

INDIGENOUS LAND DISPUTES AND LAW REFORM IN INDIA: LESSONS FOR MALAYSIA

Izawati Wook*

ABSTRACT

Disputes on indigenous land rights are a continuing issue in Malaysia which needs to be addressed. Apart from the common law recognition of the land rights of the indigenous peoples, they are increasingly and widely recognised, both, under national and international laws as a stakeholder in the natural resources located within their areas. Since 1992, there has been a dramatic increase in legislation around the world recognising the rights of indigenous peoples and communities to forest lands and resources. An interesting law reform exercise has taken place in India with the introduction of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA) to address the claim of the indigenous peoples to forest resources. India is relevant as a comparison to Malaysia as both share some common political and legal features. Using a comparative approach, this article analyses processes and mechanisms adopted in the relevant law reform in India and its relevance to Malaysia. Comparative perspectives provide models for practical applications of indigenous peoples' rights. These will assist policy analysis through learning from the successes and failures of other jurisdictions in improving legal reform. This article provides a new perspective in addressing the issue of land disputes involving the indigenous peoples in Malaysia which is significant to the policy and law reform on this issue.

Keywords: Comparative law, law and indigenous peoples, rights to natural resources

* LLB (IIUM), MCL (IIUM), Ph.D. (Victoria University, Melbourne), Senior Lecturer, Faculty of Syariah and Law, Universiti Sains Islam Malaysia.

PERTIKAIAN BERKAITAN HAK TANAH ORANG ASLI DAN REFORMASI UNDANG-UNDANG DI INDIA

ABSTRAK

Pertikaian berkaitan hak tanah melibatkan masyarakat orang asli dan orang asal di Malaysia merupakan isu berterusan yang memerlukan tindakan penyelesaian. Hak berkaitan tanah yang diduduki oleh masyarakat asal ini telah pun diiktiraf oleh *common law* di Malaysia. Selain daripada itu, hak-hak masyarakat asal ini semakin diiktiraf secara meluas di peringkat antarabangsa dan juga kebangsaan yang mana mereka juga dianggap sebagai pemegang taruh bagi sumber semula jadi yang boleh diperoleh daripada kawasan yang mereka duduki. Di seluruh dunia, sejak tahun 1992, pelbagai negara telah pun menggubal undang-undang dalam bentuk statut yang mengiktiraf secara jelas hak masyarakat asal terhadap tanah, hutan dan sumber semula jadi yang lain. India juga telah menggubal statut bagi reformasi undang-undangannya. Ia telah memperkenalkan Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA) bagi menyelesaikan tuntutan oleh masyarakat asal mereka terhadap sumber tanah dan hutan. India merupakan negara yang relevan bagi tujuan perbandingan dengan Malaysia. Ini kerana kedua-dua negara berkongsi sebahagian pengalaman politik dan perundangan. Dengan menggunakan pendekatan perbandingan, makalah ini menganalisa proses dan mekanisme yang diamalkan oleh undang-undang tersebut di India serta kerelevanannya kepada Malaysia. Pandangan bandingan sebegini menyediakan model untuk aplikasi secara praktikal bagi isu berkaitan. Ia juga dapat membantu analisis polisi dengan mempelajari kejayaan dan masalah dalam reformasi undang-undang. Kertas ini memberi perspektif yang baru dalam permasalahan masyarakat asal di negara ini.

Kata Kunci: Undang-undang perbandingan, undang-undang dan masyarakat asal, hak kepada tanah dan sumber semula jadi

INTRODUCTION

Disputes on indigenous land rights are a continuing issue in Malaysia which needs to be addressed. In July 2013, the Malaysian National Human Rights Commission (SUHAKAM) released its report on a national inquiry into the position of land rights of the indigenous peoples¹ in Malaysia. This is the first inquiry in Malaysia studying land rights issues faced by the indigenous peoples including the Orang Asli.² The report exposed numerous incidents of land issues involving the indigenous peoples' land.³ Other research reports⁴ and news⁵ also highlight the same predicament such as encroachment on

¹ The term 'indigenous peoples' used here is as it is referred to in the context of international law. See: Patrick Macklem, "Indigenous Recognition in International Law: Theoretical Observations," *Michigan Journal of International Law* 30 (2008): 177. The scope of the term to refer to these groups is also accepted in a national policy statement. See, "Malaysian Criteria and Indicators for Forest Management Certification [MC&I (2011)]" (Malaysian Timber Certification Council (MTCC) and Forest Stewardship Council (FSC),), accessed November 3, 2015, http://www.mtcc.nl/lib/documenten/certificering/Malaysian_Criterica_and_Indicators_for_Forest_Management_Certification_MC_I_2002_.pdf. These include the Orang Asli in Peninsula Malaysia and the natives of Sabah and Sarawak.

² A collective term for the indigenous peoples of Malaysia, see: <http://www.oxforddictionaries.com/definition/english/orang-asli>

³ "Report of the National Inquiry into the Land Rights of Indigenous Peoples," *Human Right Commission of Malaysia* (Kuala Lumpur: Suhakam, 2013), http://nhri.ohchr.org/EN/Themes/BusinessHR/Business_Womens_and_Childrens_Rights/SUHAKAM_BI_FINAL.CD.pdf.

