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*Sagong Tasi:*  
**Reconciling State Development and  
Orang Asli Rights in Malaysian Courts**

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***Sagong Tasi:***  
**Reconciling State Development and Orang Asli Rights in Malaysian Courts**

Cheah Wui Ling

*“Dulu gagah menyerang kita. Sekarang pembangunan yang menyerang kita” (in the past, it was elephants that attacked us, today it is this thing called development)*<sup>1</sup>

## **Introduction**

The Malaysian State’s drive towards Vision 2020 has seen the rolling back of rainforest frontiers with the construction of massive dams, highways, industrial projects and luxury golf courses, leaving Orang Asli communities dispossessed of their ancestral customary land and summarily resettled without fair compensation or consultation.<sup>2</sup> Government officials have responded to Orang Asli resistance with indignant remarks about how “the problem of changing attitudes and inability to accept change is the main factor keeping the Orang Asli community in poverty”.<sup>3</sup> Civil society groups championing the Orang Asli’s cause have been labelled as “those who feel that the Orang Asli community should stay in the jungle, without education and without healthcare.”<sup>4</sup> With little help or protection from existing Malaysian laws, the Orang Asli have resorted to extra-legal methods of defending their ancestral land and traditional ways of life, setting up blockades and refusing to accede to State resettlement schemes.<sup>5</sup>

In recent years, a series of judgments emanating from the Malaysian courts have resulted in a progressive turning of tide for Orang Asli land rights, culminating in the *Sagong Tasi* case of 2002. The *Sagong Tasi* court declared the existence of Orang Asli land title at common law despite non-statutory recognition, giving them the right to adequate compensation from compulsory acquisition under the Malaysian Land Acquisition Act.<sup>6</sup> The Malaysian judiciary’s foray into the arena of Orang Asli land rights is extraordinary for several reasons. First, despite much of international indigenous land rights’ content being uncertain and nonbinding on the Malaysian domestic legal system, the Malaysian court’s decision extensively referred to comparative State practise and international developments in indigenous land rights.<sup>7</sup> Second, despite its benevolent intentions, the *Sagong Tasi* case effectively fails to give full recognition to Orang Asli land rights. This is because of the court’s decision to ultimately apply the Land Acquisition Act, the same compensation regime governing private land rights, to Orang Asli land. This piece of legislation, never intended to apply to Orang Asli land resulted in only partial articulation of Orang Asli land rights.

This paper will begin with an overview and analysis of the various ideological frameworks currently employed by the international community in the implementation of indigenous land rights. It then proceeds to propose an international minimum content of indigenous land rights as established through these various frameworks. The second part of this paper examines the particular effect of *Sagong Tasi*’s landmark judgment on Orang Asli land rights in Malaysia with reference to international minimum standards and proposes how the Malaysian court could have brought its judgment in conformity with these international standards.

## Indigenous Peoples Land Rights

As recognised by Special Rapporteur Jose R. Martinez Cobo, the “relationship between indigenous peoples and their land (is) as basic to their existence as such and to all their beliefs, customs, traditions and culture”.<sup>8</sup> This unique and fundamental relationship has been repeatedly recognised in various international forums. In 1991 the International Labour Organisation recognised the “special importance for the cultures and spiritual values” of indigenous peoples in their relationship with their land.<sup>9</sup> The Draft United Nations Declaration (hereinafter the UN Draft Declaration) on the Rights of Indigenous Peoples states the right of indigenous peoples to “maintain and strengthen their distinctive spiritual and material relationship with the land...”<sup>10</sup> In 1997, the Organisation of American States’ proposed for consideration, a Declaration on the Rights of Indigenous Peoples (hereinafter the OAS Proposed Declaration) which acknowledged the “special relationship” between indigenous peoples and their land that is a “necessary condition for their survival social organisation, development and their individual and collective well-being”.<sup>11</sup>

While the indigenous concept of land may seem primitive and at best romantically archaic to societies which have embraced private land ownership, such different conceptions of land are by no means exclusive to indigenous peoples.<sup>12</sup> The legal conceptualisation of land differs in accordance to underlying ideological values of a particular society. In Israel, over 90% of the land is state-owned reflecting the Jewish State’s nationalist aspirations.<sup>13</sup> Huttite and *kibbutz* communes practise joint ownership of land and its produce.<sup>14</sup> Women in strict Islamic societies do not have the legal capacity to own land. China’s communist system has produced a hybrid between State and commune owned land. The controversy surrounding indigenous land rights lies not in its difference from private land ownership but its claim for recognition within a larger mainstream society. While the unique existence of indigenous land rights is largely uncontested by the international community today, its content and ideological justification remains unsettled, giving rise to its implementation via a variety of different frameworks on the international scene.

Such piecemeal and limited development of indigenous land rights on the international level has been caused by States’ resistance to claims of indigenous peoples to exist as a distinct group with rights and claims against the State. States are traditionally wary in granting rights to collectivities, as seen in the early days of minority rights, perceiving them as threats to a single State identity accompanied with their potential to challenge en masse the State’s authority.<sup>15</sup> The claims and interests of indigenous peoples, articulated in the form of people’s rights or group rights, represent an even stronger challenge to State’s authority.<sup>16</sup> The difference between a people’s right or group right and rights of collectivities such as a minority’s rights to culture, is that while the former group’s existence is itself to be guaranteed due to its inherent good and value, the latter’s right is defined in terms of the individual, whose enjoyment of that right may include a communal aspect.<sup>17</sup> The State is obliged to take certain steps in ensuring conditions conducive to the growth of minority cultures but is not obliged to ensure the continued existence of the culture itself. Indigenous cultures and societies has a right to exist, claims that have been accompanied with calls for territorial autonomy and which threaten the State’s political and territorial integrity.<sup>18</sup>

Indigenous rights within South-east Asia

The indigenous rights movement was first spearheaded and focussed on indigenous groups from States colonised and still dominated by European settlement such as the Americas, Australasia and the Nordic countries. Due to this fact, South-east Asian States with no history of European colonisation such as Thailand or which have achieved national independence such as Cambodia and Indonesia, have argued that the concerns of the indigenous movement are limited to the experience of groups subject to European colonisation and continuing domination, capitalising on this difference to deny the presence of indigenous peoples within their borders.<sup>19</sup> The official line taken by these South-east Asian States is that as all citizens are original inhabitants of the State, there is no need for separate treatment of any group based on their characterisation as indigenous peoples. Indigenous populations have argued that such historical differentiation results in the denial of recognition to indigenous populations with genuine needs for protection against State persecution or discrimination.<sup>20</sup>

The reality of such fears was clearly demonstrated at the 1998 meeting of the Working Group for Indigenous Peoples (hereinafter known as WGIP). The Myanmar representative's claim that all 135 ethnic groups within Myanmar were "indigenous in the truest sense of the word" and that "problems of indigenous populations did not exist in Myanmar" was uncomfortably juxtaposed with evidence of State persecution against indigenous tribes submitted by the indigenous representative of Myanmar.<sup>21</sup>

The official position taken by most South-east Asian States not only denies the existence of indigenous populations within their borders but legitimises the aggressive assimilation of these indigenous communities into mainstream society. Indigenous populations are characterised as backwards and primitive, as hindrances to national development, and are persuaded or coerced into giving up their indigenous lifestyles. All this has been championed in the name of State progress and unity, terms which have assumed an urgent sacred aura in the discourse of post-colonial South-east Asian States caught up in the race towards development and modernisation. In a queer twist of fate, this parallels many colonisation policies carried out by the British, Portuguese and the Dutch during their colonisation of South-east Asian States. The nationalist movements and political elites of colonised South-east Asia which negotiated for independence with their former colonising masters have now ironically assumed the role of "coloniser" with respect to the indigenous populations within the State. This has been characterised as another form of imperialism, as fourth-world colonialism, or internal colonialism.

While the definition of indigenous peoples has remained controversial due to the complex and varying nature of indigenous cultures worldwide, States and indigenous representatives alike have accepted the general definitions formulated by UN Special Rapporteurs and international organisations such as the ILO and the World Bank.<sup>22</sup> These definitions consist of several objective and subjective identifying criteria. The former focuses on the group's distinct culture and social organisation, antecedence and attachment to a particular territory while the latter, argued by many indigenous groups as the most important identifying factor, focuses on the group's own self-identification.<sup>23</sup> According to these definitions, it is undeniable that many indigenous groups exist within South-east Asian States. Recent years have seen the mobilisation of these diverse groups, their formation of State-wide and regional networks and their participation within international for a calling for States to recognise their separate and unique identity as indigenous peoples. The

1989 Asian Indigenous Peoples Pact declares the solidarity among indigenous groups in Asia as “descendents of the original inhabitants of a territory which has been overcome by conquest...distinct from other sectors of the prevailing society...(with) their own language, religion, customs and worldview” and their common aspiration “to transmit these to future generations”<sup>24</sup>.

