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THE RECOGNITION AND CONTENT OF NATIVE TITLE IN PENINSULAR MALAYSIA

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During a recent International Conference on Customary Lands, Territories and Resource Rights,[1] at which the writer was a speaker, several questions were raised with regard to the nature and content of native title, whether it extended to unsettled or nomadic land, whether there must be physical presence, exclusive possession or occupation over the land and whether the definition of 'aborigine' and 'aboriginal way of life' in the Aboriginal Peoples Act 1954 can effectively cause the loss of native title claims. There were no clear or definite conclusions to those questions at the conference. It is hoped that the discussions set out in this paper will to some extent, address those questions.

INTRODUCTION

In 2002, the High Court of Malaysia handed down the landmark decision of *Sagong bin Tasi v Kerajaan Negeri Selangor & Ors,*[2] in which the writer was a member of the team of lawyers who represented the plaintiffs. The case subsequently went on appeal to the Court of Appeal[3] and the Federal Court.[4] Whilst this decision finally recognised the aboriginal peoples' rights in and to the land, as opposed to merely rights of use and enjoyment over the land, other

6 MLJ xci at xcii

issues such as whether these rights extend to nomadic or unsettled people and even if they are settled people, whether these rights extend to the area where they forage, hunt or fish as well as what constitutes an 'aborigine' remains unclear. This paper will deal with those challenges and the *orang asli*[5] land rights in Peninsular Malaysia covering international legislation and jurisprudence, customary laws recognised locally and internationally, local legislation and court decisions with emphasis on *Sagong*'s case and references to other jurisdictions, in particular, Australia, Canada and New Zealand.

BACKGROUND

There are about 180,000 aboriginal people in Peninsular Malaysia.[6] The laws governing the aboriginal people in East and West Malaysia are similar but not the same.[7]

The 'orang asli' is a collective term for the original or first peoples of Peninsular Malaysia comprising 18[8] ethnic sub-groups officially classified for administrative purposes under Negrito, Senoi and Aboriginal-Malay/Proto-Malay. They are the descendants of the earliest known inhabitants in the Peninsular prior to the establishment of the Malay Sultanates.[9]

The Senoi are the largest group comprising about 54% of the *orang asli*. They are believed to have entered the Peninsular around 2,000BC from the north. Many of the Senoi[10] have now taken to permanent agriculture.[11]

6 MLJ xci at xciii

The Proto-Malays[12] are the second largest group. Most of them live in the southern half of the Peninsular and are engaged mainly in permanent agriculture or riverine fishing.[13]

The Negritos comprise about 1% of the *orang asli* and are believed to have been in the Peninsular for at least 25,000 years.[14] Though direct descendants of largely nomadic foragers, many of the Negrito groups comprising the Kensiu, Kintak, Jahai, Lanoh, Mendriq and Batek now live in permanent settlements largely in the northern and eastern states.[15]

Less than 1% of all *orang asli* are still semi-nomadic opportunistic foragers but even so, these communities have their own distinct traditional territories.[16]

The *orang asli* groups kept to themselves until about the first millennium AD when they supplied forest products to traders from India, China and the Mon civilisations in exchange for salt, cloth and iron tools. However the rise of the Malay Sultanates coincided with a trade in *orang asli* slaves prompting many *orang asli* groups to retreat further inland.[17]

The British colonialists introduced the Torrens system, and with it the alienation of land and title. All lands then belonged to the state including the native territories ('kawasan saka') of the *orang asli* and though some of these lands were gazetted as forest reserves[18] and aboriginal reserves, more than 80% of aboriginal peoples' lands remain ungazetted.[19]

Despite a lack of clear guidance and direction in local legislation, the *orang asli*'s struggle for recognition of their land rights has improved incrementally mainly as Malaysian judges have taken heed of international developments and jurisprudence, discussed below.

INTERNATIONAL LAW

The Indigenous and Tribal Peoples Convention 1989 ('ILO 169') and the UN Declaration on the Rights of Indigenous Peoples adopted in 2007 ('UNDRIP')

6 MLJ xci at xciv

are specific and mutually reinforcing instruments which now provide the framework for the universal protection of indigenous and tribal peoples' rights.[20] However the ILO 169 is not widely ratified and both are more recent instruments.

UN bodies have effectively used general human rights provisions, enshrined in other older and more widely ratified international instruments, in particular provisions on the prohibition of discrimination, the right to self determination, minorities' right to culture and right to property, to aid in the recognition and protection of indigenous peoples' land rights.

ILO 169

The International Labour Organization was one of the first international bodies to have been concerned with the situation of indigenous and tribal peoples since its inception. Its longstanding engagement in this area led to the adoption in 1957 of the first international instrument concerning indigenous and tribal peoples' rights, the Indigenous and Tribal Populations Convention ('Convention 107').[21]

In the 1980s, the approach of assimilation adopted by Convention 107 was considered outdated.[22] The convention was revised and replaced in 1989 by the ILO 169.[23]

The ILO 169 is based on the recognition of indigenous and tribal peoples' aspirations to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the states in which they live. The principles of participation and consultation form its cornerstone. It is the only up to date international treaty, which specifically provides protection for indigenous and tribal peoples. Treaty bodies and governments tend to look at the ILO 169 when interpreting other conventions and enacting legislation for their respective countries with regard to indigenous peoples. Courts in various jurisdictions have also applied similar principles.

6 MLJ xci at xcv

Articles 13-16 of the ILO 169 set out the following:

13(1) ... governments shall respect the special importance for the cultures and spiritual values of the peoples concerned, their relationship with the lands or territories, or both, which they occupy or otherwise use, particularly the collective aspects of this relationship.
13(2) the term *lands* in arts 15 and 16 shall include the concept of territories, covering the total environment of the areas which the peoples concerned occupy or otherwise use.
14(1) The rights of ownership and possession of the peoples concerned over the lands they traditionally occupy shall be recognized. Measures shall also be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
14(2) Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
14(3) Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.
15(1) The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
15(2) ... [where] the state retains the ownership of mineral/sub-surface resources/rights to other resources pertaining to lands, governments shall establish/maintain consultation procedures to ascertain how their interests would be prejudiced, before undertaking/permitting any programmes for exploring/exploiting such resources. The peoples concerned shall wherever possible participate in the benefits of such activities, and receive fair compensation for damages sustained as a result.
16(1) ... the peoples concerned shall not be removed from the lands which they occupy.
16(2) If relocation is considered necessary as an exceptional measure, it shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, to provide the opportunity for effective representation.
16(3) Whenever possible, these peoples shall have the right to return to their traditional lands, once the grounds for relocation cease to exist.
16(4) When such return is not possible, ... these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of

the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
16(5) Persons thus relocated shall be fully compensated for any resulting loss or injury.[24]

