13

Legal Privileges and the Effective Recognition of Indigenous Land Rights

Lessons from Malaysia

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Introduction

Malaysia's Indigenous Peoples share a common experience of discrimination and a systematic dispossession of their lands. Like other jurisdictions, the predicament in Malaysia can be attributed to a persistent lack of respect, recognition, protection, and priority for Indigenous lands (SUHAKAM, 2013). Despite commonalities among Malaysia's Indigenous Peoples from a land rights perspective, their experience is somewhat distinctive due to the different rights, privileges, and treatment afforded to each under the law and derived from their local circumstances.

Exploring the nuances of the legal context in Malaysia, this chapter begins by identifying "Indigenous Peoples" and their diverse traditional land tenure systems, and then examines the constitutional categorization of, and differences between, the Peninsular Malaysia Orang Asli and the natives of Sabah and of Sarawak. After surveying their respective statutory land and resource laws and policies, this analysis examines the strategy of litigation of Indigenous customary land rights through the Malaysian courts. This chapter then explores opportunities for the inclusion of Malaysia's Indigenous Peoples in connection with international conservation commitments, followed by concluding observations on the legal protections and recognition of Indigenous land rights.

Indigenous Peoples in Malaysia

Broadly, the Federation of Malaysia comprises the peninsular land separating the Straits of Malacca from the South China Sea and most of the northern quarter of the island of Borneo. Peninsular Malaysia has eleven

https://doi.org/10.1017/9781009521581.017 Published online by Cambridge University Press

states and two federal territories, formerly known as the Federation of Malaya. The Borneo territories are made up of the states of Sabah and Sarawak, and a federal territory.

Prior to the formation of Malaysia in 1963, the Federation of Malaya, Sabah (previously North Borneo), and Sarawak were three separate states. The Federation of Malaya gained independence from the British in 1957, while Sabah and Sarawak remained under British rule until the Malaysia Agreement 1963, where Sabah, Sarawak, and the self-governing British colony of Singapore combined with the Federation of Malaya to form the Federation of Malaysia. Singapore left the Federation in 1965.

The 1957 Federation of Malaya Constitution, the foundation for the Malaysian Constitution, contained provisions granting distinct special privileges to two ethnic groups, namely the Malays and the Aborigines of the Malay peninsula (also known as the Orang Asli), including quota reservations and, more pertinently, rights and privileges relating to land. Ethnic Malays were granted these special privileges following a complex compromise between the interests of the major ethnic groups in Malaya immediately prior to independence from British rule. The groups mainly involved the politically and numerically stronger Malays, whose earlier settlement and kingdoms in the Malay Peninsula had been recognized by the colonial government, and the immigrant ethnic Chinese, Indians, and other groups, many of whom were vying for entrenched citizenship rights in an independent Malaya. The relatively superior political position of the Malays ensured that two important aspects of the compromise were: (i) Malay demands for the maintenance and protection of their culture, religion, and lands and (ii) their prevailing socio-economic disadvantages compared to the Chinese and the Indians (Fernando, 2002). In contrast, the Orang Asli as the "first peoples" of the Malay peninsula, who numbered less than 0.5 percent of the population and were considered "backward" and economically insignificant, played no part in this constitutional compromise (Subramaniam, 2013). As will be observed, they were nonetheless ascribed limited constitutional protections under government stewardship.

Subsequently, Annex A of the Malaysia Agreement 1963 provided for constitutional amendments to the Federation of Malaya Constitution, legally facilitating Malaysia's formation. One of the conditions of Sabah and Sarawak joining the Federation of Malaysia was the granting of special privileges to natives (*anak negeri*) of Sabah and Sarawak tailored

to the local circumstances and political demands of both states.[1] The Malays,[2] natives of Sabah,[3] natives of Sarawak,[4] and Orang Asli,[5] were thus afforded varying degrees of constitutional rights and privileges due to legal arrangements for the protection of those considered as "indigenous" or "native" during the decolonization process. Ethnic Malays account for almost 58 percent of Malaysia's citizenry of 30.4 million, while the Orang Asli, natives of Sabah and natives of Sarawak collectively amount to 12.2 percent of the population (Department of Statistics Malaysia, 2023). The Malays are politically dominant at the federal level and state levels within Peninsular Malaysia, whereas the heterogenous native groups of Sabah and Sarawak have political control over their respective states. Peninsular Malaysia Orang Asli, whose eighteen official sub-ethnic groups only account for 0.7 percent of the population, are politically weak, and are among the most marginalized and impoverished groups in Malaysia (Nicholas, 2020, p. 284).

Although the term "Indigenous Peoples" is not contained in the Federal Constitution, the natives of Sabah and Sarawak and Peninsular Malaysia Orang Asli have collectively self-identified as *Orang Asal* (Indigenous Peoples) (Nicholas, 2020, p. 283) at international human rights fora and domestically. The Human Rights Commission of Malaysia (SUHAKAM, 2013) considers these groups to meet international criteria for "Indigenous Peoples" under the various international

[1] For commentary on constitutional federalism in Malaysia, see, for example, Fong (2008).

[2] A "Malay" under Article 160(2) of the Malaysian Constitution means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and: (a) was born before August 31, 1957, in Malaya or Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of that person.

[3] Article 161A(6)(b) of the Malaysian Constitution provides that a native in relation to Sabah is a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day [September 16, 1963] or not) either in Sabah or to a father domiciled in Sabah at the time of birth. They consist of thirty-nine Indigenous ethnic groups (Nicholas, 2020, p. 283).

[4] Article 161A(6)(a) of the Malaysian Constitution provides that a native in relation to Sarawak is a person who is a citizen, is the grandchild of a person of the Bukitan, Bisayah, Dusun, Sea Dayak, Land Dayak, Kadayan, Kalabit, Kayan, Kenyah (including Subup and Sipeng), Kajang (including Sekapan, Kejaman, Lahanan, Punan, Tanjong, and Kanowit), Lugat, Lisum, Malay, Melano, Murut, Penan, Sian, Tagal, Tabun, and Ubit race or is of mixed blood deriving exclusively from these races.

[5] Orang Asli are constitutionally defined as "the Aborigines of the Malay Peninsula" (Article 160(2)) and are officially classified into eighteen sub-ethnic groups consisting of three broad groups, namely, the Negrito, Senoi, and Aboriginal Malays (Department of Orang Asli Development, 2023).

human rights documents, as they are the earliest inhabitants of their respective lands and collectively a non-dominant and marginalized group within Malaysia that has voluntarily perpetuated a cultural distinctiveness compared to the dominant sections of society. Statistically, the Malaysian government considers all three groups *and* the Peninsular Malaysia Malays as *bumiputera* (translated literally, princes of the soil) (Department of Statistics Malaysia, 2023).

