrenched in the written *Constitution* which is the supreme law. It provides for a limited government and the safeguard of individual fundamental liberties. The fundamental liberties' provisions include the right to equality which is inherent in the principle of respect for peoples as equal and free. Malaysia also preserves a common law tradition with a judicial role in law making. The principle of equality, a significant concept in the common law, requires the same legal principles to apply equally to all persons regardless of race (Chapter 3.II).

B Philosophical Discourse on the Principles of Justice

Chapter 4 examines the scope and meaning of justice in contemporary discourses on justice. The key thematic concepts were identified as: the concept of distributive justice and its related aspects, that is, restorative justice, environmental justice and procedural justice.

1 Basic Principles of Justice: Liberty, Respect, Equality and Collective Rights

The concept of distributive justice is concerned with fairness or equitable sharing in the allocation of resources, benefits and burdens in society. The dominant strand in the contemporary discourse of justice, including those proposed by Rawls, Nozick, Dworkin and Amartya Sen, give emphasis to just political arrangements and equality in the distribution of primary goods in society including basic liberties and respect for individual freedom. Sen highlighted the need to consider actual opportunities for the exercise of freedom by people in societies not necessarily based on Western liberalism. His capability approach (Chapter 4.1.A.2) allows people to exercise freedom in what they themselves value rather than values imposed by others. The details of, and differences between, their propositions are considered in Chapter 4.1.

The emphasis on individual over collective rights has led to significant setbacks for indigenous peoples (Chapter 4.1.3). This suggests the need to consider the ideas of justice in their context which has gained growing recognition, including in international instruments specific to indigenous peoples. In this respect, Walzer, Sandel, Kymlicka and Newman argued for recognizing the collective rights of communities, which Walzer suggests, demand mutual respect. Walzer suggests that the right to a community includes the right to preserve distinctive communities as well as the place and the land on which they live.

Applying the allocation of resources in the forests and involving indigenous peoples, the principles of justice require a central consideration of liberties, self-respect, rights and interests of all the stakeholders including the Orang Asli; and respect for their diverse communities. They are entitled to equal concern and respect as citizens who are free and equal. The value of their rights and freedom must be assessed from actual opportunities that people have to advance their functional capabilities to exercise the freedom and their way of life that they value. This approach may also contribute to the general well-being of society as it may address inequality in society and the needs of peoples.

Apart from individual rights, the collective rights of the Orang Asli as indigenous peoples should also be addressed as they support their communities and their values as distinct identities. For indigenous minority groups, group rights protect members from the economic and political power of other dominant groups. Principles of freedom and equality require that group-differentiated rights, including land rights, be recognized.

Nozick's concept of rights genealogy, discussed in Chapter 4.I.A.4(b), offers an argument to support the Orang Asli. In one aspect, the distribution of land or resources without regard to the existing rights acquired legitimately, for example, the ancestral land inherited from previous generations of the communities, is unjust. In another aspect, most Orang Asli have lost their original ancestral lands following relocation, often on the states' initiative. Through the right genealogy, the giving of new land in exchange for ancestral land surrendered to the states provides arguments for the acquisition of a valid entitlement to the new land by the Orang Asli. This view is consistent with an obiter by Mohd Azman J in *Pedik bin Busu*²¹³ (Chapter 6.III.A).

As indicated in Chapter 4.I.A.5, these major theories of justice focus on rights' recognition in resource distribution and reject welfare-based equality and utilitarianism. These concepts are often used without much success to address the inequality of the indigenous peoples. This rights-based approach has the potential to empower the people towards dignity and self-sufficiency, economically, socially and politically.

2 Restorative Justice

Chapter 4.II.A examines the growing recognition of the need to achieve justice in reparation of historical wrongs suffered by indigenous peoples. In this context, restorative justice seeks reparation, with an emphasis on the principles and aims of human dignity and improving the relationship between parties, in the context of indigenous peoples with the state as well as the dominant society. On this basis, the focus is to establish a framework of respectful acknowledgement, responsibility and concern to restore tribal respect and dignity. Thus, the range of approaches to achieving restorative justice are not limited to monetary compensation and restitution but also include recognition of rights, acknowledgement that wrongs occurred, apologies and guarantees of non-repetition.

3 Environmental Justice

Environmental justice in relation to the indigenous peoples requires the addressing of the unequal share of the burden of environmental-related risks, environmental degradation and resource depletion that affect their economic resources, health and well-being, more than any other section of society.

4 Procedural Justice

²¹³ [2010] 5 MLJ 849.

Procedural justice is significant in the context of indigenous peoples as it implies respect for the parties and their position. It requires provisions of a fair process that affords the affected communities an opportunity to participate in decision making. Beyond that, it requires engagement with the communities with respect for their norms and their decision-making institutions. There is also a need to provide for means to enhance the capacity of the communities, and their knowledge, skill and financial capability to provide level playing fields for meaningful participation. The notion of procedural justice has led to the practice of out-of-court resolution processes rather than highly judicialised court processes. As experience of the indigenous peoples, including the Orang Asli, shows, the court process often unfairly works against marginalized communities.

The concept suggests that the proper recognition of the rights and interests of the indigenous peoples be placed on an equal status with the interests of other sections of society and that the acknowledgement of injustice is the starting point for the consideration of appropriate future processes and redress.

It is also found that both substantive and procedural principles of justice require acknowledgement and respect for persons as equal and with their rights and interests treated equally. They require respect for freedom and the natural rights of people including the autonomy of distinctive communities and those specific interests that people have in the fair allocation of resources.

5 Justice in Translation

The thesis also employs the concept of justice in translation in considering other laws in a comparative perspective. Justice in translation requires the need to consider issues within the local context and the relationship between the jurisdictions, the significance of the process and the justification. This is connected to comparability, transplantability and perspectives of other laws being compared, as discussed in Chapter 2.IV.A.

6 Justice from Religious and Eastern Philosophical Perspectives

The thesis also considers the religious perspectives in Malaysian society on distributive justice. Religion is considered as a value system that shapes local perspectives. It is found that religions and philosophies emphasize the same goals of fairness and equality in society. Islam also emphasizes justice, fairness and equality in the equality and liberties of individuals including non-Muslim minorities. This comprises basic rights including property and rights to practise their culture and religions as communities. However, the virtues of Islamic justice have been undermined in practice by a range of

controversial exterior factors including the inadequacies of domestic politics and urgency in enforcing national identities (Chapter 4.IV).

These perspectives are significant as they reject the contentions that human rights are foreign concepts in Asian societies which instead emphasize communal rights (Chapter 7.III.B.1). Ironically in this view, indigenous peoples have also faced problems in the recognition of their collective or communal rights (Chapter 4.I.A.3).

