

## **THE ORIGINS OF THE TRUST DOCTRINE FOR THE INDIGENOUS PEOPLES: A COMMENTARY FROM THE MALAYSIAN PERSPECTIVE**

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### **ABSTRACT**

The Trust Doctrine governs the fiduciary relationship between the state and indigenous peoples, in which the state acts as a trustee for the benefit of its indigenous peoples. However, many states have failed to fulfil their duty and have acted oppressively towards the indigenous peoples. This study critically examines the background and origins of the Trust Doctrine from the United States, its practical application in the state-indigenous relationship, and the efforts made towards a positive translation of the doctrine. In addition, the study explores the impact of a positive implementation of the Trust Doctrine in Malaysia and on the international stage, particularly in the context of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). By analysing the Trust Doctrine's origins, application, and impact, this study highlights the challenges and opportunities for the rights of indigenous peoples (Orang Asli) in Malaysia and beyond. The study emphasises the significance of transforming the Trust Doctrine into a meaningful tool for promoting and protecting the rights of indigenous peoples, while also recognising its potential for environmental protection. Ultimately, this study contributes to the ongoing global discussion on the rights of

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indigenous peoples and the need for more effective state-indigenous relations. The research methodology employed in this study involves a doctrinal legal research approach and utilises the content analysis method to gather perspectives from the international context and apply them to the Malaysian context.

**Keywords:** Legal History, Indigenous Peoples, Trust doctrine, Aboriginal Peoples Act 1954, UNDRIP.

## **ASAL USUL DOKTRIN AMANAH ORANG ASLI: ULASAN DARI PERSPEKTIF MALAYSIA**

### **ABSTRAK**

Doktrin Amanah (Trust Doctrine) menjaga hubungan fidusiari antara negara dan orang asli, di mana negara bertindak sebagai pemegang amanah untuk faedah orang aslinya. Namun begitu, banyak negara gagal menunaikan kewajipan mereka dan bertindak zalim terhadap orang asli. Kajian ini secara kritis mengkaji latar belakang dan asal usul Doktrin Amanah daripada Amerika Syarikat, aplikasi praktikalnya dalam hubungan negeri-peribumi, dan usaha yang dilakukan ke arah terjemahan positif doktrin tersebut. Selain itu, kajian ini meneroka kesan pelaksanaan positif Doktrin Amanah di Malaysia dan di peringkat antarabangsa, khususnya dalam konteks Deklarasi Pertubuhan Bangsa-Bangsa Bersatu mengenai Hak Orang Asal (UNDRIP). Dengan menganalisis asal usul, aplikasi dan impak Doktrin Amanah, kajian ini menyerlahkan cabaran dan peluang untuk hak orang asli (Orang Asli) di Malaysia dan seterusnya. Kajian ini menekankan kepentingan mengubah Doktrin Amanah menjadi alat yang bermakna untuk mempromosikan dan melindungi hak orang asli, di samping mengiktiraf potensinya untuk perlindungan alam sekitar. Akhirnya, kajian ini menyumbang kepada perbincangan global yang berterusan mengenai hak orang asli dan keperluan untuk hubungan negara-peribumi yang lebih berkesan. Kajian ini mengguna pakai penyelidikan undang-undang secara doktrinal dan juga metod analisis kandungan bagi mendapatkan perspektif antarabangsa tentang tajuk kajian dan mengguna pakainya dalam konteks negara Malaysia.

