

# The Orang Asli Customary Land: Issues and Challenges

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## ABSTRACT

*This paper briefly explains the unique relationships of Orang Asli with the customary land. It further demonstrates the common views that there is a collision between the Orang Asli notion of land ownership and that of the state. In particular the discussion highlights the interpretation of customary tenure under section 4 (2) (a) of the National Land Code, 1965 and its significance with the Orang Asli customary land. The paper also discusses the application of the United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP) to the new Orang Asli Land Policy and how it affected them.*

**Keywords:** *Indigenous people, Orang Asli, land law and customary tenure*

## Introduction

Customary land is the term used to refer to a defined area which an indigenous people identifies as its territories areas or ecosystem. The territory is considered as customary by virtue of its prior occupation, utilization and settlement by indigenous community in accordance with their customary laws and practices, since time immemorial. It includes, but is not limited to, the land *per se*, as used for shelter and residence, agriculture and subsistence, burial and other ritual purposes. It also includes the water and all other natural resources found on the surface and underneath these lands.

In the strict sense, a customary or traditional land refers to a specific human-nature symbiosis as a particular community of indigenous people have adapted to a specific environment and made it their own. In Malaysia context, this is best illustrated in the Orang Asli areas. The Orang Asli traditionally identifies themselves in relation to specific territories which they have occupied by generations. They identified themselves by their specific ecological niche.<sup>1</sup>

The Orang Asli, like others indigenous peoples view customary land as a cornerstone in their life.<sup>2</sup> They regard customary land has a sacred quality that contains their history and sense of identity and ensures their survival in the subsistence economy. Mohawk expressed the importance of customary land to indigenous peoples can be summarized as follow;

*“Our roots are deep in the land where we live...The soil is rich from the bones of thousands of our generations. Each of us were created in those lands, and it is our duty to take great care of them, because from these lands will spring the future generation.”<sup>3</sup>*

This unique relationship of indigenous people with their customary lands is recognized internationally. For example, the United Declaration on the Rights of Indigenous Peoples (UNDRIP) contains extensive provisions for the recognition and protection of indigenous customary lands, territories and resources.<sup>4</sup>

The profound relationship that the Orang Asli have to their land are no longer a domestic issues but has become the subject of international concern. Thus, there is a need to understand the notion of customary land in the light of Orang Asli perspective. This is pivotal especially in the case of policy makers to formulate land policy for the Orang Asli advancement. In a similar vein, Kamal Malhotra, United Nation resident coordinator for Malaysia advises that policy makers should have knowledge about indigenous communities so that they could come up with more inclusive laws.<sup>5</sup>

## The Orang Asli and the Relationship with Customary Land

The term Orang Asli literally means the 'original' inhabitants of the land.<sup>6</sup> It is a generic term used as official designation to refer to all aboriginal tribes in Peninsular Malaysia.<sup>7</sup> In other words, the aboriginal people in Malaysia are not homogeneous group. They consist of three main communities, viz; *Negrito*, *Senoi* and *Proto Malay*, which are further classified into eighteen distinct sub-communities.<sup>8</sup> These sub-communities have many differences in political, economic, social and cultural aspects.<sup>9</sup>

Despite of the differences they have something in common viz; customary lands. These are the lands that Mohktar Sidin JCA in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* mentioned as:

*"... unclaimed land in the present sense but were 'kawasan saka' to the aboriginal people... [the Orang Asli] had lived on these lands, and all of them still consider the jungle as their domain to hunt and extract the produce of the jungle just like their forefathers had done."*<sup>10</sup>

Thus, it can be inferred from the case that customary land are lands belonging to the Orang Asli and occupied, use, improve and settled by them for generations. They inherited these lands from their ancestors and lived on the lands as their forefathers had lived.<sup>11</sup> In a similar fashion, Mohd Noor Ahmad J. in *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* goes a step further by declaring that although, the Orang Asli have no longer depended on foraging or cultivated traditional crops these factors do not change the status of the customary land.<sup>12</sup> What is significance is that they have inherited the land from their ancestors through their own *adat* (custom).<sup>13</sup>

As such, the Orang Asli has a unique relationship with their customary land. To this effect, Zawawi noted that the Orang Asli spiritual and culture identity is intricately tied to a pre-capitalist notion of land, the concept of ancestral or customary land (*tanah saka*) where the land is not economic base but also has both cultural and symbolic value.<sup>14</sup> In a similar vein, Rameli Dollah, and Orang Asli has this to say regarding his relationship with customary land.

*“Land is the lifeline of Orang Asli...To chase Orang Asli from their land means to destroy their identity and life...”<sup>15</sup>*

This shows that the Orang Asli community has unique relationship with the customary land. They view land as a source of material and non-material culture, which symbolizes their identity.<sup>16</sup> Similarly, Crocombe in his study of changes in the Pacific land tenure aptly remarks:

*“...[land] gave people an identification, a place to belong.”<sup>17</sup>*

Significantly, the Orang Asli regards land as a symbol of pride and seniority in the area.<sup>18</sup> As such, they have symbolic and emotional ties with the land.<sup>19</sup> They claim they have a spiritual relationship with the land since the content of the soil contains the bodies of their ancestors.<sup>20</sup> To the Orang Asli rights to customary land involves a complex of responsibilities towards both kith and kin and departed ancestors who had worked and used the land. Therefore, land is a living entity which is dear and precious and holds a very deep and spiritual meaning to the Orang Asli community.