### **Indigenous Rights in Practice**

States’ resistance towards recognising indigenous rights has impeded the formation of concrete, clear norms governing indigenous land rights at international law and the accompanying lack of any enforcement mechanism geared towards the specific observance and implementation of indigenous land rights. The ILO Convention No 26 remains the only source of conventional law available regarding indigenous peoples rights. The UN Draft Declaration and the OAC Proposed Declaration have experienced limited progress in their negotiations due to State concerns centring on provisions that go beyond individual or collective rights such as the right to self-determination. While the many debates and reports generated within the UN’s Permanent Forum for Indigenous Peoples, the two UN Working Groups on Indigenous Rights and by respective Special Rapporteurs have added much understanding to indigenous peoples’ needs and interests, all this remains soft law, persuasive but non-binding in nature.

To meet the real and urgent claims of indigenous communities, the international community has adopted two distinctly different approaches. The first piggybacks on established existing rights such as basic individual rights and minority rights. The second approach draws upon newer group and third generation rights in advancing indigenous land claims, such as the right to self-determination, development and environment. While the implementation of indigenous rights within clearly accepted rights can take advantage of already existing institutional mechanisms and their legitimacy, the stretching of such concepts to accommodate indigenous rights may result in the distortion of indigenous rights or the original right itself, leading to its eventual disrepute. The latter method has the advantage of drawing on concepts which by their very nature and youth are more flexible and capable of accommodating indigenous rights within their ambit. However they also have the disadvantage of being relatively newer rights at international law, and with that come laden with the same baggage of uncertainty and State resistance.

### **Basic individual rights: the right to personal integrity, family and movement**

The dependence of indigenous communities on their land has been repeatedly emphasised by indigenous representatives in claims brought before the UN Human Rights Committee and within the framework of the Organisation of American States. Due to the spiritual, religious and social dimensions of indigenous land, the effects of indigenous land dispossession have been alleged to infringe the basic rights of indigenous peoples. Indigenous representatives have submitted evidence demonstrating the effects of land deprivation on indigenous communities’ rights to life, family, movement and health.<sup>25</sup>

The Human Rights Committee in *Hopu and Bessert v. France* held that indigenous rights, in that case being the right to family, were to be interpreted by

reference to the social practices and cultural traditions of the particular society.<sup>26</sup> In their decision, the Human Rights Committee found that because the indigenous applicants' relationship to their ancestors was of such an essential character, the gravesite of which they were dispossessed played "important role in the authors' history, culture and life" and was to be restored to them.

#### Minority rights: the right to culture

The right to culture has been broadly interpreted by the UN Human Rights Committee and European Court of Human Rights to include a minority's "way of living off the land" and applied to protect indigenous land rights.<sup>27</sup> While limited government infringement of indigenous cultural rights was held to be permissible, any action resulting in the effective denial of such cultural rights would be illegal. In *Lansmans v Finland*, State quarrying permits were held not to contravene Sami cultural practices of reindeer husbandry as prior consultations were carried out with the indigenous population; efforts made so as to minimise the effects of quarrying and that under the existing arrangements the Sami continued to benefit from reindeer husbandry.<sup>28</sup>

Though creative in its broad interpretation of cultural rights, the Human Rights Committee's approach in addressing indigenous land claims in terms of cultural rights seems inadequate as it fails to capture indigenous land's important non-cultural dimensions. Indigenous land is not only an element of their culture, but crucial in their communities' social construct, economic livelihoods and very identity. Furthermore because cultural rights have been held by the Human Rights Committee to be purely individual rights they are unable to accommodate group right aspects of indigenous land claims.

#### Self-determination

The concept of self-determination has evolved from political theory and aspiration to an international legal right of *jus cogens* status.<sup>29</sup> Its intrinsic appeal and conceptual fluidity has resulted in an increasing variety of groups articulating their claims in terms of self-determination. Today, its exact content remains in flux, with its core consisting of the right of peoples to be free from colonisation, foreign occupation and oppression and its penumbra spread across a variety of different subjects and claims. On one end of the spectrum some have denied the application of self-determination to any other situation than that of decolonisation while on the other end others have advocated a broad understanding of self-determination as the continuing process of democratic participation.

Self-determination was first applied to indigenous peoples in the 1994 Draft Declaration, paraphrasing the right to self-determination of Art 1 of the International Covenant of Civil and Political Rights and the International Covenant on Social and Economic Rights. It has remained the UN Draft Declaration's most controversial article in WGIP debates. Member States positions vary from defining self-determination to apply only to colonised peoples,<sup>30</sup> to insisting that indigenous self-determination be expressly limited by reference to States' territorial integrity,<sup>31</sup> to those supportive of indigenous self-determination.<sup>32</sup> Indigenous representatives see self-determination as being the conceptual basis of all other rights outlined in the UN

Draft Declaration including indigenous land rights.<sup>33</sup> The Special Rapporteur has sought to allay State fears of indigenous claims to secession based on self-determination by distinguishing between external self-determination or secession, limited only to cases of “alien rule” and internal self-determination, defined as the continuing right of all peoples “to choose its political allegiance, to influence the political order in which it lives, and to preserve its cultural, ethnic, historical or territorial identity”<sup>34</sup>

Indigenous self-determination claims that due to the particular relationship between indigenous communities and their land, certain land rights are deemed necessary in enabling indigenous populations to exercise their rights to self-determination. Under the UN Draft Declaration and OAS Proposed Declaration which are both conceptually based on indigenous self-determination, indigenous populations have a right to have their special relationship with their land recognised by States; a right to manage and control and participate in decisions that will affect their land.<sup>35</sup> While States have not rejected the existence these rights, they have protested certain aspects of its formulations that challenge the State’s political power and territorial control. Among State concerns are these rights’ retrospective effects on third party rights, their limits on States’ decisions for the benefit of the majority and the unequivocal right to certain remedies against the State.<sup>36</sup> While States cannot and do not deny indigenous self determination as closely connected to indigenous land rights, what States do contest are the effects of such land rights on the State’s monopoly over political power.<sup>37</sup>

#### IP rights as a historically persecuted and marginalised group

The self-determination argument presented in the preceding section is forward-looking in nature, based on the instrumental necessity of indigenous land rights to achieving indigenous self-determination. However indigenous peoples have also framed self-determination and land claims in terms of their historical persecution.<sup>38</sup> This argument is backward-looking, in which indigenous land rights are seen as reparations for past oppression. Colonisation theories of terra nullus and first discovery, while discredited and condemned today have been succeeded by the unitary Nation State’s more subtle prejudices which advocate indigenous population’s exclusion or forced assimilation into mainstream society. Due to such continuous persecution, indigenous populations find themselves trapped in vicious cycles of material poverty and political disempowerment. Excluded from mainstream political discourse, indigenous populations are unable to use the existing State political apparatus to articulate their concerns or engage in genuine political debate.

To ensure that governments and States are truly representative of entire populations, as required by the right to self-determination<sup>39</sup>, some form of belated state-building needs to take place to include indigenous populations in the State, not as wards or objects but as equal citizens. This includes the recognition of their long ignored differences within mainstream legal culture, including that of indigenous land rights. This right to participation in government is further buttressed by today’s prevailing ethos towards pluralism and multiculturalism. Indigenous peoples have a right to have their concerns and differences, including that of land rights, rearticulated within the mainstream political discourse.



### The right to environment

Though there has been an active push by interest groups towards recognising a general right to the environment ever since the 1967 Stockholm conference, States' consensus and commitment have only coalesced and resulted in conventions targeting specific environmental areas. Indeed the right to environment, first defined in the Stockholm declaration as "the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being" has been subsumed under the rubric of sustainable development in the follow up Rio and Johannesburg summits.<sup>40</sup> Indigenous land rights are recognised within the right to environment framework in two ways, first as instrumental rights towards effective environmental conservation or sustainable development and second as substantive rights in themselves granted to indigenous populations in recognition of environmental degradation's disproportionate effect on such communities.

The 1992 Rio summit saw the adoption of various international instruments such as the Rio Declaration, Agenda 21, the Forest Principles and the Convention on Biological Diversity each of which recognised and articulated for the first time the link and contribution of indigenous peoples to environmental conservation.<sup>41</sup> In 2002, the Johannesburg declaration and programme of action, each emphasised the importance of recognising indigenous people's control and title over their land.<sup>42</sup>

Aside from the above, in which indigenous land rights are seen as a means towards environmental conservation, indigenous peoples particular dependence on the environment has given them certain rights above that claimed by non-indigenous peoples. International indigenous rights instruments emphasise indigenous people's right to a clean, healthy environment.<sup>43</sup> These rights, which aim at preserving the quality and arable nature of indigenous land, elevates indigenous people's rights to the environment into a sui generis category above the general right to environment.