Political and historical narratives consider ethnic Malays as deserving of a special legal position through constitutional privileges and government policies on the basis that their ancestors, who arrived after the Orang Asli, had established kingdoms in the Malay peninsula that were recognized as sovereign by British colonizers (Dentan et al., 1997; Idrus, 2008; Nicholas, 2000). However, the politically and socially dominant Malays have not been identified as "Indigenous Peoples" at international Indigenous rights fora, and perhaps more importantly, do not possess specific communal connections to lands, a feature common to Indigenous Peoples worldwide (Nicholas et al., 2010). In comparison, many Orang Asli and Sabah and Sarawak native communities have struggled to maintain the inextricable political, social, economic, and cultural links they possess with their respective customary territories. This connection supports their traditional livelihoods, and perhaps more critically, defines their culture, identity, and wellbeing.[6]

As such, SUHAKAM has viewed "the mainstream, not minority" Malays as not within the terms of its inquiries into Indigenous Peoples' land rights in Malaysia (SUHAKAM, 2013). This chapter adopts SUHAKAM's opinion and focuses on the customary territorial rights of the Orang Asli and the natives of Sabah and Sarawak. Nonetheless, certain Malay legal privileges are examined to highlight the disparity of rights afforded to the other Indigenous groups and, in particular, the Orang Asli.

Indigenous Land Tenure Systems in Malaysia: Diversity, Flexibility, and Susceptibility to Dispossession

Collectively, the natives of Sabah, the natives of Sarawak, and Peninsular Malaysia Orang Asli have been categorized into at least eighty-four

[6] The traditional livelihoods of the various Indigenous ethnic groups in Malaysia depend on their respective local customs and locations. These activities include farming, orchard cultivation, hunting, fishing, and the gathering and use of produce from forests, waters, or tidal estuaries.

different ethnic and sub-ethnic groups: thirty-nine, twenty-seven, and eighteen heterogenous groups, respectively (Nicholas, 2023, p. 238). Through oral traditions and the domestic practice of customs and usages, these groups have developed rich, complex, and diverse land and territorial customs shaped by their geographical locales and traditional connections to these spaces.

Depending on the geographical location and cultural predisposition of each group, traditional activities include farming, orchard cultivation, hunting, fishing, and the gathering and use of produce from forests, waters, or tidal estuaries. Increased encroachment and loss of traditional lands, interaction with outsiders and state intervention have modified local customs, activities, and spatial areas but customary laws continue to observed, at least for communities that still inhabit their traditional areas.

For those communities that are traditionally engaged in more settled activities and do not inhabit coastal, urban or developed areas, there are some basic commonalities in respect of areas that they consider customary territories. Broadly, a customary territory for these groups is a specific and naturally defined area that would comprise settlements, cleared and cultivated areas, orchards, old settlement and cultivated areas, cemeteries, sacred and ceremonial sites, and forested areas for hunting and the collection of produce. Within this area there would be a combination of individual, communal, and non-exclusive customary interests that are managed by the community in accordance with customary laws. Examples of such customary land arrangements can be found among the *Semai* and *Temiar* (Peninsular Malaysia), *Iban* and *Bidayuh* (Sarawak), and *Dusun* and *Murut* (Sabah) (SUHAKAM, 2013).

Less sedentary Indigenous groups also possess distinctive concepts of defined territoriality and connections in respect of their customary areas. For example, the *Seletar* Orang Asli of Peninsular Malaysia assume custodianship of sea and coastal fringes and mangroves traditionally inhabited by them and regard such areas (within their defined boundaries) as their traditional territory and resources (SUHAKAM, 2013). Groups that are regarded as semi-nomadic such as the *Batek* Orang Asli of Peninsular Malaysia and the *Penan* of Sarawak have naturally defined traditional territories marked out by landscape features and customs relating to resource use and other cultural and spiritual connections within these areas (Bulan & Maran, 2020; SUHAKAM, 2013).

These informal, decentralized, and flexible systems of territoriality provided opportunities for subsequent waves of migrants, settlers, and incoming powers to claim these lands, having viewed large portions of

Indigenous customary territories as unsettled, unutilized, and fit for domination. The most profound of these interventions was the imposition of English property law systems to regulate land and resource use by British colonisers in the nineteenth and early twentieth centuries (Bulan & Maran, 2020; Doolittle, 2005; Subramaniam & Endicott, 2020; SUHAKAM, 2013). These foreign systems facilitated the "legal" dispossession of Indigenous Peoples by ignoring Indigenous concepts of territoriality, and sanctioning the exploitation of natural resources and the expansion of commercial activities into Indigenous customary territories. These systems form the basis of prevailing domestic laws governing lands and resources in Malaysia. The following sections detail the Malaysian legal framework and the treatment of distinct Indigenous Peoples and their customary rights to lands, territories, and resources.

Constitutional Privileges for Indigenous Peoples and their Lands: State-Centric Recognition

Malaysia is a constitutional monarchy that functions through a localized Westminster parliamentary system. The Malaysian legal system incorporates elements of local customs and *Syariah* Islamic principles into its common law system that have been modified and adapted to local circumstances through written laws and judicial pronouncements. As defined in Article 160(2) of the Malaysian Constitution, "law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof."

Due to their dissimilar histories and circumstances prior to Malaysia's formation, the Malaysian Constitution affords differing levels of special rights and privileges to the Malays, Orang Asli, natives of Sabah, and natives of Sarawak. Article 153 of the Malaysian Constitution expressly obliges the *Yang Dipertuan Agong*[7] to safeguard the "special position of the Malays and natives of any of the States of Sabah and Sarawak." This special position includes reservations of positions in the public service, scholarships, and other educational and training privileges and licenses for the operation of any trade or business (Article 153(2)).

[7] This is the equivalent of the King of Malaysia who is appointed on a rotational basis every five years by the Council of Rulers of the States in Peninsular Malaysia (see Malaysian Constitution, Articles 33–8, Third and Fifth Schedules).

Malays and natives of Sabah and Sarawak (Articles 76(2) and 150(6A)) have constitutional protection against laws that may impact their own respective laws and customs.[8] In respect of land, Malay reservations created in Peninsular Malaysia immediately before independence in 1957 are protected unless a law to the contrary is passed by a two-thirds majority in the relevant state legislature and both houses of the federal parliament (Article 89(1)). Article 90 also provides for the special protection of Malay customary lands in certain states of Peninsular Malaysia.

As for native lands in Sabah and Sarawak, Article 161A(5) of the federal Constitution permits any state law for the "reservation of land . . . or for alienation" to natives of Sabah and Sarawak or "for giving them preferential treatment as regards the alienation of land by the State." Generally, land matters fall within the exclusive jurisdiction of the state governments (Ninth Schedule List II Item 1) while List IIA of the Ninth Schedule of the federal constitution provides additional jurisdiction to the Sabah and Sarawak state governments over local native law and custom. In other words, the states of Sabah and Sarawak possess a high degree of legal autonomy to regulate the recognition of their respective Indigenous customary land rights. Nonetheless, these broad constitutional powers enable both state governments to subordinate the enforceability of any native customs in relation to land in favor of their respective land and resource utilization priorities.

In Peninsular Malaysia, Malays, who by constitutional definition must profess the religion of Islam,[9] have constitutional protections in respect of their religion, which is also the official religion of Malaysia (Articles 3 (1)).[10] The federal constitution has maintained the precedence and sovereignty of the Malay customary rulers of Peninsular Malay states to a considerable extent (Articles 70 and 181). The Malay language is the national language (Article 152).

