

Indigenous Land Dispute and Law Reform in India: Lessons for Malaysia

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ABSTRACT:

Indigenous land dispute is a continuing issue in Malaysia which needs to be addressed. Apart from the common law recognition of the land rights of the indigenous peoples, the indigenous peoples are increasingly widely recognised as a stakeholder in the natural resources located within their areas.

Worldwide, since 1992, there has been a dramatic increase in legislation around the world recognizing the rights of indigenous peoples and communities to forest lands and resources. 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. An interesting law reform exercise has been done in India. It introduced *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006* (FRA) to address the claim of the indigenous peoples to forest resources.

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. Apart from being common law jurisdictions, it is a developing Asian country with a sizable tropical forest cover.

Using a comparative approach, this paper proposes to analyse processes and mechanisms adopted in the relevant law reform in India and its relevance to Malaysia. Comparative perspectives provide models for practical applications of indigenous peoples' rights. They assist policy analysis through learning from the successes and failures of other jurisdictions in improving legal reform.

KEYWORDS: indigenous law; comparative law; India and Malaysia; indigenous peoples; rights to natural resources

INTRODUCTION

Indigenous land dispute is a continuing issue in Malaysia which needs to be addressed. The term indigenous peoples in the context of international law include the Orang Asli in Peninsula Malaysia and the natives of Sabah and Sarawak.¹ In July 2013, the Malaysian National Human Rights Commission (Suhakam) 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 exposed numerous incidents of exploitation involving the indigenous peoples' land.² Other research reports³ and news⁴ also highlights the same predicament such as

¹ The scope of the term to refer to these groups is also accepted in a national policy statement. See, Malaysian Timber Certification Council (MTCC) and Forest Stewardship Council (FSC), 'Malaysian Criteria and Indicators for Forest Management Certification (MC&I 2011)' (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)>, 50.

² 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>>.

³ See eg, Rusalina Idrus, 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) 29(Suppl. 1) *Malaysian Studies* 53; Colin Nicholas, *Orang Asli: Rights, Problems, Solutions* (Suhakam, 2010); Hasan Mat Nor et al, 'Mengapa kami jadi begini? Konflik masyarakat Orang Seletar dan

encroachment on their customary lands by outsiders for logging, commercial plantations and farming, and infrastructure development. This suggests an urgent need for the relevant law in Malaysia to be reformed.

Apart from the common law recognition of the land rights of the indigenous peoples in Malaysia, the indigenous peoples are increasingly widely recognized as a stakeholder in the natural resources located within their areas. Worldwide, since 1992, there has been a dramatic increase in legislation around the world recognizing the rights of indigenous peoples and communities to forest lands and resources. 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.

An interesting law reform exercise has been done in India. It introduced *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006* (FRA) to address the claim of the indigenous peoples to forest resources.

Using a comparative approach, this paper proposes to analyse processes and mechanisms adopted in the relevant law reform in India and its relevance to Malaysia. Comparative perspectives provide models for practical applications of indigenous peoples' rights. They assist policy analysis through learning from the successes and failures of other jurisdictions in improving legal reform.

INDIA LAW REFORM ON THE FOREST RIGHTS OF THE NATIVES

In the choice of jurisdictions in comparative exercise, 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.⁵ Others stressed choosing jurisdictions which are at similar stages of political, economic and social development or at the evolutionary stage.⁶ This includes historical contexts and the influence of international law on national legal systems.⁷ Another factor to consider is the familial relationships of the legal systems, that is, the type of legal systems in the jurisdictions chosen.⁸ 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.

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* 16.

⁴ Eg of news reports on encroachment of Orang Asli land and conflict: 'Temiar Tribe in Dire Straits', *The Sun Daily* 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* 28 December 2012; Mustafa K. Anuar, 'The Temiar Blockade, Arrests in Gua Musang', *The Malaysian Insider* 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* 17 October 2012 <<http://www.malaysiakini.com/news/211999>>; Zulaikha Zulkifli, 'Orang Asli upset with land alienation works', *Malaysiakini.com* 2012 <<http://www.malaysiakini.com/news/210182>>; 'Orang Asli Ordered to Vacate Land Get Consent Stay', *The Sun Daily* 14 August 2012 <<http://www.thesundaily.my/node/111762>>; Laven Woon, 'Orang Asli Land Still under Threat', *Free Malaysia Today* 28 September 2012 <<http://www.freemalaysiatoday.com/category/nation/2012/09/28/orang-asli-land-still-under-threat/>>; Leven Woon, 'Kelantan Orang Asli slams MB, demands apology', *Malaysiakini.com* 20 April 2012.

⁵ Peter De Cruz, *Comparative Law in a Changing World* (Routledge Cavendish, 3rd ed, 2007), 121.

⁶ *ibid*, 226-7.

⁷ Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3rd ed, 2010), 120-1.

⁸ Scholars divide general categories of legal systems into five: common law, civil law, customary law, Muslim law and mixed legal systems.