⁴ Rusaslina Idrus, "The Discourse Of Protection And The Orang Asli In Malaysia.," *Kajian Malaysia* 29, no. 1 (2011): 53–74; Colin Nicholas, *Orang Asli: Rights, Problems, Solutions* (Kuala Lumpur: Human Rights Commission of Malaysia (Suhakam), 2010); Hasan Mat Nor et al., "Mengapa Kami Jadi Begini? Konflik Masyarakat Orang Seletar Dan Pembangunan Iskandar, Johor Bahru, Malaysia (conflicts in the Iskandar Development Region: The Case of Johor Bahru's Orang Seletar, Malaysia)," *Geografia: Malaysian Journal of Society and Space* 5, no. 2 (2009): 16–26.

⁵ News reports on encroachment of Orang Asli land and conflict: "Temiar Tribe in Dire Straits," *The Sun Daily*, February 13, 2013; Nigel Aw, "Mega Plantations Gobble up Kelantan Orang Asli Land," *Malaysiakini*, December 28, 2012; Mustafa K. Anuar, "The Temiar Blockade, Arrests in Gua Musang," *The Malaysian Insider*, January 30, 2012; Zulaikha Zulkifli, "Hundreds of Orang Asli Deliver Memo to Pahang Mb," *Malaysiakini*, October 17, 2012; Zulaikha Zulkifli, "Orang Asli Upset with Land Alienation Works," *Malaysiakini*, September 28, 2012; "Orang Asli Ordered to Vacate Land Get Consent Stay," *The Sun Daily*, August 14, 2012; Laven Woon, "Orang Asli Land Still under

their customary lands by outsiders for logging, commercial plantations and farming, and infrastructure development. This suggests an urgent need for the relevant laws in Malaysia to be reformed.

Recently, following a task force report dated August 2014 that studied SUHAKAM'S national inquiry report, a Cabinet Committee for the Land Rights of Indigenous Peoples was established to address, monitor and implement the findings of the task force's report.⁶ An important recommendation included in the report is to establish a redress mechanism to resolve issues and grievances involving the indigenous peoples' land.⁷ This is a commendable effort on the part of the government to address this issue.

Under Malaysian law, the rights of the indigenous peoples to their land are recognised as affirmed by various decided cases.⁸ Under the common law, the customary laws, customs and practices of the indigenous peoples are the source of the rights that define the nature of aboriginal land rights (i.e. the scope and extent of their rights and interests).⁹ Continuous occupation and control of land may also evidence their land rights¹⁰ which may also include the right to forage and hunt for the resources in the area.¹¹ The principles developed by the court are supported by: the common law principle of respect for the right of the inhabitants that acknowledges the use and occupation of land by indigenous peoples; statutory rights provided under the

Threat," *Free Malaysia Today*, September 28, 2012; Demands Apology Kelantan Orang Asli Slams Mb, "Kelantan Orang Asli Slams Mb, Demands Apology," *Malaysiakini*, April 20, 2012.

⁶ Loh Foon Fong, "Cabinet Forms Committee on Indigenous Land Rights," *The Star Online*, June 17, 2015.

⁷ "Report of the National Inquiry into the Land Rights of Indigenous Peoples."

⁸ *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 (High Court of Malaya) ('*Adong (No 1)*'); *Kerajaan Negeri Johor v Adong bin Kuwau* [1998] 2 MLJ 158 (Court of Appeal) ('*Adong (No 2)*'); *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241 (High Court of Sabah and Sarawak) ('*Nor Anak Nyawai (No 1)*'); *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591 (High Court of Malaya) ('*Sagong (No 1)*'); affirmed by Federal Court in *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677 ('*Madeli*'). See also a recent case, *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] MLJU 291 (High Court of Malaya) ('*Mohamad Nohing*').

⁹ *Ibid.*

¹⁰ *Madeli* [2008] 2 MLJ 677.

¹¹ *Mohamad Nohing* [2013] MLJU 291.

Aboriginal Peoples Act 1954 ('APA'); and, the constitutional provisions on the special position of the Orang Asli.¹²

Apart from this, at the national policy level, the indigenous peoples are also increasingly widely recognised as a stakeholder in the natural resources located within their areas. Both the National Forestry Policy¹³ and the National Policy on Biodiversity 1998¹⁴ endorse the customary rights and interests of the Orang Asli as well as their participation as local communities. The latter also recognises the rights of the local communities to utilise and benefit from the resources. Principle (vii) of the policy states:

The role of local communities in the conservation, management and utilisation of biological diversity must be recognised and their rightful share of benefits should be ensured.

In addition, private forest regulation in the form of transnational law or that of a non-state regime has also led to greater recognition of Orang Asli rights in forests. The Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest) (MC&I 2011)¹⁵ require that recognition and respect be given to the legal and customary rights of the indigenous peoples¹⁶ 'to own, use and manage their lands, territories and resources'.¹⁷ The local communities 'shall maintain control, to the extent necessary, to protect their rights or

¹² Article 8(5)(c) of the Federal Constitution, see: *Adong (No 2)* [1998] 2 MLJ 158; *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289 (Court of Appeal) ('*Sagong (No 2)*').

¹³ FAO, "Malaysia," in *Asia and the Pacific National Forestry Programmes: Update 34* (Bangkok: FAO Regional Office for Asia and the Pacific, 2000).