**Kata Kunci:** Sejarah Undang-Undang, Orang Asli, Doktrin Amanah, Akta Orang Asli 1954, UNDRI.

## INTRODUCTION

The Westphalian concept of nation-states<sup>1</sup> defines the borders of modern states, granting each state the power and sovereignty to enforce its laws within its territory. It is founded on the ideas of territorial integrity, state sovereignty, and non-interference in domestic affairs. According to this theory, states are acknowledged as the main actors in the international system, with each having exclusive control over a specific region and the freedom to manage their internal affairs independently from the rest of the world. The historical and ongoing experiences of indigenous communities worldwide indicated that this system has often resulted in the imposition of state laws, policies, and practices that do not respect the cultural and territorial rights of indigenous communities worldwide, leading to conflicts and tensions between indigenous peoples and the state.<sup>2</sup> In Malaysia, the Orang Asli, the indigenous peoples of the Malaysian Peninsular, have been considered beneficiaries under the Aboriginal Peoples Act 1954 (Act 134). However, despite being bound by the concept and philosophy of the Trust Doctrine, the state has infringed upon the trust relationship established between it and the Orang Asli, resulting in conflicts and tensions between the two parties. By examining reports and assessments from UN bodies such as the United Nations Permanent Forum on Indigenous Issues (UNPFII) and the Special Rapporteur on the Rights of Indigenous Peoples, one can find evidence of conflicts and tensions between states and indigenous communities worldwide. These reports often highlight cases of land dispossession, lack of consultation, discrimination, and the disregard for cultural and territorial rights of indigenous peoples.<sup>3</sup> The Trust Doctrine emerged in the United States following numerous armed conflicts between the state and the indigenous peoples in the early 20th century. Originating from the cases known as the Marshall Trilogy, the courts established a relationship between the parties based on trust, rather than imposing law and authority over indigenous peoples.<sup>4</sup> The Trust Doctrine posits that the state acts as a trustee for its indigenous peoples, who are the beneficiaries. Under the legal concept of trust, trustees owe a fiduciary duty to their beneficiaries. A fiduciary is defined as “someone who has undertaken to act for and on behalf of another in a particular manner in circumstances which give rise to a relationship of trust and confidence”.<sup>5</sup> A fiduciary duty is considered the highest standard of care at either equity or law, as described in a case “at a level higher than that trodden by the crowd”.<sup>6</sup>

Despite numerous scenarios<sup>7</sup> suggesting a connection between trustees and beneficiaries under the Trust Doctrine, the indigenous peoples have not been adequately protected. This study aims to examine the background and origins of the Trust Doctrine and its actual application in the state-indigenous relationship in Malaysia. By utilising doctrinal legal research methodology and content analysis, the study seeks to identify the challenges faced by the Orang Asli in the current legal system and how the Trust Doctrine can be positively translated to ensure the protection of their cultural and territorial rights. Additionally, this study explores the impact of a positive translation of the Trust Doctrine on the international stage, particularly in light of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Malaysia's acceptance of it. Through this examination, the study highlights the need for a more nuanced and culturally sensitive approach toward indigenous peoples' rights and the need to translate the Trust Doctrine into a practical legal framework that safeguards their rights.

This article utilises a doctrinal legal research methodology, specifically employing content analysis through library research. The data used in this study were gathered from a wide range of sources, including international treaties, judicial decisions, decided cases, policy papers and reports, and articles on related issues. By reviewing the decisions of different jurisdictions, particularly in the United States, this study analyses the legal concept or principle of trust in the higher sense concerning indigenous people. Through the use of content analysis, the researchers were able to analyse and interpret the information gathered from these sources, which allowed for a more comprehensive understanding of the topic at hand.<sup>8</sup> In particular, this paper focuses on the concept of the Trust Doctrine in the higher sense in light of the rights of indigenous people and the State.

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<sup>7</sup>Such as the entry into treaties and agreements, the promulgation of specific laws and policies, the inclusion of consultation and free, prior and informed consent (FPIC), and the recognition of traditional knowledge. See also Stavenhagen, "Report of The Special Rapporteur,".

<sup>8</sup> Following the method adopted by Abdul Ghafur Hamid, "The Principle That the Land Dominates the Sea in The Context of South China Sea Disputes: A Critical Appraisal," *IIUM Law Journal* 30, no. 2 (2022): 49–75, <https://doi.org/10.31436/iiumlj.v30i2.742>.

The article is structured into several sections, starting with an introduction that provides an overview of the Westphalian concept of nation-states and the challenges it poses for indigenous communities. The subsequent section offers a brief review of the Trust Doctrine as enunciated in the American cases concerning indigenous peoples' rights, followed by an analysis of the application of the said doctrine under the Malaysian legal framework. Finally, the article concludes with a summary of the contributions and implications of this research, highlighting the significance of a positive translation of the Trust Doctrine in promoting and protecting the rights of indigenous peoples. The content analysis approach utilised in this study provides a nuanced understanding of the complexities involved in the state-indigenous relationship and offers insights into the legal and policy changes necessary to ensure greater equity and justice for the marginalised communities.