### The right to development

The right to declaration as set out in the 1986 Declaration is non-binding in nature.<sup>44</sup> Different aspects of this right have been used both by States and indigenous peoples in putting forth opposing arguments. It remains one of the most elusive third generation rights, criticised for putting form before content and schizophrenic in its many targeted objects and subjects.<sup>45</sup> The right to development, as articulated in the 1986 Declaration is a multi-faceted, granting rights and imposing obligations between individuals, their communities and State as well as between States on the international plane. It is framed as an inalienable human right, and linked to the full realisation of self-determination.<sup>46</sup> States have a right to formulate and implement national development programmes to enhance the well-being of the population with the condition that they be premised on the individual human being as beneficiary, participation of the citizenry and equal distribution of development's benefits.<sup>47</sup> Individuals in turn, though the subjects of this inalienable right have corresponding duties to the larger community in ensuring the promotion of development.<sup>48</sup>

Beyond imposing general constraints on State developmental policies, the right to development has specifically impacted indigenous land rights. Its general developmental principles of participation and equal distribution parallel those adopted in the UN Draft Declaration, OAC Proposed Declaration and more importantly in the guiding principles of various international financial lending institutions such as the

World Bank and the Asian Development Bank.<sup>49</sup> Indigenous consultation and participation rights serve as important procedural safeguards against developmental pressures on indigenous land.

### **International Minimum Standards of Indigenous Land Rights**

The content of indigenous land rights at international law has been characterised by growth within different frameworks, each of which have had different implications on the content of indigenous land rights themselves. Such piecemeal development has compromised on the certainty and coherence that a single framework would have provided. However the diversity of angles from which the question of indigenous land rights can be approached underscores not only the many substantive dimensions of the indigenous land but its interaction with other rights.

By examining the various frameworks within which indigenous land rights have developed, an emerging minimum international standard of indigenous land rights can be observed. First that indigenous land rights are *sui generis*, the content of which is to be ascertained in accordance with indigenous perceptions. This will vary from tribe to tribe and from time to time as indigenous cultures and societies evolve. Second States have to adhere to certain procedural rules when indigenous land rights are affected. Within all frameworks, being that of culture, self-determination, environmental or development, States are obliged to consult and include indigenous populations in decisions affecting them while State action is limited according to their impact on indigenous populations.

Even with political will, the implementation of these minimum international norms in the domestic arena faces certain problems. The almost haphazard growth of indigenous land rights within different frameworks has caused uncertainty as to its content and binding nature. Because indigenous peoples make up the minority, a marginalised minority at that, within States, their needs and interests are similarly seldom prioritised by majoritarian legislatures and governments. In most States, it is the judiciary, prompted by international legal developments, that has spearheaded the recognition and implementation of indigenous land rights. Judges have been faced with the difficulty of transplanting international developments into national law, a difficulty caused by the uncertain and nonbinding nature of these developments themselves.

The *Sagong Tasi* case is an example whereby the Malaysian judiciary, responding to international developments in indigenous land rights, attempted to implement these developments into domestic law via progressive statutory interpretation and common law development. The next part of this article shows how, though salutary in its intent, the *Sagong Tasi* judgment falls short of achieving current minimum international standards and respectfully suggests how the court could have achieved these standards using the same judicial tools of statutory interpretation and common law development.

## The Orang Asli of Malaysia

### Positioning the Orang Asli within Malaysia's multi-ethnic society

Malaysia's multi-ethnic and multi-cultural society consists of Malays, which form the largest ethnic category (approximately 50% of her population), Chinese (28.1%), Indians (7.9%) and indigenous peoples (14%).<sup>50</sup> The indigenous populations of Malaysia are governed under three different geographical legal regimes. Those resident in Peninsula Malaysia, known commonly as Orang Asli, fall under the Aborigine People's Act while those residing in Sabah and Sarawak, known also as Orang Asal, are subject to their respective State laws.

The terms Orang Asli and Orang Asal mean 'original people' in Bahasa Malaysia, the native tongue of the Malays and the official language of Malaysia. Experts have divided the Orang Asli, which make up less than 0.5% of the population in Peninsula Malaysia, into the three general categories of 'Negrito', 'Senoi' and 'Jakun' (or 'Proto-Malays') based on their anthropological descent. Each of these three groups can be further differentiated into 6 subgroups, each with its own culture, language, religion and subsistence lifestyle.<sup>51</sup> Some have adopted a more sedentary lifestyle due to State intervention or increased contact with mainstream society while others continue to practise shifting cultivation, hunt or forage as part of their subsistence lifestyle.

### Modernisation and Assimilation

In common with the experiences of indigenous communities on a global basis, state development and resettlement policies have resulted in the disenfranchisement of Orang Aslis on their own native soil.<sup>52</sup> The Malaysian State has refused to empower or recognise the Orang Asli as a distinct community. The application of the *Parti Orang Asli* to form a political party representing Orang Asli interests remains unapproved by the Registrar of Societies.<sup>53</sup> The Malaysian State continues to adopt a paternalistic attitude towards the Orang Asli, based on its perception of the Orang Asli as undeveloped, unprogressive and in need of State wardship – a de facto state of internal colonial tutelage.<sup>54</sup> In a 1962 policy statement, the Ministry of the Interior outlined the official view of the Orang Asli as “an indigenous community whose social, economic and cultural development prevents them from sharing fully in the rights and advantages enjoyed by other sections of the population” and its aim to “adopt suitable measures designed for their protection and advancement with a view to their ultimate *integration* with the Malay section of the community”<sup>55</sup>

The State's assimilation policy has included proselytising programmes among the Orang Asli which aim at their conversion to Islam, the official State religion.<sup>56</sup> The *Sagong Tasi* court acknowledged without condemnation the State's integration policy in respect of the Orang Asli vis-à-vis the Malays by setting up '*Perkampungan Orang Melayu - Orang Asli*' (Malay-Orang Asli villages). The extent of the Orang Asli's marginalisation as a distinct group from mainstream Malaysian society is further reflected by the non-recognition of their roles in Malaysian history. The Orang Asli's political, economic and cultural contributions to Malaysian society are seldom acknowledged except for the purposes of tourism. Malaysian history textbooks, while glorifying the role of Malay nationalists and political leaders, make no mention of the

Orang Asli despite the political alliances forged between Malay sultanates and the Orang Asli in pre-colonial and colonial times.<sup>57</sup>

The Orang Asli today makes up 50% of Malaysian population below the poverty line. Yet in Malaysia's most recent 5-year development plan, they are allocated only passing mention while the rest of the 24 chapter plan is dedicated to national development programmes benefiting mainstream Malaysian population or affirmative programmes targeting impoverished Malay communities.<sup>58</sup> Even when Orang Asli interests are ostensibly taken into account in State development schemes, due to lack of consultation and consideration of their specific circumstances, these schemes do not address their most pressing needs or are implemented inefficiently. The Malaysian representative at the 1996 WGIP meeting admitted that the Orang Asli population remains far behind mainstream population in terms of health, welfare and education. Even then his statement carried with it nuances of the Malaysian State's assimilative attitude, referring to the Orang Asli and Orang Asal as indigenous *bumiputeras*, a term more commonly associated with the dominant Malay ethnic group instead of recognising the Orang Aslis and Orang Asals as distinct communities.<sup>59</sup>

Such exclusion from national life on the economic, political and ideological level, coupled with false perceptions and stereotypes of indigenous peoples have widened the gulf between the aspirations of the Malaysian nation-state and her indigenous citizens. Orang Asli representatives maintain that while they are not against development, being in fact desirous of health and welfare improvements, their interests, especially that regarding their unique relationship with ancestral land, are seldom considered within State developmental schemes.

### The Socio-Legal Framework

#### *1. National law*

Orang Asli land rights are not formally codified under Malaysian law. Conversely these rights, if they exist, are often eroded by federal laws.<sup>60</sup> The one piece of federal legislature which is most guilty of denying of indigenous peoples' land rights is the National Land Code 1965, which declares the State owner of all land.<sup>61</sup> Under this Code, derived from the Australian Torrens system of land registration, all land belongs to the State. Private land interests are vested in individuals only upon registration in the land registrar. Orang Asli land, passed down by tradition from generation to generation, falls dismally outside the Malaysia's land registration system, technically belonging to the State.

The closest thing to statutory legal recognition of Orang Asli's land rights is to be found in the Aboriginal People's Act.<sup>62</sup> This Act was a reaction to the Orang Asli's important roles in the pre-Independence history of Malaysia especially during the Emergency of 1948-1960. The Orang Asli was known to provide food, labour, and intelligence to the communist insurgents even joining their ranks. Quickly realising the importance of winning over the Orang Asli, the colonial government established a Department of Aborigines and set up 'jungle forts' in Orang Asli areas which served to provide welfare, health and education to the Orang Asli. The Aboriginal Peoples Ordinance was legislated in 1954, and resettlement schemes were also implemented to integrate them into the cash economy.

The Aboriginal People's Act, successor to the Aboriginal Peoples Ordinance, empowers the Minister concerned to declare, via publication in the gazette, certain plots of land to be protected aboriginal reserves and areas. However the Aboriginal People's Act does not treat the Orang Asli as legal owners of these aboriginal reserves or areas nor does it mandate compensation for State acquisition of these reserves. While section 10 recognises that compensation "shall" and must be paid by State authorities for acquisition of Orang Asli's crops, section 11 merely states that the State "may" pay compensation for the acquisition of aboriginal reserves or areas. This imports a degree of discretion in the compensatory process. Furthermore sections 6 and 7 allow the Minister to extinguish by declaration the status of aboriginal reserves and areas. This power in reality renders the State's section 11 compensation duties, if any, ineffectual, as they can be circumvented by a simple status revocation of the acquired aboriginal reserves and areas.