## **Collision between Orang Asli Land Ownership and That of the State**

As mentioned above, land is a source of life and is vital survival of Orang Asli. Besides material, Orang Asli considers land as special social significance. It defines a social relation through common ‘ownership’ of land that a group is bound into society.<sup>21</sup> However, Roseman claims that Orang Asli emphasize on the rights to utilize the land instead of land ownership.<sup>22</sup> Similarly, Juli in his study of *Semai* community states that the *Semai* view land as foundation of rights, such as rights to reside and to farm.<sup>23</sup>

Under the Orang Asli customary practices, each community had a right to land, namely a right to occupation and exploitation in the general territory belonging to the community. In *Semai*, the general territory is known as *negri*. A *negri* in turn composed of smaller territories called *saka*’ (hereditary land). These are usually the valleys of smaller tributary streams and are owned by groups of kinsman. Every member is related to each other by blood or marriage and has right to their own *negri*. This means the *Semai* have proprietary rights to live, plant, harvest, hunt, fish and be buried in the *negri*.<sup>24</sup>

Recognition on these rights are based on communal rights upon occupation and imbedded in their customs. However, individual household ownership may be carved out of communal right. For example, Juli claims that when the *Semai* become involved in cash crops cultivation they begin to adopt new concept of land rights, in which land is regarded as a possession to the family that plants the crops.<sup>25</sup>

In contrast, recognition of the state is premised on notion of individual ownership of property based on registration of title as provided by the National Land Code 1965.<sup>26</sup> This illustrates that registration of title is pivotal in order for a person to claim ownership of land. However, the Code in its saving clause section 4 (2) (a) mentions that the Code shall have no effect on the provisions of any law for the time being in force relating to customary tenure. The question arises here is whether the Orang Asli customary land tenure could be fall under this provision. If the answer is affirmative; the Orang Asli customary land tenure is not subjected to the Code as it operates outside the registration system. On the other hand, if the above question is negatively answered than the Orang Asli customary land tenure will come under the purview of the Code.

To this effect, Hunud is rightly pointed out that section 4 (2) is an overriding provision which relates to a **set of statutes** that demonstrate curbing effect on the scope of the application of the National Land Code.<sup>27</sup> Historically, some writers claim that this section demonstrates the British colonialists' recognition given to personal law, which from the First Charter of Justice in Penang continuing until today under section 3(1) of the Civil Law Act 1956.<sup>28</sup>

This section provides that law to be applied in Malaysia is that of the English Common Law and Equity as in force on 7 April 1956. However, the application of the English Common Law and equitable principles and any statutory rules 'shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitant permit and subject to such qualifications as **local circumstances** render necessary.'<sup>29</sup> On this point, Hunud presumed that local circumstances means indigenous custom which will act as mitigating factors to any imported rules of English common law, equitable principles or statutory rules.<sup>30</sup>

A perusal of section 3(1) of the Civil Law Act 1956 shows that it is open to Malaysian courts to apply the common law principles of England subject to any prohibition contained in the law and such qualifications as local circumstances render necessary. To this effect, Subramaniam argues that there was plenty of leeway for the Malaysian Courts to do so given the special position of Orang Asli under the Federal Constitution, the lack of any express provisions of the National Land Code that deal with the rights, tenure or incidents of customary title and the failure of the Aboriginal Peoples Act 1954 to deal with land rights in relation to an aboriginal inhabited place.<sup>31</sup> For example, Mohd Noor Ahmad J in *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*<sup>32</sup> while commenting on the word 'land occupied under customary right' in section 2 of the Land Acquisition Act 1960, had this to say as regard to section 4 (2) of the National Land Code 1960:

*"The National Land Code—A Commentary'...(in particular, in respect of customary tenure referred to in s 4(2) of the Code as that of the tribal adat in force in Negari Sembilan and Malacca), in my view, it does not mean that the land cannot fall within the definition, because the Code and the enactments were enacted and the book was written before the Adong case was decided at the time when natives titles were unknown to our law."*<sup>33</sup>

Similarly, it is submits that:

*"...[section 4 (2) (a)] provides only for protection of dealings and rights established over a special category of land with designated geographical areas and which are classified for the purposes of the section as customary lands."*<sup>34</sup>

By the same token, Subramaniam in discussing this section concludes that:

*"...[to determine] whether there is any provision in the NLC that expressly extinguishes the per-existing rights of the Orang Asli over state land in clear and unambiguous words and the answer is clearly no."*<sup>35</sup>