Although the ILO 169 has been ratified by only 22 states[25] -- Nepal being the only Asian state[26] -- it is nonetheless now used as a benchmark of standards by other Asian countries. The Philippines, Cambodia and Laos have all used it as a model in drafting their local legislation or reviewing their policies in relation to indigenous peoples:

> ... the convention had been used as a model in drafting of legislation in the region, such as the Indigenous Peoples' Rights Act 1997 (Philippines) and the new Land Law 2001 (Cambodia). The Laotian government has expressed interest in the ILO 169 and has conducted a review concerning existing policies of indigenous peoples.[27]

The Philippines Act follows the ILO 169 closely, providing for ownership over land and resources, the right to occupy and develop land, the right to oppose displacement and the right to free, prior and informed consent.[28] The right to decision making and traditional governance mechanisms is also stipulated in Cambodia's Land Law 2001. It is clear that the ILO 169 has inspired governments and indigenous peoples well beyond the states that have ratified it, in their work to promote and protect indigenous peoples' rights.

CERD, UN Charter, ICCPR, ICESCR, DRD

The International Convention on the Elimination of All Forms of Racial Discrimination 1966 ('CERD') provides in article 5(d)(v) for non-discrimination to 'the right to own property alone as well as in association with others'. CERD's General Recommendation XXIII encourages states to 'recognise and protect rights of indigenous peoples to own, develop, control

and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories'.[29]

Indigenous peoples must not be discriminated against in their rights as stated in the General Recommendation compared to other citizens and it further recognises their right to just, fair and prompt compensation for violations of indigenous land rights.[30]

Though the ILO 169 and CERD recognise and address land rights of the indigenous peoples independently of their right to self determination, it must be appreciated that rights to land is an essential and integral part of the indigenous peoples' right to self determination:

> Certainly, they themselves pursue their land rights on the basis of their right to self-determination ... economic self-determination appears essential to indigenous peoples as the main legal basis for permanent sovereignty over their lands; the exercise of their traditional activities and indigenous practices for sustainable development; the enjoyment of the natural resources of the lands they live in; and the sharing of the benefits of such resources.[31]

The legal basis and justification for this is enshrined in various general international instruments, for example, article 1 para 2 and article 55 of the UN Charter as well as common article 1 of the International Covenant on Civil and Political Rights 1966 ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights 1966 ('ICESCR').

Article 1 para 2 of the UN Charter states that:

> The purposes of the United Nations are ... to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Article 55 of the UN Charter provides that:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United
>
>
>
> Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Common article 1 of the ICCPR and ICESCR lays out:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

Article 47 of the ICCPR and article 25 of the ICESCR include a common statement which reads:

> Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize freely their natural wealth and resources.

Article 1.2 of the Declaration on the Right to Development 1986 ('DRD') suggests that claims relating to natural wealth and resources fall within the scope of the right to self determination.[32] It reads:

> The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to relevant provisions of both International Covenants, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Xanthaki however points out the right to self determination and the right to development can be construed as two separate rights as there is no explicit link between common article 1, article 47 of the ICCPR and article 25 of the ICESCR, and though very closely related they have distinct scopes.[33] Nevertheless, even if they are deemed as separate rights, this does not weaken the legal basis for recognising indigenous peoples' land rights as an integral part of protecting either of those rights. In any event the Vienna Declaration and Programme of Action 1993 ('VDPOA') provides that all rights are indivisible and interrelated.[34]

6 MLJ xci at xcix

The issue of the right to self determination of peoples also revolves around the question of what constitutes 'peoples' as stated in the UN Charter, ICCPR and ICESCR. Many states have opposed the recognition of indigenous communities as 'peoples' because the principle of self determination of peoples as proclaimed in these instruments has led to the evolution of a principle of customary international law granting the right of independence to any people under foreign domination.[35] In the *travaux preparatoires* of the 1966 Covenants the issue of peoples living within states in a multicultural population was considered, in particular:[36]

> [t]he word 'peoples' was understood to mean peoples in all countries and territories whether independent, trust or self-governing. Suggestions were made to the effect that 'peoples' should apply to 'large compact national groups', to 'ethnic, religious or linguistic minorities', to 'racial units inhabiting well-defined territories', etc. It was thought however, that the term peoples should be understood in its most general sense and that no definition is necessary.[37]

Xanthaki however notes that some states insist that indigenous peoples do not fall within the term 'peoples' their concerns being state sovereignty.[38]

> Nevertheless, the HRC has indicated that indigenous people fall within the scope of arts 1(2) and 47. In its comments concerning the latest periodical reports from Australia, Canada and Mexico, the HRC dealt with indigenous peoples' right to natural resources, in the context of self-determination, as enshrined in common art 1 of the ICCPR and ICESCR.[39]

As Lenzerini rightly argues, whatever meaning one attributes to the term 'peoples', the evolution of international law from the 1960s leaves no doubt that, in light of article 31.3(c) of the VDPOA, and international customary law, today the term 'peoples' used in common article 1 also encompasses non-national peoples, such as minorities and indigenous peoples.[40]

In any event, the UNDRIP now clearly recognises indigenous peoples' right to self determination as set out in various articles in particular article 3:

6 MLJ xci at c

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

These rights are however subject to the overriding article 46 of the UNDRIP:

> 46(1) nothing in this declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity, or to perform any Act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember, impair, totally or in part, the territorial integrity or political unity of Sovereign and Independent States.

Thornberry points out that:

> the acceptance of indigenous self-determination by states has often been on the basis that it does not disturb territorial integrity and that it is specific to the indigenous.[41]

He cites Japan's explanation of support when adopting the UNDRIP:

> ... The revised version of art 46 correctly clarifies that the right of self-determination does not give indigenous peoples the right to be separate and independent from their country of residence and that that right shall not be invoked for the purpose of impairing a state's sovereignty, national and political unity or territorial integrity ... [42]

If 'peoples' and self determination is understood in this context, more states would be willing to recognise indigenous people as 'peoples' with the right to self determination.