¹⁴ MOSTE, "National Policy on Biological Diversity," (Ministry of Science, Technology and Environment, Malaysia, 1998).

¹⁵ The standard is used for assessing forest management practices at the forest management unit (FMU) level for the purpose of certification or the forest verification system. It has been adopted by the "Malaysian Criteria and Indicators for Forest Management Certification [MC&I (2011)]." For the exercise of the audit process, issues and criticism, see, David Brown et al., "Multiple Approaches to Improving Forest Control in Malaysia," in *Legal Timber: Verification and Governance in the Forest Sector* (London: Overseas Development Institute, 2008), 187..

¹⁶ The term 'indigenous people' in this standard is specifically defined to refer to 'Aborigines in Peninsular Malaysia, and Natives in Sabah and Sarawak'.

¹⁷ "Malaysian Criteria and Indicators for Forest Management Certification [MC&I (2011)]", Principle 3.

resources, over forest operations.’¹⁸ The certification requires that the ‘long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established’.¹⁹ In terms of Orang Asli rights in forests, the laws, apart from the APA, to be complied with in forest management include the common law.²⁰

However, despite the common law recognition as well as the affirmation of the rights of the indigenous peoples in the policy statements relating to forest and timber certification, the implementation of this policy on the ground is not apparent. A 2014 research that focused on the land rights issues among the Orang Asli found that at present, the current environment demonstrates indifference towards the legal rights of the Orang Asli to land and resources.²¹ This is shown, among others, by the continuing state-sponsored encroachment on Orang Asli land as reported in various news media.²² Besides the continued practice of individual land grants to the Orang Asli communities at present, many state authorities disregard the customary rights that these people have over their land and this results in serious disadvantages to them through the loss of their collective customary land.²³ This position was also acknowledged by the 2013 SUHAKAM Report on the land rights issues among the indigenous peoples as mentioned above.²⁴

On the other hand, since 1992, there has been a dramatic increase in legislation around the world recognising the rights of indigenous peoples and communities to forest lands and resources. The surge is seen as a response to the 1992 Earth Summit and its Convention on Biological Diversity that emphasise the preservation of forests for halting biodiversity loss.

¹⁸ Ibid. Principle 2, Criterion 2.2..

¹⁹ Ibid. Principle 2..

²⁰ Ibid. Principle 1 Criterion 1.1.

²¹ Izawati Wook, “The Rights of the Orang Asli in Forests in Peninsular Malaysia: Towards Justice and Equality” (Victoria University, 2014).

²² “Malaysian Criteria and Indicators for Forest Management Certification [MC&I (2011)]”; Idrus, “The Discourse Of Protection And The Orang Asli In Malaysia.”; Nicholas, *Orang Asli: Rights, Problems, Solutions*; Nor et al., “Mengapa Kami Jadi Begini? Konflik Masyarakat Orang Seletar Dan Pembangunan Iskandar, Johor Bahru, Malaysia (conflicts in the Iskandar Development Region: The Case of Johor Bahru’s Orang Seletar, Malaysia)”; “Report of the National Inquiry into the Land Rights of Indigenous Peoples.”

²³ Wook, “The Rights of the Orang Asli in Forests in Peninsular Malaysia: Towards Justice and Equality.”

²⁴ “Report of the National Inquiry into the Land Rights of Indigenous Peoples.”

An interesting law reform exercise has taken place in India through the introduction of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA) which addresses the claim of the indigenous peoples to forest resources. Using a comparative approach, this article analyses processes and mechanisms adopted in the relevant law reform in India and its relevance to Malaysia. Comparative perspectives provide models for practical applications of indigenous peoples' rights. These assist policy analysis through learning from the successes and failures of other jurisdictions in improving legal reform.

RESEARCH METHODOLOGY – COMPARATIVE LAW CONSIDERATION

This article adopts the comparative legal methodology with the aim to look for and learn the practical approaches implemented in another jurisdiction with the ultimate aim to assess the Malaysian law and to consider the mechanisms that could be suitable to the home jurisdiction.

Zweigert and Kotz defined comparative law as 'an intellectual activity with law as its object and comparison as its process'.²⁵ Comparative research is part of a non-doctrinal approach which takes into account the extra dimension of the sources of law in other jurisdictions.²⁶ It has followed well-established paths comparing official law, or law in the books or legal doctrine, of one jurisdiction with another. It has often involved an appreciation of differences in legal cultures and processes which may lead to similar rules being applied in different ways in different legal systems. The method has long served as an aid to law reform.²⁷ It is used as a construction tool to fill in gaps in legislation or in case law providing the background to

²⁵ Konrad Zweigert, Hein Kötz, and Tony Weir, *Introduction to Comparative Law* (Clarendon Press Oxford, 1998), 2.

²⁶ Terry C Hutchinson, *Researching and Writing in Law* (Lawbook Co./Thomson Reuters, 2010), 117..