IV CONCLUSION TO RESEARCH QUESTIONS

The above theoretical discourse provides a framework for mapping the approach to addressing access by indigenous minorities to resources. The main findings for the research questions in the framework are chapter-specific and were summarized within the respective chapters. The following sections briefly synthesise these findings.

Question 1: What are the rights of the Orang Asli in forests under their own laws and customs?

Chapter 5 examines the Orang Asli customary laws which have been the basis for their land and resources claims. The position of custom as part of the law in Malaysian society and its status in the Malaysian legal system, in relation to statutes and other related issues, are also discussed. The chapter also considered the limitations on the study found during the research (Chapter 5.II.C).

Custom is constitutionally recognized as a source of law in Malaysia. However, little is written about and known outside of the Orang Asli communities about their custom from a legal perspective. Discussion of custom in the context of the legal system is often confined to those groups with significant numbers. The brief survey of the perspectives among the Orang Asli representatives concerning their customs suggests that they continue to be regulated internally by their own traditional laws in various matters including land and natural resources.

The review of the customs, usages and traditions of the different forest-dependent communities suggests significant economic and cultural connections between the communities and their environment. It is found that, except when relocated, each group is a distinct community living within their own communities in a specified territory. The territories, land and environment are fundamental to their communities, and to their cultural and spiritual needs. Their belief systems are founded in the connection between the communities and the land. There is a strong spiritual and historic attachment to this ancestral land on which they and their previous generations have lived.

For many communities, the land and resources considered as within their control are regarded as communal. There is generally a certain defined territory consisting of a large tract of land occupied by the community for a very long time. This includes the areas that they use to find resources.

From the communities' perspective, they belong to the territories that they occupy and inherited from their ancestors. The land and its environment are their ancestral lands on which they can access the resources from which they may benefit. Practices have developed, specifically among communities engaging in agriculture, to recognize certain proprietary interests over particular land for individuals or families within the communal territories. Communities which have been moved from their ancestral lands have tended to develop a new relationship with the new land and consider the new land as a replacement for their lost ancestral land.

The economic significance of the forest resources to the Orang Asli was also considered. Based on the interview data and various recent studies, it is found that the forest resources, both in land and its produce, remain significant for most of the communities. They practise diversified economic activities including collection of various forest products, hunting various animals, fishing and some agricultural activities, both for own consumption and for sale for a cash income (Chapter 5.II.B.2). This finding reveals inconsistency with the laws in Malaysia that tend to restrict the Orang Asli's access to resources only for traditional subsistence or personal consumption (Chapter 6.I.B.3.a).

To conclude, land, forest and resources are culturally, socially and economically important to the Orang Asli communities. Acknowledgement of these facts is a significant starting point in considering the reform of the relevant laws and practices.

Question 2: To what extent are the rights of the Orang Asli recognized in the existing laws and policies on forests in Malaysia?

Chapter 6 surveys the extent of the rights of the Orang Asli in the present laws and policies on forests in Malaysia. As argued in Chapter 2, the law developed on the principles of justice, equality and fairness. This is consistent with the position of the Orang Asli's customary rights in land and forests. As established in Chapter 6, they are, to an extent, recognized by constitutional, statutory and common law provisions.

The constitutional provisions safeguard the right to equality for all persons including the Orang Asli and recognize the need for special protection of the Orang Asli for their 'well-being or advancement' (Chapter 6.I.B.1). The APA, as legislation governing the Orang

Asli, establishes a specific framework to protect and preserve the rights and interests of the aborigines including their autonomy, identity and land from competing economic and political forces. Mechanisms created to protect the Orang Asli include the creation of reserves for them, prohibiting the creation of any other reserve within an Orang Asli reserve, the exclusion of non-aboriginal communities from these reserves and the establishment of a specific federal department to safeguard the Orang Asli's interests. The creation of reserves is a duty of the state authority as a fiduciary having the legal powers and responsibilities to protect them. The Orang Asli also have an exclusive right to resources within the reserve (Chapter 6.I.B.2). Other legislation and policy statements relating to land, forestry and wildlife also recognize the Orang Asli's rights and interests, although they have been gradually eroded. Likewise, the practice of the executive branch of government revealed in several policy statements also recognizes the right of the Orang Asli to participate in decision-making processes. This is also reinforced in the local administrative policies relating to forest and timber extraction, partly influenced by international human rights law and global regulation of the forest and timber industry (Chapter 6.I.B.3.a-b).

The common law recognition of the Orang Asli's rights has strengthened this position. Courts have held that the Orang Asli have legal proprietary rights to their land and resources that arise from their customary law, unless they are extinguished by plain legislation. The rights include the right to live on the land and to use the resources, and proprietary interests in settlement land. With respect to land areas on which the people customarily forage, in the past, the courts have been reluctant to recognize substantive rights to land in areas subject to customary rights to forage. But recent rulings from Sarawak, on similar facts, suggest that they are appropriate subject to native customary rights. With respect to resource rights, *Adong* recognizes the rights to the forest resources that have been customarily accessed. This ruling remains good law. Courts appear to limit their consideration to entitlement to land rather than the right to access forest resources more generally. In a recent High Court judgment, *Mohamad Nohing*,²¹⁴ the rights of the Orang Asli to hunt and forage in forests were affirmed but it was considered to be an 'inborn instinct' of the people rather than entitlement under their customary laws (Chapter 6.II).²¹⁵

²¹⁴ [2013] MLJU 291, [41].

²¹⁵ *Mohamad Nohing* [2013] MLJU 291, [41].

These rights prevail over the rights and interests of the state authorities. They also have an impact on forestry-related legislation including restrictions on the use of forests and creating forest reserves (Chapter 9.II.C). It is also argued that the powers of the state authorities to extinguish the existing rights and legal restrictions to them are subject to fiduciary duties and the safeguard of procedural justice (Chapter 6.II.C.3).

Contrary to this legal recognition, there has been a continuing resistance to greater acknowledgement of the rights of the Orang Asli including the denial of and violation of their customary resource rights. These circumstances partly result from lack of express acknowledgement in legislation and the wide discretion given to state authorities in various statutes.

The common law also appears to have had a limited impact in practice. The requirement for occupation and traditional connection to the land restricts the claims of some groups (Chapter 6.III.A). A large number of groups have been dispossessed of their lands, ending their occupation and weakening their traditional connection. The restorative measures provided are limited to monetary compensation (Chapter 6.II.B(e) and 6.III.B). Although procedural justice is required by law and recognized in various policy statements, its practice is problematic. Procedural issues such as difficulties in court-based processes, lack of professional advice and support for legal costs are significant barriers to the Orang Asli (Chapter 6.III.C). Furthermore, the complexity of the common law means lack of clarity in the legal provisions for protecting the communities' resources. Unlike legislation, it is not clearly written down and legislation makes no reference to it. Local attitudes towards the common law itself as an alien institution or relict of colonisation also affect its implementation (Chapter 9.II.B.1). These limitations and the significant gaps between the law and practice have serious implications for the scope of the law on the Orang Asli resource rights, its interpretation and future direction.

