

Title : A Legal Analysis on the Land Rights of Indigenous People in Malaysia

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**A LEGAL ANALYSIS ON THE LAND RIGHTS OF INDIGENOUS PEOPLES IN
MALAYSIA**

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The students/authors confirm that the work submitted is their own and that appropriate credit has been given where reference has been made to the work of others.

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ABSTRACT

Indigenous people is one of the communities that form the plural society in Malaysia. The aboriginal people in Peninsular Malaysia and the natives in Sabah and Sarawak are to be considered as 'indigenous peoples'. Embedded with unique practices and customs and their traditional way of life, indigenous peoples possess special value related to their customs. The problem take effect upon the acquisition of their land by the government as their right of livelihood had be deprived. The research dig into the dispute relating to indigenous land rights to discover the dilemma facing by indigenous peoples. The provisions in the Federal Constitution 1957, the Aboriginal Peoples Act 1954 the Land Acquisition Act 1960, the National Land Code 1965, the Sarawak Land Code 1958, the Sabah Land Ordinance 1975 are the statutes that being analyse in order to improve the protection of indigenous land. The research found that several provisions give inadequate protection to indigenous people thus it will put them in vulnerable conditions. Apart from that the research also analyse relevants government policy such as Dasar Pemilikan Tanah Orang Asli which are in conflicting with indigenous interest especially in their land rights. The research concludes with several recommendations to be implemented in order to resolve the dilemma on indigenous peoples land rights in Malaysia.

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3. Director of Forest, Sarawak v TR Sandah ak Tabau [2017] 2 MLJ 281.
4. Sagong Bin Tasi v. Kerajaan Negeri Selangor [2002] 2 MLJ 591
5. Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai and Ors [2006] 1 MLJ 256.

LIST OF STATUTES

1. Aboriginal Peoples Act 1954
2. Federal Constitution 1957
3. Interpretation Ordinance (sabah cap. 64)
4. Land Acquisition Act 1960
5. National Land Code 1965
6. Sabah Land Ordinance 1975
7. Sarawak Land Code 1958
8. Wildlife Act 1972

ABBREVIATIONS AND GLOSSARY

JAKOA	- Jabatan Kemajuan Orang Asli
SUHAKAM	- Suruhanjaya Hak Asasi Manusia
UNDRIP	- United Nations Declaration on the Rights of Indigenous Peoples
UN	- United Nations
ILO	- International Labour Organisation Convention
ECOSOC	- United Nations Economic and Social Council
CEDAW	- Convention on Eliminations of all Forms of Discrimination Against Women
CRPD	- Convention on the Rights of Person Disabilities
ICRED	- International Conference on Renewable Energy and Development
ERT	- Equal Rights Trust

CHAPTER ONE: INTRODUCTION

1.0 Introduction

The term “indigenous” cannot be defined clearly considering the diversity of indigenous peoples around the world. Each group of indigenous peoples around the world differs from each other in terms of culture, customs, practices as well as religion. In order to make the term “indigenous” universal, the United Nations¹ has developed a modern understanding of the term “indigenous” based on the following criteria; (i) Self- identification as indigenous peoples at the individual level and accepted by the community as their member; (ii) Historical continuity with pre-colonial and/or pre-settler societies; (iii) Strong link to territories and surrounding natural resources; (iv) Distinct social, economic or political systems; (v) Distinct language, culture and beliefs; (vi) Form non-dominant groups of society; (vii) Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. The reason why these criteria were developed was because the United Nations wanted all groups of indigenous peoples around the world to fall within the modern understanding of indigenous.

In Malaysia, the term indigenous people is not clearly defined. However, under Article 160(2) of the Federal Constitution, there is a definition of the term “aborigine”. Aborigine is defined as “an aborigine of the Peninsular Malaysia”. The term, aborigine, was later emphasized in the Aboriginal Peoples Act 1954.² The

¹ United Nations Permanent Forum on Indigenous People, ‘Indigenous Peoples, Indigenous Voices’ <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> accessed on 19 June 2017.

² Section 3 (1) defines aborigine as follow;-
(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 descendant through males of such persons;
(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 an aboriginal community; or

natives of Sabah and Sarawak are predominantly explained in the Federal Constitution by their ancestry or race. Article 161A (6)³ specifically stated the criteria of a native under the Federal Constitution. Thus, for the purpose of this research, the term “indigenous people” will cover both the aborigines in Peninsular Malaysia and also the natives in Sabah and Sarawak.

Generally, the laws governing the rights of indigenous peoples in Peninsular Malaysia are the Federal Constitution, the Aboriginal Peoples Act 1954, the Land Acquisition Act 1960, and the National Land Code 1965.⁴ On the other hand, the relevant statutes for the natives of Sabah and Sarawak are the Sarawak Land Code 1958 and Sabah Land Ordinance respectively. Despite all these laws provided for indigenous people in Peninsular Malaysia and natives of Sabah and Sarawak, their rights to land are not exclusively stated in the laws. Hence, they faced similar problems in terms of the degradation of land rights.

Therefore, this research would critically analyze the current law which governs the rights of indigenous peoples relating to land, the problems faced by them, and a few possible solutions, so that their land rights are well protected under the law.

³ (c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.

article 161A (6) provides as follow;

In this article “native” means—

(a) in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races; and

(b) in relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.

⁴ Jerald, G, “The Recognition and Content of Native Title In Peninsular Malaysia”, (2011) 6 MLJ xci *Malayan Law Journal articles*.

1.1 Problem Statement

The rights of indigenous peoples pertaining to land widely affect their rights to their land. As an example, the Federal Constitution allows the federal government to intervene with a state land jurisdiction by coordinating aspects relating to land law, administration, and policy to ensure uniformity and consistency.

The Federal Constitution expressly distinguishes the Malays and the natives of Sabah and Sarawak from the aborigines which also includes their respective rights as by virtue of Article 153(1) of the Federal Constitution which imposes a duty to safeguard the special position of the Malays and natives of Sabah and Sarawak. Likewise, it has obviously left out the aboriginal people from the categories of people who are accorded with such special privileges. However, Article 74(1) of the Federal Constitution empowers the federal government to legislate for the welfare of aboriginal peoples. Although there is a specific provision relating to aboriginal peoples, the effectiveness of this provision is highly dependent on the Federal Government's initiatives. In addition, Article 8(5)(c) of the Federal Constitution specifically refers to aboriginal peoples of the Peninsular Malaysia but this provision does not expressly oblige the government to safeguard their position.

In addition, the administration and land law practices in Malaysia is based on the Torrens system where the registration is vital in contrary to the customs of indigenous land. Hence, the customary lands inherited from generation to generation are not included in the registration system in accordance with the laws of Malaysia. In other words, they have no indefeasibility of title over the land and their rights are considered as tenant occupation only. Therefore, the rights of aboriginal peoples in Peninsular Malaysia over their ancestral land will not be protected under National Land Code 1965.

The only statutory recognition of the status and rights of the aboriginal peoples is stated in the Aboriginal Peoples Act 1954. However, the Aboriginal Peoples Act 1954 does not provide any special titles to aboriginal peoples in Peninsular Malaysia unlike in Sabah and Sarawak where the Sabah Land Ordinance recognises a ‘native title’ which is an entry in the Native Title Register or in the Field Register.⁵ Certain provisions in Aboriginal Peoples Act 1954 create problems such as the issue of gazetted lands which have been regarded as being nothing more than a mere tenant at will of the state authority as the status of the land can be revoked at any time.⁶

In addition, if any land is excised from any aboriginal area or aboriginal reserve, the state authority may grant compensation for such act.⁷ However, by the virtue of section 11 of the Aboriginal Peoples Act 1954, the compensation is specified to pay only for the fruit and rubber tree. Meanwhile, the Minister also has the power to revoke the whole or part of declaration of aboriginal area and aboriginal reserve.⁸ Moreover, in a situation where their land is not gazetted, logging concessions can easily be given out and such act is not punishable under the law.⁹ The protection of aboriginal peoples’ reserve land can also be easily revoked by the State Authority as stated under Section 7 of the Aboriginal Peoples Act 1954.¹⁰

Another issue is the method of compensation to the aboriginal peoples for when their land is acquired by State Authority. Section 11 of the Aboriginal Peoples Act 1954 deals with the compensation based on the fruit or rubber trees on the land acquired. Meanwhile, it is provided that State Authority has a discretionary power to

⁵ Sabah Cap. 68, s 4.

⁶ Yogeswaran Subramaniam, ‘Beyond Sagong bin Tasi: The Use of Traditional Knowledge to prove Aboriginal Customary Rights over Land in Peninsular Malaysia and Its Challenges’ (2007) <http://www.aliran.com/index.php?option=com_content&/view=article&id=343:paybacktime&catid=47:20076&Itemid=10> accessed 24 April 2009.

⁷ Aboriginal Peoples Act 1954 at s 12.

⁸ Ibid at s 7(3).

⁹ Ibid at s 8.

¹⁰ Zainal Zulhimi Zainal Abidin, Seow Wee, ‘Issues of Customary Land For Orang Asli in Malaysia’ <http://eprints.uthm.edu.my/5828/1/16._Zainal_Zulhimi.pdf> accessed 2 May 2017.

compensate when the land of aboriginal peoples is acquired.¹¹

Furthermore, the definition of the term ‘land’ is provided under section 2 of Land Acquisition Act 1960. According to this section, ‘land’ refers to any alienated land, land occupied under customary right, and land occupied in expectation of title. However, the Land Acquisition Act 1960 does not distinguish between the unique characteristics of native title and ordinary private ownership. The State Authority can acquire any land for any purposes stated in section 3 of the Land Acquisition Act 1960.¹² The term ‘land’ used in this section is very wide, where it is read as “any land”. Hence, any land belonging to and inhabited by aboriginal peoples can also be acquired by the State Authority under this Act.

Meanwhile, the application of Sarawak Land Code in Sarawak has resulted in several obstacles to the native communities. It also fails to recognise the traditional forms of occupation as provided under the native law.¹³ Besides, broad authority given to the state may threaten the native customary land rights. For instance, in Sabah, there are issues concerning the section 15 of Sabah Land Ordinance on the definition of native customary rights. Traditionally, ancestral lands are held collectively by the community, however Section 15 of the Sabah Land Ordinance treats land as individual properties rather than collective ownership of the land.¹⁴

Problems can also be found in the government agency that acts for aboriginal peoples which is Jabatan Kemajuan Orang Asli (JAKOA). JAKOA does not act on its fiduciary duties.¹⁵ For instance, the number of aboriginal lands that have been approved to be gazetted as aboriginal peoples reserve in the 1960s and 1970s were never gazetted as aboriginal peoples reserve due to the failure of JAKOA in

¹¹ Note at 7.

¹² Land Acquisition Act 1960 at s 7.

¹³ SUHAKAM, Report Of The National Inquiry Into The Land Rights Of Indigenous Peoples, Copyright of Human Rights Commission of Malaysia(Suhakam), (2013) at 46.

¹⁴ Ibid at 23.

¹⁵ Note 11 at 19.

producing survey maps. There is usually no payment of compensation for the loss of ownership of the land, if not being recognised as belonging to or being owned by the aboriginal peoples.¹⁶ In some cases, there was no consultation with the aboriginal peoples before alienation or revocation of the forest reserve status was made.¹⁷

Hence, all of these problems need to be solved to create viable land rights for indigenous peoples. In order to provide a fair legal entitlement of land to them, amendments to the existing provisions and legislations should be made. For example, the recognition of the aborigines' identity through Federal Constitution might bring a lot of changes to their full recognition and rights in Malaysia. In addition to that, several amendments should be made by the government to the Land Acquisition Act 1960 and the Aboriginal Peoples Act 1954 to solve this problems.

Initiatives by the government to sign and ratify international treaties relating to indigenous peoples should be taken into account. The International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, 1989 (No. 169), United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and International Convention on the Elimination of All Forms of Racial Discrimination, are some of the examples of existing treaties and conventions concerning the rights of indigenous peoples. The application of guidelines provided by the treaties and conventions may in return provide a clear description of the recognition of indigenous peoples' legal rights. The Government should follow these guidelines as a benchmark on Malaysian legislation pertaining aboriginal rights.