²⁷ Peter De Cruz, *Comparative Law in a Changing World* (London and New York: Routledge Cavendish, 207AD), 20. describes that in various legal systems for centuries, one of the strategies for new legislation and reforms of the law has been based on the comparative method.

legal rules and concepts that have been transplanted from other jurisdictions.²⁸

India and Its Relevance to Malaysia

In the choice of jurisdictions in a comparative exercise, Grossfeld suggested several factors to determine comparability: cultural, political and economic components of a society, particularly the relationship that exists between the State, its citizens and its value system.²⁹ Others stressed choosing jurisdictions which are at similar stages of political, economic and social development or at the evolutionary stage.³⁰ This includes historical contexts and the influence of international law on national legal systems.³¹ Another factor to consider is the familial relationships of the legal systems, that is, the type of legal systems in the jurisdictions chosen.³² Obvious differences need to be acknowledged to achieve useful comparisons. Nevertheless, De Cruz proposed that the ultimate test is in the main aims and objectives in making the comparisons.

In consideration of the comparability, similar to Malaysia, India is a common law jurisdiction. Both are developing Asian countries with a sizable tropical forest cover. They share some common political and legal features. In both regions, as former colonies or indirectly ruled territories of Britain, their land, forestry institutions and related management practices have experienced similar imperatives of British imperialism as well as the globalising economy over the past two centuries.³³ Lands and forests became the object of formal management around the beginning of the 19th century so as to prevent shortages of timber and other commercially valuable forest resources. Forests were managed for a variety of needs ranging from

²⁸ Ibid., 22.

²⁹ Ibid., 121.

³⁰ Ibid., 226–227.

³¹ Hutchinson, *Researching and Writing in Law*, 120–121. Hutchinson, *Researching and Writing in Law*, 120-1.

³² Scholars divide general categories of legal systems into five: common law, civil law, customary law, Muslim law and mixed legal systems.

³³ Haripriya Rangan and Marcus B Lane, “Indigenous Peoples and Forest Management: Comparative Analysis of Institutional Approaches in Australia and India,” *Society & Natural Resources* 14, no. 2 (2001): 145–60; Jeyamalar Kathirithamby-Wells, *Nature and Nation: Forests and Development in Peninsular Malaysia* (NUS Press, 2005).

subsistence requirements for native inhabitants, to regional climate stability, infrastructure development and commercial demand.

India directly influenced the development of law in Malaysia and this continues, to a certain extent, until the present day. Historically, the British practice in India directly influenced British policies in the Malay Peninsula. These include the administration and governance system such as land and resources as well as the laws on the constitution and administration, criminal laws and the related procedures.

India also has a comparable differentiation of indigenous ethnic groups to Malaysia. In relation to the category of 'natives', groups considered as indigenous to the land, the aboriginal peoples in Malaysia are in a similar position to the 'tribes' or 'tribal groups' in India who commonly live within or near forest areas. The tribes, along with the territories they occupied, were subject to customary law that governed their access to productive resources and territorial organisation.³⁴ In Malaysia, from the British construct during the colonial period, the term 'natives' in Malaysia refers to the Malays. In the *Federal Constitution*, however, the word 'native' specifically refers to the natives in Sabah and Sarawak.

Analogous to the experience of the Orang Asli in Malaysia but on a greater scale, the Forest Act 1927, the Wildlife (Protection) Act 1972 and the Forest Conservation Act 1980 created various reserves without proper recognition of the interests of the tribal groups, criminalised their livelihoods and contributed to the marginalisation of millions.³⁵ In effect, similar to the position in Malaysia, the tribal people are considered as having no legal rights to the land and resources. In Malaysia, although the British legal system was meant to preserve customary law, the colonial courts altered processes for the expressions of conflict and litigation. As Bose described, the idea of land ownership was enforced in place of complex communal relationships as a means of isolating tax revenue responsibility and

³⁴ Rangan and Lane, "Indigenous Peoples and Forest Management: Comparative Analysis of Institutional Approaches in Australia and India," 148.

³⁵ Kundan Kumar and John M Kerr, "Democratic Assertions: The Making of India's Recognition of Forest Rights Act," *Development and Change* 43, no. 3 (2012): 745–755.

proprietary privilege with respect to the means of agriculture production.³⁶

INDIA LAW REFORM ON THE FOREST RIGHTS OF THE NATIVES

In its reform of forest tenure in 2006, India specifically acknowledged the rights of the tribal groups in the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA).³⁷ Enacted in response to a nationwide mobilisation of marginalised forest dwellers and their advocates, the legislation emerged out of a rights-based development strategy that challenges duty-bearers (e.g. government officials) to reinstate the rights of marginalised tribal people – the rights holders – and empowers them to claim their rights and responsibilities.³⁸

The rationales for recognition are long occupation of the tribes within the forests, the need to address historical injustice and the acknowledgement of the significance of security of tenure for sustainable forest ecology.³⁹ This initiative was mainly to counter the growing threat of the Naxalite movement as part of a government engagement with the tribal people similar to the strategy adopted by the Malaysian colonial regime and governments in the early years of independence with the Orang Asli.⁴⁰

It provides for a framework within which to record the rights of forest dwellers; allowing them to continue occupying and cultivating forest land; guaranteeing them the right to collect, use and dispose of minor forest produce; and protecting traditional and customary rights including grazing and maintaining homesteads.

³⁶ Robert L Kidder, “Western Law in India,” *Sociological Inquiry* 47, no. 3-4 (1977): 155–80.

³⁷ No. 2 of 2007 (came into force on 31 December 2007). It extends to the whole of India except the states of Jammu and Kashmir. The Act is supplemented by *Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007* (came into force on 1 January 2008).

³⁸ Purabi Bose, “Individual Tenure Rights, Citizenship, and Conflicts: Outcomes from Tribal India’s Forest Governance,” *Forest Policy and Economics* 33 (2013): 2.