Under this Act, the Orang Asli are effectively tenants-at-will of the State. In addition, not all inhabited Orang Asli land have been declared aboriginal reserves or areas, leaving them unprotected from State acquisition or third party encroachment. Recently, Orang Asli communities in Pos Gedung and Kampung Sungei Bil have been forced to acquiesce to logging activities on their traditional land as these had not been declared an aboriginal reserve or area, leaving them trapped within a legal vacuum.<sup>63</sup> Furthermore the meagre protections offered by the Aboriginal People's Act are unreal and impractical as most of the Orang Asli do not know the existence or implications of this Act and are unable to petition the government for the protections owed to them under this Act.

## *2. The Department of Orang Asli Affairs*

The Department of Orang Asli affairs, set up pursuant to the Aboriginal People's Act, retains a paternalistic attitude towards the Orang Asli and has proven ineffective in safeguarding or guaranteeing their land rights. A 1961 policy statement which remains applicable and binding today states in respect of Orang Asli land rights that "every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically into line with other communities in this country". In the same section, seemingly contradictory duties requires the Department to recognise "the special position of aborigines in respect of land usage and land rights" and that they "will not be moved from their land without their free consent".<sup>64</sup> The Department, staffed with a majority of non-indigenous staff is perceived by the Orang Asli as being distant, unapproachable and irrelevant in representing their interests at the national level. A 2001 resolution passed by the Orang Asli Association of Peninsular Malaysia passed calls for the dissolution of the Department, or the transfer of effective control to the Orang Asli themselves.<sup>65</sup>

## *3. Malaysian courts*

Due to the undeclared status of most Orang Asli land and the absence of any State mechanism to keep track of Orang Asli's land, the State often ends up awarding Orang Asli land to developers. These developers then proceed to clear and develop indigenous people's land, often without giving the Orang Asli advance notice or

warning.<sup>66</sup> Due to their political marginalisation, the Orang Asli are often at a loss with respect to remedies, not knowing who to petition in regards to their plight.

Recent Malaysian case law have sought to give formal legal recognition to Orang Asli land rights and reintegrate them into a legal system which has excluded them. In 1997 the Johor High Court in *Adong bin Kuwau* declared the customary right of indigenous peoples to gather produce from land surrounding their ancestral homes.<sup>67</sup> Then, in a 2002 groundbreaking decision, the Selangor High Court declared the existence of native title to ancestral lands at common law.<sup>68</sup> *Sagong Tasi* ushers in a new era of aboriginal land rights in Peninsula Malaysia. Previously the court in *Adong bin Kuwau* was reluctant to recognise aboriginal rights to land as actual interests or ownership rights, restricting the court's decision to the actual facts of the case before them which concerned adequate compensation for crops grown instead of land acquired. *Sagong Tasi* brings *Adong bin Kuwau* to its logical conclusion, declaring that the establishment of ancestral ties would bestow actual ownership of the said land on the indigenous community.

Though admirable for its foray into the terrain of Native title rights, the *Sagong Tasi* judgment, while recognizing native title's unique characteristics, held that in relation to State acquisition, native title was to be equated with private land title and its compensation similarly considered under the Land Acquisition Act. This fails to give recognition to the innate differences between the Orang Asli ancestral land rights and a private individual's right to land.

### ***Sagong Tasi***

#### Case summary

In 1996, the plaintiffs, members of the Orang Asli Temuan tribe, were ordered by State authorities to vacate their homes at Kampung Bukit Tampoi, an area found by the court to have been inhabited by the Temuan for at least 210 years. The State authorities sought to acquire the Temuan's land, part of which consisted of a gazetted aboriginal reserve under the Aboriginal People's Act, for the construction of a highway to the Kuala Lumpur International Airport. The plaintiffs were given 14 days to vacate their homes and monetary compensation for the loss of their homes and crops but not for their ancestral land. Unhappy with the lack of compensation for their ancestral land, the plaintiffs refused to relocate or accept the compensation offered by the State, resulting in their forced eviction by the police.

In *Sagong Tasi*, the court declared the existence of aboriginal land ownership or Native title at common law, apart from aboriginal reserves and areas set up under the Aboriginal People's Act. The Act, which does not require State compensation for acquired land, was held to cover only aboriginal reserves and aboriginal areas. This restrictive interpretation of the Act and liberal interpretation of the common law would require the State to pay compensation for Native title at common law and necessary to avoid the Aboriginal People's Act inconsistency with Article 13 of the Federal Constitution which provides for compulsory State compensation for acquired land. The valuation and acquisition of Native title's was to be determined in accordance to the Land Acquisition Act, the same regime applying to private registered title.

The court in *Sagong Tasi* also held that the State had breached a fiduciary duty owed to the Orang Asli when the State acquired their land without adequate notice

and compensation. Thus the State, in evicting the Orang Asli from their land, had committed trespass and needed to pay damages to the Orang Asli.

## Case Analysis

### Article 8 of the Federal Constitution

Article 8 of the Federal Constitution's Article 8 guarantees to Malaysian citizens equal protection of laws. This right to equal treatment, has been broadly interpreted by the Malaysian High Court as "a dynamic concept with many aspects and dimensions ..(which) cannot be imprisoned within traditional and doctrinaire limits".<sup>69</sup> Like must be treated with like and unlike with unlike. This article argues due to its inherent differences, Orang Asli land should not be treated under the same compensation regime as private land.

The *Sagong Tasi* judgment recognised that Orang Asli land rights differed in several ways from private land rights. Orang Asli land was held to be "a form of native title" based on "their laws and customs", entitling them "to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself (in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein)".<sup>70</sup> And yet despite these differences, the *Sagong Tasi* court proceeded to apply to Orang Asli native title, the same compensation regime governing private land rights. By implication, the court must have premised their decision on the fact that despite differences in content, Orang Asli native title and private title are to be considered as like goods when it came to determining compensation for State compulsory acquisition.

This conclusion can be partially explained by court's reasoning in *Sagong Tasi*. The Malaysian court based their finding of Orang Asli native title on the Orang Asli's exclusive and continual occupation of their ancestral lands since time immemorial.<sup>71</sup> Such reasoning though sufficient to ground an interest in land, unless linked to recognition of the Orang Asli as a legally distinct group, in itself is not ground for treating Orang Asli land interests differently from private land title. In arguing for different treatment of Orang Asli native title, the reason for treating Orang Asli land rights differently from private land rights when it comes to State acquisition needs to be addressed.

The next section will first make the case for such different treatment of Orang Asli land rights, based on the Orang Asli's status as a protected indigenous group at national law and then proceed to outline the content of such different treatment which consists of adequate compensation taking into consideration the many dimensions of Orang Asli land rights as well as fiduciary obligations of the State when dealing with matters impacting Orang Asli land rights. While based on national law, it is argued that the interpretation and application of domestic legislature should be guided by international developments and standards. This is especially so with Malaysian courts recognition that in the area of indigenous rights "in keeping with the worldwide recognition now being given to aboriginal rights".<sup>72</sup> Such an approach is consistent with recent indigenous land cases in which Malaysian courts looked to international law for guidance, though acknowledging their non-binding persuasive authority.<sup>73</sup>

*Making a case for different treatment*

The privileged position of the Orang Asli is enshrined in the Federal Constitution in three ethnic-specific provisions spelling out State duties in relation to the Orang Asli's welfare; namely Article 8(1) legitimising affirmative action in favour of the Orang Asli; Article 45(2) providing for the appointment of Senators "capable of representing the interest of the aborigines" and Nine Schedule (List 1) vesting upon the Federal Government legislative duties for the "welfare of the aborigines". Literal reading of these provisions give rise to a strong presumption that at the very least, the Orang Asli's welfare is to be made a priority before other unmentioned ethnic groups.

Federal Constitutional provisions favouring the Malays, Orang Aslis and Orang Asals have specific historical origins.<sup>74</sup> The Malays, as the dominant ethnic group in Malaya and the leading negotiators for independence from the British sought to cement their position as the existing ruling political elite due to fears of being threatened politically by more recent immigrant populations especially the Chinese who controlled commercial matters in British-colonised Malaysia. The Orang Asal of Borneo sought specific constitutional guarantees as pre-conditions for joining the Malaysia. The Orang Asli seem to have piggybacked on the Orang Asal's claims, the latter's privileges being more specifically spelt out in the Constitution than the former. Within the backdrop of Malaysia's constitutional history, these specific constitutional guarantees with regards to the Orang Asal and the Orang Asli intended to prevent their political marginalisation by what even then seemed to them as a dominant mainstream society and preserve their unique identity within the Malaysian polity.