## THE TRUST DOCTRINE

Throughout history, powerful nations have often subjugated the so-called “inferior” peoples to their rule, and colonialism is a prime example of this.<sup>9</sup> The effects of forced subjugation on the conquered societies have been varied, including extermination, assimilation, and dependence on the conqueror. However, in the case of dependence, a unique co-existential relationship of trust between the parties emerged, allowing the indigenous peoples and the dominant power, now recognised as a state, to develop a relationship based on trust. But this trust relationship often leads to the dominant state exerting authority over the affairs of the indigenous peoples solely because the state considers them inferior, and this is where the Trust Doctrine comes into play.<sup>10</sup> In the context of the relationship between states and indigenous peoples, the Trust Doctrine refers to the legal responsibility of the state to act as a fiduciary for the benefit of the indigenous peoples. This means that the state is expected to act in their best interests, protect their rights, and manage their assets (such as land and resources) as a trustee would manage property for a beneficiary. The Trust Doctrine is based on the idea that indigenous peoples have been historically oppressed and dispossessed by colonial powers, and that the state has a special responsibility to protect their interests and ensure their well-being. The Trust Doctrine has been applied in various legal contexts, including in the United States, Malaysia, and other jurisdictions.

The origin of the Trust Doctrine is unclear,<sup>11</sup> but scholars have suggested that it may have originated during the Age of Discovery or as a result of influential United States Supreme Court decisions made by John Marshall in the 1820s and 1830s.<sup>12</sup> Moreover, Daes suggested that the Trust Doctrine can be traced back to a series of international practices, including historical international documents, that provided a protectionist perspective on indigenous populations by states.<sup>13</sup> The international practices mentioned by Daes include the Covenant of the League of Nations,<sup>14</sup> the Charter of the United Nations,<sup>15</sup> and the International Labour Organisation Conventions No. 107<sup>16</sup> and 169.<sup>17</sup>

However, the term “indigenous” used in some of these documents differs from the current most acceptable working definition of indigenous peoples.<sup>18</sup>

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<sup>11</sup> David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Oklahoma: University of Oklahoma Press, 2001), 66.

<sup>12</sup> John Fredericks III, "America's First Nations: the origins, history and future of American Indian Sovereignty." *Journal of Law & Policy* 7 (1998): 347

<sup>13</sup> Erica Irene A. Daes, “Working Paper by The Chairperson Rapporteur Of The United Nations Working Group On Indigenous Populations,” UN Doc E/CN.4/Sub.2/AC.4/1996/2.

<sup>14</sup> Art. 22. Covenant of the League of Nations – members of the league accepted as a sacred trust to civilization the duty of promoting the well-being and development of the indigenous populations of those colonies and territories which remained under their control.

<sup>15</sup> Art. 73. The Charter of the United Nations.

<sup>16</sup> Convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, 1957.

<sup>17</sup> Convention on indigenous and tribal peoples in independent countries, 1989.

<sup>18</sup> Jose Martinez Cobo, “Study of the Problem of Discrimination Against Indigenous Populations,” UN Doc E/CN.4/Sub.2/1986/7 and Add.1-4.

Despite the differing opinions on the origin of the Trust Doctrine, it is clear that it has influenced the law in other jurisdictions, including Malaysia.<sup>19</sup> In the United States, the Trust Doctrine has determined the relationship between the government and indigenous peoples, and it has been applied to other jurisdictions as well.<sup>20</sup>

Although Francis Prucha has asserted that the Trust Doctrine is perhaps a mere “figment of the fertile imagination of the 1975-77 American Indian Policy Review Commission”,<sup>21</sup> it is widely accepted that trust relationships and responsibilities are legally incumbent on the federal government when they are spelled out in treaties.<sup>22</sup> Therefore, the Trust Doctrine plays a crucial role in shaping the relationship between states and indigenous peoples, and it is essential to examine its application in different jurisdictions to ensure the protection of indigenous peoples' rights. Despite the uncertainty as to its origin, this paper argues that the doctrine of trusteeship<sup>23</sup> originated in the United States during the 19th century through a series of court decisions. One of the most well-known cases is *The Cherokee Nation v. The State of Georgia*,<sup>24</sup> in which Chief Justice John Marshall of the United States Supreme Court ruled that Indian nations were “wards” to their federal guardian in the US law. The case arose when the Cherokee Nation sought an injunction from the Supreme Court to prevent Georgia from implementing certain laws on their reservation. The US Constitution granted Congress the power to regulate commerce with the Indian nations, and the Supreme Court held that since the Cherokee Nation was not a foreign nation but a “domestic dependent nation,” the injunction was not a matter of original jurisdiction and was therefore denied.<sup>25</sup>

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<sup>19</sup> Muhamad Sayuti Hassan, and Rohaida Nordin, "Political Participation of Aboriginal People (Orang Asli) in Peninsular Malaysia: Examining the Compatibility of the Aboriginal Peoples Act 1954 with UNDRIP Standards," *International Journal on Minority and Group Rights* 28.3 (2020): 493-513

<sup>20</sup> James Olson, "All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine," *Vermont Journal of Environmental Law*. 15 (2013): 135.