³⁹ The preamble of the FRA.

⁴⁰ Indranil Bose, “How Did the Indian Forest Rights Act, 2006 Emerge?” (IPPG Discussion Paper, 2010), 23.

The beneficiaries of the Act are forest dwellers who primarily reside within, and depend on, forests for their livelihood. They can be Scheduled Tribes, that are tribes listed as such under s 342 of the *Constitution of India*;⁴¹ and other forest dwellers that are not identified as Scheduled Tribes but who have occupied the forest for at least three generations.⁴²

The Act recognises 12 types of rights of the Scheduled Tribes living in forests and other traditional forest dwellers.⁴³ The rights, which can be individual or communal, include rights over forest land, rights over non-timber forest products, rights to protect and manage community forest reserves and 'community tenures of habitat for primitive tribal groups and pre-agricultural communities'.⁴⁴ The rights are 'heritable but not alienable'.⁴⁵ In relation to forest land, a community has the right to hold, live on and cultivate the land.⁴⁶ However, the extent of the land area allowed for claim is limited to not more than four hectares regardless of individual or communal holdings.⁴⁷ In relation to forest produce, they have rights to own and access and to collect, use and dispose of non-timber forest produce that they traditionally collect within or outside village boundaries;⁴⁸

⁴¹ The *Constitution of India* provides for reservation of seats for the Scheduled Tribes in both legislative assemblies of states and parliament, ie, in the House of People (Lok Sabha) according to the proportion of the total population: (s 330, 332 the *Constitution of India*). A National Commission for Scheduled Tribes is also established under the s 338A of the *Constitution* (inserted in 2003) to investigate into matters and complaints relating to the Scheduled Tribes.

⁴² S 2(c), (o) FRA.

⁴³ S 4, FRA: 'Forest dwelling Scheduled Tribes' refers to members or community of the Scheduled Tribes who primarily reside in and depend for their livelihood on the forest. It also includes pastoralist communities. 'Other traditional forest dweller' refers to members or community who have lived in and depended for their livelihood on forest land for at least three generations (S 2 FRA).

⁴⁴ Section 3(1), FRA; Kumar and Kerr, "Democratic Assertions: The Making of India's Recognition of Forest Rights Act."

⁴⁵ S 4(3), FRA.

⁴⁶ S 3(a) FRA. For the Scheduled Tribes, they must have occupied the forest land prior to 13 December 2005 (s 4(3)). In the case of forest dwellers other than Scheduled Tribes, the conditions for the entitlement are: they primarily reside in and depend on the forest land; and have occupied the land for three generations, ie, 75 years (s 2 FRA).

⁴⁷ S 4 (6) FRA.

⁴⁸ S 3(1)(c) FRA.

and to fish, graze and other resource access,⁴⁹ but excluding rights to specified wild animals.⁵⁰

In an effort to balance the interests of the holders of these rights in the forest and the environment, the rights holders are also held responsible under the legislation for the sustainable use of forests and the conservation of biodiversity.⁵¹ The *Gram Sabha*, a local village level authority, is responsible for environmental protection and regulates access to community forest resources and prevents any activity which 'adversely affects the wild animals, forest and the biodiversity'.⁵² The guarantee of communities' right to manage, protect and conserve forests⁵³ is another measure that may promote environmental interests for the benefit of both the communities themselves as well as the wider community.

Resettlement of the forest dwellers from areas considered as critical wildlife habitats in protected areas is allowed. This is subject to the free and informed consent of the *Gram Sabha* in the area and a written compensation package offered to secure the community's livelihood.⁵⁴

The Process

The FRA and the Rule passed in 2007 under the FRA create a framework for claim determinations. Parts of the Rule, however, contradict its parent Act and some provisions violate the rights protected by the Act.⁵⁵

⁴⁹ S 3(1)(d) FRA.

⁵⁰ S 3(1)(l). S 2(q) explains that the wild animals prohibited for hunting are the animals which are found wild in nature as specified under Schedules I to IV of the *Wildlife Protection Act 1971*.

⁵¹ These include the responsibility to protect wildlife, forests and biodiversity (S 5(d) and 5(d) FRA), adjoining catchments, water sources and other sensitive ecological resources (S 5(b) FRA).

⁵² S 5(a)-(d) FRA.

⁵³ S 3(1)(i) and 5 FRA.

⁵⁴ S 4(2) (a)-(e) FRA.

⁵⁵ *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007* was notified on 1 January 2008. An instance of its contradictory provision to the FRA is, under Rule 14(3), the Sub-Divisional Level Committee has been empowered to reject the claims without any explanation.

Generally, the process of determination is to be initiated at the community level by the *Gram Sabha*.⁵⁶ It has to adequately represent different sections of the communities.⁵⁷ It is to determine the nature and extent of the rights within the limits of its local jurisdiction. It is also to receive claims, consolidate and verify them and prepare a map delineating the area of a claim. It is then to pass a resolution on its determination. The resolution is to be notified to the Sub-Divisional Level Committee under the relevant state government. This process allows for direct claim by *Gram Sabhas* to state authorities.