¹⁶ Ibid.

¹⁷ Ibid.

1.2 Research Questions

1. How does the existing law protect the rights of indigenous peoples relating to land?
2. What is the problem faced by the indigenous peoples in regard to their rights to land?
3. How can the problems encountered by the indigenous peoples be overcome?

1.3 Research Objectives

1. To analyse the relevancy of the existing law which protects indigenous peoples' rights relating to land.
2. To examine the problems faced by indigenous peoples concerning their rights to land.
3. To propose solutions that can overcome the problems relating to land rights of indigenous peoples.

1.4 Research Methodology

This research will be analytical and critical; it is analytical in the sense that the research involves a careful examination and evaluation of the issue about the rights of indigenous peoples relating to the land. Furthermore, this research is critical in analysing the relevancy of the law which governs the rights of indigenous peoples relating to land.

Qualitative research is applied as it is legal research which is used to gain understanding of ascertaining opinions, reasons and motivation. It does not involve numerical data and the fields of observations that are analyzed are without statistics in any form.¹⁸ There are two types of qualitative research which are doctrinal and non-

¹⁸ Dooley, D *Social Research Methods* (4th edn), (Prentice Hall Inc 2001) at 248.

doctrinal.¹⁹ This research is a non-doctrinal research, also known as social-legal research, which is a research that employs methods taken from other disciplines to generate empirical data which answers the research questions.²⁰ The non-doctrinal approach allows this research to analyze the law from the perspective of other science disciplines, and to employ those disciplines in drafting the law. For example, in this research, we also consider the nature of life of the indigenous peoples.

The source of data involved in this research are primary and secondary sources. Primary sources are original data collected by the researcher for his study. Primary sources for this research are statutes and cases such as the Aboriginal Peoples Act 1954, Sabah Land Ordinance (Cap. 68), Sarawak Land Code (Chapter 81), Federal Constitution, National Land Code 1965, and Land Acquisition Act 1960. Moreover, this research will also include opinions from experts by conducting interview sessions. It will be done using the structured method as specific questions will be asked to a few respondents and the response will be recorded.

Secondary sources are the data obtained from historical information or the field work such as committee reports and academic research. Secondary sources can be retrieved from several sources such as texts, articles, journals or legal documents such as the Report by SUHAKAM on National Inquiry into Land Rights of Indigenous People, Judicial Recognition of the Orang Asli, and The Recognition and Content of Native title in Peninsular Malaysia.

A critical data analysis is implemented as this research analyses the mechanism and system that gives protection to the rights of the indigenous peoples in Malaysia. The research also critically examines the current provisions relating to rights to land and the source of problems faced by indigenous peoples in regard to their rights to land.

¹⁹ Anwarul Yaqin, *Legal Research and Writing* (Malayan Law Journal 2007) at 137.

²⁰ Salim Ibrahim Ali, Dr Zuryati Muhammad, Dr Zainal Amin Ayub, "Legal Research of Doctrinal and Non Doctrinal", (2017) *International Journal of Trend in Research and Development* at 4.

1.5 Scope and Limitation of Research

The scope of this research only covers the issue of rights to land. It will not cover other aspect of the indigenous peoples such as custom, education and poverty. It is because the focus of the research on the land rights is intended for better discussion. Besides that, there is a limited period of time to cover other topics relating to indigenous peoples.

In addition, this research will not discuss the issue of indigenous land rights at the international level as it would be time consuming to conduct research on other countries' legislation. Moreover, there are various international organisations which have discussed such issues such as International Labour Organization (ILO) which has made a compilation of ILO supervisory bodies' comments between the years of 2009 to 2010. This report discussed Indigenous peoples' rights in several international countries such as Brazil, Argentina, Bangladesh and Colombia.²¹

1.6 Significance of Research

This research will be an important source for the experts and the indigenous peoples themselves in reviewing their land rights as it will fill in the demand for the indigenous peoples in acquiring their rights to the land through a fair and just law jurisdiction. In addition, this research is a compendium of the lacuna in the existing law practices and it narrows down the problem domestically. Thus, it will help them to become more aware about the current situation and to take necessary actions in protecting their rights over the land. Moreover, there are several solutions and recommendations that can possibly be introduced to fill in the lacuna to ensure a better development of law for the indigenous peoples. Therefore, the society, in particular, the indigenous peoples will directly benefit from this research and if there

²¹ International Labour Organization (ILO), *Monitoring Indigenous and Tribal Peoples' Rights through ILO Conventions*, (2010).

are no revisions being made on this matter, the unbalanced law practiced would continue to exist and be even harder to alter.

CHAPTER TWO: INDIGENOUS PEOPLE AND THE ISSUES RELATING TO LAND

2.0 Introduction

The land right issues of indigenous peoples have arisen over a few decades ago. In this chapter, various aspects such as the definition of indigenous peoples, their position relating to land rights, domestic laws and other countries' laws, and international law will be covered. This chapter will also cover both the problems and recommendations. Their status and issues will be the main discussion in this chapter, assisting in gaining more knowledge relating to the indigenous land rights and helping in understanding more about this topic.

Generally, the journals and articles that were written by the experts, on land matters, focused on the problems faced by indigenous people relating to their land rights. The source of the problem especially on the inadequacy of law governing indigenous land rights is the significant area in our research. The focus will also cover the practice by the authority in governing land matters of indigenous people. It is also concerned about the indigenous peoples' law in other countries, and the suggestions by the authors and expertise in regards to the solution introduced by them.

2.1 Indigenous People in Malaysia

In Malaysia, the practices of indigenous peoples contributed to the development of law of their rights. Their own unique culture, language and religion come hand in hand in shaping the law without denying the values of their customs. However, over the years, there are numerous and persistent complaints made by the indigenous people, pertaining to their indigenous customary rights to land.

2.1.1 Definition of Indigenous Peoples

There are diverse interpretations of the indigenous peoples at the international level. Frank Wilmer¹ defines indigenous people as those who are traditionally based on cultures which were politically autonomous before the colonization and continue to struggle for the preservation of their culture and political independence after colonization. Meanwhile indigenous people are those who are the original settlers of a land before colonization.² Jose R. Martinez Cobo³ defined indigenous as those having their territories before colonization and are determined to preserve, develop and transmit their territories and ethnic identity to their future generations. The definitions above seem to agree that indigenous people are those who have their own culture, identity and territories before colonization and continue to struggle for it after colonization.

In addition, Yogeswaran Subramaniam⁴ in his article attempts to explain the application of the term 'indigenous peoples' in Malaysia. According to him, the definition of 'indigenous people' stated in United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is not treated as legally binding in Malaysia. For study purposes, Yogeswaran Subramaniam also defines the word 'indigeneity' with reference to the common characteristics of 'Indigenous Peoples' as described by Jose R Martinez Cobo in "Study of the Problem of Discrimination Against Indigenous

¹ Frank, W, *The Indigenous Voice in World Politics* (Newbury Park 1993) p 97.

² Karsta Straub, "An Overview, Four Cases Studies and Annotated Reading Recommendations" (2014), at 4, <<http://www.eprpinformation.org/files/peaceprocesses/indigenous-land-rights/indigenous-land-rights--case-study-malaysia-6feb2015-eng.pdf>> accessed 28 April 2017.

³ Jose R. Martinez Cobo is a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities wrote in her article title "Cobo's Study on the Problem of Discrimination against Indigenous Populations", <<http://indigenouseoples.nl/indigenous-peoples/definition-indigenous>> accessed 10 May 2017.

⁴ Yogeswaran Subramaniam is a Malaysian lawyer who specializes in Indigenous land rights and acts as an associate member of the Centre for Malaysian Indigenous Studies at the University of Malaya wrote in his article title "Ethnicity, Indigeneity and Indigenous rights: The 'Orang Asli' Experience", at 72.

Populations”.⁵ It shows that the authors, especially Yogeswaran Subramaniam and Karsta Straub agree with the definition given by Jose R Martinez Cobo and used that definition as a reference to define the word ‘indigeneity’ or ‘indigenous people’.

The most relevant definition is the definition of aboriginal people as provided under The Aboriginal Peoples Act 1954.⁶ Apart from that, Ramy Bulan⁷ stated that, the Federal Constitution defines an ‘aborigine’ as an aborigine of the Peninsular Malaysia but the provisions in The Aboriginal Peoples Act 1954 states otherwise.⁸ In Sarawak, an indigenous person is referred to as a native who is born to parents who are both natives. Meanwhile in Sabah, a native is considered as citizens including his child or grandchild who was born as indigenous and apart with his father whom live in Sabah is also known as indigenous.⁹

2.1.2 The Laws Governing Indigenous Peoples

After discussing the definition of indigenous peoples, it is important to consider the law governing their rights over the land. By analyzing the law governing them, it will show the rights provided by law and the weaknesses in the current law relating to rights to the land.

For aboriginal people in Peninsular Malaysia, The Federal Constitution, The Aboriginal Peoples Act 1954, The Land Acquisition Act 1960 and The National Land Code 1965 are the relevant laws pertaining to the indigenous land rights.¹⁰ In addition, apart from the Federal Constitution, Sabah Land Ordinance (Cap. 68) and Sarawak Land Code 1958 are the laws that governed the native in Sabah and

⁵ Ibid.

⁶ The Aboriginal Peoples Act 1954, s 3.

⁷ Ramy, B, “Indigenous Peoples and the Right to Participate in Decision Making in Malaysia” (International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making, Chiang Mai, Thailand, 20-22 January 2010.)

⁸ Note 4.

⁹ Interpretation (definition of native) ordinance (sabah cap. 64), s 2.

¹⁰ Jerald, G, “The Recognition and Content of Native Title In Peninsular Malaysia”, (2011) 6 MLJ xci *Malayan Law Journal articles*.

Sarawak.¹¹ According to Para 1(d) of the 1961 Policy Statement, the special position of aborigines in respect of land usage and land rights shall be recognized, where they shall not be moved from their traditional areas without their full consent.¹²

For the native communities residing in Sarawak, there were early legislation that had been used as reference for the terms of legislation, application and recognition of indigenous peoples' land boundaries and ownership by the society in Sarawak.¹³ Among them are Land Orders 1931, the Land Settlement Ordinance 1933, Application of Law Ordinance 1949, Land (Classification) Ordinance 1948, the Civil Law Act 1956 and presently, the Sarawak Land Code 1958.

Meanwhile in Sabah, Forever Sabah¹⁴ stated that the Sabah Land Ordinance (Cap. 68) is the principal legislation relating to property rights over the land in Sabah. The ordinance establishes rules relating to the status of land, the rights and obligations associated with ownership. In short, the ordinance sets out the recognition and protection of the native land.

As discussed above, there is more than one law or statute that governs indigenous land rights. Moreover, the status of the land rights are different between Peninsular Malaysia, Sabah and Sarawak due to the different statutes that governing their rights.

¹¹ Marja A. Omar, "Indigenous Land Rights in Malaysia: From Legislation to Litigation?", at 72. <<https://queenspoliticalreview.files.wordpress.com/2015/05/qpr-omar.pdf>> accessed 27 April 2017.

¹² SUHAKAM, Report Of The National Inquiry Into The Land Rights Of Indigenous Peoples, Copyright of Human Rights Commission of Malaysia(Suhakam), (2013) at 137.

¹³ Azima A.M., Novel L., and Mohd Shafiq Akmal. "Understanding of the Meaning of Native Customary Land (NCL) Boundaries and Ownership by the Bidayuh Community in Sarawak, Malaysia", (2015) *Mediterranean Journal of Social Sciences* Vol 6 No 5 S1.

¹⁴ Forever Sabah, "Environmental Law and Policy in Sabah: From Ridge to Reef", (2015) Vol 1 at 2.

2.1.3 The Recognition on the Land Position of Indigenous People

The discovery of the position of indigenous land rights is important as it serves as the root of the problems faced by them. Indigenous peoples status to land needs to be looked into in order to understand the problems they are currently facing.