Question 3: What are the rights and interest of the indigenous peoples in forests under international law?

Chapter 7 surveys the rights and interests of the indigenous peoples in forests under international and transnational law. As pointed out in Chapter 3, the contemporary international laws relating to indigenous peoples share the same origin and principles that have influenced the common law and statutes in common law jurisdictions including Malaysia (Chapter 3.I.B.1). On the same, but more elaborated, principles of justice, equality and self-determination, international law endorses a rights-based approach as

a strategy to build a new relationship between indigenous peoples and states (Chapter 7.I).

The survey of various international law instruments suggests that international law mandates the legal recognition of indigenous land rights by states. They include the specific instruments relating to the indigenous peoples, the UNDRIP and the ILO Convention; the general human rights instruments, both international and regional; as well as the instruments related to forests, environment and conservation. The legal position of the instruments, the position of the Orang Asli as indigenous peoples in international law and the scope of rights of indigenous peoples recognized in various instruments are briefly discussed in Chapter 7.I-II.

The UNDRIP and the ILO Convention provide for the strong protection of land and resource rights of the indigenous peoples based on various aspects of justice. They affirm a wide scope of indigenous rights in land and resources and state duties corresponding to them (Chapter 7.II). Briefly they include:

1. Collective and individual rights for indigenous peoples to be protected by international law. States are to respect the collective aspects of the relationship of indigenous peoples to their land which is important for their cultural and spiritual values.
2. The right to own and possess, use develop and control the lands and resources that they traditionally or currently occupy or use.
3. The right to natural resources, traditionally used or not, found on land that they traditionally occupy or use. This includes the right to participate in its use, management and conservation. The ILO Convention provides that, in jurisdictions in which the ownership of resources is retained by the government, the communities concerned have rights: to be consulted prior to exploration and exploitation of the resources; to participate in the benefits of the activities; and to fair compensation for any damages resulting from their exploitation.
4. Rights to redress as restorative measures for wrongs related to lands, territories and resources which give priority to restitutions of land or resources equal in quality. Monetary compensation or other redress requires the free consent of the relevant indigenous peoples.
5. Rights to procedural justice. In relation to the rights declared, states have an obligation to protect and facilitate their realization and security including the establishment of proper processes with participation of the indigenous peoples

affected and rights to be consulted before any projects such as extractive activities are conducted on their land. Art 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), concerning the right to cultural life, has also been interpreted to include participation by indigenous communities and to free and informed consent in decision making affecting their land.

6. In relation to environmental justice, the UNDRIP affirms the right to environmental and resource conservation which obligates states with a duty to establish and implement relevant programs. The UNDRIP also affirms the protection of indigenous territories against the siting of hazardous materials and use for military activities without their free, prior and informed consent.

The development of the cultural rights of minorities under Art 27 of the ICCPR has also been extended to cover the land and resource rights of indigenous peoples. It has also been suggested that the protection extends to the situation of nomadic peoples exercising their way of life and the specific use of natural resources. However, its scope is restricted to individuals belonging to the specific communities (Chapter 7.II.C.6).

The study also considers the relevance of international law in the Malaysian context from several aspects: its position in the Malaysian legal system and the public and cultural perspectives (Chapter 7.III). Within the legal system, international law has a significant potential to influence the Malaysian legal system apart from direct ratification. One way is through the application of customary international law (CIL). It directly binds as domestic law, or indirectly as part of the common law. Another way is through the common law, as an aid to statutory interpretation or as a persuasive authority. Direct references made by judges to international law in interpreting local law in recent cases may signify a greater potential role for international law in Malaysian law. The international law on the rights of indigenous peoples is also instrumental in cases recognizing indigenous land rights in Malaysia. Personal communication with two judges also reveals a positive attitude towards international human rights law. Furthermore, international principles have been internalised through government policies and domestic implementation of the principles (Chapter 7.III.A.1-4).

On the other hand, the limited survey of public and religious perspectives on international human rights law suggests a clash between acceptance and resistance to greater reliance on international law on human rights and indigenous peoples. Within some academic circles, civil society and in the media, international law is seen as providing leverage for human rights in Malaysia. Resistance towards it, however, is seen among

politicians and public officials. The impact of these perspectives of international law and its relation to the position of Orang Asli resource rights are further considered in Chapter 9.II.B.1.b.

Question 4: What is the most effective way to accommodate the rights of the Orang Asli in forests?

Chapter 8 surveys the approaches taken by some common law jurisdictions to address the resource rights of the indigenous peoples within them. They are Canada, Australia, New Zealand, the United States (as a collective referred to as CANZUS), India and the Philippines. The developments in these jurisdictions provide a model of practical applications on how to approach the matter of indigenous peoples' rights, in terms of contents and possible mechanisms to be used. The relevance and comparability of these jurisdictions are also considered, employing comparative law methodology as discussed in Chapter 2.IV.A. A brief comparison of approaches taken by these jurisdictions is described in the conclusion (Chapter 8.IV).

There is a significant resemblance among these jurisdictions. They were all once part of the British Empire or in the case of the Philippines, under US control which also originated in that empire and its institutions. It can be seen that the principles that developed from British practices in North America in respect to the rights of the indigenous peoples were influential in legal developments in these jurisdictions (Chapter 3.I.B).

Between the CANZUS, their common laws influence each other. Cases, especially from Canada and Australia, have been followed by judges in Malaysia to find for Orang Asli rights. As India and the Philippines have similar economic, political and social status to Malaysia, and also practise common law, they are considered as suitable for comparison. As indicated in Chapter 2, Malaysian legal and administrative systems were also directly influenced by the British practice in India. Many institutions and statutes introduced in the then Malay states were directly borrowed from India.

This comparative analysis suggests that there are important features that must be taken into account in the reform of the law affecting Orang Asli resource rights. First, the analysis suggests that a rights-based approach has been a significant feature in all jurisdictions including India and the Philippines. Second, from the perspective of distributive justice that emphasizes peoples' rights, there is a need to give proper recognition to their rights, respect their institutions and acknowledge that injustice occurred and must be corrected.