In consideration of the comparability, similar to Malaysia, India is a common law jurisdiction. Both are developing Asian countries with a sizable tropical forest cover. They share some common political and legal features. In both regions, as former colonies or indirectly ruled territories of Britain, their land, forestry institutions and related management practices have experienced similar imperatives of British imperialism as well as the globalizing economy over the past two centuries.⁹ Lands and 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.

India also directly influenced the development of law in Malaysia and continues until present days. Historically, the British practice in India directly influenced British policies in the Malay Peninsula. These include the administration and governance system such as land and resources as well as the laws on the constitution and administration, criminal laws and the related procedures.

India also has a comparable differentiation of indigenous ethnic groups to Malaysia. In relation to the category of 'natives', 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 organization.¹⁰ 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*.

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.¹¹ In effect, similar to the position in Malaysia, the tribal people are considered as having no legal rights to the land and resources. As in Malaysia, although the British legal system was meant to preserve customary law, the colonial courts altered processes for the expressions of conflict and litigation. As Bose described,

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.¹²

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*

⁹ 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; Jeyamalar Kathirithamby-Wells, *Nature and Nation: Forests and Development in Peninsular Malaysia* (NIAS Press, 2005).

¹⁰ Rangan and Lane, above n 9, 148.

¹¹ 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.

¹² 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.

*Rights) Act 2006 (FRA).*¹³ 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.¹⁴

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.¹⁵ 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.¹⁶

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 under s 342 of the *Constitution of India*;¹⁷ and other forest dwellers that are not identified as Scheduled Tribes but who have occupied the forest for at least three generations.¹⁸

The Act recognizes 12 types of rights of the Scheduled Tribes living in forests and other traditional forest dwellers.¹⁹ 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'.²⁰ The rights are 'heritable but not alienable'.²¹ In relation to forest land, a community has the right to hold, live on and cultivate the land.²² However, the extent of the land area allowed for claim is limited to not more than four hectares regardless of individual or communal holdings.²³ 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

¹³ 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).

¹⁴ Bose, above n 12, 2.

¹⁵ The preamble of the FRA.

¹⁶ Indranil Bose, 'How did the Indian Forest Rights Act, 2006, emerge?' (2010) 39 *Discussion Paper Series Thirty Nine* 1, 23.

¹⁷ 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.

¹⁸ S 2(c), (o) FRA.

¹⁹ 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).

²⁰ Section 3(1), FRA; Kumar and Kerr, above n 11, 758.

²¹ S 4(3), FRA.

²² 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).

²³ S 4 (6) FRA.

traditionally collect within or outside village boundaries;²⁴ and to fish, graze and other resource access,²⁵ but excluding rights to specified wild animals.²⁶

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.²⁷ 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 the wild animals, forest and the biodiversity’.²⁸ The guarantee of communities’ right to manage, protect and conserve forests²⁹ 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.³⁰

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.³¹

Generally, the process of determination is to be initiated at the community level by the *Gram Sabha*.³² It has to adequately represent different sections of the communities.³³ 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 the

²⁴ S 3(1)(c) FRA.

²⁵ S 3(1)(d) FRA.

²⁶ 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*.

²⁷ 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).

²⁸ S 5(a)-(d) FRA.

²⁹ S 3(1)(i) and 5 FRA.

³⁰ S 4(2) (a)-(e) FRA.

³¹ *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.

³² 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.

³³ 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’.

representatives of the *Gram Sabha*. The meeting for the election is to be convened by the *Gram Panchayat*, a higher authority for several villages.³⁴ 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.³⁵ 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.³⁶ Consequently the process has failed to provide adequate representation from the village level.³⁷

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).³⁸ 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 Committees³⁹ for final determination and preparation of records.⁴⁰

The District Level Committee (DLC) comprises the District Collector, forest and tribal welfare officials and representatives of the communities from the *Panchayat* level.⁴¹ The decision of the DLC is final and binding.⁴² A record of any rights will be made in the relevant government records.⁴³ 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.⁴⁴

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

³⁴ 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.

³⁵ Bose, above n 12.

³⁶ *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.

³⁷ Asian Indigenous & Tribal Peoples Network (AITPN), above n 36: 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>>.

³⁸ S 6(2) FRA.

³⁹ S 6 of the 2007 Rule.

⁴⁰ S 6(3) to s 6(9) FRA 2006.

⁴¹ S 7 of the 2007 Rule.

⁴² S 6(6) FRA; S 8 of the 2007 Rule.

⁴³ S 8(f) of the 2007 Rule.

⁴⁴ S 9-10 of the 2007 Rule.

and title format for recognition of rights pertaining to protection and conservation of community forest resource.⁴⁵

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.⁴⁶ However, the reform has many limitations. It is poorly implemented in most states, with the forest bureaucracy maintaining control.⁴⁷ The local democratic processes of rights settlement involving the *Gram Sabha* seem to have been bypassed in most cases.⁴⁸ This is seen as a failure to empower and involve local communities as equal partners.⁴⁹ 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.