The provision given in the National Land Code 1965, as provided under section 40, states that all state land within the territory of the state is vested solely under the jurisdiction of the state authority. The same Code also mentions that states lands do not include alienating land, reserved land, mining land and reserved forest.¹⁵ The provision is sufficiently comprehensive to cover aboriginal area which is assigned to the aboriginal people under section 6 of the Aboriginal Peoples Act 1954.¹⁶ Aboriginal people may reside in their traditional areas or reserves provided at the will of the State Authority.¹⁷ However, the state authority is not obliged to pay any compensation for the land, or to replace it with suitable alternative land when they are acquired. Although the indigenous peoples' land rights is protected under the law, their rights are only considered as mere tenants to the land they acquired.¹⁸

On the other hand, Ramy Bulan¹⁹ suggested that, Malaysian courts should apply the doctrine of common law, on the native title, to indigenous land rights where both common law and statutory rights are proprietary rights protected under Article 13 of the Federal Constitution. This provision provides that any deprivation and compulsory acquisition of those rights must be compensated. However, this is just a right that has been recognized by the court. It is not a statutory right as the doctrine of common law of native title is not incorporated in any written law in Malaysia except

¹⁵ National Land Code 1965, s 41.

¹⁶ Note 11 at 64.

¹⁷ Note 12 at 51.

¹⁸ Aboriginal Peoples Act 1954, s 8(2) (c).

¹⁹ Ramy Bulan is an Associate Professor of Law at University of Malaya wrote in her article title "Ripples of Mabo: Aboriginal and native customary land rights in Malaysia" <<http://repository.um.edu.my/25617/1/Chapter6Bulan.pdf>> accessed 25 April 2017.

in Sabah and Sarawak. The low literacy rate and the fact that some of the indigenous people lack knowledge have caused them to be at a disadvantage and cannot benefit from the court's recognition on native title.

In Sarawak, Baru Bian²⁰ stated that the status of the Native Customary Land is listed under section 2 of Sarawak Land Code 1958 which provides the cut-off date, land gazette by the Minister under section 6 of the Code, and the natives could only occupy the Interior Area Land upon the issuance of a valid permit pursuant to section 10 Sarawak Land Code. The only issue is that the condition of the land, before and after the cut-off date, is considered as Native Customary Land.

Ramy Bulan²¹ stated that in Sabah, the predominant ethnic groups are the Indigenous Kadazan Dusun and Bajau, who make up about 35.7 percent of the population; Malays comprise about 15.3 percent. The Indigenous groups in Sabah and Sarawak, officially called 'natives', as defined under Article 161A (6) and (7) of Federal Constitution, traditionally occupy the interior areas of these states where their communities continue to be governed by customary laws.

As the law governing indigenous peoples are still developing, the position of the indigenous peoples in acquiring their land rights slowly takes place in the making of the legislation. The only question left to be answered is whether the laws exist only for the sake of being there, or whether they exist genuinely for protecting the rights of indigenous people.

²⁰ Baru Bian, *Native Customary Rights Over Lands in Sarawak*, (2007) <https://pengayau.wordpress.com/2011/02/09/native-customary-rights-ncr-over-land-in-sarawakmalaysia/> accessed 20 October 2010..

²¹ Ramy, B, "Native Title in Malaysia: A 'Complementary' Sui Generis Proprietary Rights under Federal Constitution" (2007) *Australian Indigenous Land Review* Vol 11 No 1 at 55.

2.2 Indigenous Peoples at International Level

The laws of indigenous peoples have been developed throughout the lines of law and its practices. The major guidelines of other various legislations in other countries on how such protection in terms of governing the land rights has been governed in their jurisdiction of law.

2.2.1 International Law Relating to Indigenous Peoples

International law serves as a guidelines for the countries around the world in regulating the laws relating to indigenous peoples. International law such as declarations, conventions or treaties provides the benchmark for the countries to measure their performance regarding their roles and achievements in protecting indigenous people's interests.

According to Karsta Straub,²² sources of indigenous land rights in international level can be found in various treaties and conventions that provide the recognition and protection of indigenous rights. These rights can be found in several treaties and conventions namely; Indigenous and Tribal Peoples Convention 1989 (No.169), Universal Declaration on The Rights of Indigenous Peoples (UNDRIP), Convention on the Elimination of all Forms of Racial Discrimination, International Covenant on Civil and Political Rights, American Convention on Human Rights (OHCHR), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and Convention on the Rights of the Child (CRC). However, according to the findings by The Equal Rights Trust and Tenaganita,²³ Malaysia has a weak legal and policy framework related to equality because of the poor participation in the

²² Note 2 at 22.

²³ The Equal Rights Trust, *Country Report on "Washing The Tigers: Addressing Discrimination and Inequality in Malaysia"*, (November 2012), at XV.

major United Nation Treaties. This is similar to the finding of Karsta Straub²⁴ in his study, where he stated that Malaysia only ratified the UNDRIP and is a party to CEDAW and the CRC. Malaysia has not yet joined other crucial international treaties and conventions.

The law of indigenous people's land rights in other countries practically emerged along the ILO Convention 169. Alexandra Xanthaki²⁵ stated that under the Article 13 of International Labour Organization Convention 169, not only the ownership of the land is required but also collective ownership as well, where the lack of collective ownership dilutes the control of indigenous communities have over their lands. The individual ownership which is being upheld in some of the countries could possibly weaken the rights of ownership owned by the communities.

The development on an international level is increasing every year where the movements of indigenous peoples seeking their rightful position are being supported by other organizations. Franke Wilmer²⁶ stated that in 1982, the response is partly due to increasing international cooperation between indigenous peoples through non-governmental organizations such as World Council of Indigenous Peoples and International Indian Treaty Council in which the United Nations Economics and Social Council (ECOSOC) established a 'working group' charged with the task of drafting a universal declaration on the rights of indigenous populations.

Rodolfo Stavenhagen²⁷ stated that numerous international conferences have reaffirmed such rights (the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and

²⁴ Note 2 at 24.

²⁵ Alexandra Xanthaki is a Director of Research at Brunei Law School in UK and indigenous right experts wrote in her book Alexandra Xanthaki, *Indigenous Rights and United Nations Standards* (Cambridge University Press New York 1st edn 2007).

²⁶ Note 1 at 26.

²⁷ Rodolfo Stavenhagen was a German-born Mexican sociologist and anthropologist who specialized in the study of human rights and the political relations between indigenous peoples and states wrote in his article, "The Emergence of Indigenous Peoples", (2014) Chapter 5 at 87.

the lands they occupy) in one formulation or the other, notably the Rio Earth Summit (1992) and the Johannesburg World Summit on Sustainable Development (2002). The World Bank is in the process of adopting a new operational policy that establishes the need to involve indigenous peoples in development projects that may affect them, and the Inter- American Development Bank has laid down similar guidelines for its own activities.

In the Report of the National Inquiry into the Land Rights of Indigenous People by SUHAKAM,²⁸ international law and standards on indigenous people's land rights, territories and resources are found in a myriad of international, regional and domestic instruments, decisions and policies. These include the UNDRIP; international human rights treaties; ILO Convention 169; regional human rights treaties such as the Inter-American Convention on Human Rights and the African Convention on Human and People's Rights; and interpretations of international law by authoritative bodies such as courts, commissions and UN human rights treaty bodies.²⁹

As stated above, there are many international laws that govern the rights of indigenous people. However, Malaysia does not sign and rectify all the conventions or treaties provided. This put difficulties on the part of the government because there is no standard and guideline as provided by the international law to be referred to in regulating indigenous land rights.

2.3 The Problems Relating to Land Rights

The main concern is the problems related to indigenous land rights. Generally, The Equal Rights Trust (ERT) and Tenaganita³⁰ suggested that Malaysia has a weak legal and policy framework related to equality. This is caused by a number of significant

²⁸ Note 12 at 320.

²⁹ Ibid.

³⁰ Note 23 at XV.

gaps and limitations in regard to Malaysia's legal and policy framework.

One of the reasons is Malaysia's poor participation in the major United Nation treaties relevant to the equality right. In fact, Malaysia is a party to only three of the major human rights treaties which are Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), and Convention on the Rights of Person Disabilities (CRPD) as stated by Karsta Straub.³¹ According to The Equal Rights Trust in his report, it stated that there are so many other important treaties which Malaysia has not joined. For example, other treaties like International Covenant on Civil and Political Rights and ILO Convention No. 169 on Indigenous and Tribal Peoples.

According to these two studies, it shows that there is a correlation between both studies as they suggest that Malaysia is not involved in many important treaties and convention related to human rights. Besides, according to the findings made by Equal Right Trust,³² Malaysia also has not signed the Optional Protocols to CEDAW and CRPD. Thus, this makes it impossible for any person under its jurisdiction to file complaints and seek compensation.

Other than at the international level, this report also touches on the national laws, mainly the Federal Constitution. According to ERT, Article 89 and 153 of the Federal Constitution create ethnic preferences which may amount to racial discrimination. ERT³³ in their report further states that these provisions violate the international standards established under CEDAW and International Conference on Renewable Energy and Development (ICRED) in relation to affirmative action. It is because the affirmative action operated under these provisions is not time-limited or function-limited. The fact that these privileges can exist permanently appears to be unequal and separate standards on the ground of race in conflict with the constitutional

³¹. Note 2 at 3.

³² Note 23.

³³ Ibid, at XVII.

prohibition of discrimination under Article 8 of Federal Constitution.

In the issue of enforcement and implementation of equality rights, one of the reasons suggested in this report is the absence of a single equality body responsible to scrutinize the enforcement of the rights of equality and non-discrimination stated under any domestic laws. Besides, the victim of discrimination faces an additional obstacle where the court tends to interpret the right of equality very narrowly. Therefore, the victim faces difficulty in obtaining legal redress and remedy for any type of discrimination he or she has suffered.³⁴

Particularly on the issue of land rights, Karsta Straub³⁵ states that aboriginal people are considered as tenant-at-will and this grants the authority of the right to order aboriginal people community to leave and stay out of an area at their own will. The state authority also has the right to revoke the status given to aboriginals at any time for the purpose of re-acquiring the land. As provided under Aboriginal Peoples Act 1960, the State Government can take any land including land occupied by the aboriginals. The government also has the power to remove the reservation land made into aboriginal land.

For Sabah and Sarawak, the natives are recognized with the coexisting open system of land ownership where any individual whether resident or foreigner are entitled to apply and own the land. As a result, the native customary rights do not establish any collective ownership.³⁶

³⁴ Ibid, at XX.

³⁵ Note 2 at 4.

³⁶ Jannie Lasimbang, “Juridical Rights of Indigenous Peoples and Their Relations to the State and Non-Indigenous Peoples”, (1996) *Indigenous People in Asia*.

2.4 Conclusion

In conclusion, by reviewing all of the authors' statements, arguments, comments and suggestion regarding this topic, it can be concluded that, the indigenous peoples' land rights are technically being recognised. In Malaysia specifically, there are laws protecting indigenous land rights. However, most of the journals and articles do not highlight on the facts that the laws pertaining to indigenous land rights are scattered into various statutes and is different between Peninsular Malaysia, Sabah and Sarawak. This will create the problems in terms of interpretation, overlapping jurisdiction and power, and the practicality of the provisions itself.

The problem appeared that certain provisions in the existing law create some problems that affect their rights to the land. As discussed above, the Malaysian government only sign and rectify a few numbers of international conventions or treaties regarding indigenous land rights. These conventions and treaties are important because it functions as a safeguard towards indigenous land rights and provides the government with a standard procedure in implementing laws or policies towards indigenous people.

Therefore, there is a gap in knowledge regarding the uniformity of the law governing indigenous peoples' land rights in Malaysia. Scattered legislations and different approaches by different statutes make it difficult to protect their rights. There are also some issues regarding to the existing legislation where it is not sufficient to assist indigenous land rights. Therefore, the main objective of this research is to address these problems.

CHAPTER THREE: THE LEGAL STATUS OF INDIGENOUS LAND RIGHTS

3.0 Introduction

The rights of indigenous peoples in maintaining the legal status in their land is still one of the major concerns nowadays. The violation of the land rights, that is perpetrated by the people whom in prejudice carries out certain activities involving the encroachment of the indigenous land. Thus, it has resulted to a disruption in the indigenous peoples' lives as a community member in Malaysia. On top of that, this topic will solely focus on the matters that are related with the legal status of the land which belongs to the indigenous peoples. There are numerous issues pertaining to the rights of the indigenous peoples over their land.