Pursuant to these constitutional provisions, specific State legislative and administrative policies have been set up ostensibly for the benefit of Orang Aslis. Section 4 of The Aborigines Peoples Act recognises the Commissioner's, an appointed government official, responsibility "for the general administration, welfare and advancement of the aborigines." The Charter of the Department for Orang Asli, set up under the same Act, aims to inter alia "reduce and subsequently eliminate poverty", "improve the quality of life" and "health" of Orang Asli communities.<sup>75</sup> The Department of Orang Asli Welfare's 1961 policy statement, in effect today, recognise the "special position" of Orang Asli and aims to "provide for their protection, well-being and advancement".<sup>76</sup>

Aside from the privileged position that Orang Asli were intended to maintain within the Malaysian polity via specific constitutional and legislative provisions, Article 5 of the Federal Constitution's right to life provides further support for recognizing the Orang Asli's specific relationship with their ancestral land. Article 5's right to life has been given an all-encompassing definition by the Malaysian courts, being held not to refer to "mere existence" but "all those facets that are an integral part of life itself and those matters which go to form the quality of life".<sup>77</sup> State acquisition of non-indigenous land when accompanied by market-value compensation does not deprive a non-indigenous landowner of an "integral part" of his life. However, for the Orang Asli, their economic, cultural and spiritual dependence on their land makes their ancestral land "an integral part of life itself". This link between indigenous peoples and their land has been recognised in international State practise.<sup>78</sup> For the Orang Asli, land acquisition without appropriate resettlement or reintegration programs effectively takes away the Orang Asli's centre of their cultural, spiritual and social life as well as the source of their centuries-old subsistence life-style. This not only "denude(s) life of its effective content and meaningfulness but it would make life impossible to live"<sup>79</sup>, contravening their right to life under Article 5.



### Adequate compensation

Blackstone in his exposition on the State's right to compulsorily acquire land, states that the sanctity of property rights demand that they cannot be stripped in an "arbitrarily manner" but must be compensated "by giving full indemnification and equivalent for the injury thereby sustained".<sup>80</sup> This emphasis on true compensation must require the consideration of Native title's and ordinary registered title's real substantive differences as well as the "injury" sustained.

### *Content*

The *Sagong Tasi* court interpreted 'land occupied under customary right', as set out in the Land Acquisition Act's Section 2, to include Orang Asli native title within its ambit.<sup>81</sup> However even the court itself recognised that at the time of its codification, this phrase in Section 2 intended to target, not Orang Asli or Orang Asal land rights, but lands occupied under the tribal adat in Negeri Sembilan and Malacca.<sup>82</sup> The Land Acquisition Act was never intended or drafted to accommodate within its scope the substantive compensation and procedural rights of native title.

#### a) A cultural and spiritual dimension

Like many indigenous communities, the Orang Asli of Peninsula Malaysia depend on their ancestral land not only for their economic survival but for their cultural and social identity. The Temuan at Kampung Bukit Tampoi have a belief system distinctly tied to their land.<sup>83</sup> Before any activity is carried out on a specific plot of land, the ritual of "adat tanah" in which certain spirits are called upon, has to be performed. The spirits of the Temuan dead, known to the community as "penunggu" or spirits-in-waiting, are said to be tied to the land and guard the community. These spirits' help and blessings are sought by the Temuan in all daily matters, from health to weather problems. Market-value compensation under the Land Acquisition Act does not give full expression to the cultural and spiritual significance of Temuan land. The court in the case of *Adong bin Kuwau v Kerajaan Negeri Johor*, noted how "native land is a far cry from a titled land", its spiritual and cultural value making it an unsuitable subject for the market-value test which applies in determining the compensation amount of registered.<sup>84</sup>

#### b) The community's heritage

The incongruity of considering native title under the Land Acquisition Act as simply any other private registered title, lies not only in the former's spiritual and cultural dimension but also in its collective and communal character. As defined in *Sagong Tasi*, native title consists of "the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not the land itself (in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein)".<sup>85</sup> This difference stems from the communal nature of Native title. The land belongs to the community as a whole, not separately to the individuals within the community. This communal nature of Native

title also has a generational aspect as pointed out by Justice Chin in *Nor Anak Nyawai v. Borneo Pulp Plantation* when he drew attention to the land value lost to future generations when indigenous land is compulsorily acquired from the community.<sup>86</sup> This communal nature of Native title varies from tribe to tribe and community to community. Justice Brennan of the Australian High Court, cited by the Malaysian High Court in *Sagong Tasi*, recognised that while Native title belonged to the aboriginal community as whole, individuals within the community could by its laws and customs possess proprietary individual rights over their respective parcels of land.<sup>87</sup> The distinguishing factor between Native title and modern registered title is that while Native title is recognised and given effect by the common law of the modern legal system, its content is defined by the particular indigenous community's own laws and customs.<sup>88</sup> The legitimacy of dividing communal land into individual plots during the valuation process depends on the indigenous populations own value system.

### c) The land's fruit

50% of the Orang Asli live below the poverty line as compared to the national average of 7%.<sup>89</sup> There is also the prevalent problem of quitting school among Orang Asli children due to the lack of teachers and schools within or near Orang Asli settlements.<sup>90</sup> Such marginalisation is worsened by forced displacement and encroachment of their traditional land which strips them of their heritage and cultural identity. Though there is significant out-migration of young Orang Asli into cities in search of work and a gradual embracing of more modern agricultural techniques by others, many Orang Asli communities still depend on subsistence farming and foraging as they live off their ancestral land in sharp contrast to the cash crop cultivation and high-tech farming encouraged and practiced throughout the rest of the country. As recognised by J Chin in *Nor Anak Nyawai*, for the Iban tribe of Sarawak, the traditional longhouse and its “pemakai menoa” (surrounding traditional land) play an especially important role in alleviating the poverty of Ibans, providing them with a home and means of subsistence, without which they would be reduced to “vagabonds in their own land”.<sup>91</sup>

### *Total injury*

While the *Adong Kuwau* court refrained from awarding compensation for the non-economic aspects of indigenous land due to the difficulties of quantification, the practise of other national and regional courts have demonstrated its possibility.<sup>92</sup> Such quantification is important as it serves as public acknowledgement and vindication of indigenous land's unique status.<sup>93</sup> Aside from that, courts have also awarded moral compensation for mental and emotional suffering in acknowledgment of the effects of illegal land dispossession on indigenous peoples.<sup>94</sup>

Adequate compensation should aim to counter the full effects of indigenous land dispossession. As observed by the court in *Adong Kuwau* “An aborigine will not be in the same category as the other Malaysian citizen, for an aborigine has special attachment to his land and without any skill, education or way to live as the other communities, he would find it very difficult, if not impossible, to relocate himself and start afresh.”<sup>95</sup> While resettlement and relocation are often necessary in large-scale

developmental projects, the State has to take into consideration not only the immediate effects of any relocation or resettlement but the long-term sustainable development of Orang Asli communities within these settlements. Resettlement in modern plantations and estates, even when consented to by the Orang Asli, becomes meaningless without the retraining the Orang Asli in modern ways of farming. Resettlement should also seek to preserve the cultural and social framework of the Orang Asli, with sufficient land to cater to their community's activities. As stressed in Operational Policy 4.12 of the World Bank that lays down guidelines on resettlement for donee States, resettlement land should be in "productive potential, locational advantages, and other factors at least equivalent to the advantages of the land taken".<sup>96</sup> This seeks to ameliorate the immense impact of resettlement on the lives of indigenous peoples.

### Fiduciary duties

Aside from adequate monetary compensation, the Land Acquisition Act's procedural safeguards fall far short of that envisioned for indigenous peoples at the international level. While the *Sagong Tasi* court found the existence of a fiduciary duty on the part of the State towards the Orang Asli, it failed to elaborate on the content of this duty except to define it 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".<sup>97</sup>

The fiduciary's duty, a concept existing in many areas of law such as company law and trust law, limits and requires fiduciary to exercise his or her power in the best interests of the beneficiaries.<sup>98</sup> The fiduciary's duty is one that the law guards jealously. In a sense the State as the repository of the citizenry's voting power, is also fiduciary of all citizens, giving rise to the argument that there may be circumstances in which the general population's developmental interests may overrule the interests of Orang Aslis.<sup>99</sup> However, the explicit mention in the Federal constitution of the State's duties towards the Orang Asli must have intended a duty to the Orang Asli beyond that towards ordinary citizen.<sup>100</sup> Taking this into consideration, the question asked is then how and where should the balancing point between conflicting rights be struck? Malaysian courts have exempted States from administrative duties of natural justice and procedural fairness in land acquisition decisions due to its public interest dimensions.<sup>101</sup> It is argued however that the State's fiduciary duty towards the Orang Asli not only subjects the process of indigenous land acquisition to scrutiny but imposes on it obligations beyond general administrative law.