Proper recognition of them as owners of their traditional lands must be given equal status with the interests of other sections of society. In Canada and the Philippines, the indigenous peoples' rights are given recognition not only through the common law but also in constitutional provisions. With respect to the Orang Asli, the constitutional recognition of their special position should also be interpreted to include the protection of their resources rights which are partly recognized by statute, common law and policy statements (Chapter 6.I). Express statutory recognition is significant as it is a clearer written form of law which facilitates understanding and enforcement. Legislation is a 'means through which legal norms come into force and have effect'.²¹⁶ Therefore it helps to ensure that the norms are respected by all members of society. This may overcome the problem faced by the common law in Malaysia as highlighted in Chapter 2.III.B and Chapter 9.II.B.1.a.

From a rights-based perspective, recognition is significant in the sense that the distribution and re-distribution of resources to indigenous peoples occurs through the entitlement of indigenous peoples to their traditional land and not through welfare mechanisms (Chapter 4.III). The welfare approach which is adopted in Malaysia, as well as in other jurisdictions, has tended to ignore peoples' rights, created continuous dependency on government and failed to deal with the most important aspects, that is, land and resources, which provide security for the communities and for their well-being.

Respect for customs and practices of the communities, and the institutions that support them, is a significant element recognized in all jurisdictions and accepted in Malaysian common law. The manner, the content and nature of indigenous land rights which are elaborated in different jurisdictions assists understanding of how the resource rights of the Orang Asli may be approached. Variations to these should only occur after significant participation by the particular indigenous peoples involved, highlighted in the aspect of procedural justice.

The rights of indigenous peoples, as with the rights of others, also need to be balanced against other existing rights and competing values. This, in a way, reduces risks of potential conflicts which may prevent the effectiveness of reform.

It has also been increasingly recognized in all jurisdictions that a secure land base, control over their territories and access to natural resources are necessary elements for their well-being and futures. In the past, settlement agreements concentrated on

²¹⁶ L du Plessis, 'The Status and Role of Legislation in South Africa as Constitutional Democracy: Some Exploratory Observations' (2011) 144(4) *Potchefstroom Electronic Law Journal* 91, 93.

extinguishing native title in exchange for compensation. There has been a shift from this in contemporary approaches to agreement making, particularly in CANZUS, towards retaining or returning land to the indigenous peoples. In the US, and to a more limited extent in Canada, this process has led to tribal or band self-government that helps to secure a land and resource base.

Achieving restorative justice in reparations for wrongs and injustice suffered by the Orang Asli is essential. All jurisdictions studied attempt to undertake approaches to achieve this aspect of justice. These approaches are not restricted to compensation payments but include other measures necessary to secure land and resources which are not limited to traditional access. Measures have also been taken to allow indigenous communities to participate in viable economic activities on their own terms and to a share of the benefits from resources exploited from their land, at the same time, allowing them to retain their cultural and social integrity. In addition, apologies are increasingly used as part of restorative measures to achieve inter-community harmony. These measures help towards reconciliation, improving the relationship between the state and the indigenous communities.

It is also necessary to acknowledge that the indigenous peoples disproportionately share the burdens of environmental degradation and resource depletion. In all of the jurisdictions reviewed, environmental justice to the indigenous peoples is taken as a central element either in settlement agreements or in legislation. Connected to other aspects of justice, providing security for indigenous peoples' rights as well as recognizing and providing for their role in environmental management are essential in reducing the unequal share of the burdens borne by them. Associated with these elements are the rights to negotiate and to free and informed consent over the use of indigenous peoples' land and resources as promoted by the concept of procedural justice.

The analysis also suggests the need to consider the ideal of procedural justice, namely, processes that are fair and just both to the Orang Asli and to the other parties affected. These processes include the concept of participatory democracy which allows for significant participation, treats people as equals, gives them responsibility for the decision making and outcomes that affect them, gives them a voice and respects their dignity. Participatory democracy, as observed in justice theories, requires engagement in the exercise of public power that affects marginalized communities. This is because they are normally weakly represented in executive government and legislatures. It requires parties to meet to seek fair and practicable solutions allowed by the law. It not

only facilitates good outcomes but also provides voice and dignity to the marginalized. Processes that emphasize negotiation between parties reflect the presumption and recognition of the indigenous peoples as equals. People treated as equals have a self-respect that gives credence to their positions and entitlements.

This is indicated in the practice of agreement making adopted in all of the common law jurisdictions reviewed. This process reflects the same mechanism of treaty making practised in the past by nations to govern their relationships (Chapter 3). Negotiation, meaningful participation and agreement making with the indigenous groups are perceived to be essential both in the legislative process and in its implementation. This indicates respect for the autonomy of an indigenous group in their internal affairs (which varies between different peoples and jurisdictions) specifically in matters of group representation and methods of decision making.

With respect to the Orang Asli, laws and policies affecting them have been made on the assumption that they are a single group (Chapter 6.I.B.3.c(iii)). As a result, a single policy is created to address their diverse cultures and practices. This approach unfairly affects the Orang Asli communities. On the other hand, their diversity requires representation from the different groups in matters affecting them. The representation must be left to them to make using their own institution. Related to this is respect for their systems of government, leadership and decision making characterised in the right to self-determination recognized under the international law (Chapter 7.I).

The ideal therefore is of a just political system with communities' representation at all levels or at least in the states and districts that have the Orang Asli populations. However, in view of the political and social systems in Malaysia (discussed in Chapter 9.II.B.2), it is imperative at least that their representations exist in administrative bodies that deal with their interests.

The multiple processes adopted in Australia to address the limited effect of land rights and native title schemes may be relevant to Malaysian indigenous peoples whose relationship with the state was also not governed by treaties. The processes include the grant of inalienable freehold title to their existing land with secure access to resources and some control over resource extraction, a share in the benefit of resource extraction and land purchase or acquisition for their benefit.

In cases of disputes which involve evidential and substantive complexity, establishing a non-judicial process to resolve disputes has been seen as essential for the administration of justice. For many interested parties, the process provides certainty and clarity for

resource use and management. This also overcomes the problem of judicial processes and their stricter application of law that may further dispossess the indigenous communities. It allows the non-legal interests and perspectives of the parties to help shape the outcome of their dispute. The parties themselves will be able to participate effectively in shaping the outcome. It is expected that the direct participation of the indigenous peoples increases the likelihood that outcomes will endure. As Neate suggests,

the relationship that developed out of the negotiations provided the traditional owners and the governments with mechanisms for, and commitment to, an ongoing association that provided a 'lasting value ... beyond the conclusion of the Act'.²¹⁷

This approach also has the capacity to build broader, positive relationships with the Orang Asli communities, rather than relying purely on legal-based forms of engagement.

There is also a need to acknowledge that inequality exists between the indigenous peoples and the states as well as the larger groups in the society. For example, the lack of full recognition and failure to regard the indigenous peoples as of equal status to non-indigenous peoples has led to the narrow interpretation of aboriginal property rights in many jurisdictions.

