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## Indigenous Peoples in Protected Areas and Equitable Conservation: Recent Legal and Policy Development in Malaysia

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### ABSTRACT

Respect and recognition of the rights of the indigenous peoples are acknowledged as indispensable for sustainable and equitable conservation of protected areas. Corresponding to this, in Malaysia, significant changes have also been seen in the relevant laws and policy statements in the last few years, providing for greater recognition of the needs and rights of the indigenous peoples in the management of the protected areas. This paper provides an overview of the Malaysian laws and policies on protected areas affecting the rights of Malaysia's indigenous peoples, the Orang Asli, with a focus on the recent changes in the relevant laws and policy statement. However, without adequate legal support and recognition as landowners, the effort to meaningfully include the indigenous peoples in the management of the protected areas may be hampered. A concrete legal change needs to take place, specifically through legislation to formally recognize and acknowledge the rights of the Orang Asli communities to their customary land. This may lead to a change of perspective towards the Orang Asli as landowners and pave a new foundation for creating new relationships to create a genuine partnership and meaningful involvement of the communities in the management of the protected areas.

**Keywords:** Indigenous peoples; Orang Asli; Protected areas; Sustainability; Equitable conservation; Malaysia

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### 1. Introduction

Many indigenous peoples live in and around protected areas around the world, including in Malaysia, and rely on their resources for generations. They are also recognised as



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'custodians' of the environment and ecosystems, as their knowledge, customs, and practices play an important part in environmental protection. Conservation development has been a major cause of the infringement of indigenous peoples' rights. In many countries, including Malaysia, the protected areas were established during the colonial period with the main purpose of a game reserve mainly for hunting and recreation with less consideration for the interest of local communities resulting in the problem of social, economic, and environmental effects.<sup>1</sup>

However, more recently, respect and recognition of the rights of the indigenous peoples have also been acknowledged as important elements for effective and equitable conservation. Studies show that protected area sites that directly involve indigenous peoples and local communities as active stakeholders are generally more effective in terms of not only biodiversity conservation, but also the socio-economic development of the communities.<sup>2</sup> The positive outcomes mainly come from situations, in which the indigenous peoples and local communities play a central role in the management of the protected areas with a significant influence over decision-making, and their local institutions that regulate tenure are recognized by the law and policy as a part of governance, apart from other enabling factors.<sup>3</sup>

In Malaysia, significant changes have also been seen in the relevant laws, and especially in the policy statements, since the last few years, providing for greater recognition of the rights and interests of the indigenous peoples in the management of the protected areas. However, the current statutory protection for the land of the Orang Asli communities is limited to the form of reservation of land by the State Authorities, and many of their lands are not reserved as such. It is argued that without adequate legal support and recognition by relevant state authorities of their tenure and position as customary landowners, the effort to include meaningfully the indigenous communities in such conservation efforts, which is important to achieve effective and equitable conservation, may be hampered.

This paper provides an overview of the legal and policy development which focuses on the rights of the Orang Asli communities as a group of indigenous peoples in Malaysia. The methodology used in this writing is the doctrinal research method of law by examining the relevant statutory and common laws, and policy statements, as well as the previous studies on the position and rights of the Orang Asli in the protected area.

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<sup>1</sup> Z Hashim, SA Abdullah and S Md Nor, 'Stakeholders Analysis on Criteria for Protected Areas Management Categories in Peninsular Malaysia' (2017) 91 IOP Conference Series: Earth and Environmental Science 12014 <<https://dx.doi.org/10.1088/1755-1315/91/1/012014>>.

<sup>2</sup> Neil M Dawson and others, 'The Role of Indigenous Peoples and Local Communities in Effective and Equitable Conservation' (2021) 26 Ecology and Society 19 <<https://www.ecologyandsociety.org/vol26/iss3/art19/>>; JA Oldekop and others, 'A Global Assessment of the Social and Conservation Outcomes of Protected Areas' (2016) 30 Conservation Biology 133 <<https://doi.org/10.1111/cobi.12568>>.

<sup>3</sup> Dawson and others (n 2).

The following second and third parts describe the present law governing terrestrial protected areas in Malaysia and provide an overview of the Orang Asli communities living within and adjacent to protected areas. The fourth part of the paper explains the legal position of the indigenous communities to access land and resources under the statutory laws that govern the protected areas in Malaysia and the common law recognition established by the judicial decisions involving land rights claims by the Orang Asli. The fifth part highlights the recent changes in law and policy, which address the interests of the indigenous peoples in the management of the protected areas. The subsequent parts consider the way forward for the law in Malaysia, recommending a concrete legal change providing for greater protection of the indigenous peoples in Malaysia, to achieve equitable and effective conservation, consistent with the legal and policy development both local and internationally.

## **2. Terrestrial Protected Areas in Malaysia**

With committed conservation regulations, Malaysia has a high percentage of land covered by protected areas.<sup>4</sup> These areas are broadly categorised into terrestrial and marine protected areas. The protected areas may take the form of a permanent reserve forest with various purposes, including protection, amenities, and water catchment. The protected areas could also be in the form of nature, wildlife, marine sanctuary/reserves, and national/state parks. The establishment of the protected areas is significant to preserve and conserve the rich biological diversity of the country as one of 17 mega-diverse countries in the world, crucial for the protection against the impacts of natural disasters, as well as mitigation and adaptation to climate change.<sup>5</sup> The areas are also vital for people's livelihoods, especially the communities living in and surrounding the protected areas, as they also provide for clean water supply, food sources, and medicines.