The Human Rights Committee ('HRC') has also used the right to minority culture under article 27 of the ICCPR to give effective protection to land rights. In *Jouni Lansman v Finland*, the HRC warned that any future mining activities on a large scale 'may constitute a violation of the ... right under art 27 of the ICCPR, particularly the right to enjoy their culture'.[43] Article 27 of the ICCPR states:

> [I]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with
>
> *6 MLJ xci at ci*
>
> other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The HRC in general comment 23 drew a distinction between the right to self determination and the rights protected under article 27.[44] Differently from the right to self determination belonging to peoples, the rights under article 27 relate to rights conferred on individuals and are personal rights.[45]

> The enjoyment of the rights to which art 27 relates does not prejudice the sovereignty and territorial integrity of a state party. At the same time, one or other aspect of the rights of individuals protected under that article -- for example, to enjoy a particular culture -- may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.[46]

> Although the rights protected under art 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.[47]

The HRC interpreted article 27 to extend to protecting indigenous peoples' special relationship with their land:

> With regard to the exercise of the cultural rights protected under art 27, the Committee observes that culture manifests itself in many forms including a *particular way of life associated with the use of land resources, especially in the case of indigenous peoples*. That right may include such traditional activities as *fishing or hunting and the right to live in reserves protected by law*.[48] (Emphasis added.)

The individual rights to property and non-discrimination have likewise been used in aid of the protection of indigenous peoples' land rights.[49]

CRC, Genocide Convention and UNDRIP

Though Malaysia is not a signatory to the above conventions, it is a signatory to the UNDRIP and has ratified the Convention on the Rights of the Child

6 MLJ xci at cii

1989[50] ('CRC') and the Convention on the Prevention of the Crime of Genocide 1948[51] ('Genocide Convention').

CRC provides for protection of the child and makes clear reference to indigenous peoples. Article 17 requires state parties to recognise the important function performed by the mass media and to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well being and physical and mental health and at article 17(d), to encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous.[52] Article 30 provides that in those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.[53]

The Genocide Convention article II defines genocide to include:

> deliberately inflicting on the group conditions of life calculated to bring about physical destruction of the whole or in part.

However, an offence is only committed when there is the act of genocide against the group with the requisite intent to destroy that group in whole or in part, which is difficult to prove. Removing indigenous people from their native lands ' ... often have ramifications for the physical survival of the group'.[54] The UNDRIP in article 43 clearly states:

> the rights recognised herein constitute the minimum standard for the survival, dignity and well-being of indigenous people of the world.

The UNDRIP has removed the requirement of intent and provides that indigenous people 'shall not be subjected to the act of genocide'.[55]

All these rights are intrinsically linked to the recognition and protection of indigenous peoples' rights to land. The importance to the indigenous peoples of their land rights cannot be overemphasised. The interdependence and

6 MLJ xci at ciii

enjoyment of other indigenous rights are inextricably linked to their land rights[56] and is consistent with the position taken in VDPOA that all human rights are indivisible, interdependent and interrelated.[57]

This is also emphasised in the UNDRIP which was adopted by the General Assembly Resolution 61/295 on 13 September 2007, after two decades of discussions, with 143 state parties voting for its adoption and four state parties voting against. Each of these four countries have since endorsed the UNDRIP -- Australia on 3 April 2009,[58] New Zealand on 20 April 2010,[59] Canada on 12 November 2010[60] and the United States on 13 December 2010.[61]

Both the UNDRIP and the ILO 169 recognises the special bond between indigenous peoples and their land. The UNDRIP expands this further by linking, in its preamble, protection of indigenous land rights to indigenous political, economic and social structures, spiritual traditions, history and philosophies.[62]

> For some indigenous communities, land rights are the central claim in their struggle for protection. Largely, this is because of their special relationship with the land on which they live, a relationship confirmed by the UN Human Rights Committee, the UN Special Rapporteur on Indigenous Issues and ILO Convention No 169. As indigenous peoples have explained:
>
> > The land is the basis for the creation stories, for religion, spirituality, art and culture. It is also the basis for relationships between people and with earlier and future generations. The loss of land, or damage to land, can cause immense hardship to indigenous people. Land was indigenous peoples' sacred mother, lifegiver and source of their survival, and therefore [land rights] were the heart and soul of the draft.[63]
>
> Land rights often have ramifications for the physical survival of the group.[64]

6 MLJ xci at civ

The UNDRIP further stipulates that:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used land ...[65]

The UN declared 1993 as The International Year for the World's Indigenous Peoples[66] and the decade from 1995-2004 as the International Decade of the World's Indigenous Peoples. Recognising the continuing need for attention to indigenous peoples, on 22 December 2004, the General Assembly adopted Resolution A/RES/59/174[67] declaring the decade from 2005 through 2014 as the Second International Decade of the World's Indigenous Peoples.

At the international level, the various conventions and declarations have taken effect slowly but surely. 2010 saw the final three opposing state parties, New Zealand, Canada and the United States giving their endorsement to the UNDRIP, and major historic victories in various countries, including India, where the nearly 8,000 Dongria Kondh people succeeded in their bid to block the mining of bauxite by multinational corporation Vedanta Resources from their sacred Niyamgara Hills.[68]

However, there have been some setbacks in many other countries and in some cases, even criminalising advocates -- indigenous Peruvian leaders were sentenced to prison for participating in protests surrounding Peru's forestry law.[69]

The greatest recognition of the land rights of indigenous peoples has been in Latin America, largely due to the inter-American system for the protection of human rights, which functions within the Organization of American States ('OAS'). The OAS Inter-American Commission on Human Rights, in consultation with OAS member states and indigenous peoples' representatives, has reported on the human rights conditions of particular OAS member states, has accepted several important human rights complaints, which it is currently investigating, brought by indigenous peoples against various OAS member

states, and has also prosecuted cases such as the *Awas Tingni* case from Nicaragua, before the OAS Inter-American Court of Human Rights.[70]

In the other nations and continents, closing the gap between rhetoric and recognition is one of the major questions of 2011, particularly in Africa and Asia.[71] Israel currently faces a challenge by Nuri El-Okbi, a Bedouin claiming indigenous land rights, who, despite living in the Negev Desert with his family for hundreds of years on their ancestral land, long before modern day Israel was even formed, are being accused by Israel of 'trespassing'. The Israeli position is that the Bedouin do not qualify as indigenous people but Israeli geographer Professor Oren Yiftachel, accuses the government of declaring '*terra nullius* in reverse'. None of the previous Bedouin land claims have succeeded, but Nuri and his legal team hopes that this will be their 'Mabo moment'.[72]

Malaysia has to some extent, applied the UDHR standards and was an active participant in the drafting of the UNDRIP. However local legislation has yet to fully recognise and protect indigenous people's rights and falls far short of the rights enshrined in those declarations and conventions.