Inequality also affects the indigenous peoples in litigation and the negotiation process. Action must be taken to level the playing field by building the capacity and institutions of the indigenous peoples through financial and training assistance; the change of attitude of state officials and the larger communities through institutional support and promotion of public awareness of the need to respect and protect indigenous rights for the well-being of the wider society; and good governance of the institutions that directly deal with indigenous affairs.

Courts also play an important role in promoting procedural justice. As observed in Canada and New Zealand, their role is not limited to deciding cases using substantive legal principles but also by observing that procedural justice has been satisfied. This is possible in Malaysian common law which also subjects the matters affecting fundamental liberties to procedural justice (Chapter 3.II.C).

²¹⁷ Neate, Graeme, 'Land Rights, Native Title and the 'Limits' of Recognition: Getting the Balance Right?' (2009) 11 *Flinders Journal of Law Reform* 169.

In summary, proper recognition, status and fair processes provide ways for indigenous peoples to have sufficient opportunities to negotiate to achieve just and enduring outcomes.

Question 5: What are the factors that influence effective legal transplants between donor and host legal systems in this context?

Chapter 9 analyses the future of legal reform in Malaysia should the principles and approaches identified in Chapter 8 be transferred to Malaysia. It also considers the impact of legal change on the resource rights of the Orang Asli, and, the potential towards greater recognition and protection of their rights on a rights-based approach. The analysis uses concepts from comparative law on legal transfers, namely, the concept of legal transplants and models of law as autopoietic systems. This perspective helps to understand the present situation and predicts the prospect for further legal recognition of Orang Asli land rights in Malaysia.

Scholars are divided on the factors that influence effective legal changes or transplants. From the perspective of law as an autopoietic system, legal transfers cannot directly change a legal system. Law is a self-reproducing system in a social system, autonomous from other social subsystems in the society. These systems are part of an evolutionary dynamic. Law is co-evolving within an environment made up of various social systems. This co-evolution is influenced by changes from within and outside the systems.

On the transfer of a new institution into a legal system, the system internally reconstructs its own rules including the alien elements. It may influence changes in other sub-social systems but the manner of changes depends on the nature of coupling of the new institution to other social processes. This involves the structural coupling, that is, the nature of connections or interchange of communications between the legal system and other subsystems. Furthermore, the interpretations of these changes are made according to the subsystems' own rules. The transfer of law which is closely connected to 'social processes' is prone to meet resistance in the recipient legal system. The connections of the law to other social systems are known as the law's binding arrangement.

In Malaysian legal discourse, interchange of communications, that is, the structural coupling between the common laws of different jurisdictions and between the common law and the international law, have contributed towards legal and policy changes positive to Orang Asli land rights. This also suggests that the introduction of the new or modified principles by judges using the common law technique of applying persuasive foreign

precedents to consider new legal issues may be more effective as the changes are internalised within judicial law and practice.

However, the analysis of the impact of these legal changes suggests the 'environment' has been indifferent towards these changes (Chapter 9.II.A). In light of the conceptual framework of law as an autopoietic system, there are two factors that may explain this. First, there is a lack of structural coupling between the Malaysian common law system and other systems in the Malaysian social system, especially the legislative and administrative subsystems. Therefore, further internalisation within the legal system appears restricted (Chapter 9.II.A.1). Second, the rights of minorities and indigenous peoples in land and resources are closely connected to various other social processes. These processes include politics, the economy, social make-up and culture. As a result, the introduction of the new institution of rights into the existing law's binding arrangement is prone to resistance (Chapter 9.II.B.2). On this understanding, the interactions between these social processes and the domestic circumstances are discussed.

However, a shift towards greater recognition of Orang Asli rights, partly by greater awareness towards a more pluralist and inclusive system in Malaysia may be expected. Movements within the society that may help to leverage policy changes in the government are noteworthy. Analysis also suggests that there are potentials within the local legal elites and other actors including Orang Asli social-political movements and civil society to contribute towards further internalisation of Orang Asli rights in Malaysia.

IV LIMITATIONS OF RESEARCH

This study has adopted multiple approaches to the consideration of this issue ranging from theoretical perspectives, legal doctrinal approaches, comparative law and empirical studies. These approaches are useful in developing a normative framework for the future direction of the national law relating to the rights of the Orang Asli and their access to resources. The study encountered a number of limitations:

1. The research methodology:
 - a. The doctrinal research reveals that there is a limited study of the methodology used by Malaysian judges in the interpretation of legal texts. There is also a lack of analysis of the common law as well as factors that influence its evolution in Malaysia (Chapter 2.III.B). The scope of institutional principles that inform Malaysian judges in their analytical processes has not been

subjected to comprehensive study. Understanding these principles is important in enhancing the predictability of law.

- b. The study also found that there have been conflicting perspectives among judges on the scope and meaning of the common law applicable in Malaysia (Chapter 2.III.B.3). It found that there is resistance to the common law both as a tradition and the source of law (Chapter 9.II.B.1). This position may influence its impact in practice. The extent of the application of the common law in practice has also not been subjected to a detailed study.
- c. Limited access to government documents. During research, it emerged that facts and figures for certain components of the study were difficult to obtain. Due to this factor and the limited time available for research, the study has used qualitative information and perspectives from government and non-governmental sources.

2. The Orang Asli customary laws

There are various aspects relating to the Orang Asli customary laws that limit the analysis in the study (Chapter 5):

- a. With respect to the examination of the customary laws of the Orang Asli (Chapter 5), there are different distinctive customary laws in the varied communities. This makes it difficult for the study to make generalisations on customary rights.
 - b. Furthermore, as explained in Chapter 5, little is written about the customs of the Orang Asli in legal analysis on customary laws in Malaysia. Their rights and interests in land have also not been taken into account in legal studies on land and natural resources. To overcome this limitation, this study relied on interview data and anthropological research. However, as indicated in Chapter 5.II.C, the nature of anthropological research may limit any extended legal analysis for reasons already identified. These include issues of bias or independence of observation.
 - c. The content of Orang Asli customary laws, both theoretical and conceptual aspects, as well as the rapid changes to them, present difficulties in determining aspects of the proprietary rights of the communities.
3. With respect to the empirical study, there are limited reflections of the views of the Orang Asli communities. Owing to the sensitivity of ethical issues, government concern and limited resources, a wider perspective of the aspiration and

perspectives of the Orang Asli communities on their land and resource rights is not reflected in this thesis.