By contrast, the Rule requires establishment of a Committee of the *Gram Sabha*, namely the Forest Rights Committee (FRC). The Committee of 10 to 15 members is drawn from the representatives of the *Gram Sabha*. The meeting for the election is to be convened by the *Gram Panchayat*, a higher authority for several villages.⁵⁸ The FRC, under the Rule, has broad powers including handling and verifying the claim process by *Gram Sabhas*.

In many states, the Forest Rights Committees (FRCs) have not been constituted at village level or habitat level but at the Panchayat level. Bose suggested that the *Gram Sabhas* required by this Act should be at the level of the actual settlements, that is, the hamlets or, at most, the revenue villages, small administrative regions which

⁵⁶ Section 6(1) FRA. S 2(g) FRA specifies that the *Gram Sabha* is 'a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women'. The *Gram Sabha* is the village council comprising the assembly of all adult residents of a village) as the primary centre of tribal governance. In 1996, the *Panchayats (Extension to the Scheduled Areas) Act 1996*, was enacted by the Indian Parliament. The legislation recognized the rights of tribes to self-governance. However, the actual implementation of the PESA has been far from satisfactory: Lovleen Bhullar, 'The Indian Forest Rights Act 2006: A Critical Appraisal' (2008) 4(1) *Law, Environment and Development Journal* 20, 22.

⁵⁷ S 4(2) of the 2007 Rule: '... where there is a heterogeneous population of Scheduled Tribes and non Scheduled Tribes in any village, the members of the Scheduled Tribe, primitive tribal groups (PTGs) and pre-agricultural communities shall be adequately represented'.

⁵⁸ S 3(1) of the 2007 Rule. There are three levels of *Gram Sabhas*: the assembly of all voters in a *Gram Panchayat*; as the assembly of all the residents of a revenue village, or as the assembly of the residents of a hamlet. A typical *Gram Panchayat* includes multiple revenue villages, which in turn include multiple hamlets.

consist of several hamlets.⁵⁹ The constitution of a FRC under the influence of the *Gram Panchayat*, the higher authority with a broader territorial jurisdiction, allows interference by interested parties, with better connections to state governments, to exploit the procedures for their own interests.⁶⁰ Consequently the process has failed to provide adequate representation from the village level.⁶¹

Under the FRA, as noted, any resolution reached at the *Gram Sabha* level is brought to a higher-level committee, the Sub-Divisional Level Committee (SDLC).⁶² The Committee comprises forest and tribal welfare officers and representatives of the communities at the level of the *Gram Panchayat* appointed by the relevant state government. It should have broad powers including settling disputes between *Gram Sabhas*; in respect to any claims, to examine and collate resolutions in their areas; and to prepare a record of the resolutions to be forwarded to the District Level Committees⁶³ for final determination and preparation of records.⁶⁴

The District Level Committee (DLC) comprises the District Collector, forest and tribal welfare officials and representatives of the communities from the *Panchayat* level.⁶⁵ The decision of the DLC is final and binding.⁶⁶ A record of any rights will be made in the relevant government records.⁶⁷ A state-level Monitoring Committee is

⁵⁹ Bose, "Individual Tenure Rights, Citizenship, and Conflicts: Outcomes from Tribal India's Forest Governance."

⁶⁰ Ibid. Bose found that the majority of officials met in the study of the implementation of the FRA expressed the view that individual forest tenure claims were marred with corruption. A report by the Asian Indigenous & Tribal Peoples Network (AITPN) also found that the appointment of the Committee is dominated and influenced by political persons who are working under the influence of vested interests; some FRC constituted at *Gram Sabha* level are rejected. Asian Indigenous and Tribal Peoples Network, *The State of the Forest Rights Act: Undoing of Historical Injustice Withered* (New Delhi: Asian Indigenous & Tribal Peoples Network, 2012), 8.

⁶¹ Ibid., 36. Many hamlets and villages are not represented within the FRC established at Panchayat level. See also, "Campaign for Survival and Dignity, The Current Situation," accessed November 3, 2015, <http://www.forestrightsact.com/current-situation>.
<<http://forestrightsact.com/current-situation>>.

⁶² S 6(2) FRA.

⁶³ S 6 of the 2007 Rule.

⁶⁴ S 6(3) to s 6(9) FRA 2006.

⁶⁵ S 7 of the 2007 Rule.

⁶⁶ S 6(6) FRA; S 8 of the 2007 Rule.

⁶⁷ S 8(f) of the 2007 Rule.

also to be established by the state, among others, to monitor the whole process of recognition and vesting of rights.⁶⁸

In September 2012, a guideline was issued by the Ministry of Tribal Affairs, among others, defining community forest rights and making clarifications that support decentralisation of non-timber forest produce governance. The new guideline also provides a standard claims and title format for recognition of rights pertaining to protection and conservation of community forest resource.⁶⁹

The FRA in Practice

As of 31 January 2012, individual claims to forest land numbering 3,168,478 had been filed under the law in different states and were being processed and 1,251,490 titles have been issued.⁷⁰ However, the reform has many limitations. It is poorly implemented in most states, with the forest bureaucracy maintaining control.⁷¹ The local democratic processes of rights settlement involving the *Gram Sabha* seem to have been bypassed in most cases.⁷² This is seen as a failure to empower and involve local communities as equal partners.⁷³ The meaningful participation of peoples with a real stake in all forest

⁶⁸ S 9-10 of the 2007 Rule.