3.1 Statutory Provisions

As discussed in previous chapters, there are several laws that govern indigenous peoples' land rights. These provisions are scattered into various statutes and provide different approaches where sometimes cause difficulties. The Federal Constitution 1957 defines what is meant by natives of Sabah and Sarawak and excluded the definition of the aborigines in Peninsular Malaysia, The Aboriginal Peoples Act 1954 however, provides the definition of aboriginal people. The National Land Code 1965 and Land Acquisition Act 1960 are the relevant statutes that govern matters relating to land in Peninsular Malaysia whereas the lands of the native people in Sabah and Sarawak are governed by their own laws which are Sarawak Land Code 1958 and Sabah Land Ordinance 1930. Therefore, it is vital to analyse all these statutory provisions in order to determine to what extent does the indigenous land rights are protected under the laws.

3.1.1 The Federal Constitution 1957

The basic fundamental rights under Federal Constitution (the Constitution) are provided in Part II of the Federal Constitution. One of the most relevant articles is, Article 5 (1). The word 'life' in Article 5 (1) also covered rights to livelihood.¹ In the landmark case on the aboriginal people, *Adong bin Kuwau v. Kerajaan Negeri Johor*², the court recognised that the aboriginal people have the right of livelihood to forage on aboriginal inhabited area. Therefore, the decision, in this case, portrayed that deprivation of their land rights may amount to deprivation of rights to life provided by Article 5 of the Constitution.

In regards to equality before the law, Article 8 of the Constitution provides that all person are equal before the law and are entitled to equal protection of the law. Thus, indigenous people are also entitled to equal treatments and protection in relation to land matters particularly on adequate compensation when their land is acquired. In addition, Article 8 (5) gives power to Federal Government to legislate law in order to protect aboriginal peoples' rights and for their advancement of life. This protection also includes reservation of the land as one of the methods to protect their rights.³ As for natives in Sabah and Sarawak, it is provided under Article 161A (5) of the Constitution to permit the State government to make laws for reservation of land and give them preferential treatment as regards to their alienated land. This provisions also stated that Article 8 on equality shall not invalidate or prohibit any State law enacted pursuant to Article 161A (5).

Article 13 of the Constitution provides that the acquisition of the land shall be adequately compensated. The provision does not allow the authority to violate rights to owned private properties for all citizens, thus this rights should also be applied to

¹ See *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Other Appeal* [1997] 1 CLJ 665.

² [1997] 1 MLJ 418.

³ Jerald, G, "The Recognition and Content of Native Title In Peninsular Malaysia", (2011) 6 MLJ*xi*Malayan Law Journal articles at 9.

indigenous peoples when their land is acquired.⁴ However, in practice, it seems like the compensation towards indigenous peoples is different with the land belonging to other citizens. Indigenous are compensated based on the trees, not based on the value of the land which inconsistent with the provisions of the Federal Constitution.⁵

As the supreme law of the land, it is clear that the Federal Constitution protect the land rights of indigenous peoples. General and specific provisions are served as a shield to indigenous people whenever their rights are violated. On the part of relevant authorities, it is important for the authorities to follow the provisions in the Federal Constitution when enacting the laws or in making decision relating to indigenous land rights. If they fail to do so, it completely violates the provisions of the Federal Constitution.

3.1.2 The Aboriginal Peoples Act 1954

The purpose of the Aboriginal Peoples Act 1954 (the Act) is clearly stated in the preamble of the act. The preamble states that the Aboriginal Peoples Act 1954 is to provide for protection, well-being and advancement of the aboriginal people of Peninsular Malaysia. The relevance and importance of the Act is to provide the definition of aboriginal peoples and certain provisions which cover the land rights of aboriginal peoples. These provisions will be analysed in order to know to what extent the Act protect the land rights of aboriginal people.

⁴ Zainal Zulhimi Zainal Abidin, Seow Wee, 'Issues of Customary Land For Orang Asli in Malaysia' <http://eprints.uthm.edu.my/5828/1/16._Zainal_Zulhimi.pdf> accessed 2 May 2017.

⁵ SUHAKAM, Report Of The National Inquiry Into The Land Rights Of Indigenous Peoples, Copyright of Human Rights Commission of Malaysia(Suhakam), (2013) at 60.

Section 3 (1) defines aborigine as follows,

- (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.

The Act is only applicable to Peninsular Malaysia as clearly mentioned in Section 2. Therefore, the natives in Sabah and Sarawak are excluded. In the matters of provisions relating to land, Section 6 of the Act empowers State Authority to gazette an aboriginal area which has not been gazetted as aboriginal reserves whilst section 7 empowers the State Authority to gazette aboriginal area. The State Authority also has the power to de-gazette both aboriginal reserves, and aboriginal area on their discretion.⁶ However, the land continue to be treated as State land as there is no recognition of their customary rights to the land. It portrayed that the protection enjoyed by the aboriginal peoples over reserves land is not well guarantee under the Act as the State Authority has a discretionary power whether to gazetted or de-gazetted the land belonging to aboriginal peoples.

In addition, State is not obliged to pay any compensation for the land or to replace it with a suitable alternative land when aborigines lands have been acquired or alienated.⁷ The compensation is only for the loss of aborigines crops or dwelling alone. Thus, its has often being used by State Authority to provide the legal basis for the acquisition of the aborigines traditional territories.

⁶ The Aboriginal Peoples Act 1954 s 6 (3) and 7 (3).

⁷ The Aboriginal Peoples Act 1954 s 11(1) and 12.

3.1.3 The Land Acquisition Act 1960

The Land Acquisition Act 1960 is the act that regulates land acquisition and provides procedures and rules for granting compensation to the landowner affected by this Act. The Land Acquisition Act 1960 (hereinafter referred as “LAA 1960”) empowers the government to acquire any land for the purposes stated under section 3 of the LAA 1960. The State Authority may acquire any land which is needed for any public purposes, or acquire by any individuals or corporations for any purposes.⁸ The purpose of such acquisition of land must either be beneficial to the economic development of Malaysia, or to the general public or any class of the public.⁹

Furthermore, the State Authority has the power to acquire any land which is needed for the purpose of mining, or for residential, agricultural, commercial, industrial or recreational purposes or any combination of such purposes.¹⁰ It is relevant to discuss the LAA 1960 because this act is applicable to all land including the land belonging to indigenous people. The word “land” is defined as alienated land of the State land law, land occupied under customary right and land occupied in expectation of title.¹¹ “State land law” had been defined as the process of tenancy, land registration, or revenue collection under the land law enforced by the State.¹² Meanwhile, “expectation of title” is a type of land where an intended acquisition had been made on the said land to be registered.¹³ However, the term “customary land” is not clearly defined. In the First Schedule of LAA 1960, the term “customary land” were inclined to the issue of Malay reservation land only. Therefore, the issue of entitlement of indigenous land is not adequately provided.

⁸ Land Acquisition Act 1960. s 3(1).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Land Acquisition Act 1960, s 2.

¹² Ibid.

¹³ Land Acquisition Act 1960, s 9.

LAA 1960 provides several provisions to give a fair compensation to the landowner whose land has been acquired by this LAA 1960. For example, section 29(1) states that the Land Administrator shall make payment of compensation once a notice of award in Form H has been served to all interested persons.¹⁴ Further, section 47(2) (a), states that the amount awarded shall be made based on the market value of the land.¹⁵ However, such compensation is only given to the landowner, or a person registered as a land proprietor on the instrument of document of title.¹⁶ This may lead to problem in which most of the indigenous people are not registered as land owner and merely regarded as a tenant-at-will. Hence, they might not be entitled to receive compensation as stipulated under the Land Acquisition Act 1960.¹⁷

3.1.4 National Land Code 1965

The Torrens System is practiced in Malaysia through the National Land Code 1965 (hereinafter referred as “the Code”). The Code is one of the important Acts that governs matter pertaining to the registration of land of every citizen in Malaysia. In relation to registration, ownership in land must be registered to obtain ownership.

Section 4(2) of the Code gives implication that the customary tenure had been recognised as stated in the Code. It is stated that

except in so far as it expressly provided to the contrary, nothing in this Act shall affect the provision of-

- a) any law for the time being in force relating to customary tenure

Although section 4(2)(a) in National Land Code give the customary tenure protection over the land but there is no exclusive rights stated that is specifically for indigenous peoples on their land. There is nothing novel about section 4(2) as it merely illustrates the traditional recognition that is given to personal law which it continues until today

¹⁴ Land Acquisition Act 1960, s 29(1).

¹⁵ Land Acquisition Act 1960, s 47(2)(a).

¹⁶ Land Acquisition Act 1960, s 2.

¹⁷ Ibid.

by referring to Civil law Act 1956 that particularly recognises local law only.¹⁸ In contrary to that, since the malay customary tenure is given priority by section 4(2), it somehow refers to tribal *adat* as malay customary tenure where it deals with the enrolment of the Mukim Register.¹⁹ Hence, in this scenario, the customary tenure does not merely refer to indigenous peoples but it indicates for malay customary tenure.

Moreover in section 48 in the Code, the ability of indigenous people to reside the area within aboriginal areas or aboriginal reserves are restricted as it depends on the state and executive jurisdiction to give a decision over the matter. This is because the state authority has the comprehensive jurisdiction over the land.²⁰ In addition, the state authority is reluctant to exercise their authority to gazette land as aboriginal reserve and the federal government will not exercise its discretion to acquire state land for the protection and well-being of indigenous peoples.²¹ Hence, the reluctance of the federal and state authorities over land matters results in the indigenous peoples' rights on the land are neglected.²²

The lack of reference to indigenous people pertaining to their rights on the land has resulted in major problems being unsolved. The misconception of the state to neglect the right of indigenous peoples is because they are treated as low civilization and their right should not permitted at all.²³

¹⁸ Sihombing, Judith (2nd ed), National Land Code: A commentary 2008 at 81.

¹⁹ E.g. The Land (Group) Settlement Areas.

²⁰ National Land Code, s 48.

²¹ Lim, Hen Seng, "The Land Rights of Orang Asli" in Consumers Association of Penang (ed) Land Issues in Malaysia (Jutaprint Sungai Pinang) at 173.

²² Nicholas, Colin, The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia (IWGA Kuala Lumpur 2000) at 180.

²³ Report Of The National Inquiry Into The Land Rights Of Indigenous Peoples, Copyright of Human Rights Commission of Malaysia (Suhakam), (2013) at 79.

3.1.5 Sarawak Land Code 1958

Over the years, the existing rights under the native law and customs have been practiced by the people of Sarawak. Native customary rights have secured and protected their land as they are entitled to the land. Practically, any person who clears the virgin jungle has exclusive rights to cultivate cleared land and that right is passed to their heirs and descendants.

In Sarawak, the Sarawak Land Code (Cap. 81) 1958 (hereinafter referred as “the Sarawak Code”) defined the terms ‘native customary land’²⁴;

- (a) land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January 1958 and still subsist as such;
- (b) land from time to time comprise in a reserve to which section 6 applies; and
- (c) Interior Area Land upon which native customary rights have been lawfully created pursuant to a permit under Section 10.

The terms ‘native customary rights’ is defined as the land created before 1st day of January 1958, and it is in accordance to native customary law.²⁵ Due to the legal recognition, the native customary rights are no longer in question. However, they are unable to claim new territory without a permit under section 10 of the Sarawak Code. Section 5(2) also provides specific method for the indigenous people in order to acquire the customary land through the plantation of fruit trees on land, the occupation of cultivation of land, and the use of land for a burial ground or shrine.

Native communal reserve under Section 6 of the Sarawak Code shows the role of the Minister in assisting the natives by applying his discretion. A native communal reserve is an area where any community can have a native system of personal law and declare that the customary law of the community in relation to the acquisition, transfer and transmission of rights and privileges in or over the land.²⁶ Once reserve

²⁴ Sarawak Land Code 1958, s 2.

²⁵ Sarawak Land Code 1958, s 5.

²⁶ Sarawak Land Code 1958, s 6.

area is created and gazetted, it will act as a tool for the Native to use in claiming the area as theirs if any dispute arises.