V SUGGESTIONS FOR FUTURE RESEARCH

Several areas are suggested for future research as follows:

1. The issues facing the Orang Asli are extensive and complex even at the local level. In order to generate deeper legal analysis of their legal rights and their practice on the ground, there is a need for more local case studies to allow further assessment of the local dimensions of the issues.
2. In view of the limited study on the methodology used by judges in their analysis of legal texts, a detailed study on this aspect is important not only to predict the direction of the law in the area of indigenous peoples' land rights but also other aspects of law.
3. A detailed study of the common law in Malaysia, its evolution and the factors affecting its evolution as well as resistance to it, will help to fill the gap in understanding it and its implications.
4. In view of the limitations of the study in terms of Orang Asli customary laws, there is a need for further studies of Orang Asli customary law and their present practice. This includes the effect of cross-cultural influence on custom and customary laws and the social structures which support or administer them. However, it is necessary to recognize that as customary laws are naturally unwritten and develop through communications within the society, writing on customary law should not be taken to replace its oral forms.
5. It is also essential to make further analysis of custom as a source of law in Malaysia, specifically relating to land and resources, and its likely future.
6. As this study is exploratory in nature, further empirical studies on Malaysian-specific local values and perspectives on principles of justice and its relationship or non-relationship to the formulation of local laws are essential.
7. At present, the common law on land and resource rights of the indigenous peoples, both in Peninsular Malaysia and East Malaysia, is developing. The body of common law that has been established addresses a wide range of the content of land rights of the Orang Asli and other indigenous peoples in Malaysia. Further detailed studies on their access to natural resources within territories not exclusively occupied by them will help contribute towards the development of more just law.

VI CONCLUDING THOUGHTS

The study has offered an evaluative perspective on an important national and international issue of a multicultural society relating to the relationship between communities and the question of how best to co-exist together with respect and dignity. This is a significant issue in Malaysia and remains contested. However, the national discussion has not taken into account the Orang Asli communities who are very small in number and weak in political and economic strength.

The thesis suggests that a rights-based approach be undertaken in reforming the existing law to address Orang Asli interests in their land and resources. It is significant that on this approach, any mechanism should ensure a land and resource-based security and a fair process that seeks engagement with these communities, addressing aspects of distributive, restorative and environmental justice. Above all is the need to respect their status and concern on an equal level with any other interests.

To conclude, this study is significant in contributing towards the debate relating to land and resource security of indigenous peoples not only in Peninsular Malaysia but also in other jurisdictions. It offers a framework for how to approach the matter based on principles of justice, fairness and humanity. It believes that

The past can be reconstructed, the present can be interpreted and the future can be imagined with justice.²¹⁸

²¹⁸ Neil Andrews, 'Book Review: One Land, One Nation: Mabo – Towards 2000 by Frank Brennan (1995)' (1997) 21 *Aboriginal History* 242.

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Appendixes

Appendix A: Interview Schedule

Perspectives on concepts and significance

1. Do you think that the rights of the Orang Asli in their land and forests are important? Probe: Why? Do they need to be able to access forests to live?
2. Do you think other people see the rights of the Orang Asli as being as important as you do?
3. How many of them still live in or on the fringes of forests? In your experience how many are still dependent on forest resources?

The scope of the rights and interests of the Orang Asli in land and forest resources under their customary law

4. What do you think about the customs and practices of the Orang Asli relating to land and forests? Probe: How do they perceive their relationship with the land and forests? Rights to ownership? Individual or communal ownership? Can these customs be recognised in a contemporary legal system?
5. Do you think the Orang Asli want their traditional relationships to their land and forests to continue? Probe: Are they able to easily adapt their laws, customs and practices? Should they be required to change their laws, customs and practices?
6. Should the rights of the Orang Asli only be recognised in respect of their settlements or in respect of all of their traditional lands?
7. Do you see the Orang Asli as having rights in lands and forests whether or not they have been specifically granted by the state?

Existing laws, policies and practices in Malaysia

8. There is legislation dealing with the rights of the Orang Asli in the Aboriginal Peoples Act, National Forestry Act and Wild Life Act. In your experience is this body of law adequate? Probe: Should changes be made to any legislation?
9. In addition to the existing legislation are there specific policies or procedures dealing with forests occupied by them? Probe: Licenses for logging, hunting, collection of other resources? Clearance of forests for any purpose? Land acquisition and compensation?
10. In your experience, how do governments or officials deal with the land in forests occupied by the Orang Asli? Probe: For specific to interviewees representing particular government agencies eg Forest Department, Orang Asli Affairs Department Ministry of Rural and Regional Development: How does your agency regard the rights in the land occupied by the Orang Asli? Are they treated as the owners of the land or as mere occupants without legal title? Are there differences in this regard between federal and state government agencies?
11. Are there any differences between the land declared as aboriginal reserves and areas not declared as such? Probe: Are the law and practices relating to aboriginal reserves effective in protecting Orang Asli rights?

12. Do you think there should be restrictions on access to, and use of, the forests by the Orang Asli? Probe: Why? Forest and environmental protection? Equal rights with other Malaysian communities?
13. Many Orang Asli are still dependent on forests for water, for food and for other economic resources. In your experience, is this taken into consideration in government or official decision making? Probe: Do you think that it should be taken into consideration? For dams? For logging licences? For forest clearances for other purposes?
14. Are there procedures or practices for consulting Orang Asli forest communities over any projects which may affect them? Probe: Should Orang Asli communities be consulted? If a project will affect water cleanliness and a community has no other source of water, should the project proceed?
15. The federal government recently announced a policy to grant land to individual Orang Asli. What is your opinion of this policy? Probe: What do you think is the general opinion of Orang Asli communities on it? Were they consulted before the policy was announced? How might it impact on their rights in forests?
16. Do you think the Orang Asli should have the right to determine the future use of the land that they possess? Probe: Are there land uses which are so incompatible with the interests of the Orang Asli that they should have a veto over them?
17. Are there any policies, procedures or practices requiring Orang Asli communities to directly benefit from development projects on their lands including forests? Probe: Should the Orang Asli share any benefits from the commercial use or conservation use of their land including national parks?
18. Do existing laws, policies and procedures require reform to more effectively protect the interests of the Orang Asli? Probe: Would any factor justify the forced resettlement of an Orang Asli community away from their traditional lands? Would any factor justify the use of their land in a way which made it impossible for them to continue their traditional lives?
19. The courts have decided in some cases that Orang Asli communities have rights and interests in their traditional lands and forests. In your experience, have those decisions led to changes to government policies, procedures and practices?

Legal developments in Malaysia

20. In your opinion what are the major influences shaping developments in Malaysian constitutional and human rights law? Probe: Political elites? Civil servants? Lawyers? Judges? Non Government Organisations? Media including the internet? The Human Rights Commission of Malaysia (SUHAKAM)? How far can public opinion go in producing changes to the law?
21. What do you think are the major factors influencing the development of the law relating to Orang Asli land rights in forests? Probe: Forest industry interest groups? Non government organisations? Media?
22. In your opinion, should the government recognise the Orang Asli rights in land and forest resources? Probe: Should any specific rights be recognised? Should Orang Asli land to be given the same status as Malay Reserve Land? Do you think other people share your opinion?
23. What do you think are the problems or obstacles in recognising Orang Asli rights to resources in law? Probe: State governments? Industry or development interest

groups? Would the recognition of Orang Asli land rights affect the position of the Malay as indigenous peoples or *bumiputra*?