<sup>21</sup> Wilkins and Lomawaima, *Uneven Ground*, 66.

The notion of a guardian-ward relationship between the US federal government and Indian tribes was further established in the case of *Lone Wolf v Hitchcock*.<sup>26</sup> However, the subsequent case of *Worcester v Georgia*,<sup>27</sup> also decided by Marshall, started to address the issue in a more pragmatic and positive tone against the tribes. The case recognised that Indian tribes possessed inherent sovereignty. This sovereignty meant that treaties entered into by the Indian tribes with the US held the same weight as treaties negotiated with foreign nations. Justice McLean supported this viewpoint in his concurring yet condescending statement, arguing that such treaties should not be disregarded merely because they were made with an “uncivilised people” and emphasised that such treaties imposed equal obligations between the parties. McLean stated:

“...we have made treaties with them; and are those treaties to be disregarded on our part because they were entered into with an uncivilised people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us?”<sup>28</sup>

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<sup>22</sup> Francis P. Prucha, *The Indians in American Society: From the Revolutionary War to the Present* (Berkeley, University of California Press, 1985), 101.

<sup>23</sup> The doctrine is also known as the doctrine of trust and doctrine of fiduciary relationship. It is also has been referred to as the trust duty, trust relationship, trust responsibility, trust obligation, trust analogy, ward-guardian, and beneficiary-trustee.

<sup>24</sup> (1831) 30 U.S. 1

<sup>25</sup> In what is known as the Commerce Clause, the US Constitution empowered Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The Supreme Court was authorized to hear only matters of “original jurisdiction”, that is, matters expressly provided for in the Constitution. The Supreme Court held that the Cherokee Nation was not a foreign nation, rather a “domestic dependent nation” subject to the sovereignty of the United States federal government. Since the tribe was not a “state” or a “foreign nation”, the Supreme Court’s held that the motion for an injunction was not a matter of original jurisdiction and refused to grant the injunction.

<sup>26</sup> (1903) 187 U.S. 553.

<sup>27</sup> (1832) 31 U.S. 515.

<sup>28</sup> (1832) 31 U.S. 551-552.

The Trust Doctrine has been the subject of discussion in several cases, which have established a standard for its meaning. One such case is *Covelo Indian Community v FERC*,<sup>29</sup> where the court held that the trust principles that apply to private fiduciaries also govern the federal government's obligation to tribes. These principles include preserving and protecting trust property, acting fairly with utmost good faith, fairness, and justice, and exercising sound judgment and prudence.

For over 126 years, between 1778 and 1904,<sup>30</sup> the United States and the Indian tribes entered into numerous treaties covering various topics such as maintaining peace, conduct of war, regulating trade, jurisdiction of law, and resolving land issues. These treaties reflected the standards of the relationship between the United States and the Indian tribes, with many of them exhibiting the guardian-ward dynamic as identified by Marshall. For example, the Treaty of Holston granted the United States the authority to regulate trade, while requiring the Cherokee Nation to acknowledge protection from the United States.<sup>31</sup> It can therefore be inferred that the trust relationship between the parties also emanated from these treaties, as noted by Prucha.<sup>32</sup>

In conclusion, the Trust Doctrine plays a significant role in shaping the relationship between states and indigenous peoples, and it is essential to examine its application in different jurisdictions to ensure the protection of indigenous peoples' rights. Although the origin of the Trust Doctrine is uncertain, it is widely accepted that trust relationships and responsibilities are legally incumbent on the federal government when they are spelled out in treaties. The doctrine of trusteeship originated in the United States during the 19th century through a series of court decisions, which established a guardian-ward relationship between the US federal government and Indian tribes. The trust principles that apply to private fiduciaries also govern the federal government's obligation to tribes. The treaties entered into by the United States and Indian tribes reflect the standards of the relationship between the parties, with many exhibiting the guardian-ward dynamic identified by Chief Justice John Marshall. Therefore, it is essential to continue exploring and analysing the Trust Doctrine's application to ensure that indigenous peoples' rights are protected and respected.