⁶⁹ Pune Kalpavriksh and Bhubaneshwar Vasundhara, *Community Forest Rights under Forest Rights Act: Citizens' Report*, ed. S. Desor (Delhi: Oxfam, Community Forest Rights Learning and Advocacy Process, 2013), 18.

⁷⁰ Indigenous and Network, *The State of the Forest Rights Act: Undoing of Historical Injustice Withered*.

⁷¹ Kinsuk Mitra and Radhika Gupta, "Indigenous Peoples' Forest Tenure in India," in *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia*, ed. Jayantha Perera (Mandaluyong: Asian Development Bank, 2009), 204; Kumar and Kerr, "Democratic Assertions: The Making of India's Recognition of Forest Rights Act," 759; Lovleen Bhullar, "Indian Forest Rights Act 2006: A Critical Appraisal, The," *Law Env't & Dev. J.* 4 (2008): 24; Indigenous and Network, *The State of the Forest Rights Act: Undoing of Historical Injustice Withered*, 9..

⁷² Kumar and Kerr, "Democratic Assertions: The Making of India's Recognition of Forest Rights Act," 759. AITPN also reports that in many cases neither the Forest Rights Committee (FRC) nor *Gram Sabhas* were found to be involved significantly at any stage in the implementation of the FRA Indigenous and Network, *The State of the Forest Rights Act: Undoing of Historical Injustice Withered*, 7.

⁷³ Dinesh Pratap, "Community Participation and Forest Policies in India An Overview," *Social Change* 40, no. 3 (2010): 235; Bose, "Individual Tenure Rights, Citizenship, and Conflicts: Outcomes from Tribal India's Forest Governance."

matters affecting the community is an important element in achieving the law's objective, both for the interests of the community affected as well as the wider society.

A number of states have not implemented the Act.⁷⁴ Actions by other states have frustrated the objective of the legislation in protecting the tribal peoples' rights. They include: issuance of rules in violation of the legislation; interference in the claims process; harassment; and, active discouragement of claims.⁷⁵ There are also a high rejection of claims; disposal of petitions without proper hearings; denial of opportunities to appeal against the decision; and, improper issuance of titles.⁷⁶ Studies indicate that the implementation of forest tenure reform has promoted the individualisation of forest right claims. The state governments emphasise individual rights in occupied lands rather than communal rights in community-controlled forest areas vested in the states. This has resulted in an increase in tribal inter-household-level conflicts and further breaches of the customary rights of the marginalised tribal communities.⁷⁷ As a recent report remarks, the implementation of the reform process has ended

⁷⁴ Indigenous and Network, *The State of the Forest Rights Act: Undoing of Historical Injustice Withered*, 12.

⁷⁵ Bose, "Individual Tenure Rights, Citizenship, and Conflicts: Outcomes from Tribal India's Forest Governance," 12. In India, reports and summary on implementation of the law is available at "Campaign for Survival and Dignity, The Current Situation." See also, the Council for Social Development's Summary Report on the Implementation of the Forest Rights Act (September 2010), available at "State of Implementation of the Forest Rights Act - Summary Report," accessed November 3, 2012, [http://forestrightsact.com/component/k2/item/15.Charge Sheet on Government's Violations of Forest Rights](http://forestrightsact.com/component/k2/item/15.Charge%20Sheet%20on%20Government's%20Violations%20of%20Forest%20Rights), available in <http://forestrightsact.com/current-situation/75-chargesheet-on-governments-violations-of-forest-rights-act>. Accessed November, 5 2012.

⁷⁶ Indigenous and Network, *The State of the Forest Rights Act: Undoing of Historical Injustice Withered*, 8–9.

⁷⁷ Kumar and Kerr, "Democratic Assertions: The Making of India's Recognition of Forest Rights Act," 758; "Campaign for Survival and Dignity, The Current Situation." it highlighted that, in most areas the state and central governments have made concerted efforts to deny or ignore these community rights and to instead treat the Act as if it is purely about individual land rights. Bose, "Individual Tenure Rights, Citizenship, and Conflicts: Outcomes from Tribal India's Forest Governance": research on Bhil tribal villages in Rajasthan found that the forest tenure reform promoted the individualisation of forest right claims – thereby increasing Bhil tribal inter-household-level conflicts – and that households' forest land tenure claims relate primarily to the formal recognition of their citizenship rights.

up perpetuating historical injustices in the loss of more land by tribal people.⁷⁸ Furthermore, the forest rights of hunter-gatherers,⁷⁹ shifting cultivators and nomadic pastoralists continue to be neglected.⁸⁰ There is also lack of implementation of the FRA in protected areas.⁸¹

Furthermore, interventions by Indian courts to protect tribal rights from violation through executive action appear to have been very unsuccessful.⁸² There has also been considerable political violence about the rights of tribal people with the Communist Party of India (Maoist) engaged in armed resistance to developments which have threatened to dispossess tribal people particularly in north eastern India.⁸³

Nevertheless, the legislation represents a significant change in Indian law and practice on tribal peoples' rights.⁸⁴ It provides a foundation on which to build. In a recent Supreme Court decision, drawing upon the FRA, it was held that the indigenous peoples have the final decisions on plans for mining on their land.⁸⁵ In a public interest litigation filed by a group of NGOs, the Gujarat High Court ordered the state government to strictly adhere to the FRA and its rules.⁸⁶ At an executive government level, the Ministry of Tribal

⁷⁸ Indigenous and Network, *The State of the Forest Rights Act: Undoing of Historical Injustice Withered*.