LOCAL LEGISLATION

Malaysia has specifically incorporated the UDHR into its Human Rights Commission of Malaysia Act 1999 where it states in s 4(4) that 'for the purpose of this Act, regard shall be had to the UDHR to the extent that it is not inconsistent with the Federal Constitution'.

However, the rights and protection of the aboriginal people in particular their land rights, are not provided for clearly under Malaysian law. One must look at four different pieces of legislation and case law to ascertain these rights:

(a) The Federal Constitution 1957 ('the Constitution').
(b) The Aboriginal Peoples Act 1954 ('the APA').

(c) The Land Acquisition Act 1960 ('the LAA').
(d) The National Land Code 1965 ('the NLC').

6 MLJ xci at cvi

The matter of their welfare comes under federal jurisdiction (First List of the Ninth Schedule of the Constitution), whereas matters of land generally come under state jurisdiction (Second List of the Ninth Schedule).

Article 89(6) of the Constitution defines Malay reservation land as 'land reserved for alienation to Malays or to natives of a state'. However legislation governing Malay reservation of the various states does not extend the benefit of such legislation to the aboriginal people.

The Constitution ensures under art 13(1) that no person shall be deprived of property save in accordance to law, and in art 13(2), that no law shall provide for compulsory acquisition or use of property without adequate compensation.

Article 4(1) states that the Constitution is the supreme law of the federation and any law passed after Merdeka Day[73] which is inconsistent with the Constitution shall, to the extent of its inconsistency, be void.

Article 8(5)(c) provides for the special position of the aboriginal people and allows the government to positively discriminate in favour of the aboriginal peoples. Article 8(5) states that:

> This article does not invalidate or prohibit ...(c) any provision for the protection, well being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to the aborigines of a reasonable proportion of suitable positions in the public service.

Article 160(2) defines what is recognised as law in Malaysia, and this includes 'any custom or usage having the force of law ...

If the land rights of the aboriginal people, whether usufruct or in and to the land, are regarded as property rights, then it will fall within the protection of art 13(2).

The Constitution supersedes both statutory law and the common law, and requires that all acquisition of property rights be compensated adequately. Any law made for compulsory acquisition or use of property without adequate compensation shall be rendered void in accordance to the Constitution.

The NLC is a piece of federal legislation which codifies laws relating to the alienation, rights and use of land but does not provide for alienation of land to the aboriginal people or compensation for lands acquired from them. It must be read as being subservient to art 13 of the Constitution.

6 MLJ xci at cvii

The APA is a legislation specifically enacted to govern aboriginal peoples. Section 3 defines an aborigine as:

> (a) Any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendent through males of such person.
> (b) Any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of the aboriginal community or
> (c) the child of a union between an aboriginal female and a male of another race, provided that child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of the aboriginal community.

This definition has led to difficulties for aboriginal peoples seeking to enforce their land rights, which will be discussed below.

The APA does not in any way treat the aboriginal people as legal owners of the lands inhabited or reserved to them. Section 10 of the APA states that compensation shall and must be paid for the destruction and acquisition of aboriginal peoples' crops. Section 11 merely states that the state 'may' pay compensation, which gives the state discretion in the compensatory process. Section 12 empowers the director general with a discretionary power to pay compensation as he thinks fit. Sections 6 and 7 of the same Act allow the Minister to

extinguish land designated as aboriginal reserves and areas. This allows the state to avoid paying compensation by the simple act of revoking the areas designated to the aboriginal people.

The LAA is the law governing the acquisition of land in Malaysia. Under s 2, the word 'land' is defined to mean 'alienated land within the meaning of state land law, land occupied under customary right and land occupied in expectation of title'. The expression 'land occupied under customary right' is not defined under the Act.

Despite the gaps in the local legislation, the Malaysian judiciary has recognised the international standards manifested in case law from various jurisdictions -- some of whom are parties to the international conventions. The judiciary has done so incrementally with the hope that the executive and Legislature will catch up.

CASE LAW

6 MLJ xci at cviii

In the landmark case of *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*,[74] the plaintiffs were aborigines of the Temuan tribe. They brought a representative action for themselves and their respective families for being unlawfully evicted from their lands following the acquisition of 38,477 acres of their land for the purpose of construction of the highway to the Kuala Lumpur International Airport. They were compensated for the loss of their crops, fruit trees and loss of their homes but not for the loss of the land. The government refused to recognise that the plaintiffs had a proprietary interest in the land. The eviction was done by police operation with support from the Federal Reserve Unit in the presence of government officials. Their fruit trees and crops were destroyed. The houses, community hall and traditional/cultural hall were demolished.

The plaintiffs' claim was for recognition of their proprietary right to the land and compensation for breach of art 13 of the Constitution. The plaintiffs also argued that the government owed them a fiduciary duty based on constitutional provisions which required the government to protect and ensure the advancement and welfare of the aboriginal peoples in Malaysia. The plaintiffs also claimed for trespass.

Until 1997 the Malaysian courts had denied the *orang asli* any form of compensation other than under the APA. In *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*,[75] the court recognised for the first time that aboriginal peoples had usufructuary rights, rights over the land but not in and to the land. The court found that aborigines had rights at common law over the land vested in the state and such rights existed despite the APA. The aborigines here were compensated for loss of land use and livelihood over the land but not for, in and to the land.

Mohd Noor J in *Sagong* went further:

> I follow *Adong*'s case, and in addition, by reason of the fact of settlement I am of the opinion based on the findings of facts in this case, in particular on their culture relating to land and their customs on inheritance, not only do they have the right over the land but also an interest in the land.[76]

The court relied on *Amodu Tijani v The Secretary, Southern Nigeria*[77] which held:

6 MLJ xci at cix

> The title such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of the community. Such a community may have possessory title to common enjoyment of the usufruct, with customs which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves a study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are but little assistance, and are as often as not misleading.