## THE REALITY OF THE TRUST DOCTRINE

As mentioned above, the Trust Doctrine is a fundamental aspect of the relationship between the United States government and indigenous peoples. However, despite its positive yet condescending recognition, the doctrine is not regularly enforced at the governmental level. This reality is supported by historical evidence which shows that the state has consistently violated its trust obligations to the indigenous populations.<sup>33</sup>

The courts have consistently emphasised the duty of the United States government to deal fairly with the indigenous peoples. This duty imposes an “overriding duty” on the United States government to treat them fairly regardless of their location. Despite this, the state has failed to act as a fiduciary towards the indigenous peoples. As stated in *Morton v Ruiz*,<sup>34</sup> historical evidence suggested this failure. According to Wilkins, there are commentators who believe that the Trust Doctrine is a legal metaphor that has been employed to the detriment of the tribes.<sup>35</sup> In *Lyng v Northwest Indian Cemetery Protective Association*,<sup>36</sup> the United States Supreme Court allowed for the building of a logging road over sacred sites, showing that the state prioritised development over indigenous culture and religious beliefs. In that case, the destruction of sacred sites and consequently the religion of three small northern California tribes could not be stopped by the federal government’s Trust Doctrine or the First Amendment’s religious freedom clause. This decision is a direct assault on the protection and preservation of Indian sacred sites.<sup>37</sup>

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<sup>33</sup>Olson, “All Aboard,” 135.

<sup>34</sup>(1973) 415 U.S. 199 at 236.

<sup>35</sup>Wilkins and Lomawaima, *Uneven Ground*, 66.

<sup>36</sup>(1988) 485 U.S. 439.

<sup>37</sup>Alvin M. Josephy, Joane Nagel and Troy Johnson, *Red Power: American Indians Fight for Freedom* (Nebraska, University of Nebraska Press, 1999), 6.

Furthermore, historical treaties aimed at maintaining peace and ending hostility between the United States and the indigenous tribes have increasingly focused on establishing American dominance over them. The Treaty of New Echota is a prime example of a treaty that went against the Trust Doctrine and relationship.<sup>38</sup> This treaty led to the military relocation of most of the Cherokee people to the present-day Oklahoma, resulting in the death of around four thousand Cherokees due to logistical mismanagement by the United States Army.<sup>39</sup> This event, known as the Trail of Tears, is widely considered an act of genocide and a clear violation of the Trust Doctrine.<sup>40</sup> Furthermore, there are several historical examples that can be used to further illustrate the reality of the Trust Doctrine's implementation at the governmental level. The Indian Reorganisation Act of 1934 aimed to assist tribes but promoted assimilation and limited tribal sovereignty.<sup>41</sup> The Termination Era<sup>42</sup> led to land loss and cultural destruction. The Navajo Hopi Land Dispute involved unsuccessful attempts at relocation, causing home loss and community disruption.<sup>43</sup> The Standing Rock protests against the Dakota Access Pipeline highlighted inadequate consultation and disregarded tribal concerns.<sup>44</sup> These instances demonstrate ongoing challenges in land rights, self-determination, and cultural preservation for Native American tribes. These examples illustrate how the federal government has often failed to uphold its obligations under the Trust Doctrine and has frequently acted in ways that have harmed Native American tribes and their cultures. The reality of the Trust Doctrine is that it has been a largely symbolic concept that has not been consistently enforced or implemented in a way that truly benefits Native American communities.<sup>45</sup>

In conclusion, the reality of the Trust Doctrine's implementation at the governmental level is a bleak one. Despite its recognition, the state has consistently violated its obligations to the indigenous populations, and historical evidence serves as concrete proof. It is imperative to take immediate steps to address and rectify this issue to ensure that the Trust Doctrine is not merely a legal metaphor that has been employed to the detriment of the tribes.

## POSITIVE TRANSLATION OF THE TRUST DOCTRINE

The Trust Doctrine has been a crucial legal concept in protecting the rights and interests of the indigenous peoples in the United States. However, its implementation has often been criticised as a legal metaphor or a mere figment of imagination. Despite this, it is essential for the indigenous peoples to shift the negative perception of the doctrine to a positive one that benefits them. In this section, we will explore the positive translation of the Trust Doctrine that has been made possible through the actions of indigenous peoples in fighting for their rights. By examining relevant cases and events, we will see how

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<sup>38</sup> Treaty of New Echota, signed on 29 Dec 1835, United States–Cherokee (faction)(ratified March 1836).