The terrestrial protected areas in Malaysia are generally divided into Wildlife Protected Areas and Permanent Reserve Forests. The first category, the Wildlife Protected Areas, includes National and State Parks, Wildlife Reserves and Sanctuaries, and Nature Reserves were developed primarily to protect wildlife and conserve biodiversity. This category of terrestrial protected areas is established under and governed by various legislations providing for the establishment of national and state parks, and wildlife, including the National Park (Kelantan) Enactment 1938, the National Park (Terengganu) Enactment 1939, the National Park (Pahang) Enactment 1939, the National Parks Act 1980, Perak State Parks Corporation Enactment 2001, and the Wildlife Conservation Act 2010. At present, most of the protected areas are managed by the Department of Wildlife and National Park (PERHILITAN). Some state conservation parks, which are more recently established under the relevant legislation, are managed by the relevant authorities, such as Perak State Park

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<sup>4</sup> Wan Izatul Asma Wan Talaat, 'Review Article Revisiting the Status of The Malaysian Laws and Policies on Biodiversity' (2020) 15 *Journal of Sustainability Science and Management* 198 <<http://agris.upm.edu.my:8080/dspace/handle/0/21365>>.

<sup>5</sup> *ibid.*

Corporation and Johor National Park Corporation. The national and state parks were created largely to protect and manage the area's geological, historical, ethnological, archaeological, and scenic qualities in addition to its wildlife and natural features.

The other category is the Permanent Reserve Forests, which is established and governed by the National Forestry Act 1984 and the relevant state enactments. The establishment of the Permanent Reserve Forests has the objective of protecting forests to ensure good climatic and physical condition of the country by safeguarding, among others, water resources, soil fertility, and environmental quality. There are four major classes of the Permanent Reserve Forests based on their functions, which are, production, protection, amenity as well as research and education forest. The majority of the Permanent Reserve Forests are designated as "managed resource protected areas" primarily to maintain the sustainability of the natural ecosystem.<sup>6</sup>

Apart from the specific legislation, which establishes and governs the different protected areas in Peninsular Malaysia, there is also an extensive legislative and policy framework that supports the management of the protected areas. Relevant legislations include the Environmental Quality Act 1974, the Town and Country Planning Act 1976, and the Access to Biological Resources and Benefit Sharing Act 2017. The Town and Country Planning Act 1976 provides for states and local authorities to set aside certain areas of land for conservation and protection. The Environmental Quality Act 1974 mandates the completion of Environmental Impact Assessments for certain development activities, such as land conversion for forestry and agriculture, as well as infrastructure development. The Environmental Impact Assessments should be carried out through public consultations and the complete report is required to be made available to the public.

Other policy statements also govern the protected areas, including the National Physical Plan and other plans relevant to conservation, including National Policy on Biodiversity and the National Policy on Forestry.

However, numerous issues in the protected areas remain, including unsustainable logging, de-gazettement of the protected areas, encroachment and wildlife poaching, and lack of awareness at the grassroots level, aggravated by insufficient law enforcement and often influenced by regional politics.<sup>7</sup> Despite different rules in place, there are still loopholes preventing Malaysia from effectively conserving biodiversity, necessitating an urgent revision of existing legislation to align with international law and norms. Furthermore, Malaysia's convoluted biodiversity governance may contribute to inefficient biodiversity conservation measures implementation and enforcement. These may also collectively hamper efforts by the country to fulfil her international obligations relevant to

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<sup>6</sup> Nigel Dudley, *Guidelines for Applying Protected Area Management Categories* (International Union for Conservation of Nature and Natural Resources, 2013) <<https://portals.iucn.org/library/sites/library/files/documents/pag-021.pdf>>.

<sup>7</sup> Mariani Ariffin, 'Enforcement against Wildlife Crimes in West Malaysia: The Challenges' (2015) 10 *Journal of Sustainability Science and Management* 19 <<https://jssm.umt.edu.my/wp-content/uploads/sites/51/2015/06/2.pdf>>.

environmental sustainability, such as the Convention on Biological Diversity and the Aichi Targets, and the 2030 Agenda for Sustainable Development.<sup>8</sup>

### **3. The Indigenous Peoples and Protected Areas in Malaysia**

The local communities living in and surrounding the protected areas in Malaysia are mostly Orang Asli who live in West Malaysia, and the natives in the states of Sabah and Sarawak. They are generally recognised as the indigenous peoples in Malaysia. For example, in the Access to Biological Resources and Benefit Sharing Act 2017,<sup>9</sup> indigenous communities are defined as comprising these three groups of people.