The court in *Sagong* then relied on *Mabo & Others v Queensland*[78] ('*Mabo No 2*') and *The Wiks Peoples v State of Queensland & Ors*[79] which support this content of native title.[80] In Canada, *Delgamuukw v The Queen in right of British Columbia et al; First Nations Summit et al, interveners*,[81] the Supreme Court held that the aboriginal peoples' right included an interest in the land and not merely usufructuary rights. In America, the position was stated in *Johnson and Graham's Lessee v William M'Intosh*[82] where Marshall CJ said:

> They (Indian tribes or nations) were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, to use it according to their own discretion.[83]

In Australia, Brennan J of the High Court in *Mabo No 2* considered the essential character of aboriginal title to the land as follows:

> Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively, that none but its members has any right to occupy the land or has an interest in the land that must be a proprietary nature; there is no other proprietor. It would be wrong, in my opinion, to point to inalienability under municipal laws of our society, to deny that indigenous people owned their land. The ownership of land within the territory in the exclusive occupation of the people must be vested in the people: land is susceptible to ownership, and there are no other owners ...[84]

Brennan J went on to hold that:

6 MLJ xci at cx

> there is no impediment to the recognition of individual non-proprietary rights that are derived from community's laws, and customs and are dependent on community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.[85]

An important point to note is that the content of native title is not identified in relation to English common law or that of the state but it is derived from the traditions and customs of the indigenous people.

As early as 1957, in the leading case of *Adeyinka Oyekan v Musendiku Adele*[86] Lord Denning sitting in the Privy Council held:

> [I]n inquiring ... what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even if those interests are of a kind unknown to English law.

In *Mabo No 2*, Brennan J put it this way:

> native title has its origins in and is given its content by traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.[87]

From the above cases the content of native title can vary depending on the customs, tradition and the practices of the aborigines. The plaintiffs' lawyers in *Sagong* distilled from the above cases, that in order to show that the native title of the Temuan tribe was not merely for use and enjoyment but was a proprietary interest in and to the land, the following had to be proven:

(1) The plaintiffs were aboriginal peoples of the Temuan tribe.
(2) They had a connection to the land with continuous occupation to the exclusion of others from time immemorial.
(3) They were an organised society.
(4) They had clear and distinct customs to their land, in particular exercising ownership of the land with the power to give it as an inheritance.

6 MLJ xci at cxi

(5) There were clear boundaries to the land that belonged to them.

The High Court, at first instance, held that all the above were proven, and recognised that the native title to the settled areas of the land taken, was a proprietary interest in and to the land, and ordered that compensation be paid to the plaintiffs under the LAA. The court held:

> to my mind, as the land was continuously occupied and maintained by them to the exclusion of others in pursuance of their culture and inherited by them from generation to generation in accordance with their customs, it falls within the ambit of 'land occupied under customary right' within the meaning of the definition [of the LAA].[88]

This however only dealt with the settled areas of the land. At the Court of Appeal, Gopal Sri Ram JCA endorsed the above finding and went further. He held:

> The fact that the plaintiffs enjoy a community title by custom is nothing out of the ordinary. The Privy Council in *Amodu Tijani* recognised the existence of such title in other jurisdictions. The concept has been re-affirmed by the Constitutional Court of South Africa in *Alexkor Ltd v Richtersveld Community* [2003] 12 BCLR 130. Chaskalson CJ said:
>
> > In light of the evidence and findings of the SCA (Supreme Court of Appeal) and LCC (Land Claims Court), we are of the view that the real character of the title that the Richtersveld community possessed in the subject land was a right to communal ownership under indigenous law. The content of that right included the right to exclusive possession and use of the subject land by members of the community. The community had the right to use its water, to use its land for grazing and hunting and to exploit natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld community had a right of ownership in the subject land under indigenous law.[89]

The Court of Appeal was of the view that native title rights extended to areas of land used for hunting or foraging but did not clearly specify the content of that right.[90] It would seem that they followed *Amodu Tijani* where Viscount Haldane LC in the Privy Council held:

> A very usual form of native title is that of a usufructuary right ...[91]

On another point and more importantly, the Court of Appeal considered the complaint that the land in respect of which the claim for compensation was

made was not gazetted as an aboriginal reserve as required under the APA, and second, that there was no duty on the part of the state or federal governments to *gazette* the land in question, and therefore no liability could attach to pay compensation for depriving those aborigines on the ungazetted lands.[92]

The Court of Appeal endorsed the following finding of the High Court that the state and federal governments were fiduciaries and had a duty to protect the welfare of the aborigines including their land rights. Quoting Mohd Noor J:

> The content of the fiduciary duties has been described in many (sic) ways. But in essence, it is 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. In *Mabo No 2* ... it was said that the obligation on the Crown was to ensure that the traditional title was not impaired or destroyed without the consent of or otherwise contrary to the interests of title holders. And in *The Wik People's case,* ... it was reiterated that the fiduciary must act consistent with its duties to protect the welfare of the aboriginal people. The remedy, where the government as trustee or fiduciary has breached its duties, is in the usual form of legal remedies available, namely by declaration of rights, injunctions or a claim in damages and compensation.[93]

Gopal Sri Ram JCA at the Court of Appeal went on to hold that having found that they were fiduciaries, and had a duty to protect the welfare of the aborigines including their land rights, the trial judge ought to have included the ungazetted areas in question for purposes of compensation, and further, that the government could not defeat a claim for native title by relying on their own default as a defence to a claim for land by the aboriginal peoples.[94]

> ... it was open to the judge to have made a finding that the failure or neglect of the first defendant to *gazette* the area in question also amounted to a breach of fiduciary duty. Here you have a case where the first defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the ungazetted area. It was aware that so long as the

> area remained ungazetted, the plaintiffs' rights in the land were in serious jeopardy. It was aware of the 'protect and promote' policy that it and the fourth defendant had committed themselves to. The welfare of the plaintiffs, on the particular facts of this case, was therefore not only not protected, but ignored and/or acted against by the first defendant and/or the fourth defendant. These defendants put it out of their contemplation that they were the ones there to protect the vulnerable first peoples of this country. Whom else could these plaintiffs turn to? In that state of affairs, by
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> *6 MLJ xci at cxiii*
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> leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendants committed a breach of fiduciary duty. While being in breach, it hardly now lies in their mouths to say that no compensation is payable because of non-gazettation which is their fault in the first place.

This part of the judgment effectively removed all doubts that a claim for indigenous land rights will not be defeated by reason of it being non-gazzetted land as required under the APA and further made the government liable for failing to do so.

ISSUES

In Malaysia, despite the progress in *Adong* and *Sagong*, a number of issues still remain at large, for example whether native title includes unsettled or nomadic land, whether there must be exclusive possession or control over the land and whether the definition of 'aborigine' and 'aboriginal way of life' as set out in the APA is still relevant or crucial to an indigenous claim.

Unsettled or nomadic land

In *Adong*, the court granted the *orang asli* land rights over their hunting ground where they looked for food. The compensation was by way of loss of livelihood. They were not compensated for the value of the land or recognised as having an interest in and to the land.