In addition, indigenous people have to apply the title from Lands and Surveys as stated under Section 18(1) of the Sarawak Code. They have to satisfy the Superintendent by occupying any unalienated State land in accordance with rights acquired by customary tenure amounting to ownership of the land.²⁷ If they only rely on the native customary rights under Section 5, they only obtain the right as a licensee as stated under Section 5 (i) of the Sarawak Code.²⁸

3.1.6 Sabah Land Ordinance 1975

The Sabah Land Ordinance 1975 (hereinafter referred to as “the Sabah Ordinance”) is a specific legislation in the State of Sabah that governs matters relating to land. This legislation provides a guideline for the classification of land and the provision of rights and titles. Furthermore, it contains various provisions to cover issues relating to native customary rights, revenue collection, survey, penalties, compensation as well as enforcement related to land matters.

Under the Sabah Ordinance, property rights can be divided into three categories : State property rights, private property rights and communal property rights.²⁹ As for private property rights, it refers to alienated land such as land owned by companies or individuals as well as land held under native customary rights.³⁰ In addition, communal property rights refer to community ownership over a specific area of land. They may receive communal property rights by applying to a governmental body to make an area of land to be recognised as a native reserve land.³¹

²⁷ Sarawak Land Code 1958, s 18(1).

²⁸ Baru Bian, *Native Customary Rights Over Lands in Sarawak*, (2007) <https://pengayau.wordpress.com/2011/02/09/native-customary-rights-ncr-over-land-in-sarawakmalaysia/> accessed 20 October 2010.

²⁹ Case study: Sabah Forest Ownership at 257.

³⁰ Sabah Land Ordinance 1975, s 10 and s 15.

³¹ Sabah Land Ordinance 1975, s 76.

The Sabah Ordinance recognises the existence of native customary rights. It is stated in section 15 of The Sabah Ordinance where the native customary rights only exist on; the land possessed by customary tenure, land planted with fruit trees, burial grounds or shines, and a few other conditions. In other words, this provision classified that native customary rights only apply to land that had been cultivated or being used. Native customary rights may not be granted if failed to do so. Once native customary rights are established, such rights can be dealt with either by money compensation or by a grant of the land to the claimant.³²

In analysing section 15 and section 16 of Sabah Ordinance, the wider protection to the native peoples as the native customary rights have been incorporated into the Sabah Ordinance. This shows that the native peoples can constantly rely on this provision to protect their land as their rights have been clearly laid down in a written law. As a result, the rights of the native peoples are more protected as the government cannot arbitrarily deny this right due to the reliance that the government needs to make sure that they observe with the rights provided under the Sabah Ordinance. If they fail to do so, their actions can be challenged by the native peoples before the court of justice.³³

On the contrary, the situation in Peninsular is quite different because there is no recognition of land customary rights in any written law. In the circumstances specified under section 48 of National Land Code, aboriginal people can only gains title on the land that they had occupied if they had acquired title through common law customary rights.³⁴ Thus, we could say that the rights of the indigenous peoples in Peninsular is far less protected compare with the position in Sabah.

³² Sabah Land Ordinance 1975, s 16.

³³ Ibid at s 149.

³⁴ Marja A. Omar, "Indigenous Land Rights in Malaysia: From Legislation to Litigation?", at 64. <<https://queenspoliticalreview.files.wordpress.com/2015/05/qpr-omar.pdf>> accessed 27 April 2017.

3.2 Cases Analysis

Judicial decisions are one of the sources of law in Malaysia. The decision of the higher court will bind the lower court. The court plays an important role to interpret the relevant laws relating to indigenous people. The interpretation of the court is important as it will serve as an authority. The discussion will focus on the decision by the court in cases related to indigenous land rights.

3.2.1 The Recognition of the Aboriginal Land Rights.

The case of *Adong bin Kuwau v. Kerajaan Negeri Johor*³⁵ (hereinafter referred as Adong's case) is one of the landmark case involving the aboriginal community who claimed for their rights against government. This case involved 52 plaintiffs who represented a group of aboriginal people living around Sungai Linggiu against the Government of the State of Johor. They claimed that their land has been acquired by the defendant for construction of dams. Before the court, they requested for compensation claiming that the land in Sungai Linggiu was their traditional ancestral lands in which they forage for their livelihood. The plaintiffs claimed that they had the rights granted by common law and statutory law which was Article 13 (1) of Federal Constitution.

The court allowed the application by the plaintiffs affirmed that the aborigines are entitled to common law rights such as the right to live on their land as their forefathers had lived. The court also emphasised that the plaintiffs shall be compensated adequately which was protected by Article 13 of the Federal Constitution. However, this right was not only suitable for the production of the land. What can be derived from this case is that the court recognised that the aboriginal peoples had the rights over the land which they claimed as aboriginal inhabited area

³⁵ [2017] 2 MLJ 281

based on common law and statutory law rights but the aboriginal peoples have no rights to lease out, convey or rent.³⁶

Meanwhile in *Sagong Bin Tasi v. Kerajaan Negeri Selangor*³⁷ (hereinafter referred as “Sagong Tasi’s case”), the case discussed about the aboriginal community of the Temuan tribe (the plaintiffs) who had their land acquired for construction of a highway leading to the airport in Kampung Bukit Tampoi, Dengkil, Selangor. In their claim before the High Court, they argued that their rights were under common law, statute law and the Federal Constitution. They claimed that under common law, they had the rights of native title over the land based on customs. Their land was also their customary and ancestral land, hence they had customary and proprietary rights in and over the land.

The High Court allowed the application by the plaintiffs and stated that the plaintiffs were entitled to the right in and on the land. In addition, this was due to the fact that the land was also customary and ancestral land belonging to the plaintiffs because they traditionally continued to occupy the land which they inherited through their own customs. They also had the rights under common law and statutory law which were proprietary rights protected by Article 13 of the Federal Constitution. The compensation shall be paid in accordance to Article 13(2) of the Federal Constitution and must be compensated under Land Acquisition Act 1960. The defendants appealed to the Court of Appeal but the appeal was dismissed and learned judges had affirmed the high court decisions. The court also ruled that the State of Selangor and Jabatan Hal Ehwal Orang Asli (JHEOA)³⁸ who were the defendants in this case has a fiduciary duty towards the aboriginal peoples.

The main important principles deduced from these two cases are that the court recognised the common law rights of the aboriginal peoples despite that their land

³⁶ SUHAKAM, Report Of The National Inquiry Into The Land Rights Of Indigenous Peoples, Copyright of Human Rights Commission of Malaysia(Suhakam), (2013) at 77.

³⁷ [2002] 2 MLJ 591.

³⁸ Now known as Jabatan Kemajuan Orang Asli (JAKOA).

matter is governed by various statutes such as Aboriginal Peoples Act 1954. It must be noted that the existence of this Act did not exclude the aboriginal rights under common law which the court described as complementary to each other. The court also recognised their *adat* on the land and recognised it as an evidence to establish their rights on the land. It was stressed that the acquisition of their land shall be adequately compensated as their proprietary rights are protected by Article 13 of the Federal Constitution.

3.3.2 Native Customary Rights Issues

In the case of *Director of Forest, Sarawak v TR Sandah ak Tabau*³⁹, there were three native customary terms that were mentioned in this case which were *temuda*, *pulau* and *pemakai menoa*. The issue on the term *pulau* and *pemakai menoa* was the terms were not recognised in any of the said Orders or Ordinance⁴⁰ as custom for the creation of rights to land. The custom of clearing virgin jungles and cultivating the cleared area to create rights over the land in accordance with the custom or *adat* known as *temuda* had been recognised by Statute and Orders or Proclamation made by the Rajahs and subsequently by the Legislation of Sarawak.

Since the terms *pemakai menoa* and *pulau* are not found in the legislation, thus these native customs, usages or practices are not recognised and do not have the force of law in Sarawak. In other words, only cleared or felled area of land (*temuda*) is recognised as being part of native customary law. Thus, the application of the customs on *pemakai menoa* and *pulau* are out of the equation.

Besides, a claim for native "title" in respect of customary land is significantly dependent on the requirement of "occupation". The issue is whether the natives

³⁹ [2017] 2 MLJ 281.

⁴⁰ Rajah's Orders 1863, 1875, 1899, 1921, 1931, Land Settlement Rules 1934, the Land (Classification) Ordinance 1948.

occupy and maintain a traditional connection with the customary land in accordance with their customs and usages. The real character of the native customary rights claims, in this case, is about their customary practices of *pemakai menoa* and *pulau*. Under Iban custom, each longhouse has a territory over which a community exercises control. The term *pemakai menoa* refers to an area of land held by a distinct longhouse or village community exercised within a *garis menoa*⁴¹.

In the appeals, the existence of the customary practices of *pemakai menoa* and *pulau* was not disputed. However, as stated in the case, 'not all customs have the force of law', and it is critical to discover what customs actually have the force of law. In this case, although the existence and the recognition of the customs, *pemakai menoa* and *pulau*, cannot be denied, it still not being protected by law.

Thus, the position of customary law are still being accepted by the common law although it is not completely protected by the enacted legislation. It has not been abolished by the Sarawak Land Code or any other statute, but they remained protected and survived through the Brooke orders and Ordinances of the Colonial period up to the present.

The issue of native customary rights also arise in the case of *Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai and Ors*,⁴² logging activities were operated on a piece of land called as Lot 591 ("the disputed area"). Forest Timber Licence had been issued over this area and logging operations were performed in that area by several licensees. The respondents who were the representatives of the native peoples claimed that they had acquired native customary rights over a part of land which overlapped with Lot 591. They made a claim stating that their native customary land have been trespassed and damaged by contractors due to their logging activity in that

⁴¹ Known as territorial boundaries between villages marked by rivers, hills or clumps of trees and other natural features.

⁴² [2006] 1 MLJ 256.

area. The issue was whether the disputed area falls in the the area claimed by the respondents to be under native customary rights.

In the High Court, the judge had made a conclusion in relation to the issue above which stated that the plaintiffs or the respondents had successfully established their native customary rights over the disputed area. The appellant appeal the decision to the Court of Appeal.

The Court of Appeal set aside the appeal and has applied several principles based on decision in the case of *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*⁴³ and *Kerajaan Negeri Johor & Anor v Adong bin Kuwau*⁴⁴, in determining the scope of the term ‘native customary rights’ in relation to land. The Court of Appeal concluded that the disputed area was not part of the customary land held by the respondents under the native customary rights. The court stated that the disputed area cannot be regarded as part of the customary land because there was an absence of evidence to show that the disputed area was in fact under continuous occupation by the respondents and their ancestors. Furthermore, the court stated that there was no evidence produced to indicate that the disputed area was within the territorial domain of the longhouses of the respondents or their ancestors.

⁴³ [2002] 2 MLJ 591.

⁴⁴ [1997] MLJ 418.

3.3 Conclusion

The laws in the statutes have laid down the land rights of the indigenous people. However, it looks like the existing statutory provisions do not provide a comprehensive protection on the rights of the indigenous people. From our analysis, based on the decisions and principles of the cases above, it shows that the laws are not well regulated in terms of administering the rights of these groups. Hence, as time passes, the rights of the indigenous peoples are still not in a favorable position due to inadequate laws to protect their rights from being deprived by the external intervention towards their land. In addition to that, there are some cases where the judiciary has exercised their power to uphold the indigenous land rights, for example, rights relating to native customary land. Unfortunately, several decisions by the courts in recent cases have shown that they have become reluctant to recognise the land in dispute as a part of native customary land especially in Sabah and Sarawak. Therefore, it is important for us to highlight these issues and problems to find the weaknesses of the laws so that proper recommendations may be made to address these problems.

CHAPTER FOUR: FINDINGS AND ANALYSIS

4.0 Introduction

This chapter will unravel findings resulting from the discussions in the previous chapters which provide the gist of the law and the status of indigenous peoples in Peninsular Malaysia, Sabah and Sarawak. The discussion in this chapter will include the information gathered from an interview with Amani Williams Hunt Abdullah.¹ Apart from that, this chapter will discuss on the findings of other works related to the issue such as report, journal articles, and academic papers. It will be presented in the form of sub topics to ensure thorough and complete understanding.