These view suggested that section 4 (2) (a) may include Orang Asli customary land. It is to be remember that unlike the land title registered under the Code, the *sui generis* nature of Orang Asli customary land title require the courts to look at Orang Asli rights under common law and the statute conjunctively in order to determine the extent of Orang Asli customary rights to land, for both rights are complementary.<sup>36</sup>

Furthermore, it is noted that that the introduction of the Torrens title system of registration does not necessitate the extinguishment of native title as it lacks a clear and plain intention to do so.<sup>37</sup> In addition, an examination of the National Land Code and the preceding legislation does not disclose any clear and unambiguous words suggesting that the Orang Asli rights have been extinguished.<sup>38</sup>

In the contrary, Sihombing in her commentary on the National Land Code 1965, analyses section 4 (2) (a) by stating that:

*“Land held under the incidents of customary tenure, which incidents are given paramountcy by section 4 (2) of the Code, refers to [firstly] Negeri Sembilan tribal lands... [secondly] are those of adat perpatih Naning [in Malacca].”<sup>39</sup>*

Therefore, it is clear that the lands over which special customary tenure rules are acknowledged by the National Land Code are those Negeri Sembilan tribal lands and Malacca Naning Customary Land. By the same token, Hunud concluded that:

*“... [this provision] represent a policy trend adopted by the legislature since the advent of the British colonial administration to preserve certain customary laws relating to certain types of tribal lands. The extent of such preservation... the nature of the land covered by such customary practices was not left to develop at the whims of individual parties but always been provided for in some written enactments.”<sup>40</sup> [emphases added]*

Both writers concur that in order for the customary land tenure to be subjected to the provision it must be written in enactments or ordinances. For example, the Negeri Sembilan tribal tenure was regulated by the Customary Tenure (State of Negeri Sembilan) Ordinance 1952 and Malacca Naning Customary land was governed by the Customary Tenure of Land (Settlement of Malacca) Ordinance 1952.<sup>41</sup> In other words, the definition of customary tenure in section 4(2) (a) was general and intended to apply to what existed under previous state laws, still in force.

agreeing with Sihombing, Sethu reiterates that section 4 (2) of the Code should be confined to land held under customary tenure in Malacca and Negeri Sembilan as it refers to rights already provided for under the legislation and not new rights.<sup>42</sup> It was not intended to create or revive what has ceased to exist prior to or with the introduction of the Torrens system.<sup>43</sup> However, as mentioned above the argument that the National Land Code and its preceding legislation did not recognize Orang Asli customary tenure is fails. This is because to recapitulate, the concept of Orang Asli title has its origins in customs and traditional laws and does not owe its existence to statutes as it existed long before any legislation.<sup>44</sup>

In addition, the above writers failed to discuss the possibility whether the Orang Asli customary tenure may be included in section 4 (2) (a) of the Code. This is probably because the book and article were written before the *Adong* case whereby prior to this case the Orang Asli customary land titles were unknown in Malaysia jurisdiction. Mokhtar Sidin JCA has emphasized this matter in *Adong bin Kuwau v Kerajaan Negeri Johor*, which he mentioned that:

*“...I believe that this is the first case in this country where the aboriginal people [Orang Asli] have sued the government for their traditional rights under law.”<sup>45</sup>*

Thus, this is the landmark case in Malaysia which recognized the Orang Asli customary land rights. Incoming to its decision, the court drew upon decisions from other common law countries such as Australia and Canada whose land law is based on formal registration systems similar to that adopted by Malaysia.<sup>46</sup>

The next section briefly study the rights of indigenous people particularly the Orang Asli customary land rights contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that Malaysia voted for both at the Human Rights Council and General Assembly level.<sup>47</sup>

## **The Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007**

It is stated that approximately there are 370 million indigenous peoples spanning 90 countries, worldwide.<sup>48</sup> Historically, they shared common features, viz; often been dispossessed of their lands, in the center of conflict for access to valuable resources or struggling to live the way they would like.<sup>49</sup> In short, indigenous peoples are amongst the disadvantage people in the world. Fortunately, on 13 September 2007 the UNDRIP was adopted by the United Nation General Assembly, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).<sup>50</sup> Anaya and Wiessner mentioned that the United Nation General Assembly landslide adoption of the UNDRIP is a milestone in the re-empowerment of the world's aboriginal groups.<sup>51</sup> Although, the UNDRIP is not a legally binding instrument to the member states it have a major effect on indigenous peoples worldwide in regards to their rights.<sup>52</sup> To this effect, the United Nation aptly describes the UNDRIP as setting:

*“...an important standard for the treatment of indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations against...indigenous peoples and assisting them in combating discrimination and marginalization.”<sup>53</sup>*

The UNDRIP encompass of comprehensive provisions for the recognition and protection of the lands, territories and resources for the indigenous peoples. Subramaniam<sup>54</sup> encapsulates these provisions into three broad principles, namely;

(a) the UNDRIP calls for ownership, use, develop and control of indigenous lands, territories and resources with due respect to customs, traditions and land tenure systems of indigenous persons concerned;<sup>55</sup>

(b) indigenous peoples shall have the right of consultation, participation and free prior and informed consent in matters affecting their lands, territories and resources;<sup>56</sup>

(c) it also provides for protection from relocation from indigenous lands, territories and resources and just and equitable redress for dispossession of lands, territories and resources.<sup>57</sup>

These principles emphasize that the UNDRIP bestow special recognition and protection for indigenous land. Thus, this article intends to discuss the effect of the UNDRIP on the Orang Asli in Malaysia especially those provisions relating to their customary land rights.