The indigenous communities are highly dependent on the resources from the protected areas. The main economic activities for the communities in most protected areas are traditional customary activities, such as fishing and the collection of non-timber forest products, including vegetables and medicinal plants. There are also agricultural activities, such as a small-scale plantation of vegetables and ecotourism-based activities. In Taman Negara, which is a vast national park located in the middle region of the Malaysian peninsula, it is estimated that there are around 2000 Batek people, a tribe of Orang Asli, living within the park. They depend heavily on non-timber forest resources for food supply, fuel wood, building materials, traditional medicines, and other daily necessities.<sup>10</sup> Similarly, in Endau-Rompin National Park situated at the southern peninsula, there are four local villages of *Urang Huluk* or *Orang Hulu* (Jakun tribe), which are close to the national park. Other than agricultural and tourism-based activities, their livelihoods are also based on subsistence activities, such as hunting, fishing, and collection of rattan and *gaharu* for sale.<sup>11</sup> In addition, the communities in all the national and state parks are also actively involved in tour guiding activities in all the national and state parks appropriating their knowledge of the area. The attraction of tourists to the areas provides them with employment opportunities, such as trekking and fishing guides, tour operators and assistant staff at the park management office.<sup>12</sup> Some also work as park rangers to help to monitor the park for poachers.

However, forest conservation and the development of national parks and other protected places have also been acknowledged as a major threat to the cultural survival and

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<sup>8</sup> Talaat (n 4).

<sup>9</sup> Access to Biological Resources and Benefit Sharing Act 2017, s 4.

<sup>10</sup> Kirk Endicott and others, 'Batek Playing Batek for Tourists at Peninsular Malaysia's National Park' (2016) 2 *Hunter Gatherer Research* 98 <<https://doi.org/10.3828/hgr.2016.5>>.

<sup>11</sup> O Hussain and others, 'Orang Asli Jakun dan Taman Negara Endau Rompin', *Pendayaupayaan Bahasa, Agama dan Transformasi Masyarakat* (Universiti Tun Hussein Onn Malaysia 2017) <<https://doi.org/10.17576/geo-2021-1702-27>>.

<sup>12</sup> Azrina Abdullah, Or Oi Ching and Kamal Solhaimi Fadzil, *Collectors and Traders: A Study of Orang Asli Involvement in the Belum-Temenggor Complex, Perak* (Centre for Malaysian Indigenous Studies, University of Malaya 2011).

sovereignty of the indigenous peoples.<sup>13</sup> Commonly, communities residing in the designated areas were not informed of or included in the creation of protected areas. Aside from the fact that indigenous peoples' rights to land and resources are often times not explicitly provided by the statutory law, the establishment of protected areas has restricted their activities and access to their traditional lands. They may also face threats of expulsion and exclusion from the areas which have been experienced by Jakun communities who were required through a general notice, among others, to leave the Endau-Rompin National Park, Johor.<sup>14</sup>

Further, enforcement of the rules governing protected areas may cause resentment among the locals who are used to accessing these lands and resources.<sup>15</sup> On another note, although efforts have been made by the government to reduce the dependency of the Orang Asli on the forest resources, the alternative livelihood projects have often been plagued with equity issues and fail to reduce poverty.<sup>16</sup>

#### **4. The Law and Access to Protected Areas by the Indigenous Peoples in Peninsular Malaysia**

With respect to the land of the Orang Asli communities, the statutory protection is limited to the form of provisions on land reservation by the relevant State Authorities under, first, the Aboriginal Peoples Act 1954 (Malaysia)<sup>17</sup> and second, the National Land Code (Malaysia),<sup>18</sup> which may be invoked for public purpose.

However, for the reservation under the Aboriginal Peoples Act 1954, the State Authorities may revoke the reservation without the legal requirement of consultation or consent of the communities affected by the decision. Furthermore, although the Orang Asli are allowed to live on land declared as other types of reserve, including the forest reserve, game reserve, or Malay reserve, state authorities may order them to leave the area, but with a condition that compensation is paid.<sup>19</sup>

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<sup>13</sup> Asia Pacific Forum on Sustainable Development, 'Report of Roundtable on SDG 15 Life on Land' (2018) <[https://www.unescap.org/sites/default/files/APFSD\\_Roundtable\\_SDG\\_15\\_Report.pdf](https://www.unescap.org/sites/default/files/APFSD_Roundtable_SDG_15_Report.pdf)>.

<sup>14</sup> *Sangka bin Chuka v Pentadbir Tanah Daerah Mersing, Johor* [2016] 8 Malayan Law Journal 289 (HC).

<sup>15</sup> Sheema A Aziz and others, 'Why Conservationists Should Be Concerned about Natural Resource Legislation Affecting Indigenous Peoples' Rights: Lessons from Peninsular Malaysia' (2013) 22 *Biodiversity and Conservation* 639 <<https://doi.org/10.1007/s10531-013-0432-5>>; Normah Abdul Latip and others, 'The Involvement of Indigenous Peoples in Promoting Conservation and Sustainable Tourism at Lower Kinabatangan Sabah: Common Issues and Challenges' (2015) 9(7) *Australian Journal of Basic and Applied Sciences* 323 <<https://www.ajbasweb.com/old/ajbas/2015/April/323-325.pdf>>.

<sup>16</sup> SK Gill, WH Ross and O Panya, 'Moving beyond Rhetoric: The Need for Participatory Forest Management with the Jakun of South-East Pahang, Malaysia' (2009) 21 *Journal of Tropical Forest Science* 123 <<https://jtfs.frim.gov.my/jtfs/article/view/800>>.