In *Sagong*, the High Court indicated that it would be reluctant to grant rights in and to the land if the aboriginal people were nomadic. The judge held that:

> ... in the case before me, the acquisition is in respect of a small portion of their traditional and customary or ancestral land where they resided, that is to say, their settlement. I follow the *Adong* case, and in addition, by reason of the fact of settlement I am of the opinion that based on my findings of fact in this case, in particular on their culture relating to land and their customs on inheritance, not only do they have the right over the land but also an interest in the land.[95]

After reviewing international jurisprudence on the content of common law native title which included the cases of *Amodu Tijani, Mabo No 2, The Wiks Peoples* case, *Johnson* and *Delgamuuk*, the High Court went on to hold that:

> Therefore in keeping with the worldwide recognition now given to aboriginal rights, I conclude that proprietary interest of the *orang asli* in the customary and
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> *6 MLJ xci at cxiv*
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> ancestral lands is an interest in and to the land. However this conclusion is limited only to the area that forms their settlement, but not the jungles at large where they used to forage for their livelihood in accordance with their tradition. As to the area of settlement and its size, it is a question of fact in each case. In this case the land is clearly within their settlement. I hold that the plaintiffs' proprietary interest in it is an interest in and to the land.[96]

The dilemma the High Court judge had was that if they were nomadic and/or if the right was not confined to settled areas, the aborigines could claim the whole country as belonging to them so long as they could show that they had at one time stayed, hunted or foraged there. This was echoed by Hashim Yusoff JCA in the Court of Appeal in *Nor Nyawai*,[97] who expressed this view while considering the case of *Sagong*:

> Further, we are inclined to agree with the view of the learned trial judge in *Sagong* ... that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such a view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food.[98]

This view held by the Malaysian courts is not new. Gilbert[99] points out that Locke, Kant and Vattel all fostered the idea that land ownership could only be based on the definite occupancy of such land and agriculture was the only means to define the terms of occupation widely known as the 'agricultural argument'. These theories were used to justify the application of the Roman law principle of *terra nullius* meaning that any uninhabited land is open to conquests and can be occupied by states.[100]

> The 'agricultural argument' coupled with the concept of *terra nullius* meant that the use and occupation of territories by nomadic peoples had no standing, did not need to be respected, and could not constitute a source of ownership or use of the land.[101]
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> *6 MLJ xci at cxv*

It was only in 1975[102] that the International Court of Justice ('ICJ') in an advisory opinion to the UN General Assembly, with regard to the status of the Western Sahara, while rejecting the application of the *terra nullius* doctrine, stated that:

> territories inhabited by nomadic peoples living as 'organized societies' were not to be considered empty nor open to state acquisition on the basis of occupation.

Judge Ammoun, Vice President of the ICJ concluded that:

> the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned.[103]

This was followed in *Mabo No 2* where Brennan J referred to Judge Ammoun's conclusion and held:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interest in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.[104]

Contemporary international law and decision of various courts throughout the Commonwealth have moved away from the 'agricultural argument' and the doctrine of *terra nullius*.

As stated by Brennan J in *Mabo No 2*:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[105]

Therefore, the common law recognises a native title that reflects an entitlement to land that is held in accordance with, and is given its content by, the laws and customs of the indigenous inhabitants of that land.[106]

L'Heureux-Dube J in *Van Der Peet*[107] states in this way:

> Finally, it is almost trite to say that what constitutes a practice, tradition or custom to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting
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> *6 MLJ xci at cxvi*
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> lens of existing regulations.

PHYSICAL PRESENCE / CONTINUOUS OCCUPATION/EXCLUSIVE POSSESSION

In *Delgamuukw*, cited with approval in *Sagong*, Lamer CJC defined native or aboriginal title as follows:

> it arises where the connection of a group with a piece of land 'was of central significance to their distinctive culture'.[108]
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> ... Physical occupation may be established in a variety of ways, ranging from construction of dwellings through cultivation and enclosure of fields to *regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources* ... a claim to title is made out when a group can demonstrate 'that their connection with a piece of land ... was of central significance to their distinctive culture'.[109] (Emphasis added.)

La Forest J concurred with the Chief Justice that in order to establish title indigenous the plaintiffs must demonstrate that the claimed land is of central significance to them by demonstrating evidence of prior and continuous occupation based on tradition:

> ... aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy.[110]

The ILO 169 in article 14 as set out above, recognised the special position of nomadic people in relation to the land to which they had access for sustenance and traditional activities. Article 14 distinguishes between settled peoples who have a right of ownership and those who have access to lands not exclusively occupied by them for subsistence/traditional activities, who have the rights of use.[111] It would seem that nomadic people who are seen as sharing the land would have only the right to use.

The words of the text were adopted after the meeting of experts, which was in charge of drafting the new convention, highlighted the danger that nomadic peoples 'may be compelled to change their lifestyles and lose effective access to

their traditional lands'[112] in the contest for land in light of many states' national policies to settle nomadic indigenous peoples.[113]

In *Sagong*, the claimants were not nomadic but nevertheless used the surrounding areas for foraging, hunting and their traditional activities. The Court of Appeal while recognising that the Temuan had settled on the land, stated:

> They are, by custom and tradition, settled peoples. In other words, they are not nomadic as are some of their other aboriginal brothers and sisters. They settled on the land. They cultivated it with crops. They put up buildings on the land. They also exercised rights of usufruct over the surrounding area. In other words they forage and fish in that area.[114]

The Court of Appeal drew a distinction between the type of rights under native title for settled areas and the surrounding area where they used to forage and fish. For the settled areas the rights recognised were rights in and to the land and for the surrounding areas, the rights recognised were only for the use and enjoyment of the land, better known as usufructuary rights, similar to the distinction made in art 14, which had in its contemplation nomadic peoples. However the common law requires one to establish 'exclusive and continuous occupation' before succeeding in a claim for native title albeit for usufructuary rights.

The Court of Appeal also expressed its approval of *Amodu* and *Alexkor*, a decision of the Constitutional Court of South Africa where the Constitutional Court held that the community had the right to use its water, to use its land for grazing and hunting and to exploit natural resources,[115] granting them ownership rights within the vicinity of a settled area of which they had proved they had exclusive and continuous occupation. The Constitutional Court recognised the communal native title of the Richtersveld community including lands for grazing and hunting purposes.

The point made in *Alexkor*'s case was that on the basis of exclusive use and occupation of the subject land, the Richtersveld community had right of ownership.