4.1 Government Approach in Aboriginal Matters

The Government of Malaysia has taken various measures to ensure the national goal to be a fully developed country by the year 2020 is achievable. In doing so, every policy introduced by the government may affect the indigenous peoples either directly or indirectly.

4.1.1 The Conflict on the Perspective of Land

The land is the eye of the indigenous people and is worth more than that of their own property. It holds special values to the people and is closely intertwined to their cultures and practices. The land is not a commodity, but it is a heritage rightfully obtained from their ancestors, historical beliefs, and their customs. It is passed from one generation to another. However, Amani Williams Hunt expresses that there is a

¹ Amani Williams Hunt Abdullah is a respected Malaysian indigenous social activist who campaigned mainly focusing on greater social justice, land rights, and better life opportunities for aboriginal people in Peninsular Malaysia. He also known as Bah Tony, whom very active in aboriginal advocacy and was President of Persatuan Orang Asli Semenanjung Malaysia from 1987 to 1991. He is also the first aboriginal people who be called into High Court of Malaya as advocate and solicitor.

conflict of contrasting perspectives regarding land between the government and aboriginal community. He believes that the government tend to view indigenous land as a mere individual property rather than as ancestral land which leads to the conflict.²

For instance, the aboriginal community in Peninsular Malaysia is identified by a particular land area which they treat this as traditional territory. The aboriginal community describe the land in specific terms such as *teiq wei*³, *teiq keramat*⁴ and also *teiq jendrap*⁵ which are being used by the Temiar⁶ aboriginal community.⁷ Similarly for the Semai⁸ community, the customary land is called *Neggerik* which is also divided into several specific terms such as *teiq keramat*⁹, *genei*¹⁰ and *penep*¹¹. Usually a family group who has used the land for a particular set of activities would hold onto the land provided that if they abandon the land, it will be reverted back to their community. However, in the Semai community, the areas which are described as *ne'enduk* and *jeres* are permanently held by the community.¹² It shows that land is not merely their property but it is also related to their culture and beliefs.

Amani Williams Hunt suggests that the conflict on perspective of land arise when the government attempted to introduce Dasar Pemberimilikan Tanah Orang Asli 2009 (hereinafter referred as 'the policy').¹³ The policy has affected the customary land system which was being practiced by the aborigines and replaced with a new system where their their land is divided following the normal practice of other citizens. It

² Interview with Amani Williams Hunt Abdullah, a social activist and former President of Persatuan Orang Asli Semenanjung Malaysia (Tengah, Perak 20 October 2017).

³ The site where they no longer live or hunt due to poor harvest or accident occurred on that place so that they have to move out.

⁴ Sacred areas where they cannot hunt or fish.

⁵ Area where blood is spilled for examples area where a tiger killed a man.

⁶ Temiar is one of the tribe of aboriginal community. They mainly resides in Pahang, Kelantan and Perak

⁷ SUHAKAM, Report Of The National Inquiry Into The Land Rights Of Indigenous Peoples, Copyright of Human Rights Commission of Malaysia(Suhakam), (2013) at 30.

⁸ Semai is one of the tribe of aboriginal community. They mainly resides in Perak and Pahang.

⁹ Note 4.

¹⁰ Village proper.

¹¹ Gravesites.

¹² Note 7 at 22.

¹³ Note 2 at 2.

was also mentioned that the communal practices and structure organization in the aboriginal community would be abolished. The land under this policy would be treated as an individual property rather than held by the community.

This issue was highlighted by ALIRAN¹⁴ in their memorandum to the government in regards to the policy of Dasar Pemberimilikan Tanah Negara 2009. In their view, the policy would enable the government to move the aborigines out from their own area to other aboriginal community areas. The process of moving out of the aborigines community is an encroachment toward their ancestral land and would contrast with their *adat*.¹⁵ As explained above, it must be noted that the aboriginal people are recognised by their own territorial areas where they reside. The land possesses special spirits which are linked to the people's practices in life.

The issue of the conflictive perspectives can also be seen in the case of *Adong*¹⁶. Even though the court recognises the rights of the aboriginal community towards the land, the court compensated towards the aboriginal people based on market value of the land rather than the deprivation of livelihood.¹⁷ It shows that the court tends to look at the aboriginal land similarly to the land held by other citizens, which is an individual property rather than the land embedded with customs. However, as discussed in the previous chapter, the court recognises that inflicting encroachment to the land of the aboriginals is a deprivation of their livelihood as decided in the case of *Sagong Tasi*.¹⁸

However, it must be noted that, in spite of the decision in *Sagong Tasi* recognise right to livelihood of the aboriginal community, some cases have failed to

¹⁴ ALIRAN is referred to Persatuan Aliran Kesedaran Malaysia. They have drafted a memorandum entitled 'Bantahan Dasar Pemberimilikan Tanah Orang Asli' in 2010 in response to Dasar Pemberimilikan Tanah Negara 2009.

¹⁵ ALIRAN, 'Bantahan Dasar Pemberimilikan Tanah Orang Asli' 11 April 2010 <<https://aliran.com/civil-society-voices/memo-bantahan-dasar-pemberimilikan-tanah-orang-asli/>> accessed 19 November 2017.

¹⁶ [1997] 1 MLJ 297.

¹⁷ Yogeswaran Subramaniam, *Orang Asli Land Rights By UNDRIP Standards In Peninsular Malaysia: An Evaluation And Possible Reform*, (University of New South Wales, 2012) Note 2 at 143.

¹⁸ [2002] 2 MLJ 591.

acknowledge that the land belonging to the aboriginal community embedded with cultural, spirit, communal and economic dimensions which are beyond the market value of individual title. This can be confirmed by the court decision in the case of *Bato Bagi*¹⁹ where the Court defines ‘adequate’ as only referring to the livelihood rather than the connection between the natives and their lands.

4.1.2 Assimilation and Economic Modernisation Policies

The long-term objectives of the Malaysian government can be seen through the introduction of Vision 2020. The vision aims to make Malaysia an industrialized country by the year of 2020 with the standard of living of a developed country.²⁰ The vision seems in accordance with an economic plan that has been introduced by our current Prime Minister Dato’ Seri Najib Tun Razak. The plan is known as the New Economic Model (NEM) which is intended to increase the income of the country by the year of 2020.²¹ In addition to that, the plan will help the private sector to grow as well as to reduce the fiscal disparity between every class citizens of Malaysia.²²

Based on these two measures taken by the government of Malaysia, it can be inferred that the paramount long-term goal of the Malaysian government is to become a developed country by the year of 2020.²³ Thus, a serious plan in the development of the country is needed in order to achieve this goals. The word ‘development’ is associated with the word ‘modernisation’ as both will help a country to become a developed nation.²⁴ The government has to adopt necessary measures in order to promote development such as imposing capitalist economic practices, divisions of labour and modern state structures. Generally, modernisation is inevitable as modernisation and development are a pair that cannot be separated.

¹⁹ [2011] 6 MLJ 297.

²⁰ Note 17 at 144.

²¹ Economic Planning Unit Prime Minister’s Department, <<http://www.epu.gov.my/en/development-policies/new-economic-policy>> accessed on 18 November 2017.

²² Ibid.

²³ Note 17 at 46.

²⁴ Ibid.

The measures taken by the government will indirectly affect the life of its people. Such development and modernisation will prevent its peoples from fully adopting their traditional practices and social forms.²⁵ As an example, the government will try to make a policy that aims at for the aboriginal people and boost the economy of the nation. It is in accordance with the government's effort to fully utilise its maximum capacity in increasing the income of the state. The economy policy will affect or change the nature of the aboriginal people on how they live their life as they are not very familiar with modernisation. Furthermore, 'development' will rationalises the act of the government in taking the customary land of the aboriginal people.²⁶

As an example, Tenaga Nasional Bhd (TNB) had acquired an ancestral land belonged to a group of aboriginal people for the construction of the Telom Dam in Kuala Lipis.²⁷ However, their actions have been challenged by eleven aboriginal people claiming that they had native title over the said land. Based on this situation, it shows that the government had relied on the ground of development to justify their action in taking the land belonged to aboriginal people.

Moreover, there are several programs that have been implemented by the government in the process of achieving the NEM. In particular, the Ministry of Rural and Regional Development introduced the Rural Development Master plan (PIPLB) in 2010 which focuses to make rural areas become economically viable.²⁸ This plan provides for the transformation of rural areas, eradicates poverty through economic and industrial activity, and to bring infrastructure improvement, education, as well as administer rural areas in an efficient and sustainable way.

²⁵ Ibid.

²⁶ Note 17 at 47.

²⁷ "TNB sued by Orang Asli over dam project", *The Rakyat Post*, (18 May 2015) <<http://www.therakyatpost.com/business/2015/05/18/tnb-sued-by-orang-asli-over-dam-project/>> accessed 20 November 2017.

²⁸ Ministry of Rural and Regional Development, <<http://www.rurallink.gov.my/en/rural-development-master-plan/>> accessed on 19 November 2017.

According to Dr. Cheah Wui Ling²⁹, the official position taken by most Southeast Asian countries is that they focus to assimilate the aboriginal people into mainstream society.³⁰ It can be said that Malaysia is also one of the many countries that attempts to do as such. It can be seen through various types of implementation and measures taken by the government towards the aboriginal people such as PIPLB and NEM.

The government attempts to assimilate or ‘mainstreaming’ the aboriginal people through socio-economic development policies.

4.1.3 The Issue of Non-Gazetted Land

Aboriginal people customary land can be divided into three categories, gazetted aboriginal reserves, aboriginal areas approved for gazettement as aboriginal reserves but not gazetted as yet, and aboriginal lands applied for gazettement but not approved yet. As stated by Amani Williams Hunt³¹, the three categories stand as the recognition by the statute, but it is not absolute as the State Authority have power to revoke the declaration aboriginal reserves, aboriginal areas, and aboriginal lands.³² The power of gazettement and approving the application of aboriginal people reserves is the power of the State Authority, or in practical terms, Majlis Mesyuarat Kerajaan Negeri (MMKN).³³

As of 2010, there are around 26,288.47 hectares (ha) that have been approved for the aboriginal people but are still being gazetted by the State Authority. According to SUHAKAM³⁴ the estimated land in 2010 are lower compared in 1990, where it was

²⁹ Dr. Cheah W.L. is an Assistant Professor at the Faculty of Law of the National University of Singapore (NUS) since 2007 and holds a joint appointment at the NUS University Scholars Program. She holds academic qualifications from the National University of Singapore (LL.B., LL.M.), Harvard Law School (LL.M.), European University Institute, and Oxford University (D.Phil).

³⁰ Cheah Wui Ling, *Sagong Tasi: Reconciling State Development and Orang Asli Rights in Malaysian Courts* (National University of Singapore, 2004) at 3.

³¹ Note 1.

³² Note 2 at 2.

³³ Note 7 at 132.

³⁴ SUHAKAM referred to Suruhanjaya Hak Asasi Manusia.

recorded at 36,076.33 ha.³⁵ The number of hectares of aboriginal people land reserves in 1990 and 2010 are at 20,666.96 ha and 20,670.83 ha respectively. There has only been 0.02 percent in change between both years. Although there is a change of number of hectares between 1990 and 2010, the land that have been approved for gazetting never became aboriginal people reserves land.

Moreover, the problems concerning the aboriginal people land reserves can be further seen through administrative shortcomings. There are three administrative shortcomings as suggested by SUHAKAM namely: Under-gazetting, Non-gazetting, and De-gazetting.³⁶

Under-gazetting refers to a situation where the full extent of the aboriginal people customary land is not taken into account when the land is being gazetted as an aboriginal reserve.³⁷ Meaning, the actual number of hectares of the alleged customary land does not correspond with the number of hectares being gazetted as an aboriginal people reserve. Most of the time, the final area approved for gazetting is smaller than the actual land sizes applied to be gazetted.³⁸

Non-gazetting happens when customary lands which have been approved by the State Authority is to be gazetted but it does not happen due to administrative shortcomings. For instance, there may be some defect in complying with the procedures of land alienation which cause this to happen. As a result, the time required for the process of gazetting of an aboriginal people reserve to be completed would be much longer. In particular, Land Registry Office Kuala Langat stated that JAKOA did not make any application for the reservation of land situated in Kg Sungai Bumbun in Pulau Carey which has caused the land not being gazetted as an aboriginal people reserve despite an application for reservation of aboriginal land has

³⁵ Note 7 at 132.