In contrast, Peninsular Malaysia Orang Asli do not enjoy equivalent constitutional rights but instead are dependent on the federal government for their welfare. Item 16 of the Ninth Schedule List I of the

[8] There are constitutional rights for the resolution of such disputes by the *Syariah* courts (see Malaysian Constitution, Article 121(1A)) for Malays and native courts (see Malaysian Constitution, article 72(20) and Ninth Schedule, List IIA, Item 13) for Sabah and Sarawak.

[9] For a definition of 'Malay' under Article 160(2) of the Malaysian Constitution, see note 3 above.

[10] See, for example, Articles 101(4) and 76(2).

Malaysian Constitution specifically empowers the federal government to legislate for Orang Asli welfare.[11] Article 8(5)(c) permits laws "for the protection, well-being or advancement" of Orang Asli "including, the reservation of land" or the "reservation to Orang Asli of a reasonable proportion of suitable positions in the public service" without offending the constitutional equality provision contained in Article 8(1). Despite enabling positive discrimination, these constitutional provisions leave the protection of the Orang Asli and their traditional lands in the hands of the federal government and the individual state governments, the latter having jurisdiction over land matters.

The special constitutional rights and privileges afforded in Malaysia are arguably hierarchical, with the Malays possessing the strongest and widest form of protections. Broadly, natives of Sabah and Sarawak possess comparable constitutional rights and privileges in relation to their lands and customs. However, the legal power and jurisdiction over the recognition of such rights and privileges, including those relating to domestic Indigenous land customs and their enforceability, lie with the state governments of Sabah and Sarawak. In comparison, the Orang Asli possess constitutional protections that do not explicitly encompass their languages, laws, traditions, customs, and institutions, and with respect to lands and other privileges are dependent on government discretion.

There are historical reasons for the apparent constitutional anomaly between the Malays and the Orang Asli. Despite the Orang Asli being descendants of the earliest inhabitants of the Malay Peninsula and their relative independence from the Malay rulers (Carey, 1976; Clifford, 1897; Dentan et al., 1997), they were deemed non-sovereign dependents of the Malay rulers by the British colonial rulers (Noone, 1936; Sullivan, 1998). The diverse tribal lifestyles of the minority Orang Asli groups, which were considered lower on the scale of social organization compared to the Malays and backward (Nah, 2004; Wilkinson, 1923), culminated in legal protections that were paternalistic, and designed for persons incapable of self-determination and destined for integration with the dominant Malay population (Subramaniam, 2011).

Notwithstanding better levels of constitutional protection and their state governments enjoying a higher level of autonomy, local native communities in Sabah and Sarawak share a long history of dispossession

[11] Article 74(1) of the Malaysian Constitution empowers the federal government to legislate for matters enumerated in the federal list (Ninth Schedule List I).

of their customary territories with the Orang Asli, a dilemma exacerbated by their continued lack of security of tenure over these areas (SUHAKAM, 2013). Increased demand for lands and resources for economic growth have caused acute encroachment and appropriation of the remaining areas traditionally inhabited by Indigenous communities (Carling & Godio, 2018; Open Society Justice Initiative, 2017; SUHAKAM, 2013).

Statutory Land Rights: State Curtailment of Indigenous Territorial Space

Statutory land rights for Malaysia's Indigenous Peoples are broadly divided into two levels of legal recognition, a "lower" level and a "higher" level. At a "lower" level, Peninsular Malaysia Orang Asli have limited rights and privileges in respect of "inhabited" lands and resources "used" by them, dependent on land reservations or subsistence privileges granted by the state government. However, they do not enjoy express statutory recognition of their respective customary land arrangements. At a "higher" level, the natives of Sabah and Sarawak possess limited rights to their customary lands and resources as defined and determined by their respective state laws.

As will be observed in the ensuing subsections, both forms of statutory recognition could also be viewed as a barrier to the effective protection of Indigenous lands, territories, and resources as they have facilitated the "legal" dispossession of Indigenous traditional areas.

Lower Recognition: Peninsular Malaysia Orang Asli

The *Aboriginal Peoples Act* 1954 (*APA*) is the main statute governing Orang Asli administration and rights, including land matters. Legal commentators have described the *APA* as static and outmoded due to its paternalistic and protectionist skew that secures government control over Orang Asli and their traditional lands (Hooker, 1996; Subramaniam, 2011; Wook, 2017).

The *APA* confers extensive powers on the federal executive, including powers to: (i) determine who is an Orang Asli (section 3(3)); (ii) determine the appointment and removal of Orang Asli headmen (section 16); (iii) exclude undesirable persons from any Orang Asli inhabited areas (sections 14 and 15); and (iv) restrict the entry into or circulation of any written, printed, or photographic matter within Aboriginal inhabited

areas (section 19).[12] The Department of Orang Asli Development (JAKOA), headed by the Director-General of Orang Asli Affairs, is the federal agency responsible for Orang Asli "administration, welfare and advancement" (section 4).

Orang Asli customary land tenure has not been recognized by statute. The primary legal protection of traditional Orang Asli lands is through the reservation of specific areas by the state government. In practice, JAKOA would apply to an individual state authority for the reservation of a tract of land on behalf of an Orang Asli community. Analogous to other common law jurisdictions, the state authority, essentially the state government, holds radical title over state land and possesses the power to create land interests and regulate land dealings under the *National Land Code* 1965 (*NLC*). The *NLC*, the primary statute governing land tenure, registration, and dealings in Peninsular Malaysia, does not expressly encompass Orang Asli customary land rights. However, a state authority may formally declare areas inhabited by Orang Asli as reservations under the *APA*, namely, Aboriginal reserves (section 7(1)) or Aboriginal areas (section 6(1)).[13] Despite a measure of statutory protection from the creation of land and resource interests over areas formally declared as Aboriginal reserves and Aboriginal areas (sections7(2) and 6(2)), sections 7(3) and 6(3) respectively permit Aboriginal reserves and areas to be revoked by a notification in the state government gazette. Consequently, statutory Orang Asli reserves provide limited security of tenure as the existence of a reserve is dependent on the state government's executive fiat.[14] As for land interests, rights of occupancy to Orang Asli within an Aboriginal reserve are limited to that of a tenant at will (section 8), meaning these rights are terminable by a notification from the state authority. Section 10 permits Aboriginal communities to continue residing in areas declared as Malay reservations, forest reserves or game reserves, but upon conditions prescribed by the state authority.

Redress available under the *APA* for loss of traditional lands is far from adequate. There is no right to replacement lands for lands lost, and

[12] For commentary, see, for example, Subramaniam (2011).

[13] State authorities have also declared Orang Asli reserves by employing the general "public purpose" provision (section 62) in the *National Land Code* 1965. However, these reservations do not carry the protection from the creation of other land interests afforded to reserves declared under the *APA*.

[14] For commentary on how the common law has supplemented Orang Asli land rights, see notes 25–45 below and accompanying text.

statutory compensation for the loss of lands is discretionary (sections 10 (3) and 12). However, section 11 provides for the payment of mandatory compensation for the loss of Orang Asli fruit and rubber trees as a result of any alienation or disposal.