Therefore, the distinction between settled or unsettled lands becomes less important and what is more important is exclusive occupation and continuous use of the subject land.

Recently in *Madeli*[116] the Federal Court further qualified the above and held that the element of control over the land exhibited by the claimant is the determinant factor of native title and not so much the use of the land.

> On the issue of what is meant by occupation, we agree with the view of the Court of Appeal that actual physical presence on the land is not necessary. There can be occupation without physical presence on the land provided there exist sufficient measures of control to prevent strangers from interfering: see *Newcastle City Council v Royal Newcastle Hospital* [1959] 1 All ER 734; which was followed by the local case of *Hamit Matusin & 6 Ors v Superintendent of Lands and Surveys & Ors* [1991] 2 CLJ 1524. [117]

In *Newcastle*'s case, there was no physical use of the 291 acres by the hospital. It was just vacant land, to provide a buffer from the encroachment of industrial and residential development and to keep the atmosphere clear and unpolluted. Lord Denning held that this constituted use of the land notwithstanding the lack of physical presence. The rationale is illustrated in Lord Denning's example:

> ... but anyone would say that a 'farmer' occupies the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another.[118]

Here Lord Denning conceptualised ownership of land in terms of who controls its use, rather than whether the land is physically used in a particular manner. Following *Madeli*, the limitation imposed in *Sagong* and *Nor Nyawai* to recognition of native title on the basis of land use, may no longer be valid in Malaysia.

What Brennan J held in *Mabo No 2* that 'the ownership of land within a territory in the exclusive occupation of a people must be vested in the people'[119] must now be seen in light of control over the land. So long as the plaintiffs have control and can prevent strangers from interfering, they have occupation of the land, and that will entitle them to the right in and to the land.

Looking at it from a different perspective, whatever the use and even if such is only intermittent, this cannot be construed as abandonment so long as there is still control over the land. Friedrich von Savigny's classic *Treatise on Possession*,

6 MLJ xci at cxix

a study of the relevant law first published within a few years of the settlement of Australia and republished many times in the 19th Century, set out the main principles of the law of possession as quoted by Reynolds:

> Possession can only be lost when the land is physically abandoned and a determination exists to give it up. Land that is only visited occasionally -- like alpine pastures, for instance -- would not be considered abandoned because of intermittent use. As Von Savigny argued, 'Where the use is of such a nature that it only recurs at certain periods, the omission to visit the land during the interval is not evidence of any intention to give up possession'.[120]

In *Sagong*, the plaintiffs foraged and hunted in the areas surrounding the settlement. They used the land to the exclusion of any other community. There were specific borders to their land. No outsiders were allowed to enter the land without permission, and if anyone did, they would be chased out. The only other persons allowed into the land were those who married into the Temuan community who would then have to follow the Temuan peoples' customs and laws.[121]

Therefore based on the Federal Court's control test in *Madeli*, we are on our way to recognising rights in and to the land even in areas where they used to forage and hunt so long as they have continuous occupation in the context of control over the area.

DEFINITION OF 'ABORIGINE' OR 'INDIGENOUS' PEOPLE, AND 'ABORIGINAL WAY OF LIFE'

As to the definition of 'aborigine' -- the recognition of people as indigenous/aborigines is a threshold question and is a condition precedent before a claim for native title to land can even be considered. International law does not have one universally accepted definition of 'indigenous peoples'. The three key definitions often referred to are found from the UN, ILO and World Bank.[122]

> Even though each is slightly different, these three definitions have certain common elements. They all offer a mix of objective criteria, such as historical continuity, and 'subjective' ones, most commonly self-definition. In particular three features are shared by all definitions; (i) indigenous peoples are descendants of the original inhabitants of territories since colonized by foreigners (having a
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> *6 MLJ xci at cxx*
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> historical continuity with pre-invasion and pre-colonial societies); (ii) they have distinct cultures, which sets them apart from the dominant society; (iii) they have a strong sense of self identity.[123]

In Malaysia, s 3 of the APA, set out earlier, defines an 'aborigine' which requires that they 'follow an aboriginal way of life'. In *Sagong*, Mohd Nor J summarised the contention of the defendants:

> The defendants recognise the plaintiffs as aboriginal Temuan people but challenge the fact as to whether they still continue to practice their Temuan culture. Therefore, the onus is on the plaintiffs to show that they speak an aboriginal language, follow an aboriginal way of life as well as aboriginal customs and beliefs.[124]

The objection was actually that they are not aboriginal peoples within the definition of the APA and therefore they are not entitled to make a claim for native title.

To require them to prove they habitually speak an aboriginal language, habitually follow an aboriginal way of life and aboriginal customs and beliefs before they are deemed to be aboriginal is a sure way of making them extinct. The world is changing, developing and fast becoming a village. The aborigines are not exempted. The aborigines are also learning and developing. They cannot be expected to remain static in order to assert their land rights.

In Malaysia, the young ones speak the national language and go to the national type schools; some are even university graduates. Many also convert to other religions. Their traditions, culture, customs and beliefs are impacted by their new religious beliefs. This aspect of change of religion is expressly recognised in s 3(2) of the APA which provides:

> Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practicing that religion.

This was referred to and applied in *Sagong*.[125] However, would the change of traditional ways and customs and the use of modern technology and knowledge and/or the use of a common national or international language disqualify them from coming within the definition of an aborigine or indigenous person?

6 MLJ xci at cxxi

There are clear examples in other countries whose indigenous people have evolved significantly and use modern technology in their everyday life. For example the Inuit hunters of the Arctic now use helicopters for hunting and herding activities and the reindeer breeders of Sami origin in Finland use snow scooters and modern slaughterhouses.[126]

Some guidance can be gleaned from the HRC's approach to the adaptation of indigenous peoples' way of life to modern technologies.[127] In *Sara v Finland*[128] the respondent state argued that the 'concept of culture in the sense of article 27 provides for a certain degree of protection of traditional means of livelihood' and by using modern technology such as snow scooters and modern slaughterhouses, the reindeer breeders of Sami origin were not entitled to such protection. On this issue the HRC stated:

> While Finnish Sami have not been able to maintain all traditional methods of reindeer herding, their practice still is a distinct Sami form of reindeer herding, carried out in community with other members of the group under circumstances prescribed by the natural habitat. Snow scooters have not destroyed this form of nomadic reindeer herding.[129]

The HRC were of the view that the adaptation to modern technology did not preclude them from enjoying the rights under article 27 of the ICCPR.

In the same way where indigenous peoples have adapted using modern technology and even where they have adopted different religious beliefs, this should not preclude them from being known and recognised as indigenous people for purposes of a claim for indigenous land rights.