<sup>17</sup> Aboriginal Peoples Act 1954, ss 6-7.

<sup>18</sup> National Land Code, s 62.

<sup>19</sup> Aboriginal Peoples Act 1954, s 10(1).

Reservation of land is a form of protection for the relevant communities against interference by others. This is premised on the welfare approach which, however, is open to a wide discretion of the State Authorities. However, it is reported that there are many areas of land occupied by the Orang Asli communities, which are not protected as such.<sup>20</sup> In addition, despite the absence of any statutory limitations, very few lands of the communities are protected under the system of land registration provided by the National Land Code or the state land legislations. However, the law providing for the system of land grants and registration may not recognize the nature of customary land of the communities. This position of law has been seen, or even appropriated as a factor that weakens the customary right of the indigenous communities.<sup>21</sup>

However, certain 'privilege' is specifically provided to the Orang Asli communities by several legislations regarding settlement, access, and collection of certain resources for essential needs and domestic consumption. For example, the Orang Asli communities may continue to live in a forest, wildlife, or Malay reserve on conditions laid out by the relevant State Authority.<sup>22</sup> The State Authority may also prescribe that certain legal provisions not in force, or certain provisions may be modified in its application to the relevant community.<sup>23</sup> In addition, under the Wildlife Conservation Act 2010, the Orang Asli community is allowed to hunt for personal consumption only, certain protected wildlife species specified in the Sixth Schedule of the legislation. However, hunting of wildlife for sale or exchange for food or others is strictly prohibited.<sup>24</sup>

Besides, the forestry-related legislation also allows the relevant authorities to exempt the Orang Asli from payment of royalty on the taking of forest products for their personal needs, such as the building and maintenance of temporary huts on land that they lawfully occupied. Other domestic purposes allowed under the provision is the taking of forest produce for fishing and firewood.<sup>25</sup> Likewise, the transfer of forest products by the Orang Asli community for domestic purposes may be exempted from the requirement of license by the State Authorities, which in other situations is required by law.<sup>26</sup> However, as highlighted by a lawyer through an interview with the author in 2021, such provisions may have led the Orang Asli community to be exploited as collectors of forest products by traders who have the necessary license.

Apart from the statutory provisions discussed above, there are also several decisions by the court of law on the land claims by the Orang Asli and natives in Sabah and Sarawak. The

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<sup>20</sup> Yogeswaran Subramaniam, 'Orang Asli, Land Rights and the Court Process: A "Native Title" Lawyer's Perspective' in Kirk Endicott (ed), *Malaysia's Original People: Past, Present and Future of the Orang Asli* (National University of Singapore Press 2015).

<sup>21</sup> Sheema A Aziz and others (n 15).

<sup>22</sup> Aboriginal Peoples Act 1954, s 10.

<sup>23</sup> *ibid.*

<sup>24</sup> Wildlife Conservation Act 2010, s 51.

<sup>25</sup> National Forestry Act 1984, s 62(2)(b).

<sup>26</sup> *ibid* s 40(3)

judicial decisions have formed into what is known as a body of common law principles on recognition of the customary land of the indigenous peoples in Malaysia. Being a common law-based legal system, the judicial decisions are also part of the law in Malaysia, read together with other laws, including the Federal Constitution and legislation.<sup>27</sup>

Briefly, under the common law principles, some practices, traditions, and customs of the indigenous communities may give rise to legal rights, which may be enforced by the courts of law, except when practice, tradition, and custom were extinguished by an explicit provision in legislation, or an act of executive government, which are authorised by legislation. In other words, for an existing right, which was given rise by a custom legally enforceable, such rights would only come to an end if provided as such by legislation and subject to payment of compensation. For example, if there is no explicit provision, laws establishing forest reserves may not impact an existing title.<sup>28</sup> Besides, laws governing land classification and preventing unauthorised habitation of land may not also have an impact on an existing customary claim.<sup>29</sup>

It follows that ownership of land by state authorities is subject to existing legal rights, such as the rights that exist under custom enforceable by law, which is also a source of law recognised by the Federal Constitution<sup>30</sup>. In view of this, the statutory rights, such as those provided by the Aboriginal Peoples Act 1954 may co-exist alongside the common law rights.

To successfully establish the existence of a customary land right in a certain area, the community must prove that they have continually been in the area for a significant amount of time—perhaps for multiple generations and they still exercise their traditional rights to the land but not necessarily actual physical presence. For example, the court in several cases has held that a piece of land planted with fruit trees and frequented for the yield commonly for sale, was subject to occupation and control by the communities, although they no longer live in the area.<sup>31</sup>

The common law principle also applies to the land within a national park that the Orang Asli community lives in. For example, in the case of *Sangka bin Chuka v Pentadbir Tanah Daerah Mersing, Johor*,<sup>32</sup> the court decided that certain areas of land located within the Endau Rompin National Park, which was claimed by the Orang Asli claimants in the case, were their customary land. In this case, the claimants from the Jakun community who lived

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<sup>27</sup> Ramy Bulan, 'Native Title in Malaysia: A 'Complementary' Sui Generis Proprietary Right under the Federal Constitution' (2007) 11 Australian Indigenous Law Review 54 <<http://www.jstor.org/stable/26422991>>; Yogeswaran Subramaniam, 'Affirmative Action and the Legal Recognition of Customary Land Rights in Peninsular Malaysia: The Orang Asli Experience' (2013) 17 Australian Indigenous Law Review 103; Izawati Wook, 'Addressing the Rights of Indigenous Peoples to Resources in Malaysia: A Procedural Justice Approach' (2019) 26 International Journal on Minority and Group Rights 40 <<https://doi.org/10.1163/15718115-02601003>>.