³⁶ Ibid.

³⁷ Note 7 at 132.

³⁸ Ibid.

been made by the aboriginal people to JAKOA.³⁹ Consequently, the process of gazetting the area was on pending for more than 10 years.

Lastly, de-gazetting is where the State Authority uses its power to degazette an aboriginal people land reserve.⁴⁰ Thus, the land that is originally under aboriginal people land reserve reverts to the State.

Aboriginal people land reserves will always be a better option for the betterment of the aboriginal people. However, sometimes, reservations may not be able to fulfill the expectations of the aboriginal people. There are a few instances that can be included to illustrate this situation.

The process of gazetting a reserve usually takes about three months.⁴¹ In reality, the process would take much longer than that despite the area claimed is free from any disputes or problems. Only around 12 percent of all the 869 aboriginal settlements are gazetted as aboriginal reserves.⁴² The number of aboriginal reserves is significantly smaller compared to the total number of settlements they have. Furthermore, a spokesperson from Land Registry Office Kluang claimed that they received an application for the aboriginal people of Peroh reservation in June 1998.⁴³ The office had processed and forwarded the application to Pejabat Pengarah Tanah & Galian (PTG) Johor in January 2006 but they did not receive any response.

From this situation, we can infer that the procedures relating to the reservation of aboriginal people land reserves can be time-consuming. Any delay in declaration would cause further problems as there is no expressed protection given to the aboriginal people if any disputes arise on the area needed to be claimed.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Note 7 at 132.

⁴² Colin Nicholas, 2012, 'The Orang Asli of Peninsular Malaysia', <http://coac.org.my/main.php?section=about&page=about_index> accessed 20 November 2017.

⁴³ Note 7 at 133.

4.1.4 Limited Powers of JAKOA

The matters related to Orang Asli are all channelled to the Department of Orang Asli Development or Jabatan Kemajuan Orang Asli (JAKOA), also formerly known as the Department of Orang Asli Affairs or Jabatan Hal Ehwal Orang Asli (JHEOA).

The power of JAKOA is highly limited that even though it acts as the body to govern matters related to the Orang Asli, the government does not provide enough allocation of funds for JAKOA to operate as it is.⁴⁴ The insufficiency in funds in terms of finance and capacity will result into the difficulty for JAKOA to meet the requests of securing the customary lands of the Orang Asli.⁴⁵ JAKOA officers are not relatively well-versed with the indigenous peoples' culture, customs, and issues, and they are still solely dependent on the long-serving effort of the JAKOA staff who still take the old approach of being assimilationists rather than developing on the needs of aboriginal peoples.⁴⁶

In addition, most of the time when there are claims made from the aboriginal peoples for their rights of land, the Districts and Land Office will ignore their requests on the ground that the claims of the aboriginal peoples do not suffice as fail to meet the cadastral maps of the Department of Survey and Mapping Malaysia or the Jabatan Ukur dan Pemetaan Malaysia (JUPEM).⁴⁷

Aboriginal peoples' land that have not been gazetted as aboriginal land reserves are not indicated, marked, blocked or caveated as aboriginal lands on such maps.⁴⁸ Hence, it is merely assumed as the aboriginal peoples' land, does not officially exist and due to that, they are not entitled for any rights on the land. Therefore, the

⁴⁴ Ibid at 130.

⁴⁵ Ibid.

⁴⁶ Note 7 at 152.

⁴⁷ Ibid at 130.

⁴⁸ Ibid.

government should allocate a reasonable amount of fund for the JAKOA to operate as it is. The lack of enough resources will result in JAKOA to fail exercise their power within efficiency. This will also result JAKOA not to act on its fiduciary duty as by evidence shows from the civil suits taken by the aborigines against the government as the facts are likely to show that JAKOA are reluctant from time to time to treat the welfare of the aborigines with advancement and interest.⁴⁹

In this situation, JAKOA should not mistakenly take all responsibility for any default in the mistreatment of the Orang Asli. The lack of power to obtain a justice and fairness results in aboriginal land are resulting from the lack of power from JAKOA as it solely depends on the maps provided by Department of Survey and Mapping Malaysia. Moreover, as far as it is concerned, JAKOA must take initiatives to reserve skills and training for their officers to view the significance of the needs of the aboriginal peoples more seriously rather than taking the approach on assimilation itself.

4.2 Limited Recognition by Legislation

Through the legislation process, recognition of rights may be obtained by the statute, court jurisdiction, and practices of common law. The importance of recognition of rights is to secure the privileges given by the authority to the indigenous community rather than being misled and harassed by irresponsible parties. Thus, this part will focus on the limited recognition by the law itself.

4.2.1 Aboriginal Peoples Customary Laws

State land policies tend to focus on the advancement of the aboriginal people, a marginalised community through the development of aboriginal peoples lands for productive economic use. Generally, such policies might have been significant but it

⁴⁹ Ibid at 134.

still can erode the aborigines customary rights. For instance, in the Aboriginal Peoples Act 1954 (APA), the inadequate and limited recognition of aborigines are extremely vague. Aboriginal land can be terminated by the State⁵⁰ without any compensation being invoked.⁵¹

Although the government's policies are intended to lift the social-economic state of the aborigines these might bring negative impact towards aboriginal land through encroachment, alienation, state appropriation and creation land resources interest.⁵²

The recognition of common law on aboriginal customary rights demands for the existing private rights in an acquired state where it comes from international jurisprudence and common law cases.⁵³ In order to develop the aborigines' customary rights, Malaysian courts have applied a doctrine of Indigenous Title.⁵⁴ By exercising the power of the court to recognize the rights of aborigines to their land, the common law and statutory rights of aborigines should be looked at conjunctively.⁵⁵ Undoubtedly, the aborigines community do have the rights on their lands as exercising by the jurisdiction of the court that applies the common law principle that entitles the aboriginal peoples to claim their rights on the land.

Moreover, the aborigines only possess limited statutory rights to make use of forest produce and hunting wildlife. Aboriginal lands can be reserved and the area may be degazetted at any period of time.⁵⁶ Furthermore, they have no exact control over the land as the area can be gazetted at any time, hence, it will result in the aborigines to lose control of forest produce. As for hunting purposes, it will only be limited to hunting ten species of wildlife⁵⁷ and hence, it shows no recognition to the dynamism of aboriginal peoples laws, customs, traditions, and institutions.

⁵⁰ The word 'State' in this context means individual States of the Federation of Malaysia in Peninsular Malaysia.

⁵¹ Aboriginal Peoples Act s 6(3) and s12.

⁵² Note 17 at 2.

⁵³ Ibid at 231.

⁵⁴ Ibid at 191.

⁵⁵ [2002] 2 MLJ 591, 615, 620.

⁵⁶ Note 51 at s 7(3) and 6(3).

⁵⁷ Wildlife Act 1972, s 51(1).

4.2.2 Native Customary Rights

On the matter of native customary rights, there is a clear distinction between the aboriginal people in Peninsular Malaysia and the natives in Sabah and Sarawak. In the Sarawak Land Code 1958 (the Code), Section 5 of the Code specifically covers the native customary rights on the methods of acquisition, classification, and compensation. Section 6 of the Code somehow strengthens the status of the natives in Sarawak by laying out the acquisition, transmissions and privileges on the native communal reserves. Amani Williams Hunt⁵⁸ states that the concept of communal reserve land is one of the better option existed in order for the aboriginal people to acquire the entitlement of their land.⁵⁹ However, as it only had been covered in the Sarawak Land Code 1958, the aboriginal people in Peninsular Malaysia cannot rely on such provision as the Aboriginal Peoples Act 1954 (the Act) silence on it.

In Sabah, Sabah Land Ordinance⁶⁰ (the Ordinance) has laid out the native customary rights under section 13 to section 16. Section 15 of the Ordinance specifically provides the definition and condition of the native customary rights. The recognition of native customary rights in Sabah are well-supported by the practice of Land and Survey Department.

In the case of *Director of Forest, Sarawak v TR Sandah ak Tabau*⁶¹, the recognition of the court towards the native customary rights are limited only to *temuda*⁶² instead of *pulau*⁶³ and *pemakai menoa*⁶⁴. Despite the recognition on native customary rights under the Sarawak Land Code 1958, it still does not fully protect the customary rights of the natives of Sarawak as the court had to justify the eligibility of the custom.

4.3 Conclusion

⁵⁸ Note 1.

⁵⁹ Note 2 at 2.

⁶⁰ Sabah Cap. 68.

⁶¹ [2017] 2 MLJ 281.

⁶² Farming land left fallow on which there are secondary growths.

⁶³ Communal forest reserve.

⁶⁴ Territorial domain.

The discussion above shows that it is crucial for the government to respect and acknowledge the customs and practices relating to the land of indigenous people. Failure on the part of government will create dilemma with the indigenous community. Apart from that, the government must take serious approach to protect the interest of the indigenous community because their vulnerable conditions have once put difficulties on the indigenous community. Although the national goal must be prioritized, the government should preserve the culture, customs, and heritage of these people as they are also part of the bigger Malaysian society. Hence, the cooperation between the government and non-governmental organisations should be in line with the notion for the equality and equity of the rights of the indigenous people.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

Throughout the analysis, we found out that the issue on the right of land among the aboriginal peoples seems to be left out from the concern of the society. The court's judgement in previous cases shows that the rights of land of aboriginal peoples are hardly acquired through the existing legislation. As the consequences of the previous chapters, this concluding chapter plays a vital part in highlighting the important details of the research and will also be including appropriate recommendations for future studies. The recommendations provided serve as solutions for the problems stated in previous chapters. Furthermore, it also provides our concluding opinion and vision of the output of this research once it has been made complete.

5.1 The Future of Indigenous People in Survival for the Development

Rapid development or growth made in a country allows a space of improvement in the quality of life for its people. Similarly, in the case of the indigenous people, their future depends excessively on the progress made to enhance their quality of life. However, their aspiration to have a better quality of life will be conflicted with their customs and practice. Thus, this discussion will be focusing on the legal challenges and effects of modernization which is the key factor to determine their future.

5.1.1 Legal Challenge

The indigenous people and their rights to land seem to be an endless predicament. As discussed in the previous chapters, the purpose of the law is to protect the rights of the indigenous people. Indeed, as an illustration, the aspiration of the government when enacting the Aboriginal Peoples Act 1954 is clearly portrayed in the parliament

debate. It can be traced from the speech of Dato' Onn Jaffar¹ when he introduced the Aboriginal Peoples Bill in Federal Legislature. He stated that

- (a) Now I bring this bill for the protection and welfare of a community – a comparatively large community – who are peoples of this country,
- (b) The aborigines are human beings with human reactions and the idea of this bill is to provide for their protection as human beings and not as museum pieces or exhibits.

From the passage above, apparently the government's intention is entirely channeled towards the protection and welfare of the aboriginal peoples itself. However, the law which should protect the aboriginal peoples also imposes difficulties towards them.² Their future will depend on the effort to safeguard their land rights. Undeniably, this law is the most effective tool to defend their land rights but its effectiveness needs to be pondered. As been stressed in the previous chapter especially in chapter three, several problems on the part of the law have opened the floodgates of crucial questions faced by indigenous community.

These issues need to be redressed. Their future depends on the effectiveness of the law. Many in the indigenous community such as the Temuan tribe in the case of *Sagong Tasi*³ and the Iban ethnic in the case of *Nor Nyawai*⁴ in Sarawak have to fight in the court of law as the last resort to defend their rights. The government which has a fiduciary duty towards the indigenous people should learn something from these cases. It shows that the current law is not efficient enough in providing better rights for the indigenous community especially rights relating to the land.

¹ As reported in the Malay Mail Newspaper published on 28 November 1953, cited in *Sagong Tasi v Kerajaan Negeri Selangor* [2005] 6 MLJ 289, 302-303 cited in SUHAKAM, Report Of The National Inquiry Into The Land Rights Of Indigenous Peoples, Copyright of Human Rights Commission of Malaysia(Suhakam), (2013) at 61.