Developments in international law and other jurisdictions

24. International law is increasingly recognising the rights of indigenous peoples. Do you see these developments in international law and in other jurisdictions changing public opinion in Malaysia on what legal rights the Orang Asli should have?
25. To what degree should these developments in international law and other jurisdictions – particularly on human rights - influence policy and law making in Malaysia? Probe: Are the standards appropriate and workable in a Malaysian context? Right to property? Right to self determination? Right to self-government?
26. Should Malaysian judges look to such international law and precedents from other jurisdictions in stating the common law for Malaysia on indigenous rights? Probe: Is this something which should be left to the legislature?
27. What do you see as being the key points that an ideal policy and legal framework for the protection of the land of the Orang Asli communities should contain? Can they be seen in the present framework that Malaysia has?

Appendix B: Information to Participants



INFORMATION

TO PARTICIPANTS

INVOLVED IN RESEARCH

You are invited to participate

You are invited to participate in a research project entitled "The rights of the Orang Asli in forests in Peninsular Malaysia".

This project is being conducted by a student researcher, Izawati Wook, as part of a PhD study under the supervision of Professor Neil Andrews from the Faculty of Business and Law.

Project explanation

The aim of this study is to investigate the position of the Orang Asli and their access to forest resources under the legal framework in Peninsular Malaysia. The purpose is to analyse the existing law and influences and principles affecting its implementation and to make suggestions for its reform.

The interview will focus on the implementation of the laws and the policies by the relevant authorities, the viewpoints of those representing various stakeholders' and the future directions of changes in the law.

What will I be asked to do?

You are invited to participate in an interview which takes about 90 minutes. The interview is about your knowledge, experience and view on the practice of the laws and the policies on the access by the Orang Asli communities to forest resources in Peninsular Malaysia. It relates to both legal and policy issues. It seeks to draw on your experience with these. You are, however, not obliged to disclose anything which you are not comfortable with or answer any question which you do not wish to.

What will I gain from participating?

Your comments and your views, based on your knowledge and experience, will assist in understanding the practices in respect of relevant laws and policies relating to the rights of the Orang Asli in forests. It may also contribute to possible reform and improvements in the relevant law and its administration.

How will the information I give be used?

The information you provide will be contained in a thesis which will be available in the library of Victoria University. Also some parts of the information may be published in academic journals. Your response to questions will remain confidential. You will not be named as having participated in the research project. Your statement or comments may be republished in the thesis or the articles, but not in such a way that you, or your organization, could be identified.

What are the potential risks of participating in this project?

Minimum risks have been identified from participating in this research. Throughout the interview, if you feel uncomfortable or require some form of explanation please feel free to raise the issue with the researcher. You are free not to answer any question. However, you will not be identified as the maker or author of any statement. Also, the statement or comment will not be used in a way which will enable you to be identified. You may withdraw at any time and for any reason without prejudice.

How will this project be conducted?

To make appropriate recommendations on the issue of forest resources rights of the Orang Asli communities in Peninsular Malaysia, it is necessary to study some selected aspects of the relevant laws and policies. Collection of data for this study will involve two sources. The first source is published literature on forest resources and the customary laws of the Orang Asli communities, the existing Malaysian law, international law and the law in other jurisdictions relating to the rights of indigenous peoples. The second source is interviews with people from various categories who have experience with the Orang Asli and forest management including government, other institutions or organisation involved in forest management, legal professionals, Orang Asli representatives, representatives of related non-governmental organisations and academics.

Who is conducting the study?

The project is conducted by

Professor Neil Andrews (Neil.Andrews@vu.edu.au)

Dr Edwin Tanner (Edwin.Tanner@live.vu.edu.au) and

Ms Izawati Wook (Izawati.Wook@live.vu.edu.au)

Any queries about your participation in this project may be directed to the Principal Researcher listed above.

If you have any queries or complaints about the way you have been treated, you may contact the Ethics and Biosafety Coordinator, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone 00 03 9919 4148.

Appendix C: Consent Forms for Participants



CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH

INFORMATION TO PARTICIPANTS:

We would like to invite you to be a part of a study into, "The rights of the Orang Asli in forests in Peninsular Malaysia", to investigate the laws, policies and practices related to the issue and to consider possible proposals for their reform.

CERTIFICATION BY SUBJECT

I, _____

of _____

certify that I am at least 18 years old* and that I am voluntarily giving my consent to participate in the study: "The rights of the Orang Asli in forests in Peninsular Malaysia" being conducted at Victoria University by: Professor Neil Andrews.

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by Ms Izawati Wook.

and that I freely consent to participation involving the below mentioned procedures:

- An interview: (please choose an appropriate box:
 - In which the answer will be recorded on an audio tape; or
 - In which the answers will be recorded in the form of note taking.

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

I have been informed that the information I provide will be kept confidential.

Signed:

Date:

Any queries about your participation in this project may be directed to the researcher Professor Neil Andrews at +61(0)3 9919 1826 or Neil.Andrews@vu.edu.au.

If you have any queries or complaints about the way you have been treated, you may contact the Ethics & Biosafety Coordinator, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4148.

BORANG PERSETUJUAN PESERTA

CONSENT FORM FOR PARTICIPANTS

INVOLVED IN RESEARCH

MAKLUMAT KEPADA PESERTA:

Dengan segala hormat, kami mempelawa Tuan/Puan menyertai suatu kajian bertajuk: “Hak Orang Asli dan sumber hutan di Semenanjung Malaysia”. Kajian ini bertujuan untuk membuat penyelidikan berkenaan undang-undang, polisi dan amalan berkaitan isu tersebut bagi mempertimbangkan kemungkinan cadangan bagi penambahbaikan.

We would like to invite you to be a part of a study into, “The rights of the Orang Asli in forests in Peninsular Malaysia”, to investigate the laws, policies and practices related to the issue and to consider possible proposals for their reform.

PERAKUAN OLEH PESERTA

CERTIFICATION BY SUBJECT

Saya _____

beralamat _____

I, _____

Of _____

memperakui bahawa saya berumur 18 tahun ke atas dan saya dengan sukarela memberi persetujuan untuk menyertai kajian tersebut: “Hak Orang Asli dan sumber hutan di Semenanjung Malaysia” yang dijalankan di Universiti Victoria oleh Professor Neil Andrews.

certify that I am at least 18 years old* and that I am voluntarily giving my consent to participate in the study: “The rights of the Orang Asli in forests in Peninsular Malaysia” being conducted at Victoria University by Professor Neil Andrews.