A number of states have not implemented the Act.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³ As a recent report remarks, the implementation of the reform process has

⁴⁵ 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.

⁴⁶ Asian Indigenous & Tribal Peoples Network (AITPN), above n 36, 1.

⁴⁷ 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 11, 759; Lovleen Bhullar, 'The Indian Forest Rights Act 2006: A Critical Appraisal' (2008) 4(1) *Law, Environment and Development Journal* 20, 24; Asian Indigenous & Tribal Peoples Network (AITPN), above n 36, 9.

⁴⁸ Kumar and Kerr, above n 11, 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 36, 7).

⁴⁹ Dinesh Pratap, 'Community Participation and Forest Policies in India: An Overview' (2010) 40(3) *Social Change* 235, 235; Bose, above n 12, 12.

⁵⁰ Asian Indigenous & Tribal Peoples Network (AITPN), above n 36, 12.

⁵¹ Bose, above n 12: 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.

⁵² Asian Indigenous & Tribal Peoples Network (AITPN), above n 36, 8-9.

⁵³ Kumar and Kerr, above n 11, 758. See, also, Campaign for Survival and Dignity, *The Current Situation* <<http://forestrightsact.com/current-situation>>: 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 12: 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.

ended up perpetuating historical injustices in the loss of more land by tribal people.⁵⁴ Furthermore, the forest rights of hunter-gatherers,⁵⁵ shifting cultivators and nomadic pastoralists continue to be neglected.⁵⁶ There is also lack of implementation of the FRA in protected areas.⁵⁷

Furthermore, interventions by Indian courts to protect tribal rights from violation from executive action appear to have been very unsuccessful.⁵⁸ There has also been considerable political violence about the rights of tribal people with the Communist Party of India (Maoist) engaged in armed resistance to developments which have threatened to dispossess tribal people particularly in north eastern India.⁵⁹

Nevertheless, the legislation represents a significant change in Indian law and practice on tribal peoples' rights.⁶⁰ 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.⁶¹ 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.⁶² 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

CONCLUSION – LESSON FOR MALAYSIA

The paper surveys the approach taken by India to address the resource rights of the indigenous peoples within the jurisdiction. The development in this jurisdiction provides a model of practical application 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 this jurisdiction with Malaysia are also considered. As India has similar economic, political and social status to Malaysia, and also practices common law, it is considered as suitable for comparison.

Summarily, the law reform in India, the FRA, provides express acknowledgement of the rights of the indigenous groups to land and resources. Express statutory recognition is significant as it is a clearer written form of law which facilitates understanding and enforcement. Legislation is

⁵⁴ Asian Indigenous & Tribal Peoples Network (AITPN), above n 36, 15.

⁵⁵ In India, hunter-gatherers are known as a 'particularly vulnerable tribal group' (PTG) or earlier referred to as 'primitive tribal group'.

⁵⁶ Kalpavriksh and Vasundhara, above n 45, 10.

⁵⁷ *ibid.*

⁵⁸ 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>>.

⁵⁹ 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/>>.

⁶⁰ Kalpavriksh and Vasundhara, above n 45, 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.

⁶¹ 'Odisha: Landmark Supreme Court Ruling a Great Victory for Indigenous Rights' (18 April 2013) *Indigenous Peoples Issues & Resources* <http://indigenousspeoplesissues.com/index.php?option=com_content&view=article&id=17519:odisha-landmark-supreme-court-ruling-a-great-victory-for-indigenous-rights&catid=33&Itemid=66>.

⁶² '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/>>.

a ‘means through which legal norms come into force and have effect’.⁶³ Therefore it helps to ensure that the norms are respected by all members of society.

The legislation also defines the content of the rights including ownership to and use of land traditionally used by the peoples and access to resources including the forest produce. The limit is access to some specified wild animals.

Besides, it introduced a framework for claim determination 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 process generally aims to provide for adequate representation from the communities involved aiming towards decentralization of the resource governance. However, as discussed, the purpose may be hampered in the implementation due to various reasons.

Resettlement from their traditional areas is only allowed for communities living in areas considered as critical wildlife habitats in protected areas. It is however 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.

Apart from the recognition of rights accrued to the rightful communities, the legislation also provides for responsibility of the communities for the sustainable use of forests and the conservation of biodiversity. This may help to promote environmental interests for the benefit of both the communities themselves as well as the wider community. The legislation acknowledges the significance of security of tenure for sustainable forest ecology.

To conclude, the FRA represents a significant change in Indian law and practice on tribal peoples’ rights. It provides a foundation on which to build. It has paved the way for greater protection in laws to address the historical injustice faced by the indigenous peoples although barriers remain. The approach taken may be useful to other jurisdictions, including Malaysia, which face the same problem.

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⁶³ 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.