The *National Forestry Act* 1984 governs the administration of forests in Peninsular Malaysia and confers limited exemptions to Orang Asli from licensing requirements (section 40(3)) and royalty payments (section 62(2)) in respect of forest produce used for subsistence purposes. Section 51(1) of *Wildlife Conservation Act* 2010 permits Orang Asli the right to hunt limited species of protected wildlife for sustenance purposes.

The federal and state governments' broad statutory powers to protect Orang Asli and their traditional lands and resources has produced poor outcomes for land security. As of 2018, only 25 percent of officially acknowledged Orang Asli lands had been formally reserved (Bernama, 2018). The areas selected by JAKOA as "officially" inhabited by the Orang Asli is only 17 percent of the actual customary areas claimed by the Orang Asli (SUHAKAM, 2013). Further, land policies introduced through JAKOA to address Orang Asli socio-economic issues, including the 2009 Orang Asli Land Titles Policy and other agricultural development schemes, do not legally recognize a large portion of customary communal lands (*tanah adat*), lack effective community participation, and when implemented have not alleviated the economic problems of local communities (SUHAKAM, 2013). Also, Orang Asli neither possess statutory rights for customary lands within protected areas such as national parks and wildlife sanctuaries, nor are they formally recognized as co-managers or collaborative partners within such areas, despite having valuable local traditional knowledge (SUHAKAM, 2013).

The 1961 Federal Policy Regarding the Administration of the Orang Asli recognizes the "special position" of Orang Asli "in respect of land usage and land rights," and that "Orang Asli will not be moved from their traditional areas without their consent." However, these commitments are not followed by state land administrators (SUHAKAM, 2013, p. 137). Effective processes for consultations with local Indigenous communities to ascertain the extent of their "traditional areas" are also non-existent. As such, Orang Asli communal lands are often perceived as empty and unused state land that paves the way for "legal" land grabs (Mamo, 2020) and exploitative activities by others, including logging, plantations, agribusiness, and commercial projects (SUHAKAM, 2013).

Natives of Sarawak

Unlike the experience of the Peninsular Malaysia Orang Asli, British rule in Sarawak acknowledged and recognized certain forms of Indigenous governance over customary lands, notwithstanding the imposition of English property rights concepts and registration systems (Porter, 1967). Despite an increasing pattern of regulation, land and resource laws during the colonial period, and beyond, have continued to recognize certain native customary rights, bridled by state powers to determine and extinguish such rights (Bulan, 2007).

Consequently, Native Customary Land (NCL) and Native Area Land (NAL) are officially categorized in the current *Sarawak Land Code* 1958 (*SLC*). NCL consists of land where native customary rights (NCR) were created prior to January 1, 1958, and still subsist; lands in a communal native reserve; and Interior Area Land (IAL) (residual areas after the excision of other classes of land, Bulan, 2012) upon which NCR has been created pursuant to a statutory state government permit (section 2). NAL comprises titled land held by natives or areas declared as such by state government (Bulan, 2012).

However, section 5(1) of the SLC limits the creation of NCR after January 1, 1958. Section 5(2) states that NCR can be created through a permit over IAL. The provision explicitly recognizes NCR land activities relating to the felling and occupation of cleared virgin jungle, the planting of fruit trees, occupation or cultivation, use for a burial ground, shrine or rights of way or any "other lawful method."[15]

Common law NCR acquired before January 1, 1958, can be established by a native or native community court through the courts. Individual natives can apply for a grant in perpetuity, where they have occupied and used any area of unalienated state land in accordance with rights acquired by customary ownership for residential and agricultural purposes (section 18). While these statutory provisions recognize some forms of NCR, they are mainly based on "occupation" (Bulan, 2012). More consistent with Western property law concepts, they focus on sedentarized and agricultural activities, and do not explicitly recognize broader native customary territories and areas used for hunting, fishing, the collection of forest produce and ceremonial purposes, such as the Iban native customs of *pemakai menoa* (a territorial domain) and *pulau galau* (a communal forest reserve). Remarkably, codified customs such as the *Adat*

[15] For the scope and limit of "any other lawful method," see, for example, Bulan (2012).

Iban Order 1993 also do not specifically recognize these forms of customary land use. The *SLC* does not expressly recognize the land tenure systems and territoriality of nomadic or semi-nomadic groups like the Penan and native communities claiming coastal or sea areas (SUHAKAM, 2013).

In response to the apex court decision in *TR Sandah* around the limited common law NCR to cleared, settled, and cultivated areas, the Sarawak government amended the *SLC* in 2018 to permit a native community to claim usufructuary rights enjoyed or exercised up to 1,000 hectares (section 6A). If the relevant land officer approves the claim, a native communal title would be issued describing the area as a "native territorial domain," and used for agricultural purposes or any such other purpose or conditions imposed by the state (section 6A (3)). While this amendment has recognized claims to broader sections of a native community's customary territory, the arbitrary statutory limit of 1,000 hectares for the native territorial domain has been viewed as "short-changing" natives as there exist native claims exceeding 10,000 hectares (Nicholas, 2019, p. 278). Equally, executive control over the claims process and conditions relating to the native communal title have not assuaged prevailing concerns about the government's administration of NCR matters.

Administratively, the procedures of land offices in dealing with NCR matters have been problematic for native communities due to disputes between the state and natives on the extent of lands subject to NCR. Delays and difficulties have been documented in processing applications for NCR and surveying lands, and unsatisfactory notification procedures for claims and applications, and the limitations of local state officers, have been reported (SUHAKAM, 2013). Despite 20 percent of state land being classified as NCL, only 2 percent of NCL has been formally surveyed and titled (Limbu, 2017). These problems mean the legal status of lands subject to NCR is indeterminate and open to the grant of other land interests. Further, the earlier success in taking NCR claims to the civil courts has been limited in more recent times.

Compounding matters for natives, formally recognized NCR lands are legally vulnerable to other land uses and classifications. The state government possesses wide powers to extinguish NCR subject to the payment of compensation for those natives who establish claims to NCR.[16]

[16] See SLC, section 5(3). For other legislation permitting the extinguishment, regulation or limitation of NCR, see for example, *Forests Ordinance* 1958; *Land Consolidation and Rehabilitation Authority Ordinance* 1976; *National Parks and Nature Reserves Ordinance* 1998.

Section 28 of the *SLC* permits a provisional lease to be granted over state land that includes native holdings where a survey of such holdings is impracticable. Registrations of Native Rights under section 7A are merely a "certification of rights" and do not constitute the indefeasible title accorded to other registered proprietors under sections 131 and 132(1) (Bulan, 2012).

Therefore, it is not uncommon for the state government to grant logging licenses and provisional leases for plantations of lands potentially subject to NCR without the local community's free prior and informed consent, often resulting in litigation by native communities. Other instances where the state has overridden the NCR interests of native communities include large infrastructure projects (Lasimbang, 2016), and the inclusion of NCR land into state-regulated protected areas including forest reserves where natives have limited rights (SUHAKAM, 2013). Complaints of violence and police action against human rights defenders in NCR land disputes suggest government inaction and implicit acquiescence (Amnesty International, 2018).