## **The Effect Of UNDRIP On the Orang Asli Community**

To reiterate the UNDRIP is a non binding document to its Member States, but it has a lot of persuasive value in that it is a tool for recognizing and protecting the Orang Asli customary lands, culture, tradition and identity. As mentioned above, Malaysia's vote in favor of UNDRIP has created a moral obligation and genuine expectation for it to pursue the standards contained in the UNDRIP in the spirit of partnership and mutual respect.<sup>58</sup>

In context of Malaysia, even though the Orang Asli holds a special position under the Malaysian Constitution, they remained unprotected in terms of land tenure over their customary lands.<sup>59</sup> Therefore, the persuasive authority of the UNDRIP on the Malaysian courts cannot be denied given the special position of the Orang Asli and their customary lands under the Malaysian Constitution and Malaysia's strong support for the UNDRIP in the United Nations.<sup>60</sup>

On a similar note, Subramaniam succinctly writes;

*"...to consider the provisions of the Declaration on Indigenous Rights in relation to Orang Asli traditional lands would nonetheless require a certain degree of judicial activism, something that, against the run of play, is found in abundance in the recent jurisprudence on Orang Asli land rights."*<sup>61</sup>

It is indeed true, that judicial activism is an impetus mechanism not only in recognizing and protecting the Orang Asli customary lands right but more importantly the Malaysian courts decisions generally in harmony with Article 26 of the UNDRIP. For example, Mokhtar Sidin JCA in *Adong Bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* rule that the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to these rights of their forefathers.<sup>62</sup> In addition, Subramaniam notes that the aboriginal customary titles originate before the establishment of a state and depends on the *adat* (custom) of each individual community rather than the state is in line with Article 26 para 3 of the UNDRIP.<sup>63</sup>

Therefore, it is clear that the decision of Malaysian courts in protecting and recognizing the Orang Asli customary land rights seems to harmonize with the spirit of UNDRIP. However, on the other side of the coin the government 'new Orang Asli land policy' seems to be against the basic principles of the UNDRIP. The new Orang Asli land policy if fully implemented will entitle them to get individual land title and convert the Orang Asli individual households into homogenous palm oil small holder. In addition, this policy also would result in loss of customary lands and consequently have devastating socio-culture effects on Orang Asli culture and identity.<sup>64</sup>

## **The New Orang Asli Land Policy**

The President of the Peninsular Malaysia Orang Asli Association (POASM), Majid Suhut convinced that the key to the advancement of his people is the security of land tenure.<sup>65</sup>

However, the Orang Asli has no registerable title to the customary lands. The insecurity of the customary land tenure has adversely affected the Orang Asli land rights and interests.

Firstly, they can be evicted whenever their lands are taken by other interests. Secondly, they are precluded from exercising their rights over fruit trees and other sources of income that are found in their areas. Lastly, they cannot get assistance from the government agencies to improve the land. Additionally, lack of land titles prevents the Orang Asli from using their land as capital. Without capital the Orang Asli cannot embark on any undertaking, especially business to further their economic status.<sup>66</sup> Apparently, these circumstances will not enhance the well being of the Orang Asli.

In addressing the issue of the Orang Asli insecurity of customary lands, the government has proposed the New Orang Asli Land Policy. Under the proposed policy, each Orang Asli head of household would be granted 2.5 hectares of plantation land and 0.1 hectares for housing.<sup>67</sup> With this Orang Asli Land Policy, the Rural and Regional Development Minister hopes that poverty among the Orang Asli can be eradicated as they will have a sense of ownership and responsibility towards their lands.<sup>68</sup>

The policy was announced by the Deputy Prime Minister Tan Sri Muhyiddin Yassin on 4<sup>th</sup> December 2010 was protested by most of the Orang Asli.<sup>69</sup> The Orang Asli dissatisfaction with the proposed policy finally manifested itself in the March 17 protest and a memorandum to the government setting out their demands.<sup>70</sup> Since then, the government has not yet come back with any proposal in respond to these demands.<sup>71</sup>

Commenting on the Orang Asli New Land Policy, Salleh claims that the alienation of land exercise under the policy is questionable.<sup>72</sup> For example, the Orang Asli agriculture plots will be cultivated by a third party before it can be handed over to the Orang Asli families, after the oil palm matures. The question arises whether the Orang Asli have the choice in the selection of the entrusted entity or what if they decided to cultivate the lands on their own, will the land be taken back from them. Obviously, the posed question could not be answered as the intended alienation exercise was planned without the consultation of the Orang Asli representatives or associations.