<sup>28</sup> *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 Malayan Law Journal 677 (FC).

<sup>29</sup> *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 Malayan Law Journal 241 (HC).

<sup>30</sup> Federal Constitution, Art 160(2).

<sup>31</sup> *Mesara Long Chik v Pengarah Tanah dan Galian Pahang* [2018] 1 Legal Network Series 1009 (HC).

<sup>32</sup> *Sangka bin Chuka* (n 14).



in and adjacent to Johor's Endau-Rompin National Park were required to leave the area, to remove any trees that they planted and buildings that they built. The community brought the case to the High Court in Johor Bahru for a judicial review of the order issued by the relevant land administrator. The High Court, in its decision, held that the claimants had proven their use and occupation of the customary land, which rights are recognized and enforceable by law, and such rights were not extinguished by any statute. Therefore, the decision of the administrator to expel the communities is invalid from a legal point of view.

Under the common law principles, the right to land of the community is proprietary. They could use the land according to their custom and practice, live and use the land for agriculture, and also access the land for daily needs, such as hunting and fishing. This also means that the community may pass down the land from one generation to the next. Examples of the relevant cases are *Sangka bin Chuka v Pentadbir Tanah Daerah Mersing, Johor*,<sup>33</sup> *Adong bin Kuwau v Kerajaan Negeri Johor*,<sup>34</sup> and *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang*.<sup>35</sup>

Besides, access to the non-exclusive right to water areas surrounding their customary land for fishing and gathering of produce for their livelihood was also recognized. In the case of *Eddy bin Salim v Iskandar Regional Development Authority*,<sup>36</sup> the claimants, who were Seletar communities living in coastal areas of the southern part of Johor, filed a suit against the defendants for encroachment of their customary territory, which was affected by land reclamation activities and clearance of mangrove by the relevant authorities. Some areas of land were also alienated from other parties. In the case, the claimants sought a declaratory order in relation to their communal customary rights and interests in water areas surrounding their villages. To this, the High Court held that the claimants have a non-exclusive right to water areas surrounding their customary land, which include rivers and streams that they used for fishing and gathering of produce for their livelihood. This decision is important as the first time in the jurisdiction, in the court recognized the concept of 'non-exclusive rights' of the indigenous communities. Nonetheless, prior judicial decisions had restricted the extent of the Orang Asli rights to areas that they have direct control only such as the settlement and plantation areas. Examples of such cases are *Ketua Pengarah Jabatan Hal Ehwal Orang Asli v Mohamad bin Nohing*,<sup>37</sup> and *Kerajaan Negeri Selangor v Sagong bin Tasi Sagong*.<sup>38</sup> Therefore, based on the legal position as established by the courts, the customary rights of the indigenous peoples in protected areas must be addressed.

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<sup>33</sup> *Sangka bin Chuka* (n 14).

<sup>34</sup> *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 Malayan Law Journal 418 (HC).

<sup>35</sup> *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] 5 Malayan Law Journal 268 (HC).

<sup>36</sup> *Eddy Salim v Iskandar Regional Development Authority* [2017] 1 Legal Network Series 822 (HC).

<sup>37</sup> *Ketua Pengarah Jabatan Hal Ehwal Orang Asli v Mohamad bin Nohing* [2015] 6 Malayan Law Journal 527 (CA).

<sup>38</sup> *Kerajaan Negeri Selangor v Sagong bin Tasi Sagong* [2005] 6 Malayan Law Journal 289 (CA).

## **5. Recent Changes in Law and Policy**

Consistent with the trend at the global level, Malaysia has incorporated laws, principles, policies, and action plans, which provide for greater recognition of the interests of the indigenous peoples in the country, including the Orang Asli. This includes their participation in the management of the protected areas, with more engagement with the communities and conservation organisations. This is certainly a paradigm shift away from the former exclusionary state-centric “fortress” model towards a human rights-based approach.<sup>39</sup> On the background of the legal position of the customary land of the Orang Asli communities, this part highlights the recent development at the statutory law and policy statements, which have seen greater recognition of the rights of the communities.