Community land development schemes initiated by the state government have not been without controversy or criticism (Bulan, 2006). For example, the joint venture arrangement between the Sarawak Land Custody Development Authority, investors and a local Indigenous community only granted a 30-percent equity share to the community, secured through its surrender of lands. Beyond the lack of community control, there have also been disputes over the consultation process with Indigenous beneficiaries, the lack of transparency in the joint-venture formation process, and non-payment of dividends (SUHAKAM, 2013).

Notwithstanding "native" autonomy and control over the recognition of NCR in Sarawak, legal power has enabled the state government and those in political power to mold the contours of the NCR recognition framework in accordance with their own primacies, which arguably do not prioritize the rights and interests of the local Indigenous communities in relation to their traditional lands.

Natives of Sabah

Analogous to Sarawak, British colonial administrators had expressly recognized native customs in Sabah. Article 9 of the 1881 Royal Charter granted by the British Crown for the administration of North

Borneo (now Sabah) obligated the British North Borneo Chartered Company to pay careful regard to the customs and laws of the class, tribe, or nation, especially with respect to lands.[17] As it turned out, the colonial administration instituted a system of legal pluralism, where selected native customary laws were supported, while those hampering commercial land exploitation were replaced with western legal concepts (Doolittle, 2005). After Sabah's independence and Malaysia's formation, the Malaysia Agreement and federal constitution maintained the prevailing legal position of the natives of Sabah (Doolittle, 2005).

Section 15 of the *Sabah Land Ordinance* (*SLO*) defines NCR to include land possessed under "customary tenure," land planted with fifty or more fruit trees per hectare, isolated fruit trees or plants of economic value proven to be planted or kept as personal property, grazing land stocked with sufficient cattle or horses to control undergrowth, land cultivated or built on within three years, burial grounds and shrines, and usual rights of way for people or animals (Munang, 2015).

"Customary tenure" under section 66 of the *SLO* means the lawful possession of land by natives either by continuous occupation or cultivation for more than three years, or by native title issued under written law. Similar to Sarawak, "occupation" is central to legal recognition under the *SLO*. Customary tenure confers a "permanent heritable and transferable right of use and occupancy" of native land subject to terms prescribed by the State Collector of Land Revenue ("Collector"), a government officer (section 66). Additionally, the Collector possesses the power to determine native land claims (sections 14, 81, and 82) and may deal with NCR established under section 15 by monetary compensation rather than issuing a title (section 16).

Although title registration is of paramount importance under the Sabah land law system, land "still held under NCR without document of title" is an express exception to this rule (*SLO*, section 88). However, the Collector may require a native to take out a native title by entry in the Native Title Register (section 67(2)). The *SLO* also provides for the creation of individual native title (section 70(1)), native communal title (section 76(1)), and native reserves (section 78). However, the term "title" under section 76 is arguably a misnomer, as it is not registered in favor of the native community as proprietor. Section 76, a legacy of British paternalism toward the natives, provides for the land to be

[17] For commentary on the evolution of native land rights in Sabah, see Doolittle (2005).

registered in the name of the Collector "as trustee for the natives concerned but without the power of sale." Nevertheless, the Collector has the power to sanction the subdivision of the communal title and assign and transfer the sub-divided native titles to individual owners (section 77). It is also of note that section 76 and other provisions of the *SLO* do not explicitly recognize native customary rights to broader customary territories used for less sedentarized activities.

In addition to the obvious lack of community control over the titled communal land, a 2009 amendment to section 76 that added state power to decide the plan and purpose of a communal title has drawn criticism as being "open-ended" and, in practice, favoring joint-venture development program applications rather than NCR-based communal title applications (SUHAKAM, 2013). In 2019, the newly elected Pakatan Harapan Government abolished the communal land title policy (Dzulkifli, 2019), but sections 76 and 77 remain unamended.

Subject to subsequent modification or extinction by the state,[18] natives may also possess rights or conceded privileges that survive the creation of a forest reserve (section 12 of the *Sabah Forest Enactment* 1968 (*SFE*)). However, all other rights not expressly admitted or conceded by the state are extinguished (section 12(6)). Section 41 of the *SFE* provides limited rights to remove forest produce from state land and alienated land (with consent from the owner) for specified individual or communal subsistence purposes. The inclusion of potential NCR lands into forest reserves has adversely impacted the lives of local native communities through logging activities, complaints of harsh treatment by forest enforcement officers the statutory extinguishment, and limitation of their rights without adequate notice (SUHAKAM, 2013). Community forest management initiatives have also been said to lack "a structure to ensure effective participation in the co-management of community forest areas" (SUHAKAM, 2013, p. 97). In this respect, the Sabah Forest Policy 2018 appears to be a step forward, promising to strengthen local community participation in the implementation of forest management, protection, and tourism activities (Sabah Forestry Department, 2018).

Several other written laws for the regulation of lands and resources contain provisions that envisage protection of native rights and interests. These include the *Wildlife Conservation Enactment* 1997 (e.g., sections 7 and 32), *Biodiversity Enactment* 2000 (e.g., sections 16(b), 20(3), and 25

[18] *Forest Enactment* 1968, section 14.

(1)(b)), and the *Inland Fisheries and Aquaculture Enactment* 2003 (e.g., section 35). However, the power balance in relation to the recognition and exercise of such rights lies in favor of the state. The state's long-standing priority for land and resource exploitation through logging and large-scale commercial crop cultivation can be gleaned from established statutes empowering land development, such as the *Sabah Land Development Enactment* 1981, the *Sabah Forestry Development Authority Enactment* 1981, and the *Sabah Rubber Industry Board Enactment* 1981. This trend offers no assurances that written laws recognizing Indigenous rights will be implemented any differently from before. Comparable to Peninsular Malaysia and Sarawak, land interests granted to outsiders for commercial development without the knowledge or effective participation of the local native community are a relatively common phenomenon (SUHAKAM, 2013).

Procedurally, NCR in Sabah are additionally subject to extensive procedures through which native claims are asserted, determined, and protected (Nasser Hamid & Ram Singh, 2012; Wong-Adamal, 1998). Problematic land administration processes, loss of records, overlapping land applications, inadequate notification procedures and periods, poor information on third-party projects or land alienations, and delays in land survey were among the many issues raised during the SUHAKAM National Land Inquiry (Doolittle, 2011; SUHAKAM, 2013). Community land development schemes geared towards poverty eradication initiated by the state government have also been criticized for being "top-down" in terms of transparency, community participation, and consent mechanisms, and poorly implemented in terms of financial outcomes and return (SUHAKAM, 2013).