### *Consultation*

In the area of international indigenous rights, the term "fiduciary" has often been used in to define the relationship between States and indigenous peoples. Its exact content and application has received far less attention. Canadian courts have held that State impingement indigenous beneficiaries is only permissible when the State has a "compelling and substantial" objective which is consistent with the nature of the State's fiduciary duty and only then to the extent necessary to achieve this objective.<sup>102</sup> Canadian jurisprudence on the State's fiduciary duty towards aborigines is based on Canadian constitutional provisions.<sup>103</sup>

Applying a similar methodology to the Malaysian context, the content of the Malaysian State's fiduciary duty in relation to the Orang Asli will have to be ascertained by reference to the Malaysian constitution. As mentioned earlier, the Federal Constitution empowers and obliges the State to take positive action promoting the welfare of the Orang Asli. It is silent as to how Orang Asli welfare is to be promoted, via paternalism or empowerment.<sup>104</sup> This article submits that in line with developments on the international level, such a fiduciary duty should be conceived as one that seeks to empower rather than to coddle the Orang Asli.<sup>105</sup> Constitutional history supports this view. The intent of Orang Aslis and Orang Asals in seeking group-specific constitutional guarantees was to preserve and maintain their presence in the political discourse of Malaysia. To treat them as dependent wards would exclude them as active participants in Malaysia's political discourse.

Fiduciary duties as interpreted above will require the active participation of Orang Asli in determining their interests and welfare rather than the imposition of the State's notions of welfare. This requires the State carry out good faith consultations with Orang Asli communities. Guidance as to how such a meaningful dialogue between State and indigenous populations can be achieved and maintained can be obtained from international instruments which have similarly recognised the importance of such procedural consultative safeguards, albeit with different underlying aims whether for self-determination and sustainable development.<sup>106</sup> In many States today such as New Zealand, Canada and the Phillipines, developmental decisions that impact indigenous populations are made pre-conditioned on indigenous consultation and dialogue.<sup>107</sup> The UN Human Rights Committee has also emphasised the need for involving indigenous populations when impacting their rights to culture are to be impacted.<sup>108</sup>

### *Developmental objectives*

The Canadian court in *Delgamuukw* found that while State objectives in encroaching on indigenous land rights are limited by their fiduciary duties, "The development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims" are legitimate objectives.<sup>109</sup> Are all developmental aims to be considered pressing, taking into consideration the Malaysian government's public commitment to development? To find so would to merely pay lip service to the State's fiduciary duty, allowing its avoidance by the labelling of any project as developmental in nature.

The limit to such developmental objectives can be found in the concept of the fiduciary itself, as conceived in company and trust law, which requires the fiduciary to exercise its discretion in the interest of its beneficiaries. This is further supported by the Federal Constitution's Orang Asli specific provisions which make continual references to their welfare.<sup>110</sup> Developments with no ostensible benefit to the Orang Asli such as those which denigrate the environment would not fulfil this test.<sup>111</sup> While the Orang Asli have been repeatedly driven off their land in the name of development, the benefits of such development are never or seldom enjoyed by their communities. The State as fiduciary, should bear the burden of proof of proving that developmental projects affecting Orang Asli native title are beneficial to the Orang Asli by producing evidence such as project details or environmental assessment results.<sup>112</sup>

**Conclusion**

The State's oft-repeated justification for the acquisition of Orang Asli land is the improvement of the Orang Asli's standard of living. In reality, the Orang Asli often find themselves forcibly resettled on plots of land far smaller than the one acquired from them, but furnished with modern housing and amenities. This non-consultative top-down imposition of paternalistic development schemes results in mismatches between the Orang Asli's needs and the facilities provided by the State.<sup>113</sup>

Not only does this approach waste State resources, it also treats the Orang Asli as immature state wards, incapable of engaging in meaningful dialogue with the State. Such paternalism encourages dependency, erodes the self-worth of a people and is incapable of sustaining long-term development. Sustainable development and the eradication of poverty is only possible when carried out within a human rights framework, with the aim of empowering the citizenry instead of encouraging dependence.<sup>114</sup> Only thus will the Orang Asli have a sense of ownership and a stake in the nation's development.

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## Notes

<sup>1</sup> Colin Nicholas, *Suhakam and the Indigenous People's Question*, paper presented at the National Consultation on "Suhakam after 1 year: Has the state of human rights improved in Malaysia", 5 May 2001, Kuala Lumpur

<sup>2</sup> Nicholas, *supra* note 1 ; "Suhakam calls on Perak Government to resolve Orang Asli disputes" Bernama Malaysian News Agency, November 10, 2003; "Suhakam Report on Orang Asli basic rights ready next week" Bernama Malaysian News Agency, December 15, 2003.

<sup>3</sup> "Embrace Change, call to Orang Asli" Bernama Malaysian News Agency, May 22, 2003

<sup>4</sup> "Government guarantees future of the Asli community, says Dr Mahathir" Bernama Malaysian News Agency, November 16, 2001

<sup>5</sup> Aboriginal Peoples Act (Act 134 of 1954)

<sup>6</sup> Sagong Bin Tasi, *supra* note, at para. 13(2)

<sup>7</sup> *Id.*, at para. 11

<sup>8</sup> Study of the Problem of Discrimination Against Indigenous Populations, E. 86. XIV.3 vol 5, paras. 196-197

<sup>9</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 72 ILO Official Bull, Art. 13

<sup>10</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted by the Sub-commission on Prevention of Discrimination and Protection of Minorities on August 26, 1994, at its 36<sup>th</sup> session, E/CN.4/1995/2, E/CN.4/Sub.2/1994/56

<sup>11</sup> Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 133rd session, 95th regular session, preamble.

<sup>12</sup> Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315 (exploring the different conceptions in land ownership and their underlying ideologies today)

<sup>13</sup> See Conrad Black, *Why Israel is Still an Economic Basket Case*, JERUSALEM POST, Aug. 27, 1992, available in LEXIS, Nexis Library, Jerusalem Post File (quoting 93% figure); Basic Law: Israel Lands, 14 L.S.I. 48 (1960), reprinted in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1988). In reality, the State of Israel commonly transfers land to collective farms and cooperative settlements by long-term renewable lease at nominal rent. See HARVEY H. SMITH ET AL., AREA HANDBOOK FOR ISRAEL 289 (1970).

<sup>14</sup> Ellikson, *supra* note 12 at p. 12; Pierre L. van den Berghe & Karl A. Peter, *Hutterites and Kibbutzniks: A Tale of Nepotistic Communism*, 23 MAN 522 (1988)

<sup>15</sup> Resistance to granting minority rights

<sup>16</sup> The Human Rights Situation of Indigenous Peoples in the Americas, Chapter III at 6.A; Yanomani Resolution 12/85 herein and in IACHR Annual Report 1985, p. 24; "Report on the situation of human rights of a sector of the Nicaraguan population of Miskito origin," OAS/Ser.L/V/II.62.doc 10 rev.3 and doc. 26, Washington, D.C., 1984, p.138-9; Report on the situation of human rights in Ecuador. OAS/Ser. L/V/II.96.Doc.10, rev 1, April 24, 1997, p.115.

<sup>17</sup> OAS Indigenous Rights Report, *supra* note 78

<sup>18</sup> This is demonstrated in States repeatedly resisting the articulation of indigenous self-determination in the UN Draft Declaration due to fears of secession, Report of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32 in the Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/1998/106 at para. 44 (d)-(g)

<sup>19</sup> Benedict Kingsbury, "Indigenous Peoples" in *international law: a constructivist approach to the Asian controversy*, 92 A.J.I.L. 414 at p. 417-8

<sup>20</sup> Report of the Working Group on Indigenous Populations on its twelfth session, (Geneva, 25 to 29 July 1994), E/CN.4/Sub.2/1994/30, 17 August 1994, at para 49

<sup>21</sup> Report of the Working Group on Indigenous Populations on its sixteenth session (Geneva, 27-31 July 1998), E/CN.4/Sub.2/1998/16, 19 August 1998, at para 33

"his country was a Union that comprised 135 national races and that all of them were indigenous in the truest sense of the word: there were no distinct early comers or late colonisers. Accordingly, problems of indigenous populations as such did not exist in Myanmar. The Government was committed to the promotion and protection of the rights of the national races and would continue to do its utmost for all indigenous national races in Myanmar, so that they were able to take part fully in the political, economic and social life of the Union free from any form of discrimination."

See also para. 46

“An indigenous representative from Asia stated that the Myanmar military regime had continued to deny the rights of the indigenous peoples and had engaged them in a civil conflict. Last year alone a large number of people had been forcibly relocated in the Shan and Karen regions, the homelands of two of Myanmar's largest indigenous groups. About 700 of the Shan indigenous people were reported to have been killed during the last year.”

<sup>22</sup> Report of the Working Group on Indigenous Populations on its fourteenth session (Geneva, 29 July-2 August 1996), E/CN.4/Sub.2/1996/21, 16 August 1996 at para. 32,33,36 but see also Bangladesh's comments at para. 34 stressing the need for a definition.

<sup>23</sup> Report of the Working Group on Indigenous Populations on its fourteenth session, *supra* note 22 at para. 35

<sup>24</sup> the 1989 Asian Indigenous Peoples Pact:

“Although collectively referred to as aborigines, tribals, natives, hill peoples or minority peoples, the indigenous peoples of Asia nevertheless share much in common. They are descendants of the original inhabitants of a territory which has been overcome by conquest; and they consider themselves distinct from other sectors of the prevailing society. They have their own language, religion, customs and worldview, and they are determined to transmit these to future generations. They do not have any centralised political institutions, but organise instead at the level of the community... And more often than not, the indigenous peoples find themselves to be the most depressed sector of the nation-state that they have now been incorporated into.”