A better definition of who is an indigenous person has been distilled by Gilbert,[130] that is, a person who can establish that they are the descendants of the first indigenous peoples, have a distinct culture from the dominant society and a strong sense of self definition.[131] Only after crossing this threshold, can the use of or attachment to the land be determined, by adducing evidence of historical connection and occupation/control over the land claimed.

CONCLUSION

Over the years the world has moved from considering indigenous peoples as uncivilised and unworthy of ownership of land using the principle of *terra nullius* to justify invasion and colonisation, to recognising them as a people with the right to self determination and the right to freely pursue their economic social and cultural development.

The international covenants and declarations as well as case law provide a framework of the rights and the protection of indigenous peoples' land rights. The UNDRIP in particular has not only crystallised indigenous peoples' right to self determination and rights to land but has also recognised the special bond that they have to their land. This is distinct from the western society's concept of the commercial nature of land transactions that do not have that special and spiritual bond. This distinction should translate to a higher award in terms of compensation for the deprivation of indigenous peoples' lands.

Gilbert cites the Inter-American Court of Human Rights ('IACtHR')'s landmark decision of *Mayagna (Samo) Awas Tingni Community v Nicaragua,*[132] where the court relied on 'an evolutionary interpretation of international instruments for the protection of human rights:

> discerning that under the current international regime of human rights protection there is an evolution towards such recognition. This is significant and highlights that the evolution towards a right to property which includes traditional forms of indigenous ownership is not limited to the Americas but is part of a universal advancement in human rights law.[133]

This is borne out in the evolution of cases in Malaysia from *Adong* to *Sagong* and now *Madeli*. The test of ownership to the land has evolved from physical presence and exclusive occupation to control over the land.

Xanthaki rightly points out that though there are positive results across South East Asia including Malaysia, implementation remains a problem due to '... the lack of practical measures to enforce positive provisions for indigenous protection, legislations that contradict favourable provisions in other domestic laws, limited information provided to indigenous communities about the new

measures and dependence on local authorities. All these factors indicate a lack of political motivation and obstruct the improvement of indigenous land rights'.[134]

The situation of the *orang asli* is more acute as the current administration appears to be taking steps to reverse these advancements. On 17 March 2010 an unprecedented number of *orang asli* gathered at the administrative capital of Malaysia against a proposed land titles policy which involved the granting of up to 6 acres of land for palm oil cultivation to each *orang asli* head of household. The policy paid no attention to *orang asli* customary lands and as Subramaniam reports, more than 70% of *orang asli* lands would be lost in this process, allowing for no further claims to those who accept the policy.[135]

On 15 March 2011, at a joint press conference by the Bar Council and the Peninsular Malaysia Orang Asli Network in response to statements by the former Prime Minister Tun Dr Mahathir that the Malay community's claim to the land is stronger than the *orang asli*'s 'as the latter do not have a civilisation that pre-dates the Malays', the Bar Council and *orang asli* expressed concern at the present government's deafening silence to such divisive remarks, and further, its intention to amend the APA to reverse these progressive court decisions without any consultation with the *orang asli* in blatant disregard of article 19 of the UNDRIP.[136]

The Human Rights Commission of Malaysia (SUHAKAM) has recently begun an inquiry into customary land rights of the indigenous people of Malaysia. *Orang asli* throughout the nation have voiced their dissatisfaction over proposed amendments to laws governing *orang asli* affairs, particularly in relation to land matters.[137]

While there have undoubtedly been improvements at the macro level in the recognition and protection of the *orang asli* land rights in Peninsular Malaysia, the 10th Malaysia Plan (2011-2015) shows that 50% of the *orang asli* still live below the poverty line, 19% of which are hardcore poor. The key to pulling

them out of poverty, as Nicholas points out, is the ownership, control and management of their traditional lands.[138]

Clearly, despite the advancements in court and Malaysia's active participation in the drafting of the UNDRIP, there have been setbacks and the present government does not seem to have the political will and commitment to fulfill its obligations and the aspirations set out in the UNDRIP. The *orang asli* must continue their fight for land rights. It is hoped that by increasing public and international awareness of the *orang asli* situation, together with the Bar Council's initiative[139] of training and providing lawyers nationwide to take up cases and advice the *orang asli*, recognition and protection of their land rights as envisaged in the UNDRIP will, in the long run, become a reality in Peninsular Malaysia.

1 Organised by the Centre for Malaysian Indigenous Studies at the University Malaya on 25-26 January 2011 -- *The Law on Customary Lands, Territories and Resource Rights -- Bridging the Implementation Gap.*

2 *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*[2002] 2 MLJ 591[2002] 2 CLJ 543 (HC).

3 *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors*[2005] 6 MLJ 289[2005] 4 CLJ 169 (CA).

4 Rita Jong, 'Orang Asli win 14-year battle', *New Straits Times*, (Kuala Lumpur, 26 May 2010) at http://www.nst.com.my/nst/articles/14asal/Article/.

5 The terms 'aboriginal people', 'indigenous people' and 'orang asli' are used interchangeably in this paper to refer to the native people of Malaysia.

6 SUHAKAM (Malaysian Commission on Human Rights), *Research on the Rights of Indigenous People in Malaysia: Land Rights of the Orang Asli in Peninsular Malaysia* (final draft, 5 February 2010) at p 28.

7 The 20-Point Agreement (between Malaya and Sabah) and 18-Point Agreement (between Malaya and Sarawak) state that ' The indigenous races of North Borneo should enjoy special rights analogous to those enjoyed by Malays in Malaya ...' -- These agreements were written to safeguard the interests, rights, and autonomy of the people of Sabah and Sarawak upon the formation of the federation of Malaysia; see at http://en.wikipedia.org/wiki/20-point_agreement_(Sabah) and http://untreaty.un.org/unts/1_60000/21/36/00041791.pdf.

8 Colin Nicholas, (2007), *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia*, International Work Group for Indigenous Affairs at p 14 n 2 -- there are in fact 19 subgroups but the Temoq people were subsumed into the Jakun subgroup, for administrative purposes.

9 Nicholas, fn 8 at p 3.

10 Comprising the Semai, Temiar, Jah Hut, Chewong, Mah Meri and Semoq Beri.

11 Nicholas, fn 8 at p 4.

12 Comprising the Temuan, Semelai, Jakun, Orang Kanaq, Orang Kuala and Orang Seletar.

13 Nicholas, fn 8 (above) at p 4.

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