### **5.1 Access to Biological Resources and Benefit Sharing Act 2017**

An important development of statutory law in Malaysia with respect to the position of indigenous peoples is the passing of the Access to Biological Resources and Benefit Sharing Act 2017. The Access to Biological Resources and Benefit Sharing Act 2017, which was gazetted on 17 October 2017 and came into force on 18 December 2020, is the first legislation that provides for the requirement of consent of indigenous and local communities for access to biological resources and the traditional knowledge related to the resources. The goal is to make sure that all bioprospecting operations are conducted with the approval of Malaysian authorities as well as the consent of those who possess traditional knowledge of the biological resources. The Access to Biological Resources and Benefit Sharing Act 2017 also aims to ensure benefit sharing, including the transfer of technology as well as benefits other than financial compensation. Therefore, the Access to Biological Resources and Benefit Sharing Act 2017, which was based on the Convention on Biological Diversity ratified by the country in 1992 and the relevant protocols to the Convention, recognizes the central role that traditional knowledge of indigenous and local communities is in maintaining and enhancing biodiversity.<sup>40</sup>

For access to biological resources and the traditional knowledge of such resources, found on land to which the communities “have a right as established by law”, the Access to Biological Resources and Benefit Sharing Act 2017 provides that applicants for the required permit must seek “prior informed consent” and mutually agreed terms of the indigenous and local communities. Communities’ rights are “established by law” when the land that they live in is under reservation under the Aboriginal Peoples Act 1954, allowed by State Authorities under any other relevant legislations, or affirmed as such by court decisions. It is also mandated that prospective users of the biological resources must also negotiate mutually agreed terms with the providers before accessing the resource. Professor Gurdial suggests that with full community participation, the legal provision is significant to the

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<sup>39</sup> Stan Stevens, *Indigenous Peoples, National Parks and Protected Areas: A New Paradigm Linking Conservation, Culture and Rights* (University of Arizona Press 2014).

<sup>40</sup> Talaat (n 4).

restoration of governance systems of indigenous and local communities based on local laws and customs. If properly implemented, it might address the threat to traditional knowledge that has persisted over the past few centuries, particularly when colonisation resulted in the denial of rights to the environments where traditional knowledge thrives.<sup>41</sup>

In some ways, the Access to Biological Resources and Benefit Sharing Act 2017 has highlighted the significance of amending the relevant laws in the jurisdiction to better support and provide for the formal recognition of the land rights of indigenous peoples in the country, which is significant for those communities as well as for the formal recognition of their rights. However, if the state does not acknowledge their ownership of the land or the customary law, through which such consent may be obtained, the legal right to prior informed consent for the use of traditional knowledge or resources on their lands may be illusory.<sup>42</sup>

## **5.2 National Policy on Biological Diversity 2016–2025**

In line with the Access to Biological Resources and Benefit Sharing Act 2017, the Malaysian National Policy on Biological Diversity 2016-2025 has also been formulated. The policy statement, among others, seeks to increase the contributions of stakeholders, including the indigenous peoples and local communities for the conservation and sustainable utilisation of biodiversity. This is to empower and harness the commitment of all stakeholders to conserve biodiversity, based on the principles of, among others, participatory, shared responsibility, and good governance.

Additionally, the local and indigenous groups' rights to make use of and profit from the resources are expressly acknowledged in the policy statement. Accordingly, it is necessary for the public, especially indigenous community leaders, to participate in decision-making in discussions on behalf of their communities through their cultural organisations, which is important for effective forest governance.

## **5.3 Malaysia Policy on Forestry 2021 and Forestry Policy of Peninsular Malaysia**

The same direction has also been seen in the recently crafted National Forestry Policy 2021, which comprises the Forestry Policy of Peninsular Malaysia, Sabah Forest Policy, and Sarawak Forest Policy. The national policy and the policy for the peninsula were approved by the Cabinet Meeting on 11 November 2020 and the 78th National Land Council Meeting on 29 January 2021. Relevant to the position of indigenous peoples, a specific objective sought in the management of the forests in Malaysia is to “[e]ncourage the participation of indigenous, native and local communities in the protection, conservation and rehabilitation of forests”.

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<sup>41</sup> Gurdial Singh Nijar, ‘Traditional Knowledge Systems, International Law and National Challenges: Marginalization or Emancipation?’ (2013) 24 *European Journal of International Law* 1205 <<https://doi.org/10.1093/ejil/cht077>>.

<sup>42</sup> *ibid.*

In the Forestry Policy of Peninsular Malaysia, the position of the Orang Asli living in the forest has also been significantly recognized, in which an important thrust outlined is the well-being of the Orang Asli and the local community in the planning and implementation of forest management and development activities.<sup>43</sup>

Thrust 7 specifically states that the focus is on “the rights of indigenous people and the local community to own, use and manage their areas and resources”. For this, strategies drawn to achieve the thrust are first, to promote the involvement of Orang Asli in forest management and development activities, and second, to maintain the functions and forest service for their benefit as a place to live, food source, domestic use, firewood materials, cultural heritage and religious, which are stated as essential for the survival of the Orang Asli. To achieve this goal, the policy statement states that the special sites of the Orang Asli in the permanent forest reserves will be identified and protected, institutional frameworks and mechanisms for resolving conflicts for land use of the Orang Asli in the permanent forest reserve will be streamlined, and “the interests and rights” of the Orang Asli for the management and development of forests in the permanent forest reserve will be considered.