<sup>25</sup> Though the decisions of the Inter-American Human Rights Commission and Court conventional obligations, these conventional rights are also enshrined in various universal international instruments and are arguably part of customary international customary law.

<sup>26</sup> Hopu and Bessert v. France, U.N. GAOR, 52d Sess., Supp. No. 40, at 70, U.N. Doc. A/52/40 (1997) at 79

<sup>27</sup> Omniyak v. Canada, U.N. GAOR, 45th Sess., Supp. No. 40, Annex 9, at 27, U.N. Doc. A/45/40 (1990) in which the HRC found that the failure to assure to the Lubicon Lake Band a reservation to which it had a strong claim and the effect on the Band of certain recent developments including oil and timber concessions “threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue.”; Lansman v. Finland (No. 1), Comm. on Civil and Political Rights, 57th Sess., pt. 1, at 74, 84, 85, U.N. Doc. CCPR/C/57/1 (1996); G. and E. v. Norway, Apps. No. 9278/81 and 9415/81, 35 Eur. Comm'n H.R. Dec. & Rep. 30, 35 (1984) in which the ECHR stated that “a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead”

<sup>28</sup> Lansman v. Finland (No. 1), Comm. on Civil and Political Rights, 57th Sess., pt. 1, at 74, 84, 85, U.N. Doc. CCPR/C/57/1 (1996)

<sup>29</sup> Barcelona traction, self-determination is *jus cogens*

<sup>30</sup> Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 (Geneva, 18-29 October 1999), E/CN.4/2000/84, 6 December 1999, see comments of the United States at para. 49, Australia at para. 62

<sup>31</sup> *Id.* See comments of Argentina at para. 62, Guatemala at para. 73, New Zealand at para. 78

<sup>32</sup> *Id.* See comments of Canada at para. 50, Brazil at para. 53, Ecuador at para. 56, Switzerland at para. 64, Pakistan at para. 67, Finland at para. 70, Norway at para. 81.

<sup>33</sup> *Id.* at para. 43, 58.

<sup>34</sup> Explanatory note concerning the draft declaration on the rights of indigenous peoples by Erica-Irene A. Daes, Chairperson of the Working Group on Indigenous Populations, E/CN.4/Sub.2/1993/26/Add.1 19 July 1993 at para. 17, 19 [hereinafter Explanatory note on indigenous self-determination]

<sup>35</sup> UN Draft Declaration *supra* note 10

#### Article 25

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

#### Article 26

“Indigenous peoples have the right to own, develop, control and use the lands, and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.”

#### Article 27

“Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. 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.”

#### Article 28

“Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.”

OAS Draft Declaration *supra* note 11

Article XXIV. Traditional forms of property and cultural survival. Right to land, territory, and resources

1. Indigenous peoples have the right to the recognition of their property rights and ownership rights with respect to the lands and territories that they historically occupy, as well as the use of the lands to which they have traditionally had access for carrying out their traditional activities and for sustenance, respecting the principles of the legal system of each State. These rights also include the waters, coastal seas, flora, fauna, and all other resources of that habitat, as well as their environment, preserving these for themselves and future generations.

2. Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession, and ownership of their lands and territories, in accordance with the principles of the legal system of each State. The States shall establish the special regimes appropriate for such recognition, and for their effective demarcation or titling.

3. The rights of the indigenous peoples to their lands and territories they occupy or use historically are permanent, exclusive, inalienable, imprescriptible, and inalienable.

4. The titles may only be modified by mutual agreement between the State and the respective indigenous peoples, with full knowledge and understanding by their members with respect to the nature and attributes of that property and of the proposed modification. The agreement by the indigenous people concerned shall be given following its practices, usages and customs.

5. Indigenous peoples have the right to attribute ownership within the community in accordance with the values, usages, and customs of each peoples.

6. The States shall take adequate measures to avert, prevent, and punish any intrusion or use of such lands, territories, or resources by persons from outside to claim for themselves the property, possession, or right to use the same.

7. In case the property rights over the minerals or resources of the subsoil belong to the State, or it has rights over other resources existing in the lands and territories of the indigenous peoples, the States shall establish or maintain procedures for the participation of the peoples concerned for determining whether the interests of those peoples would be prejudiced and to what extent, before undertaking or authorising any program involving prospecting, planning, or exploitation of the resources existing on their lands and territories. The peoples concerned shall participate in the benefits of such activities, and receive fair compensation for any harm they might suffer as a result of such activities.

8. The States shall provide, within their legal systems, a legal framework and effective legal remedies to protect the rights of the indigenous peoples referred to in this article.

Article XXV. On transfers and relocations

1. The States may not transfer or relocate indigenous peoples without their free, genuine, public, and informed consent, unless there are causes involving a national emergency or other exceptional circumstance of public interest that makes it necessary; and, in all cases, with the immediate replacement by adequate lands of equal or better quality and legal status, guaranteeing the right to return if the causes that gave rise to the displacement cease to exist.



2. Compensation shall be paid to the indigenous peoples and to their members who are transferred or relocated for any loss or harm they may have suffered as a result of their displacement.

<sup>36</sup> Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 (Geneva, 2 to 13 December 2002) E/CN.4/2003/92, 6 January 2003, see para. 29; 49; 1997 Report of working group on the UN Draft Declaration *supra* note

<sup>37</sup> *Id* at para. 29

<sup>38</sup> Explanatory note on indigenous self-determination, *supra* note 34 at para. 24-25.

<sup>39</sup> Explanatory note on indigenous self-determination, *supra* note 34 at para. 21, 24

<sup>40</sup> Declaration on Environment and Development: Report of the United Nations Conference on the Human Environment, Principle 1, U.N. Doc. A/CONF.48/14/Rev.1 (1972), 11 I.L.M. 1416 ("the Stockholm Declaration"), in contrast see Rio Declaration on Environment and Development, Principle 1, U.N. Doc. A/CONF.151/26/Rev.1 (1992), in U.N. Conference on Educ. & Dev., Agenda 21: Programme of Action for Sustainable Development 7, U.N. Sales No. E.93.I.11 (1993) stating "Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

<sup>41</sup> Rio Declaration on Environment and Development, UN GAOR Preparatory Commission for the United Nations Conference on Environment and Development, 4th Sess., princ. 1, U.N. Doc. A/CONF.151/PC/WG.III/L.33/Rev. 1 (1992) [hereinafter Rio Declaration]

Principle 22 affirms that: "*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 recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development*".

Earth Summit Agenda 21: The United Nations Programme of Action From Rio 3, U.N. Sales No. E.93.I.11 (1993) [hereinafter Agenda 21]. (Chapters 11 and, particularly, Chapter 26).

Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, Report of the U.N. Conference on Environment and Development (Rio de Janeiro), Annex III, U.N. Doc. A/CONF.151/26 (Vol III) (1992), (par. 2.d, 5.a, 6.d, 8.f, 12.d)

Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, 823 (1992) [hereinafter Biodiversity Convention]. Article 8 part (J)

<sup>42</sup> Johannesburg World Summit on Sustainable Development, Declaration and Plan of Implementation, available at <http://www.johannesburgsummit.org/html/documents/summit>

<sup>43</sup> ILO Convention No. 26, *supra* note 9

Art 4 relates to protection against destruction of indigenous peoples' environment. It furthermore requires for special measures to safeguard the environment of indigenous peoples and that the measures "shall not be contrary to the freely-expressed wishes of the peoples concerned." UN Draft Declaration, *supra* note 10

Article 28 of the Declaration specifies the particular rights and duties of indigenous peoples as follows: "Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation."

The Draft Declaration of Principles on Human Rights and Environment of 6 July 1994

Art 14 states Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence. Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.

<sup>44</sup> Declaration on the Right to Development, art. 6, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986)

<sup>45</sup> See Ian Brownlie, "The Human Right to Development" Human Rights Unit Occasional Paper, 11 (Commonwealth Secretariat, Nov. 1989) who has criticised the declaration and predicted that it will "blur the conceptual profile and make the task of promulgation of the right the more difficult"; Carty, From the Right to Economic Self-Determination to the Right to Development: A Crisis in Legal Theory, Third World Legal Studies 73, 75 (1984) who has criticised the right to development as the "a crisis in legal theory, because it encompasses a determined attempt to place material content before form and yet retain whatever advantages are supposed to attach to the use of legal language."