<sup>39</sup>David E Wilkins, "'With The Greatest Respect and Fidelity:' a Cherokee Vision of the 'Trust' doctrine," *The Social Science Journal*34.4 (1997): 495-510.

<sup>40</sup> Alfred Cave, "Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830," *The Historian*65, no. 6 (2003): 1330-1353.

<sup>41</sup>Lawrence C Kelly, "The Indian Reorganization Act: The Dream and the Reality," *Pacific Historical Review* 44.3 (1975): 291-312.

<sup>42</sup>The Termination Era, also known as the Termination Policy, refers to a period in United States history from the 1940s to the 1960s when the federal government pursued a policy of terminating its relationships with Native American tribes. The policy aimed to assimilate Native Americans into mainstream American society and end their status as sovereign nations. See Charles F Wilkinson, and Eric R. Biggs, "The Evolution of the Termination Policy," *American Indian Law Review* 5.1 (1977): 139-184

<sup>43</sup>David F Aberle, "The Navajo-Hopi Land Dispute and Navajo Relocation," *Anthropological Approaches to Resettlement Policy, Practice, And Theory*, ed. Michael Cernea and Scott Guggenheim ( Routledge, 2019), 153-200.

<sup>44</sup>David Archambault, "The Standing Rock Protests and the Struggle for Tribal Sovereignty," *Journal of International Affairs* 73.2 (2020): 233-238.

<sup>45</sup>Ezra Rosser, "The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and The Possibility Of Failure," *Ark. L. Rev.* 58 (2005): 291.

indigenous communities have been able to turn the trusteeship doctrine into a positive force in their favour, albeit gradually. We will also discuss the unwavering faith of indigenous peoples in the legal system and how it has led to an increasing level of respect and adherence to the doctrine by the state.

James McLaughlin mentioned in his autobiography<sup>46</sup> that the Indian is a natural litigant who believes in the capacity of the white man's courts to remedy all wrongs. Some Indian communities even hire lawyers to lobby in Washington and often sacrifice their basic needs to pay for legal fees. He wrote:

“The Indian is a natural litigant, and it is to be regretted that he is prone to this. He believes implicitly in the capacity of the white man's courts to remedy all wrongs and is disposed to hire a lawyer whenever he gets a chance. There are bands and communities of Indians in this country who practically maintain the lobbies hired by law firms at Washington, and who often go hungry, when the fees they pay to lawyers would supply them with the material necessities of life.”<sup>47</sup>

The Native Americans' unwavering trust in the legal system has been critical in turning a bleak situation into a positive one. They maintain hope that the United States government will fulfil its obligations towards the native nations, and many have even sacrificed their basic needs to pay for legal fees. This trust has resulted in an increasing level of respect and adherence to the doctrine by the state, not only in the actions of the judiciary, executive, and legislative branches of the US government, but also in the political activism of the Indigenous people themselves.<sup>48</sup>

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<sup>46</sup>James McLaughlin, *My Friend the Indian* (Boston: Houghton and Mifflin, 1910).

<sup>47</sup>McLaughlin, *My Friend the Indian*.

<sup>48</sup>McLaughlin, *My Friend the Indian*.

The doctrine's judicial recognition is exemplified by the *Seminole v United States*<sup>49</sup> case, which is often cited to support the application of fiduciary principles to the government's administration of Indian affairs.<sup>50</sup> In this case, Justice Frank Murphy acknowledged the unique trust obligation that the government has in its dealings with dependent and vulnerable Indian tribes. He stated that the government is not simply a contracting party, but rather, under a self-imposed policy expressed in numerous acts of Congress and court decisions, it has taken on moral obligations of the highest responsibility and trust. Therefore, its conduct in dealings with the Indians should be evaluated based on the most rigorous fiduciary standards.<sup>51</sup> He observed:

“...this court recognised the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people... In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a human and self-imposed policy which has found expression in many acts of Congress, and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”<sup>52</sup>

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<sup>49</sup> (1942) 316 U.S. 286.

<sup>50</sup>David Getches, Charles Wilkinson and Robert Williams, *Cases and Materials on Federal Indian Law*, 5th ed. (St. Paul: Thomson-West, 2005), 342.