Somewhat ironically, the state's domination of NCR and the consequent loss of traditional Indigenous lands is enabled by laws aimed at protecting these lands (Doolittle, 2011). However, the state government's efforts in enabling community participation in state park areas by amending the Parks Enactment 1984 in 2011, and accommodating a traditional resource management system, *Tagal*, within its inland fishing laws and policies, are relatively laudable. Nonetheless, the lack of express legal recognition of the *Tagal* as "an Indigenous Peoples' system" has created jurisdictional conflicts between the state and native communities (SUHAKAM, 2013). While more recent developments suggest that the government appears to be working guardedly towards reinstating and strengthening Indigenous values in its administration (Nicholas, 2020), it remains to be seen whether primary state land use priorities in Sabah will

be recalibrated to incorporate the effective legal recognition of NCR. Unfortunately, for local native communities in Sabah sustaining a long-term NCR agenda poses a significant challenge, exacerbated by policy priorities that fluctuate with changes in political power.

Indigenous Peoples' Rights in Malaysia and in the Courts

Indigenous rights advocacy dates from the 1980s, involving engagement with the government and broader civil society, articulation and presentation of demands, media coverage and public awareness initiatives, civil disobedience, and peaceful protests (Open Society Justice Initiative, 2017). The failure of these initiatives to yield their desired outcomes, and increased land encroachment due to rapid land clearing and development, led Malaysia's Indigenous Peoples to employ the strategy of taking their land and resource grievances to the courts. In this regard, they have enjoyed some success through a liberal judicial interpretation of the law, and the domestic application of common law principles. However, the strategy of litigating Indigenous land rights has limitations, both doctrinally and practically. This section examines the basic principles recognized by the Malaysian courts and the challenges of relying on the court process to deliver justice for indigenous land issues.

Judicial Recognition through the Common Law

From 1996, the Malaysian courts have applied international common law developments on Indigenous land rights[19] in local cases to recognize the continued enforceability of pre-existing customary land rights of the Orang Asli and the natives of Sabah and Sarawak.[20] The first case recognizing such rights was *Adong bin Kuwau v Kerajaan Negeri Johor* (*Adong HC*)[21] from Peninsular Malaysia. In affording such recognition, the court applied principles of common law native title from other

[19] For commentary on these developments internationally, see, for example, McHugh (2011).

[20] See, for example, *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] ("*Adong HC*") 1 MLJ 418; *Kerajaan Negeri Johor v Adong bin Kuwau* ("*Adong CA*") [1998] 2 MLJ 158; *Sagong bin Tasi v Kerajaan Negeri Selangor* ("*Sagong HC*") [2002] 2 MLJ 591; *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] ("*Sagong CA*") 6 MLJ 289; *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* ("*Nor Nyawai HC*") [2001] 6 MLJ 241; *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai* ("*Nor Nyawai CA*") [2006] 1 MLJ 256.

[21] *Adong HC* [1997] 1 MLJ 418, pp. 426–33.

common law jurisdictions, including the landmark decisions of *Mabo v Queensland [No. 2]*[22] (*Mabo [No. 2]*) and *Calder v AG of British Columbia*[23] (*Calder*) and considered the special position of the Orang Asli under the federal Constitution and the *Aboriginal Peoples Act* 1954. *Adong HC* was affirmed on appeal in 1998,[24] opening the door for Indigenous Peoples to assert their customary territorial rights in the courts beyond the literal confines of codified law. To a considerable degree, the common law recognition of pre-existing rights of Indigenous Peoples was subsequently found to be applicable to NCR in the jurisdictions of Sabah[25] and Sarawak.[26]

In *Madeli bin Salleh* (*Madeli*), the Federal Court, the highest court in Malaysia, affirmed the domestic application of *Mabo [No. 2]* and *Calder* and decided that the Malaysian common law recognizes and protects the pre-existing rights of Indigenous Peoples to their customary lands and resources.[27] The unanimous panel in *Madeli* also held that the common law formed part of the substantive law in Malaysia and that the recognition of such Indigenous rights accorded with the *Civil Law Act* 1956, the relevant legislation enabling the domestic application of the common law.[28]

According to *Madeli*, in Malaysia, the source of the recognition of Indigenous rights to lands and resources at common law, enunciated "throughout the Commonwealth" in *Mabo [No. 2]*, *Calder*, and other colonial decisions of the Privy Council, that "the courts will assume that the Crown intends that rights of property of the *(native)* inhabitants are to be fully respected" and that "[t]he Crown's right or interest is subject to any native rights over such land."[29] The domestic applicability of the doctrine of judicial precedent meant that *Madeli* would be binding upon the lower courts in subsequent similar cases.

The main characteristics of common law Indigenous land and resource rights in Malaysia are principally derived from the early "recognition" jurisprudence from Canada and Australia, but qualified by domestic constitutional and statutory provisions for the recognition,

[22] (1992) 175 CLR 1.
[23] [1973] SCR 313.
[24] *Adong CA* [1998] 2 MLJ 158.
[25] *Rambilin binti Ambit v Assistant Collector for Land Revenues Pitas* ("*Rambilin*") (Judicial Review K 25-02-2002).
[26] See, for example, *Nor Nyawai HC* [2001] 6 MLJ 241; *Nor Nyawai CA* [2006] 1 MLJ 256.
[27] *See Madeli* [2008] 2 MLJ 677, p. 692.
[28] Ibid.
[29] [2008] 2 MLJ 677, pp. 691–2.

regulation, and protection of such rights. The Malaysian superior courts have ruled that the radical title held by the state is subject to any pre-existing rights held by Indigenous Peoples.[30] These rights are established by way of prior and continuous occupation of the claimed areas,[31] and oral histories of the claimants relating to their customs, traditions, and connections with these areas.[32] "Occupation" does not require physical presence but evidence of continued exercise of control over the land.[33] Additionally, the federal and state governments owe a fiduciary duty to legally protect Indigenous land rights and to not act in any manner inconsistent with such rights.[34] Customary rights in common law are enforceable through the courts.[35]

However, common law land rights can be taken away through legal extinguishment by the state or, alternatively, if the local Indigenous community is demonstrated to have abandoned its lands, territories, and resources (Bulan, 2012; Subramaniam & Nicholas, 2018, p. 71). Legal extinguishment of these rights may be by way of plain and unambiguous words in legislation,[36] or an executive act authorized by such legislation.[37] If these rights are extinguished, just compensation is due in accordance with Article 13 of the Malaysian Constitution.[38]

Limitations to Recognition through the Courts

Despite these positive outcomes, recognition of Indigenous land rights solely through the judicial arm of the Malaysian government has its own issues. This section examines the limits of the judicial system in terms of the court process, substantive law, and broader observations on judicial development of the law.

[30] See, for example, *Sagong CA* [2005] 6 MLJ 289, pp. 301–2; *Madeli* [2008] 2 MLJ 677, p. 692.
[31] *Nor Nyawai CA* [2006] 1 MLJ 256, p. 269.
[32] *Sagong HC* [2002] 2 MLJ 591, pp. 610, 621–4.
[33] *Madeli* [2008] 2 MLJ 677, pp. 694–5.
[34] See, for example, *Sagong CA* [2005] 6 MLJ 289, p. 314.
[35] *Nor Nyawai CA* [2006] 1 MLJ 256, p. 269.
[36] *Ketua Pengarah Jabatan Hal Ehwal Ehwal Orang Asli v Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors and another appeal* ("*Nohing CA*") [2015] 6 MLJ 527, pp. 542–4; *Madeli* [2008] 2 MLJ 677, pp. 690, 696–7.
[37] *Madeli* [2008] 2 MLJ 677, pp. 689, 698.
[38] *Adong CA* [1998] 2 MLJ 158, pp. 163–4; *Sagong HC* [2002] 2 MLJ 591, p. 617; affirmed, *Sagong CA* [2005] 6 MLJ 289, pp. 309–10; *Madeli* [2008] 2 MLJ 677, pp. 691–2.