<sup>46</sup> Declaration on the Right to Development, Art 1.1

<sup>47</sup> *Id* Art 2

<sup>48</sup> *Id*. Art 2.2

- <sup>49</sup> For the World Bank's policy on Indigenous peoples and their Land, see <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/0F7D6F3F04DD70398525672C007D08ED?OpenDocument>; for the Asian Development Bank's policy on Indigenous peoples and their Land, see [http://www.adb.org/Documents/Policies/Indigenous\\_Peoples/default.asp?p=policies](http://www.adb.org/Documents/Policies/Indigenous_Peoples/default.asp?p=policies)
- <sup>50</sup> See the Population and Housing Census of Malaysia 1991: General Report of the Population Census, Vol. 1, Department of Statistics, Kuala Lumpur.
- <sup>51</sup> For a breakdown of groups, see <http://www.jheoa.gov.my/e-orangasli.htm>
- <sup>52</sup> Erica-Irene A.Daes, Special Rapporteur on Indigenous Populations, Indigenous peoples and their relationship to land, E/CN.4/Sub.2/1999/18, 3 June 1999, paras. 19-30. [hereinafter Report on Indigenous peoples and their relationship to land]
- <sup>53</sup> Syed Husin Ali, "Indigenous People's Experience with Electoral and Party Politics", paper presented at the Workshop on Indigenous Peoples' Experience with Electoral and Party Politics, at Poring National Park, 14-16 July 2000
- <sup>54</sup> Colin Nicholas, "Suhakam and the Indigenous Peoples' Question", paper presented at the National Consultation on "Suhakam after one year: Has the state of human rights improved in Malaysia?", Kuala Lumpur, 5 May 2001; Sonia Randhawa, "Loincloth-wearing backward infidels: Orang Asli identity?", radiqradio.com, 1 August 2002, available at <http://www.suaram.org>.
- <sup>55</sup> 1961 policy statement
- <sup>56</sup> Ali, *supra* note 53
- <sup>57</sup> Karen Lai, (Re)presenting History in Melaka: the Orang Asli of Malaysia, Department of Geography, National University of Singapore (copy with author)
- <sup>58</sup> 8<sup>th</sup> Malaysia Plan (2001-2005), available at <http://www.pmo.gov.my/RancanganWeb/menuRM8.htm>
- <sup>59</sup> Report of the Working Group on Indigenous Populations on its 15<sup>th</sup> session (Geneva, 28 July, 11 August 1997), E/CN.4/Sub.2/1997/14, 13 August 1997, para. 62
- <sup>60</sup> The National Forestry Act 1984 declares all forest produce under the State ownership, prohibiting its removal without a license. The National Land Conservation Act 1969 prohibits the clearing of hill land or the planting of short-term crops without a permit from the Collector. The Land (Group Settlement Areas) Act 1969 empowers federal agencies such as the Federal Land Development Authority (FELDA) to acquire large tracts of undeveloped land for the purpose of rural development. While the Orang Asli are seldom beneficiaries of such plans, their land and means of livelihood are very often lost when subject to acquisition under these very plans.
- <sup>61</sup> National Land Code (Act 56 of 1965)
- <sup>62</sup> Aboriginal Peoples Act (Act 134 of 1954)
- <sup>63</sup> Colin Nicholas, The Orang Asli of Peninsula Malaysia, Report by Center of Orang Asli, available at <http://www.xlibris.de/magickriver/oa.htm>
- <sup>64</sup> Sagong bin Tasi, *supra* note, para. 14(2)
- <sup>65</sup> Nicolas, *supra* note 2
- <sup>66</sup> *supra* note 2
- <sup>67</sup> Adong bin Kuwau, *see supra*. note.
- <sup>68</sup> Sagong Tasi, *see supra* note
- <sup>69</sup> Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, 284.
- <sup>70</sup> Sagong bin Tasi, *supra* note at para 11
- <sup>71</sup> Sagong bin Tasi, *supra* note at para 11 (1); basing such an argument on occupation time memorial can be argued to be based on English land law concepts of possession, *see* Bradley Bryan, Property as Ontology: On Aboriginal and English Understandings of Ownership, 13 *Can. J. L. & Juris.* 3, 10-11 (2000)
- <sup>72</sup> Sagong bin Tasi, *supra* note
- <sup>73</sup> *Supra* note
- <sup>74</sup> Tun Mohamed Suffian's *Introduction to the Malaysian Constitution* (2nd Ed, 1976)
- <sup>75</sup> <http://www.jheoa.gov.my/index-malay.htm>
- <sup>76</sup> Sagong Tasi, *see supra* n. at p. 22-23
- <sup>77</sup> Tan Tek Seng, *see supra* n. 69 at p. 284.
- <sup>78</sup> The Human Rights situation of Indigenous Peoples in the Americas [hereinafter the OAS Human Rights Report], OEA/Ser.L/V/II.108 Doc. 62, 20 October 2000, Chapter III
- <sup>79</sup> *Id.* At p. 285.
- <sup>80</sup> BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (14<sup>th</sup> Ed.) at p. 264.
- <sup>81</sup> Sagong bin Tasi, *supra* note at para. 13 (2)
- <sup>82</sup> *Id.*
- <sup>83</sup> Sagong Tasi, *see supra* note at p. 9-10.

<sup>84</sup> Adong Bin Kuwau *supra* note

<sup>85</sup> Sagong Tasi, *see supra* note at para. 11 (1)

<sup>86</sup> Nor Anak Nyawai *supra* note at p. 51

<sup>87</sup> Sagong Tasi, *see supra* note at para. 11(2)

<sup>88</sup> "The nature of native title must be ascertained by reference to the traditional laws and customs of the indigenous inhabitants of the land. Native title does not have the customary incidents of common law title to land, but it is recognised by the common law." *Pareroutja & Ors v Tickner & Ors* (1993) 117 ALR 206 at p. 213, cited by Adong Kuwau *supra* note

<sup>89</sup> *Move to boost Orang Asli productivity*, NEW STRAITS TIMES (MALAYSIA), February 22, 2003, available at [www.lexis.com](http://www.lexis.com).

<sup>90</sup> *Problem of Drop-outs Among Orang Asli Children to be Tackled*, BERNAMA (MALAYSIAN NATIONAL NEWS AGENCY), September 2, 2002, available at [www.lexis.com](http://www.lexis.com).

<sup>91</sup> Nor Nyawai, *see supra* n. 86 at p. 51-53.

<sup>92</sup> OAS Indigenous Rights Report, *supra* note 78

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Adong bin Kuwau, *see supra* n. 84

<sup>96</sup> Involuntary Resettlement, The World Bank Operational Manual, OP 4.12, available at [www.worldbank.org](http://www.worldbank.org).

<sup>97</sup> Sagong bin Tasi, *supra* note at para. 14 (1)

<sup>98</sup> For specific application of the fiduciary concept to indigenous peoples rights in Canada, *see* Gordon Christie, *Delgamuukw and the Protection of Aboriginal Land Interests*, 32 *Ottawa L. Rev.* 85

<sup>99</sup> Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at p. 18: "There may be circumstances in which the Crown's fiduciary duty to Aboriginal peoples conflicts with its other responsibilities, such as the interest of the public at large. Where such potential conflict of interest situations exist, the Crown cannot simply ignore one interest in favour of the other. Rather, it must attempt to balance its competing responsibilities."

<sup>100</sup> Christie, *supra* note 98 at p. 101 (arguing that State's fiduciary duty towards indigenous peoples should be maintained at a priority above that of mainstream society in all situations and not differentiated according to traditional or non-traditional land use as laid out in *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [hereinafter *Gladstone*] at para. 62 and applied in *Delgamuukw*)

<sup>101</sup> *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481, Sudha CKG Pillay, "The changing faces of administrative law in Malaysia" [1999] 1 MLJ cxl

<sup>102</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385

<sup>103</sup> *Id.*; *Gladstone supra* note 77; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [hereinafter *Delgamuukw*]

<sup>104</sup> While Canadian jurisprudence on fiduciary duty stresses consultation and participation, US courts have consistently held Indian nations to be dependent wards, *see Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1 (5 Pet. 1) (1831) In fact, Indian Tribes from our earliest history, have been regarded as "domestic dependent nations" that exercise inherent sovereign authority over their members and territories.")

<sup>105</sup> UN Draft Declaration, *supra* note 10 Art 19, 20; OAS Proposed Declaration; OAS Proposed Declaration, *supra* note 10, XI (2), XIV (2), XVIII (3) & (4), XX (2), XXIV (4) & (7)

<sup>106</sup> *supra* note 105

<sup>107</sup> Working Group on UN Draft Declaration 1994 *supra* note 20 at para. 75 (Canada), 78 (New Zealand) and 81 (Phillipines); HRC General Comment on Art 27 *supra* note

<sup>108</sup> Human Rights Committee General Comment 23 on Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994), para. 8

<sup>109</sup> *Delgamuukw supra* note 103 at p. 1111

<sup>110</sup> Federal Constitution, Art 8 (1), 45(2), Ninth Schedule (List 1)

<sup>111</sup> Colin Nicholas, *supra* note 1

<sup>112</sup> Indigenous Peoples, The World Bank Operational Directive, OD 4.20, available at [www.worldbank.org](http://www.worldbank.org).

<sup>113</sup> *RM24m to build three schools for Orang Asli*, New Straits Times (Malaysia), March 13, 2003.

<sup>114</sup> The United Nations Development Programme's Guidelines to Development, 10 Sept, 2002, p. 1-5