The specific reference to the Orang Asli in the national policy statement is an important development compared to the previous National Forestry Policy 1972 (Revised 1992), which did not have any recognition of the people living and dependent on the forest that it governed. Although the primary goals of the 1972 policy were to promote the state’s economic development and allay worries about the sustainability of its forestry resources, it also made a commitment to managing forestry resources “effectively and profitably” in accordance with “scientific forestry”<sup>44</sup> This viewpoint nevertheless has strong ties to colonial forestry methods “privileging industrial over subsistence production”. The forest as a habitat disappears but an economic resource to be managed. This policy effectively upholds the antiquated colonial perspective on forests, which is antagonistic to the acknowledgement of the rights of forest dwellers like the Orang Asli. Such a course maintains the advancement of state objectives at the expense of regional groups and other weaker actors.<sup>44</sup>

The phrase “local community” in the 1992 policy is portrayed as a homogenous group that needs to be re-educated on the importance of the forest. This solidifies the prevailing notions at that time that the local community is seen as “illogical and inefficient environmental managers”, which were prevalent in forestry in the 1970s.<sup>45</sup> The strategy also made no mention of the indigenous people’s traditional understanding of forest management.

Hence, it is hoped that with the recent and more specific mention in the national policy statement on the rights of the Orang Asli who are directly affected by the management and

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<sup>43</sup> Forestry Policy of Peninsular Malaysia, policy objective 8 and thrust 7.

<sup>44</sup> Fadzilah Majid-Cooke, *The Challenge of Sustainable Forests: Forest Resource Policy in Malaysia, 1970-1995* (Allen & Unwin 1999).

<sup>45</sup> *ibid.*

exploitation of the forest as they live within and in the fringe of the forest, their rights and interests will be better protected and addressed. However, as the forest is under the jurisdiction of the states, the implementation of the forestry policy requires commitment at the state level, which is challenging in view of the lack of statutory recognition of the land rights of the Orang Asli communities.

#### **5.4 The National REDD Plus Strategy 2016**

In addition, Malaysia has also formulated its national strategic plan for the implementation of the National REDD Plus Strategy 2016. By establishing a value for the carbon stored in participating developing countries' trees and charging participating developed countries for the trees' carbon offsets, REDD Plus is one of the international responses to climate change that encourages developing nations to protect and preserve the forest. There are specific commitments in relation to the rights of the indigenous peoples who may be affected by the Redd Plus implementation. The policy statement specifically recognizes and respects. "rights to lands, territories, and resources in accordance with the law"; to share equitably the benefits with them and requires the mandatorily free, prior, and informed consent of the indigenous peoples when they are affected by the related activities.

Apart from the laws and policies by the relevant ministries, there are initiatives at the level of the protected areas management to specifically address the needs of the indigenous peoples living in and surrounding the park areas. For instance, the Perak State Park Corporation Management Plan 2017 has incorporated strategies to include Orang Asli's involvement in conservation and ecotourism initiatives. The same strategies have also been adopted in other national and state parks in the country.

However, as highlighted in a study, the management of the park is still through a top-down approach, resulting in gaps in the involvement of the Orang Asli community in the park management. Further, there has been no concrete legal change taken place to provide for recognition or mechanism to determine the land of the Orang Asli. In a study in Royal Belum State Park, the Orang Asli community representative pointed out that the management of the state park was not ready to recognize the position of the Orang Asli community as the customary landowners.<sup>46</sup> The community also expressed disappointment that they were not involved in the discussion on state park management. Likewise, the study also pointed out that a similar situation is also seen in the Taman Negara National Park, in which there is no explicit recognition given to the Batek community of their rights to the land occupied by them in the park although they have been living in the area for generations. It has also been pointed out that the practice of park management continues to exclude the indigenous peoples rather than meaningfully include them.<sup>47</sup>

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<sup>46</sup> Abdullah, Ching and Fadzil (n 12)

<sup>47</sup> Kamal Solhaimi Fadzil, 'Rationalising the Role of Orang Asli in Co-Management of the Royal Belum State Park, Malaysia' (2020) 32 *Journal of Tropical Forest Science* 361 <<https://doi.org/10.26525/jtfs2020.32.4.361>>.

## **6. Approaches by Other Jurisdictions**

There are many jurisdictions, including the Philippines, India, Taiwan, and New Zealand, which have taken initiatives to provide for recognition of the indigenous peoples' land rights by way of specific legislation. Under the relevant legislation in the Philippines, India, and Taiwan, governments have an active duty to protect the indigenous people's rights.<sup>48</sup> The legislation in these jurisdictions also provides for the contents of indigenous land rights. For example, the Philippines' legislation provides for the land rights of the indigenous peoples in the jurisdiction both individually and communally, that is together with other community members, as well as the legal right to access natural resources.