To make thing worst, the lands assigned to the Orang Asli under the policy is on the basis of 99 years lease. To this effect, Nicholas rightly pointed out that:

*“Nothing as such, can be more graphic of the Orang Asli’s fate then this twist in the knife; that their inalienable right to their land now has an expiry date.”<sup>73</sup>*

To rub salt on the injury, the deputy Prime Minister Tan Sri Muhyiddin Yassin states that the land policy plan bars those awarded the land grants from filling any claims in court.<sup>74</sup> This impliedly indicates that the Orang Asli are at the losing point. Thus, not only they are losing their customary lands but significantly this restriction is against the Federal Constitution, where it guarantees the right of every citizen to access to legal justice.<sup>75</sup> On the same note, the former president of Bar Council Ambiga Sreenevasan lamented the restriction recourse to the court, and succinctly described the land policy as a:

*“...terrible bargain to the Orang Asli.”<sup>76</sup>*

On the other hand, it is observed that the proposed land policy may be intended to circumvent the courts declaration that recognizing the Orang Asli customary land rights.<sup>77</sup> By the



courts declaration not only the Orang Asli community as a whole but the activists and legal fraternity.

Thus, it can be concluded that the proposed Orang Asli Land Policy will not benefit the Orang Asli community. The policy, instead of recognizing the Orang Asli land rights, it has actually depriving the Orang Asli from their customary lands.

Nonetheless, Janie Lasimbang notes that more courts in the Peninsula had ruled in favour of Orang Asli customary land rights.<sup>78</sup> For example, the Malacca High Court granted leave for Harby Siam to initiate judicial review proceedings against the Alor Gajah Municipal Council's decision to demolish a chapel built on Orang Asli customary land at Kg. Machap Umboo.<sup>79</sup> Recently, the panel of Appeal Court judges granted to stay order on an eviction order against a group of 118 Jakun residents of Kg. Peta in Endau-Rompin National Park, issued on January 17 this year by the Mersing Land Administrator.<sup>80</sup> These decisions are good sign in giving moral boost to the Orang Asli struggle for their land rights and to bring about positive change to policies and laws relation to such rights.

## Conclusion

It is high time for the government to think 'outside the box' and explore the notion that Orang Asli progress lies in empowering Orang Asli over their customary lands. As such, the government policy relating Orang Asli should be complied with the standard set out in the UNDRIP. To reiterate, Malaysia voted twice in favour of the UNDRIP and this creates a moral obligation and genuine expectation for it to pursue the standard contained in the UNDRIP in the spirit of partnership and mutual respect. Therefore, it is timely for Malaysian government to keep the promise- to upgrade the Orang Asli standard of living to be at par with others community.

## Notes

- <sup>1</sup> This term is used by Tachimoto, N. M., quoted in Nicholas, Colin, *The Orang Asli and the contest for resources: Indigenous politics, development and identity in Peninsular Malaysia*, International Work Group For Indigenous Affairs, 2004, at 12. It refers to a particular geographical space that has specific ecology identity that is related to a sense of place for its inhabitants.
- <sup>2</sup> Hong, E., *Natives of Sarawak survival in Borneo's vanishing forest*, Institute Masyarakat Malaysia, 1987, at 37.
- <sup>3</sup> Mohawk, J., *A basic call to consciousness: Indigenous people's address to the western world*, Citizens international, 2002, at 8.
- <sup>4</sup> United Nations Declaration on the Rights of Indigenous Peoples, at <<http://iwgja.synkron.com/graphics/synkron-Library>> viewed on 9<sup>th</sup> August 2011. In particular see article 26 paras 1, 2 and 3 respectively.
- <sup>5</sup> Fong, D. R., "Pairin: Communities should also rationalize," *The STAR*, 10<sup>th</sup> August 2011, at 26.