Many Indigenous Peoples in Malaysia cannot afford to institute and sustain the protracted trial and appeal process to defend their traditional lands (Open Society Justice Initiative, 2017). Conversely, their opponents are usually state actors and commercial enterprises that possess ample financial resources, and also importantly, the persistent will to contest claims involving Indigenous lands and resources. Also, organizing community participation, decision-making, and unity throughout the litigation process, ranging from evidence gathering to support a claim to trusteeship matters relating to the benefits from litigation, poses significant problems for communal litigants (Open Society Justice Initiative, 2017). Further, a successful case does not necessarily mean an immediate remedy. For example, the Temuan-Orang Asli claimants in the *Sagong bin Tasi* case[39] endured twelve years of litigation, including appeals, before they received compensation for the loss of their customary lands acquired for highway construction.

The formal setting and adversarial nature of court proceedings are arguably at odds with Indigenous perspectives on dispute resolution, which are relatively less formal and more participatory (Subramaniam & Nicholas, 2018, p. 72). Language barriers, cultural, and epistemological differences, and unfamiliarity with court processes put many Indigenous witnesses at a tactical disadvantage compared to other witnesses (Nah, 2008; Subramaniam & Nicholas, 2018). The issue of evidential burden defeating Indigenous land rights claims in commonwealth jurisdictions (McHugh, 2011) persists in Malaysia. While the Malaysian courts have adopted a "realistic" approach to evaluating evidence in Indigenous land rights claims, taking cognizance of the reliance on oral traditions and the impediments in producing surveyed maps and official documentation,[40] judicial circumspection towards "self-serving" testimonies of Indigenous litigants[41] suggests that proof of a case would ultimately depend on the idiosyncrasies of a particular judge. The community's lack of financial resources to engage appropriate expert witnesses to provide corroborative evidence to a claim, and the want of experienced expert witnesses, is an additional obstacle for Indigenous litigants.

The uncertainties inherent in the litigation process transcend procedural law into the substantive jurisprudence on Indigenous land rights

[39] *See Sagong HC* [2002] 2 MLJ 591; *Sagong CA* [2005] 6 MLJ 289.
[40] See, for example, *Abu Bakar bin Pangis v Tung Cheong Sawmill Sdn Bhd* [2014] 5 MLJ 384, pp. 407–8.
[41] *Nor Nyawai CA* [2006] 1 MLJ 256, p. 272.

(Subramaniam & Nicholas, 2018). More recently, the latter area has seen judicial limits placed on the recognition of Indigenous rights to lands and resources in Malaysia. Common law NCR land rights have been severely restricted, particularly in the states of Sarawak and Sabah.

In the 2016 decision of *Director of Forest, Sarawak v TR Sandah Tabau* (*TR Sandah FC*),[42] the Federal Court determined by a majority that the common law recognition of NCR in Sarawak or, specifically, Iban customary rights, did not extend to the broader native customary territory (*pemakai menoa*) and forest reserved for food and forest produce (*pulau*). The primary reason was that these customs were not contained in any of the legislation and executive orders in Sarawak. This ruling goes against previous decisions that common law NCR are not dependent on legislation and executive orders[43] without adequately addressing them (Subramaniam, 2018). Notwithstanding the problematic reasoning, the majority decision in *TR Sandah* has functioned to shut the door on common law claims for broader native customary territories in Sarawak as it is a legally binding precedent. Furthermore, the 2018 amendment to the *SLC* in response to *TR Sandah* has ensured that claims for these territories are regulated by statute, thereby posing new barriers and challenges for Indigenous claimants. In *TH Pelita Sadong Sdn Bhd v TR Nyutan Jami*,[44] the Federal Court decided that indefeasibility of title under the Sarawak *Land Code* 1958 overrides NCR even if such title was issued after NCR was asserted. This determination potentially allows the state government to circumvent the formal requirements of extinguishment and defeat NCR by an administrative act of alienation, reducing legal recourse to a matter of monetary compensation. Similar rulings in other jurisdictions are viewed as discriminatory since they assume that Indigenous title is "inferior and subordinate."

In 2015, the (Gilbert, 2016) Court of Appeal held that the seasonal collection of turtle eggs by Sabah natives was "not a native customary right" as it was beyond the scope of NCR defined in section 15 of the *Land Ordinance*,[45] which only encompasses sedentarized activities. In 2016, the Court of Appeal ruled that any NCR claims must be dealt with under the Sabah *Land Ordinance*.[46] Both rulings have taken a

[42] [2017] 3 CLJ 1.
[43] See *Nor Nyawai CA* [2006] 1 MLJ 256, pp. 269, 70.
[44] [2018] 1 CLJ 19.
[45] *The State Government of Sabah v Ab Rauf Mahajud* [2016] 9 CLJ 493, pp. 505–6.
[46] *Assistant Collector of Land Revenues v Alfeus Yahsu* [2016] 7 CLJ 848, p. 859.

narrow view of the *Land Ordinance* compared to previous rulings that land laws in Sabah do not extinguish NCR but "serve to affirm their existence."[47]

As for the domestic application of international human rights laws, the Malaysian courts have generally expressed reluctance in "sticking very closely"[48] to them, unless enacted into local laws.[49] Furthermore, Malaysia is not a party to any binding international conventions that directly concern Indigenous rights to lands, territories, and resources. In respect of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the majority of the Federal Court has held that "[i]nternational treaties do not form part of our law, unless those provisions have been incorporated into our law. We should not use international norms as a guide to interpret our Federal Constitution."[50] In the same case, Chief Justice Zaki nonetheless observed the UNDRIP "must still be read in the context of our Constitution,"[51] suggesting that the issue could be open for future consideration.

There is little doubt that land rights litigation has positive impacts for Indigenous Peoples in Malaysia. Beyond the material and economic outcomes of success, litigation has also contributed to "unlocking and reframing" land rights laws and processes, increasing community and public participation in Indigenous land rights issues, and reinforcing and strengthening communal social cohesion and cultural connections to land (Open Society Justice Initiative, 2017). However, the development of substantive Indigenous rights through the Malaysian courts is subject to conservatism, regression, and a degree of judicial unpredictability.[52] Additionally, common law litigation carries high stakes as a bad judicial precedent for Indigenous claimants invariably has adverse legal, policy, and practical implications for other local Indigenous communities facing similar issues. In other jurisdictions, court judgments on Indigenous land rights are critiqued for being influenced by extra-legal and political considerations (McNeil 2004). Such occurrences could well be aggravated

[47] *Rambilin* (Judicial Review K 25-02-2002), p. 7.
[48] *Pathmanathan Krishnan v Indira Gandhi Mutho* [2016] 1 CLJ 911, pp. 935–7.
[49] See, for example, *Airasia Bhd v Rafizah Shima Mohamed Aris* [2015] 2 CLJ 510, p. 521.
[50] *Bato Bagi v. Kerajaan Negeri Sarawak* [2011] 6 MLJ 297, p. 338.
[51] Ibid., p. 307.
[52] This is not an altogether unfamiliar phenomenon. For the judicial curtailment of native title in Australia, see, for example, Brennan (2003).

in Malaysia, where the judiciary has not been short of controversy surrounding executive and legislative interference in its functions (Subramaniam & Nicholas, 2018; Yap, 2015). Consequently, relying excessively on the Malaysian courts to resolve Indigenous land rights issues without positive executive or legislative intervention may not necessarily be the best way forward.