Similarly, in Canada and New Zealand, the indigenous peoples in the jurisdictions have extensive legal rights to resources on the lands that they exclusively occupied, including the rights to live and use the land, as well as to utilise resources both on and beneath the surface of the land for purposes of their subsistence and commercial, including timber, game, and fish. They also have rights to their traditional lands, which are not exclusively occupied, different from the Malaysian common law position. The content of the rights is, however, dependent on the custom of the communities, which is central to their distinctive culture traditionally in practice prior to the acquisition of sovereignty by the Crown.<sup>49</sup>

Besides, in Australia, there are provisions under land right and native title legislation that allow for the creation of leases of the aboriginal land to the governments for the maintenance or creation of protected areas. For example, in the Northern Territory, two national parks on Aboriginal territory were created by long-term leases to the state by the traditional owners for conservation purposes of the environment and landscapes are culturally important to the Aboriginal communities in the area. In addition, the majority of the board of the park management are the Aboriginal peoples.<sup>50</sup>

## **7. Conclusion**

Summarily, the Malaysian laws and policy, including the legislation which establishes the protected areas, including the national and state parks, have to a certain extent addressed the needs of the indigenous peoples who live within and surrounding protected areas. Access and collection of certain resources by the indigenous peoples for essential needs and domestic consumption are allowed, although these are limited and subject to the discretion of the relevant State Authorities. Given the most recent revisions to the written policies, such as the Malaysia Policy on Forestry 2021, which saw a greater acknowledgement of the

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<sup>48</sup> Taiwan Indigenous Peoples Basic Law (2005); Philippines Indigenous Peoples Rights Act 1997; Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006

<sup>49</sup> Izawati Wook, 'The Rights of the Orang Asli in Forests in Peninsular Malaysia: Towards Justice and Equality' (Doctor of Philosophy thesis, Victoria University 2015).

<sup>50</sup> Graeme Neate, 'Land Rights, Native Title and the 'Limits' of Recognition: Getting the Balance Right?' (2009) 11 Flinders Journal of Law Reform 1.

indigenous peoples' and a specific mention of the strategies to govern the rights of the communities living in the forests, it is hoped that it will be effectively implemented.

However, there is no statutory provision providing for the legal rights of the indigenous communities to access land and the resources within the protected areas, although, to a limited extent, these have been recognized by the common law in Malaysia. These rights, which are principally determined by custom, may extend not only to the land used for settlement and agriculture but also access to resources that they traditionally use. These customary rights are not extinguished by the legislation, and thereby it is suggested that they continue to exist with the other interests in the protected areas. The question is, how could, if this is to be realised, the customary rights co-exist with the other existing interests including conservation?

Pursuant to the commitment at the international level, and other development of international law and policy, Malaysia has incorporated principles, policies, and action plans with greater recognition and participation of the indigenous peoples, including the Orang Asli in the management of the protected areas, with more engagement with the communities and conservation organisations. However, the implementation of earlier plans and policies, which have the same directions have been subject to criticism for lack of meaningful participation of the indigenous peoples in the management of the park. With the recognition of the land rights of the Orang Asli by the court in the country, and consistent with the position of the relevant international law instruments and standards accepted by Malaysia, it is timely for a concrete legal change to take place, specifically through legislation to formally recognize and acknowledge the entitlement of the Orang Asli communities to their customary land. This is because legal recognition of their customary rights by statutory law will lead to a change of perspective towards the people as landowners and will pave a new foundation for creating new relationships to create a genuine partnership and meaningful involvement of the communities in the management of protected areas.<sup>51</sup>

The importance of securing community land for climate change especially has also been acknowledged by the Intergovernmental Panel on Climate Change, stating that:

Insecure land tenure affects the ability of people, communities and organisations to make changes to land that can advance adaptation and mitigation ... Limited recognition of customary access to land and ownership of land can result in increased vulnerability and decreased adaptive capacity ... Land policies (including recognition of customary tenure, community mapping, redistribution, decentralisation, co-management, regulation of rental markets) can provide both security and flexibility response to climate change.<sup>52</sup>

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<sup>51</sup> Fadzil (n 47).

<sup>52</sup> Hannah Mowat and Peter Veit, 'The IPCC Calls for Securing Community Land Rights to Fight Climate Change' (World Resources Institute, 2019) <<https://www.wri.org/blog/2019/08/ipcc-calls-securing-community-land-rights-fight-climate-change>>.

Further, with the statutory provision on prior informed consent of the indigenous communities in the Access to Biological Resources and Benefit Sharing Act 2017 for access to biological resources found on their land or their traditional knowledge of such resources, it is high time for the relevant legislation in Malaysia to be amended to not only provide for formal recognition of the customary land of the indigenous communities but also provide for a specific mechanism to determine their land rights.<sup>53</sup> Besides, communities are unable or unwilling to be enthusiastic partners or actors in conservation when there is little to no long-term stability.

The approaches taken in the jurisdictions that were briefly discussed, illustrate the direction that may be taken by the governments to provide for greater legal protection of the indigenous peoples in Malaysia, which is vital for effective and equitable conservation. For this, it must be acknowledged that more needs to be done beyond simple recognition of their rights. Policies and measures must be aligned, a low-cost mechanism for resolving conflict must be instituted, and a broad sectoral strategy must be considered to transform how people view natural resources and acknowledge the many uses and values of forests. Local knowledge and practice are also important to be recognized and adopted in the management of the forests.<sup>54</sup>

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<sup>53</sup> *ibid.*

<sup>54</sup> Neate (n 50); Maria Fernanda Gebara, 'Tenure Reforms in Indigenous Lands: Decentralized Forest Management or Illegalism?' (2018) 32 *Current Opinion in Environmental Sustainability* 60 <<https://doi.org/10.1016/j.cosust.2018.04.008>>.