- <sup>6</sup> There are many academic discussion relating to the meaning of Orang Asli, see; Iskandar Carey, *Orang Asli: The aboriginal tribes of Peninsular Malaysia*, Oxford University Press, Kuala Lumpur, 1976, at 3; Jimin Idris *et. al.*, *Planning and administration of development programmes for tribal peoples (The Malaysian setting)*, Center on Integrated Rural Development for Asia and the Pacific, Kuala Lumpur, 1983, at 3; Benjamin, Geoffrey, "On being tribal in the Malay world" in Benjamin, Geoffrey and Chou, Cynthia (eds.), *Tribal communities in the Malay world: Historical, cultural and social perspective*, (Singapore: Institute of Southeast Asian Studies, 2002), at 12; Gomes, Alberto, *Modernity and Malaysia: Settling the Menraq forest nomads*, Routledge Taylor and Francis group, 2007, at 17; Baharon Azahar Rafee'I, "Parit Gong: An Orang Asli community in transition." (Ph.D. dissertation, University of Cambridge, 1973), at 1.
- <sup>7</sup> Jimin Idris *et. al.*, n.6 at 29, see also; Article 160 (2) of the Federal Constitution.
- <sup>8</sup> Jabatan Penyelidikan dan Perancangan Jabatan Hal Ehwal Orang Asli Malaysia, Data maklumat asas Jabatan Hal Ehwal Orang Asli Malaysia, Bahagian Penyelidikan dan Perancangan Jabatan Hal Ehwal Orang Asli Malaysia, 2004, at 8. It mentioned that the Negrito are subdivided into six communities, viz; *Kensiu, Kintak, Jahai, Lanoh, Mendriq* and *Bateq*. Similarly, the Senoi and the Proto-Malay are also subdivided into six communities, namely, *Semai, Temiar, Jah Hut, Che Wong, MahMeri* and *SemoqBeri*; *Temuan, Semelai, Jakun, Orang Kanaq, Orang Kuala* and *Orang Seletar*. These communities have many differences in term of economic, political, social and cultural aspects.
- <sup>9</sup> Nicholas, Colin, *The Orang Asli and the contest for resources: Indigenous politics, development and identity in Peninsular Malaysia*, International Work Group For Indigenous Affairs, 2000, at 17.
- <sup>10</sup> [1997] 1 MLJ 418 at 430.
- <sup>11</sup> Id.
- <sup>12</sup> [2002] 2 MLJ 591 at 606.
- <sup>13</sup> Id., at 609.
- <sup>14</sup> Zawawi Ibrahim, "Orang Asli identity in the nation state," JMCL vol. 25, 1998, at 175-188.
- <sup>15</sup> Rameli Dollah, "Orang Asli tiada tanah, tiada jatidiri, diterkam pembangunan dan terjun kedalam kemiskinan," Unpublished Conference Papers Presented at Persidangan tanah dan jatidiri Orang Asal seMalaysia, Faculty of Law University of Malaya, Kuala Lumpur, 2-3 September 1996, at 2.
- <sup>16</sup> Williams-Hunt, Anthony, "Land conflicts: Orang Asli ancestral land and state policies," in Razha Rashid (ed.), *Indigenous minorities of Peninsular Malaysia: Selected issues and ethnographies*, (Kuala Lumpur: Intersocietal and Scientific Sdn. Bhd., 1995), at 36.
- <sup>17</sup> Crocombe, R., *Land tenure in the Pacific*, Oxford University Press, 1971, at 4.

- 18 Juli Edo, "Claiming our ancestors' land: An ethnohistorical study of *Seng-Oi* land rights in Perak Malaysia," (Ph.D. dissertation, Australia national University, 2004), at 36.
- 19 Iskandar Carey, *Orang Asli: The aboriginal tribes of Peninsular Malaysia*, Oxford University Press, 1976, at 42.
- 20 Juli, n. 18 at 26.
- 21 Williams-Hunt, n.16 at 36.
- 22 Roseman, Marina, "singers of the landscape: Song, history, and property rights in the Malaysian rainforest," vol. 100 no.1 (1998) *Pro Quest Social Science Journal*, at 12.
- 23 Juli, n.18 at 24.
- 24 Id., at 34.
- 25 Id., at 144. The changes of the concept of land ownership can also been seen in other Orang Asli sub groups for example, the *Batek* believe the land was created for all people to use regardless the *Batek* or non *Batek*. However, the *Batek* recognize a special connection between each individual and certain place which they called *pesaka* (inheritance). The term *pesaka* refers to the area to which people have strong sentimental ties such as their birth place or place which a person grew up, even though they may be living far away from it. They have a right to live in their *pesaka*, but there is no sense in which the person who shares the *pesaka* can claim a collective right of ownership or custodian over it. The recognition of the *pesaka* concept indicates a change in land holding from non possession to a minimum degree of land ownership in particular area or territory. See; Endicott, K. 2005, "Property, power and conflict among the *Batek* of Malaysia" <<http://www.peacefulsocieties.org/Archtext/Endic88.pdf>> viewed on 18 August 2011.
- 26 Section 340 (1) of the Code provides "The title interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible."
- 27 Hunud Abia Kadouf, "The relevance of section 4(2)(a) of the National Land Code, 1965, to the *Jual Janji* customary security transaction: A call for discussion." vol. 5 no. 1& 2 (1995) *IJUM Law Journal*, at 23.
- 28 Id., at 24; Sihombing, Judith, *National Land Code: A commentary* (Second Edition), Malayan Law Journal, 1992, at 81.
- 29 See; the proviso to section 3 of the Civil Law act 1956.
- 30 Id., n. 27 at 24.
- 31 Subramaniam, Yogeswaran, "A review of 'The Orang Asli cases and property rights': An aboriginal title perspective," [2007] 7MLJ i at xi-xii.
- 32 {2002} 2 MLJ 591.