⁷⁹ In India, hunter-gatherers are known as a 'particularly vulnerable tribal group' (PTG) or earlier referred to as 'primitive tribal group'.

⁸⁰ Kalpavriksh and Vasundhara, *Community Forest Rights under Forest Rights Act: Citizens' Report*, 10., 10.

⁸¹ Kalpavriksh and Vasundhara, *Community Forest Rights under Forest Rights Act: Citizens' Report*.

⁸² Gethin Chamberlain, "'Human Safaris' to End for Andaman Tribe," *The Guardian*, January 27, 2013.

⁸³ Arundhati Roy, *Broken Republic: Three Essays* (Penguin UK, 2011); Aditya Nigam, "To Break a Siege: Justin Podur," *Kafila.org*, accessed November 3, 2015, <http://kafila.org/2013/04/03/to-break-a-siege-justin-podur/>.

⁸⁴ Kalpavriksh and Vasundhara, *Community Forest Rights under Forest Rights Act: Citizens' Report*, 10; Jayantha Perera, "Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006: A Charter of Forest Dwellers' Rights?," in *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia*, ed. Jayantha Perera (Mandaluyong: Asian Development Bank, 2009).

⁸⁵ "India: Landmark Supreme Court Ruling a Great Victory for Indigenous Rights | Amnesty International," accessed November 3, 2015, <https://www.amnesty.org/en/latest/news/2013/04/india-landmark-supreme-court-ruling-great-victory-indigenous-rights/>.

⁸⁶ "State Must Follow Act for Forest Rights of Tribals: Hc," *Indian Express*, May 4, 2013.

Affairs has also taken up a proactive role in advocacy and promoting the FRA for better implementation of the new legislation.

CONCLUSION – LESSON FOR MALAYSIA

The article surveys the approach taken by India to address the resource rights of the indigenous peoples within the jurisdiction. The development in this jurisdiction provides a model of practical application on how to approach the matter of indigenous peoples' rights, in terms of contents and possible mechanisms to be used.

The relevance and comparability of this jurisdiction with Malaysia are also considered. As India has similar economic, political and social status to Malaysia, and also practices common law, it is considered as suitable for comparison.

Summarily, the law reform in India, the FRA, provides express acknowledgement of the rights of the indigenous groups to land and resources. Express statutory recognition is significant as it is a clearer written form of law which facilitates understanding and enforcement. Legislation is a 'means through which legal norms come into force and have effect'.⁸⁷ Therefore it helps to ensure that the norms are respected by all members of society.

The legislation also defines the content of the rights including ownership to and use of land traditionally used by the peoples and access to resources including forest produce. The resource rights recognised by the legislation are restricted to non-timber forest produce traditionally accessed. The limit is access to some specified wild animals on conservation and environmental reasons.

Besides, it introduced a framework for claim determination within which to record the rights of forest dwellers; allowing them to continue occupying and cultivating forest land; guaranteeing them the right to collect, use and dispose of minor forest produce; and protecting traditional and customary rights including grazing and maintaining homesteads. The process generally aims to provide for adequate representation from the communities involved aiming towards decentralisation of the resource governance. However, as

⁸⁷ Lourens Du Plessis, "The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Exploratory Observations," *PER: Potchefstroomse Elektroniese Regsblad* 14, no. 4 (2011): 93.

discussed, the purpose may be hampered during the implementation due to various reasons.

Resettlement from their traditional areas is only allowed for communities living in areas considered as critical wildlife habitats in protected areas. It is however subject to the free and informed consent of the *Gram Sabha* in the area and a written compensation package offered to secure the community's livelihood.

Apart from the recognition of rights accrued to the rightful communities, the legislation also provides for responsibility of the communities for the sustainable use of forests and the conservation of biodiversity. This may help to promote environmental interests for the benefit of both the communities themselves as well as the wider community. The legislation acknowledges the significance of security of tenure for sustainable forest ecology.

To conclude, the FRA represents a significant change in Indian law and practice on tribal peoples' rights. It provides a foundation on which to build. It has paved the way for greater protection in laws to address the historical injustice faced by the indigenous peoples. The approach taken may be useful to other jurisdictions, including Malaysia, which face the same problem. The manner that the substance or the contents of the rights recognised, the responsibilities of parties spelt out, the process mechanisms that are provided by the Indian legislation, as well as the problems faced in the enforcement of the law should be considered by Malaysia in its reform exercise.

The conflicts in India over the introduction of the FRA highlight the need for careful planning of an institutional and policy framework as well as proper institutional capacity building of the indigenous communities. In India, bureaucratic resistance, lack of political will and corruption, have marred the processes. This is a lesson for any law reform proposal, especially in Malaysia which shares many similarities with these jurisdictions.

This analysis, which includes the significant elements that were incorporated in the law reform in India, as well as the problem encountered by the jurisdiction in its implementation, may give a perspective in the effort that is being undertaken by the government to address the issue on land rights of the indigenous peoples in Malaysia as reflected by the recent establishment of the Cabinet Committee for the Land Rights of Indigenous Peoples.⁸⁸

⁸⁸ Fong, "Cabinet Forms Committee on Indigenous Land Rights."