Saya memperakui bahawa objektif kajian, beserta dengan sebarang risiko dan kaedah untuk mengatasinya berkaitan dengan prosedur kajian telah diterangkan dengan sepenuhnya oleh Puan Izawati Wook.

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by Ms Izawati Wook.

Dan saya dengan sukarela menyertai kajian ini yang membabitkan prosedur berikut:

and that I freely consent to participation involving the below mentioned procedures:

- **Temubual: (sila pilih kotak yang sesuai):**
 - jawapan akan direkodkan oleh alat perakam suara; atau
 - jawapan akan direkodkan dengan tulisan tangan.
- **An interview: (please choose an appropriate box):**
 - In which the answer will be recorded on an audio tape; or
 - In which the answers will be recorded in the form of note taking.

Saya memperakui bahawa saya diberi peluang untuk mengemukakan sebarang persoalan dan saya faham bahawa saya boleh menarik diri pada bila-bila masa dan penarikan diri tersebut tidak akan memberi kesan negatif kepada saya dengan apa cara sekalipun.

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

Saya juga dimaklumkan bahawa maklumat yang saya berikan adalah dianggap dan dikendalikan secara sulit.

I have been informed that the information I provide will be kept confidential.

Tandatangan:

Signed:

Tarikh:

Date:

Sebarang pertanyaan berkenaan penyertaan Tuan/Puan dalam projek ini boleh dikemukakan kepada Professor Neil Andrews melalui telefon 61 3 9919 1826 atau emel Neil.Andrews@vu.edu.au.

Any queries about your participation in this project may be directed to the researcher Professor Neil Andrews at 61 3 9919 1826 or Neil.Andrews@vu.edu.au.

Sekiranya Tuan/Puan mempunyai sebarang aduan tentang layanan yang diterima, Tuan/Puan boleh menghubungi Ethics and Biosafety Coordinator, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001, no telefon: 61 3 9919 4148.

If you have any queries or complaints about the way you have been treated, you may contact the Ethics & Biosafety Coordinator, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone 61 3 9919 4148.

Appendix D: List of Interviewees - according to date

No	Code	Date of interview	Background
1	INT01	28 Apr 2011	A PhD Researcher, a researcher on Community Development focusing on Orang Asli communities, also an activist involved in Islamic missionary among Orang Asli
2	INT02	29 Apr 2011	A university lecturer and a PhD researcher on land transactions involving Orang Asli
3	INT03	3 May 2011	A member of a state Orang Asli Association; former committee member of Graduate Association of Orang Asli Malaysia; member of a state Indigenous Peoples Bureau of a political party; observer in Committee of Orang Asli Rights, Malaysian Bar Council (2011/12); blogger
	INT04	9 May 2011	A sociologist and anthropologist focusing on Orang Asli communities and natives at Sabah and Sarawak; consultant at a national project on social effect of the project affecting Orang Asli.
4	INT05	13 May 2011	A senior officer at Orang Asli Advancement Department (Kuala Lumpur)
5	INT06	23 May 2011	Member, Committee of Orang Asli Rights, Malaysian Bar Council; researcher and pro bono lawyer focusing on Orang Asli claim cases; researcher on Orang Asli land rights issue.
6	INT07	25 May 2011	A senior officer at Forestry Department of Peninsular Malaysia
7	INT08	26 May 2011	A senior officer at Orang Asli Advancement Department (State of Pahang)
8	INT09	10 June 2011	A leader of an Orang Asli association.
9	INT10	13 June 2011	A Federal Court judge; formerly Legal Advisor and Legal Officer in many states.
10	INT11	14 June 2011	Officers/managers of Department of the Protection of Wild Life and National Parks (a meeting)

11	INT12	14 June 2011	Colin Nicholas, PhD, Director, Centre of Orang Asli Concern (an active NGO advocating the Orang Asli cause); activist, researcher, anthropologist and sociologist focusing on Orang Asli communities.
12	INT13	17 June 2011	A lawyer; an active Orang Asli activist; a council member of the Orang Asli Development Advisory Council, a think-tank set up by the Rural and Regional Development Ministry.
13	INT14	21 June 2011	A sociologist and researcher focusing on Orang Asli communities in Forest Research Institute Malaysia
14	INT15	26 June 2011	A member of Dewan Negara, Parliament
15	INT 16-20	27 June 2011	5 Orang Asli student representatives at a higher learning institution. They are from Kelantan, Pahang and Johor
16	INT21	27 June 2011	A senior officer at Department of Wild Life and National Parks Protection
17	INT22	5 July 2011	A law lecturer; and researcher focusing on native land laws in Sabah and Sarawak.
18	INT23	6 July 2011	A High Court judge, also presiding judge for the case involving claim by the Orang Asli; also a former Legal Advisor involved in an Orang Asli case.
19	INT24	7 July 2011	A former dentist working for many years with the Orang Asli communities at Kelantan, Pahang and Perak; (at present is a lecturer).
20	INT25	11 July 2011	A Commissioner at Malaysian Commission of Human Rights (Suhakam).
21	INT26	12 July 2011	Researcher and lecturer in forestry – focusing on the Orang Asli communities living in the forest
22	INT27	19 July 11	A senior officer at Land and Mineral Department – the department's main role is to assist with the land acquisition for the government ministries and departments.
23	INT27	19 July 11	A legal advisor of at a Land and Mineral Department
24	INT28	19 July 11	A senior member of Malayan Nature Society

25	INT29	19 July 2011	A senior member of the Association for Orang Asli Graduates; also a member of Orang Asli Consultation Council, Ministry of Rural Development Malaysia.
26	INT30	22 July 2011	A researcher focusing on marginalized communities, development and environment.
27	INT31	2 August 2011	A forestry officer at a Department of Forestry
28	INT32	9 August 2011	Member of a State Assembly; politician.
29	INT33	9 August 2011	Orang Asli representative; an active member of Orang Asli Network Peninsular Malaysia (JOAS)
30	INT34	16 August 2011	Orang Asli representative; an active member of Network of Orang Asli Villages, Peninsular Malaysia (JKOAP)
31	INT35	19 August 2011	An officer at Malaysian Timber Council
32	INT36	24 August 2011	A priest involved in works involving the Orang Asli (not necessarily missionary work)
33	INT 37	26 August 2011	Lawyer; counsel for Plaintiffs in an Orang Asli case.
34	INT38	7 September 2011	Professor of sociology and anthropology focusing on marginalized communities in Malaysia especially Orang Asli.