<sup>33</sup> Id., at 617. The High Court of Temerloh in *Wet Ket & Anor v Pejabat Daerah & Tanah Temerloh* decided that the status of the land which the said building has erected will be determined whether the provisions of the National Land Code apply. Section 4 (2) (a) was mentioned however, Akhtar Tahir JC did not elaborate further this section in light of the Orang Asli customary land tenure. See; [Originating Summons No: 25-12-2007] 8 March 2010 [2010] CLJ JT(1) <<http://www.cjljlaw.com/public/cotw-100416.htm>.>viewed on 22 August 2011.

<sup>34</sup> Id., n.27 at 23.

<sup>35</sup> Subramaniam, n.32 at xvi-xvii.

<sup>36</sup> *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591 at 615. The *sui generis* nature of the the Orang Asli were summarized succinctly by Mohd Noor Ahmad J in this case. In addition, Subramaniam after examining *Adong* and *Sagong* cases added other *sui generis* nature of Orang Asli title, namely;

(a) The title is inalienable;

(b) It may be an entitlement of an individual, through his or her family, band or tribe to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown. In contrast, it may be a community title which is practically equivalent to full ownership;

(c) Proof of title in Peninsular Malaysia is by way of continuous occupation of land for generations by an identifiable aboriginal community and the maintenance of a traditional connection with the land in accordance with customs distinctive of that community;

(d) In order to determine the extent of aboriginal customary rights to land, their rights under common law and the statute must be looked at conjunctively, for both rights are complementary.

Perhaps it is the unique combination of these characteristics that permits the right to be best seen as *sui generis*. See; Subramaniam, Yogeswaran, “ Beyond Sagong Bin Tasi: The use of traditional knowledge to prove aboriginal customary rights over land in Peninsular Malaysia and its challenges” [2007] 2 MLJ at xxxvii.

<sup>37</sup> See *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors* [2001] 6 MLJ 241 at 245 and 292; *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai* 7 Ors [2006] 1 MLJ 256. Both decisions have been affirmed and applied in the decision of *Superintendent of Lands & Surveys, Miri Division & Anor v Madeli bin Salleh (suing as administrator of the Estate of the deceased)* [2008] 2 MLJ 677.

<sup>38</sup> Subramaniam, n. 32 at xvi.

<sup>39</sup> Sihombing, n.29 at 81 and 84.

<sup>40</sup> Id., n.27 at 28-29.

- 41 These ordinances were repealed by section 438 of the National Land Code 1965. However, express provisions had been made for the customary tenure lands by Part VIII of the National Land Code (Penang and Malacca Titles) Act 1963.
- 42 Sethu, R.R., “The Orang Asli cases and property rights,” in Harding, Andrew & Lee, H.P (eds.), *Constitutional landmarks in Malaysia: The first 50 years 1957-2007*, (Petaling Jaya: Lexis Nexis, 1995), at 264.
- 43 Id., at 265.
- 44 See, n.37.
- 45 [1997] 1 MLJ 418 at 424.
- 46 Cheah Wui Ling, ‘Sagong Tasi and oarng Asli land rights in Malaysia: Victory, milestone or false start?’ 2004(2) Law, Social Justice & Global Development Journal, <[http://www.go.warwick.ac.uk/elj/lgd/2004\\_2/cheah](http://www.go.warwick.ac.uk/elj/lgd/2004_2/cheah)> viewed on 22 August 2011.
- 47 The United Nation Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly on 13 September 2007. See; Draft Resolution on the United Nations Declaration on the Rights of Indigenous Peoples, 61<sup>st</sup> Session, Agenda item 68.<<http://iwgia.synkron.com/graphics/synkron-Library>> viewed on 20 August 2011.
- 48 “About UNPFII and a brief history of indigenous peoples and international system” <<http://www.un.org/esa/socdev/unpfii/en/history.html>> viewed on 7 August 2011.
- 49 “Rights of indigenous people”< <http://www.globalissues.org/article/693/rights-of-indigenous-people>> viewed on 8 August 2011.
- 50 “United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly 13 September 2007”< <http://www.un.org/esa/socdev/unpfii/en/declaration.html>> viewed on 7 August 2011.
- 51 “The UN Declaration on the Rights of Indigenous Peoples: Towards re-empowerment.” <<http://www.jurist.law.pitt.edu/forumy/2007/01/un-declaration>> viewed on 7 August 2011.
- 52 For further discussion on the legal effect of the UNDRIP, See; Subramaniam, Yogeswaran, “The United Nations Declaration on the Rights of Indigenous Peoples: Additional enforceable land rights for the Orang Asli?” [2008] 2 MLJ at lxxv; Anaya, S. James & Williams, Robert, A. Jr. “The protection of indigenous peoples’ rights over lands and natural resources under the Inter-American human rights system” <<http://www.law.harvard.edu/students/orgs/hrj/issl4>> viewed on 7 August 2011.
- 53 “Frequently asked questions: Declaration on the Rights of Indigenous Peoples” <<http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>> viewed on 8 August 2011.