International Conservation Obligations: Potential Opportunities for Inclusion

Like many other Indigenous Peoples globally, Malaysia's Indigenous peoples possess distinct customary knowledge systems and methods to conserve, protect, and regenerate their traditional territories in a sustainable manner. In this regard, international commitments towards the sustainable use of the environment and natural resources have recognized Indigenous Peoples as significant stakeholders in matters concerning their lands, territories, and resources.

For example, the *United Nations Convention on Biodiversity* 1992 (CBD), a binding international treaty to which Malaysia is a party, recognizes the need for contracting governments to respect, preserve, and maintain the traditional knowledge, innovations, and practices of Indigenous communities (Article 8(j)), and to move towards achieving its broader objectives of conserving biodiversity, sustainably using biodiversity resources, and equitably sharing benefits from the use of genetic resources (Article 1). Key to achieving these objectives is the maintenance of healthy ecosystems and a sufficient land base for Indigenous Peoples. Accordingly, the CBD's Programme of Work on Protected Areas, agreed in 2004, has called for the recognition of Indigenous Peoples and Community Conserved Territories and Areas (ICCAs) as one of the preferred governance types for protected areas (Bulan & Maran, 2020). While ICCAs are conceptually new in Malaysia and domestic frameworks for such management are still at an early stage of development (Bulan & Maran, 2020), they nonetheless provide an opportunity for Indigenous communities within protected areas to showcase the advantages of autonomous and collaborative management agreements. The successful management by Indigenous Peoples in the Bundu Tuhan Native Reserve in Sabah provides a good illustration of how arrangements like ICCAs can work to the benefit of the community and the environment (Bulan & Maran, 2020). However, it remains to be seen whether domestic legal and policy frameworks, when developed, can

produce effective and equitable co-management agreements. The requirement for such areas to be regarded as protected or conservation areas by the government may also limit the general application of this alternative form of local Indigenous governance.

Pursuant to its obligation under the CBD, the federal government passed the *Access to Biological Resources and Benefit Sharing Act* 2017 (*ABSA*) that came into force in Peninsular Malaysia at the end of 2020. The *ABSA* contains extensive provisions for the protection and recognition of Indigenous communities in respect of biological resources and traditional knowledge associated with such resources and the sharing of benefits arising from their utilization (Bulan & Maran, 2020). Of note is section 23(1)(a) of the *ABSA* that provides for the requirement of free, prior, and informed consent of the relevant Indigenous community for access to biological resources on land to which the community has rights established by law.[53] Regardless of potential disputes regarding the meaning of the phrase "established by law" and its legal interpretation, the acceptance of a statutory provision on free, prior, and informed consent at the federal level constitutes a significant breakthrough toward effective engagement with Indigenous communities in matters that concern them and their customary areas.

Certification standards for sustainably harvested timber (Malaysian Timber Certification Council, 2012) and sustainable palm oil (Roundtable on Sustainable Palm Oil, 2019) consider Indigenous rights to lands and resources in their criteria. These include grievance mechanisms that may result in the cancellation of certifications for enterprises found to be in violation of these standards. In 2023, Sarawak timber giant Samling had its Ravenscourt forest management certificate revoked for not adequately engaging with local Indigenous communities (Keeton-Olsen, 2023). Despite having limited economic and reputational consequences for the transgressor, and not legally enhancing the land tenure of local Indigenous communities, these mechanisms provide an avenue for Indigenous Peoples to voice their complaints and brings attention to transgressions. Both developments suggest that international

[53] The *ABSA* has not come into operation in the states of Sabah and Sarawak as both states possess their own written laws governing these matters. However, Sabah has a similar provision on the free, prior, and informed consent for biological resources located on native land where the native community has a right as established by law (see section 24B (1)(a) of the *Sabah Biodiversity Enactment* 2000).

conservation efforts have had the net effect of increasing prospects for the inclusion of Indigenous Peoples in matters affecting their traditional lands and resources.

Conclusion

Notwithstanding differences in the special legal position of the natives of Sabah, natives of Sarawak and Peninsular Malaysia Orang Asli, there is little doubt that Malaysia's governments possess sufficient power to effectively recognize and accommodate land, territory, and resource rights for all Indigenous Peoples. However, a closer examination of the legal framework governing Indigenous land rights and their implementation in Malaysia in this chapter suggests that this is not a priority.

The relevant laws in Malaysia, intended in part to empower the government to protect Indigenous Peoples for their own good, have equally enabled and justified the use of traditional Indigenous areas in accordance with government plans – thereby dispossessing Indigenous Peoples of their traditional territories in practice. In Peninsular Malaysia, poor statutory and administrative protection for Orang Asli customary areas and lands has driven the Orang Asli to pursue the strategy of litigation, where they continue to enjoy a measure of success despite formidable obstacles. These victories have functioned as an added bargaining chip for Orang Asli communities and land rights advocates in their engagements with the state. However, these negotiations have yet to cause any meaningful land reform to recognize and protect Orang Asli customary territories. This legal status quo, where Orang Asli remain largely dependent on common law customary land rights for legal redress, is precarious as these rights are susceptible to judicial and legislative curtailment in the future. As observed, experiences from Sarawak, where the apex court has limited common law native customary rights, bear witness to this potential risk.

While the natives of Sabah and Sarawak can still rely on the explicit statutory recognition of their native customary rights in state laws, these rights have been legislated and administered restrictively by the legislature and executive, and more recently, interpreted narrowly by the judiciary. These actions have limited effective outcomes for the recognition and protection of native customary rights in these two states.

As such, the main impediment in Malaysia appears to be more domestically political rather than legal. The sustained lack of political will and

priority for the effective recognition and protection of Indigenous lands and resources, even in states governed by a majority of Indigenous Peoples, suggest that the challenge lies in convincing the broader Malaysian polity that meaningful land rights are not only just but important to all Malaysians. It is in this regard that the increased international demand and requirements for Indigenous involvement in the sustainable conservation of lands, natural resources, and ecosystems present an opportunity to strengthen public support for Indigenous land rights in Malaysia. Towards realizing this opportunity, contextualized cross-disciplinary research on the high correlation between empowered and engaged local Indigenous land and resource management and positive conservation outcomes in Malaysia may well be crucial to rights advocacy and, perhaps more importantly, to conscientizing the populace.

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