² See Chapter 3.

³ [2002] 2 MLJ 591.

⁴ [2006] 1 MLJ 256.

Thus, action to rectify the problem should be made. Reviewing the current laws related to indigenous land rights needs to be done in order to detect the lacuna and sources of the problems. If this issue is yet to be settled, it will open the gates for the violation of indigenous land rights. These actions must be done to create a better future for the indigenous community in Malaysia.

5.1.2 Modernisation

Modernization refers to a model of a progressive transition of a society from traditional to a modern society. In other words, modernization is a process to remold a traditional system into a new mode. This concept has been adopted by the Malaysian Government as a central basis to achieve Vision 2020. Vision 2020 is not merely a goal for economic development but can also be regarded as a standard of maturity that needs to be achieved by the Malaysian society.

The adoption of this concept by the government can be seen through various introductions of policies and these indirectly influence the society at large. Although modernization is necessary to improve the living standards of the nation, it does come with implications and side effects. By promoting modernization, it may cause friction and tension with the traditional system or the traditional way of life.

Modernization is hugely affecting the life of the indigenous people. This minority group is often regarded as a group of people who rejects the idea of development and progress. As discussed in the previous chapters, the government has implemented various policies which adversely affect the indigenous people to assimilate them into the modern society. However, these policies have transgressed their existing rights and cultures. The policies introduced by the government are contradicting with the beliefs and values held by the indigenous people. The indigenous people are in fact not against any sort of development introduced by the government. They are a type of people who care about their culture and identity. In fact, they welcome the action taken by the government which will help them become more civilized but at the same

time, they are against any measures that will infringe their rights as indigenous people.

Development is not wrong but it must be done properly after considering all relevant factors. In regards to the indigenous people, the government should give them the right to self-determination.⁵ The right to self-determination will allow the indigenous people to freely determine their own concept of development. We do acknowledge that the way of thinking between the indigenous people and the modern society can be quite different. By having this right, it will help the indigenous people to develop without eradicating their culture and identity. In addition to that, the government should consider a development with culture and identity.⁶ It means that, the government should take into consideration for a bigger view on the concept of development where they have to take into account on the interest of the indigenous people if such development will directly affect these groups. The idea for development in culture and identity will promote development of the indigenous people and at the same time, protect their rights, culture, and identity.

After all, the indigenous people are a part of our ethnic and it forms a part of our national identity. They are one of the special characteristics of Malaysia whereby their culture, custom and identity should be preserved. Therefore, we should protect their identity similarly to what we are doing for Malays and other natives of Sabah and Sarawak.

⁵ “Indigenous Peoples: Development with Culture and Identity Articles 3 and 32 of the UN Declaration on the Rights of Indigenous Peoples”, (United Nations Permanent Forum on Indigenous Issues, New York, 19 to 30 April 2010) <<http://www.un.org/esa/socdev/unpfii/documents/Development%20with%20Culture%20and%20Identity.pdf> > accessed 22 November 2017.

⁶ Ibid.

5.2 Recommendations

In order to propose a better option to solve the existing issues, there are a few recommendations that have been made. Any existing body or individual should be concerned in emphasizing the indigenous people's land rights. This point will be further elaborated in the aspects of legislation amendment and government policy.

5.2.1 Proposed Amendment

The Aboriginal Peoples Act 1954 (the Act) stands as the protection, life advancement and welfare of the well-being of the aboriginal people. Over the years, the implementation of this Act since 1954 had significantly assisted numerous problems faced by the aboriginal people, mostly on the issues of recognition of their rights as one of the “first people” of Malaysia.⁷ This is clearly mentioned in Section 2 of the Act, exclusively refers to Peninsular Malaysia.

Section 3 of the Act has laid down the definition of the aboriginal peoples. The criteria to be classified as the aborigines are by hereditary origins, spoken language and their way of life. An individual should also practice aboriginal customs and beliefs and be a member of the aboriginal community to be considered as an aborigine person. Despite the “specific criteria Act as a definite evaluation in recognizing the aboriginal people, it should emerge in line with the development of the country's legal system” Amani Williams Hunt⁸ recommends that the definition of aboriginal people in the Act should be amended in order to create a better opportunity for the aborigines. He argues that the language and way of life of the aborigine people are no longer relevant criteria, particularly on the basis that language and way of life

⁷ Yogeswaran Subramaniam, *Orang Asli Land Rights By UNDRIP Standards In Peninsular Malaysia: An Evaluation And Possible Reform*, (University of New South Wales, 2012) Note 2 at 15.

⁸ Interview with Amani Williams Hunt Abdullah, a social activist and former President of Persatuan Orang Asli Semenanjung Malaysia (Tapah, Perak 20 October 2017).

of the aboriginal people have already emerged into the modern way of life as they interact with the general society. Hence, by amending the definition of aboriginal peoples in the Act, it may provide a better opportunity for the aborigines to claim for their rights.

In addition, section 10(3) of the Aboriginal Peoples Act 1954 states that the State Authority has the power to order the aboriginal community to leave Malay Reservation area with the payment of compensation. However, the condition of the compensation is “as may be necessary”. It is not a compulsory obligation to pay for compensation, but it is up to the discretionary power exercised by the State Authority. Thus, the provision is merely existing as an option and not binding as a protection or confirmation on regards of the compensation.

Furthermore, there are specifically states three conditions where the compensation may be obtained due to loss of ownership of the land. The conditions are; (i) if any land is excised from aboriginal area or aboriginal reserve or, (ii) if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed, or, (iii) if any right or privilege in any aboriginal area or aboriginal reserve granted is revoked wholly or in part.⁹ Under these conditions, the State Authority may grant compensation and may pay such compensation to the aborigines or, may, if he thinks fit, pay the same to the Director General to be held by him as a common fund for the aboriginal community to be administered in a manner as may be prescribed by the Minister.

If we revise the content of section 12, the compensation for aboriginal people rests upon the discretionary power of the State Authority. The words “may” and “if he thinks fit” give a clear indication that any decisions made in accordance with the three conditions are solely based on the discretion by the State Authority. As stated in section 10 Aboriginal Peoples Act 1954, the provision is not holistically protecting the rights of aboriginal people as the owner of their land. To provide a better

⁹ Aboriginal Peoples Act 1954, s 12.

safeguard for the aboriginal people, the use of words “may” and “if he thinks fit” should be amended to the word “shall”. It is not to defy the discretionary power of the State Authority, but it is in the purpose to grant the aboriginal people the rights that they deserve.

In the Federal Constitution 1957 (the Constitution), the term ‘aborigines’ is rarely mentioned compared to the term Malays and other natives of Sabah and Sarawak. Under Article 160(2) of the Constitution, the definition of aborigine is lightly defined as aborigine of the Malay Peninsular. There are no other clarifications or specifications on the definition of the term aborigine in the Constitutions. Thus, it is proposed that the Constitution should provide a better definition and specifications of the aboriginal peoples based on their cultures, customs, or religions. The better improvement must be form in order to provide better safeguard towards aboriginal peoples by amending certain provision in Aboriginal Peoples Act 1954.

Hence, instead of proposing a new legislation or statute, it is better for us to improve existing legislation. It is expected that the amendment of these few provisions could assist and provide a better opportunity for the aboriginal peoples.

5.2.2 Government Policy

The current policy¹⁰ that has been introduced by the government in matters relating to the indigenous community is not expected to govern the rights of land of the aborigines. Although the policy can be effective towards an individual as it acquires the rights of individual property, the mechanism adopted by the government does not apply to the indigenous community as the aborigines have sentimental values towards their land. Hence, rather than pursuing the aborigines for their individual rights on the land, the government should understand that the aboriginal peoples are individuals who heavily appreciate customs, cultural, spirit, and communal values. The

¹⁰ Dasar Pemberimilikan Tanah Orang Asli 2009.

government should create a new policy which can create a better welfare that can cater to the indigenous people and with respect of their community life without desegregating the rights of each of the individual in the aboriginal community.

The government can initiate a reasonable land size in order to support the livelihood and cultural life of the indigenous people to make a decent living from fully utilising the land.¹¹ The result of the systematic customary tenure in the aborigines land can also contribute to the nation's economy. For instance, in Canada, the flexible land titling shows a positive outcome towards the country's economic situation.¹² In addition, the government can also impose a policy that adopts small scale land development models where the opportunity is given to each of the aboriginal individual and the enhancement of the skills and management should be emphasised.

Furthermore, the recognition of gazetting such land as a protected area, and crediting the community on their activities in preserving the forest and land should be sustained. The establishment of institutions such as the Jabatan Kemajuan Orang Asli (JAKOA) and Human Rights Commission of Malaysia (SUHAKAM) provide a silver lining towards the indigenous people in Malaysia. These institutions continuously play significant role in assisting the indigenous people to obtain their customary rights to land.

Furthermore, in the view of the seriousness of complaints and apparent weaknesses of the Orang Asli Development Department (JAKOA) in protecting aboriginal peoples land rights as provided by the Aboriginal Peoples Act 1954, an independent and comprehensive review of JAKOA should be undertaken at an early date.¹³ The matters that are related to the aboriginal peoples community should be reviewed as whether it should remain under the supervision or control of JAKOA or not. If the

¹¹ SUHAKAM, Report Of The National Inquiry Into The Land Rights Of Indigenous Peoples, Copyright of Human Rights Commission of Malaysia(Suhakam), (2013) at 165.

¹² Ibid at 165.

¹³ Note 10 at 172.

government still preserves the power of JAKOA as the body that governs the matters of the aboriginal peoples, the comprehensive action should be executed to ensure that JAKOA remains with their power and can deliberate the conduct in manners. In addition, JAKOA should have the power and right to determine the land reserves of the aboriginal peoples without being dependent on the cadastral maps of the Department of Survey and Mapping Malaysia (JUPEM).¹⁴ Hence, the power of JAKOA in administering the matters relating to aboriginal peoples will give more significance protection on the customary land of aborigines.

The extensive protection rights of the aborigines rights are recognized under the United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP). The standard protection of the Orang Asli customary land rights has been set up as approved by the Malaysian national human rights institutions, SUHAKAM and the Malaysian Bar.¹⁵ The international law on the rights of the indigenous peoples has explicitly and implicitly recognised the importance of their lands, territories, and resources to the indigenous peoples, particularly to their cultures. Malaysia's initiative of taking an approach in voting the UNDRIP as the foundation to reform as UNDRIP in Malaysia as a roadmap for the future realisation of indigenous rights.¹⁶ Hence, guidelines provided under UNDRIP will provide the safeguard to the aborigines for their protection of the community. In addition, UNDRIP provides flexibility on the framework for stronger recognition and protection for indigenous land and resources as it recognizes the special relationship between the community and their land.¹⁷ Therefore, the implementation of UNDRIP as the foundation of the indigenous peoples in Malaysia is crucial to sustain the rights of every aborigine in the country.

¹⁴ Note 10 at 130.

¹⁵ Yogeswaran Subramaniam, *Orang Asli Land Rights By UNDRIP Standards In Peninsular Malaysia: An Evaluation And Possible Reform*, (University of New South Wales, 2012) Note 2 at 78.

¹⁶ Allen, Stephen and Xanthaki, Alexandra, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) at 327.

¹⁷ Note 13 at 84.

5.3 Conclusion

Indigenous people and their land rights are important issues which need to be highlighted. Their vulnerable position will create difficulties in voicing out their stand against violation and discrimination. Hence, lawyers, academicins, leaders and politicians should be their voice and campaign for their rights. It is true that the problems faced by them do not affect the nation as a whole but being a part of the society entitles them to receive fair and equal treatment in accordance to the law in terms of their rights, specifically their rights relating to land.

Thus, this research is a form of the responsibilities mentioned to voice out on their part. The discussion has gone through the relevant laws and dug into the core problems. These problems are also addressed with several recommendations to strengthen the indigenous land rights. The government, relevant authorities and any related body need to consider the recommendations made. Although it may not solve all the problems relating to indigenous land right, it can at least open the light towards better treatment on the rights relating to land for the indigenous people. As a conclusion for this research, it is our hope that the indigenous people will not be left out and that society can play their role in standing firmly for a better future for every individual that belongs in this community.

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