- 54 Subramaniam, Yogeswaran, “The UNDRIP and the Malaysian Constitution: Is special recognition and protection for Orang Asli customary lands permissible?” Unpublished Conference Paper presented at a Conference on United Nations Declaration on the Rights of Indigenous Peoples: Implementation and challenges, Faculty of Law University of Malaya, Kuala Lumpur, 9-10 November 2010, at 1.
- 55 See; The UNDRIP article 26 paragraph 2 &3.
- 56 Id., articles 10, 18, 19, 27, 28 & 32.
- 57 Id., articles 10 & 28.
- 58 Subramaniam, n. 51 at 1.
- 59 Lim Heng Seng, “The land rights of the Orang Asli,” in Consumers’ Association of Penang (ed.), *Tanah Air Ku: Land issues in Malaysia*, (Penang: Consumers’ Association of Penang, 2000), at 180-183; Dentan *et.al*, *Malaysia and the “original people”: A case study of the impact of development on indigenous peoples*, Allyn & Bacon, 1997, at 85-115; Williams-Hunt, Anthony, “Law and poverty: The case of the Orang Asli,” Unpublished Conference Paper presented at the Conference on Law and Poverty, The Malaysian Bar Council, Kuala Lumpur, 8-9 December 1990, at 5-7; Howell, Signe, “The indigenous peoples of Malaysia: It’s now or too late” in Barnes, R. H., Gray, A., & Kingsbury, B., (eds.), *Indigenous peoples of Asia*, ( Ann Arbor: Association for Asian Studies, 1995), at 280-282 and Cheah Wui Ling, n.45.
- 60 See; article 8(5)(c) of the Malaysian Federal Constitution 1957, which sanctions positive discrimination in favour of the Orang Asli including reservation for their customary land.
- 61 Subramaniam, n. 51 at cvii.
- 62 [1997] 1 MLJ 418 at 430. Subsequently, Gopal Sri Ram JCA in the Court of Appeal affirmed the decision of the High Court, see; *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2MLJ 158.
- 63 Subramaniam, n.51 at cv.
- 64 Subramaniam, n.53 at 28.
- 65 Idros Ismail, “Land pulling back the Orang Asli,” *The New Straits Times*, 7<sup>th</sup> August 2001 at 8.
- 66 William-Hunt, Anthony, “Law and poverty: The case of Orang Asli,” Unpublished Conference Paper presented at Conference on Law and Poverty, Malaysian Bar Council, Kuala Lumpur, 8-9 December 1990, at 4-6.
- 67 “20,000 Orang Asli families to get agricultural land,” *The New Straits Times*, 19<sup>th</sup> November 2008, at 8.
- 68 “Orang Asli to get land titles,” *Bernama The Malaysian National News Agency*, 18<sup>th</sup> November 2008, at <http://www.lexisnexis.com/us/inacademic/viewed> on 28<sup>th</sup> August 2011.

69 “Orang Asli NGO submits protest memo over land rights,” *The Malaysian Insider*, 20<sup>th</sup> May 2010, at <http://www.themalaysianinsider.com/malaysia/article/orang-asli>

70 “Orang Asli struggle for customary lands continues,” *The Malaysian Insider*, 16<sup>th</sup> July 2010, at <http://www.themalaysianinsider.com/malaysia/article/orang-asli>, see also; Subramaniam, Yogeswaran, “Orang Asli struggle for customary lands continues,” at <<http://www.aliran.com/index>> viewed on 28 August 2010.

71 Id.

72 Salleh Buang, “Still many unanswered questions,” *The New Straits Times*, 6<sup>th</sup> December 2008, at 8.

73 Nicholas, Colin, 2007, “Orang Asli and the constitution: Protecting customary lands and cultural rights,” at <<http://www.coac.org.my/>> viewed on 16 September 2011, See also; Majawat, E. “Orang Asli want development in sync with native rights,” *The New Straits Times*, 1<sup>st</sup> November 2007 at 13.

74 “New land policy for Orang Asli: Boon or bane?” at <<http://www.communityforest.org>> viewed on 19 September 2011.

75 The government has already recognised 141,210.51 hectares as being Orang Asli lands with varying statuses. Therefore, with the setting aside of 75,900.00 hectares of land under the proposed Land Policy, the Orang Asli in reality, stand to lose about 46 per cent of the recognised lands. See; Hamimah Hamzah, “Rights and interests in land among the Orang Asli in the state of Pahang: A case study” (Ph.D. dissertation, International Islamic University Malaysia, 2011).

76 See; n.73.

77 Even though the government continues to refuse to recognise the Orang Asli customary land rights, the courts have been siding with the Orang Asli in several cases involving the forced repossession of land by the state. See; *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591 and Kuppusamy, Baradan, “Battle over indigenous groups’ land rights shaping up,” at <<http://www.galdu.org/web/index>> viewed on 19 September 2011.

78 “Don’t appeal NCR cases, says Suhakam” at <<http://thestar.com.my/news/>> viewed on 24 September 2012.

79 “Orang Asli armed with legal means to save chapel.” at <<http://www.thestar.com.my/news/>> viewed on 24 September 2012.