<sup>51</sup>Getches, Wilkinson and Williams, *Cases and Materials*, 342.

<sup>52</sup>Getches, Wilkinson and Williams, *Cases and Materials*, 342.

In conclusion, the positive translation of the Trust Doctrine is essential in achieving justice for the indigenous peoples. Despite the challenges and criticisms, the unwavering trust of the Indigenous peoples in the Trust Doctrine has led to an increasing level of recognition and respect for the doctrine. It is important for the indigenous peoples to continue to advocate for their rights and to maintain faith in the legal system to ensure that the government fulfils its obligations towards them.

### **A COMMENTARY ON THE MALAYSIAN PERSPECTIVE**

The Orang Asli are the indigenous people of Peninsular Malaysia. They are a group of diverse communities with distinct cultures, languages, and traditional ways of life. The term “Orang Asli” is translated as “original people” or “aborigines”. The Orang Asli population in Peninsular Malaysia is estimated to be around 178,000, which is only about 0.6% of the country's total population.<sup>53</sup> There are 18 officially recognised Orang Asli tribes, which are further divided into three main groups: Negrito, Senoi, and Proto-Malay. The Negritos are the oldest inhabitants of Peninsular Malaysia, while the Senoi and Proto-Malay arrived later and are believed to have migrated from the north and south, respectively.

The Orang Asli traditionally relies on subsistence agriculture, hunting, and gathering for their livelihoods. They have a deep connection to the land and forests, which are central to their cultural and spiritual beliefs. The Orang Asli also have their own languages and customs, which have been passed down through generations. Despite their unique cultural heritage and contributions to Malaysia's biodiversity, the Orang Asli have faced numerous challenges over the years, including land rights issues, discrimination, and limited access to education and healthcare.<sup>54</sup> The Aboriginal Peoples Act 1954<sup>55</sup> was enacted to provide legal protection and assistance to the Orang Asli, but its effectiveness can be questioned.

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<sup>53</sup> Estimated at 180,000 people.

<sup>54</sup> Rusalina Idrus, "The Discourse of Protection and The Orang Asli in Malaysia," *Kajian Malaysia: Journal of Malaysian Studies* 29 (2011).

<sup>55</sup> Act 134.

The Aboriginal Peoples Act 1954 (APA) is a piece of legislation in Malaysia that governs the rights and welfare of the Orang Asli. The Act was enacted by the Malaysian government shortly after the country gained independence from the British colonial rule in 1957. The preamble of the APA states that it is an Act to provide for the protection, well-being and advancement of the aboriginal peoples of Peninsular Malaysia. Section 3 of the APA provides a clear definition of who is considered an “aborigine.” This definition is narrow and restrictive, limiting the number of individuals who can be classified as Orang Asli to those who meet specific characteristics outlined in the section. This definition establishes a legislatively recognised community that is subject to the Act and its governing authority, placing them in a subservient position. Unlike other Malaysian citizens who are free to manage their own affairs in accordance with the guarantees provided by the fundamental rights enshrined in the Malaysian Federal Constitution, the Orang Asli are placed under the purview and governance of a government department established by the APA to manage their affairs. This exclusivity of governance and being governed, and the preamble of the APA echoes the state-ward relationship highlighted in the Trust Doctrine, further reinforcing the notion that the Orang Asli are wards of the state.

As wards of the state, it is not incorrect to suggest that the Orang Asli are the beneficiaries by drawing on the interpretation of the Trust Doctrine. The common law principle of trusteeship involving a three-party arrangement of principal, trustee, and beneficiary can be applied, with the state acting as the principal and a government department as the trustee. APA establishes the Orang Asli Affairs Department (Jabatan Kemajuan Orang Asli or JAKOA) to oversee the general administration, welfare, and advancement of the Orang Asli. These responsibilities are supervised by the appointed Director General of JAKOA, whose appointment is outlined in Section 5 of the APA. Although the provision does not include any racial preference for the office, it is currently common practice in Malaysia to appoint an Orang Asli to the position.<sup>56</sup> This move, even though politically motivated, can be seen as a positive acknowledgement of the Orang Asli's ability to manage their own affairs.

It is interesting to note that despite the current positive development of the Orang Asli affairs, the bane of APA still subsists within its provisions. The real challenge to Orang Asli rights can be seen entrenched in the provisions of the APA that give State Authority the power over the rights of occupancy of the Orang Asli. Under Sections 6 and 7 of the APA, the State Authority has the power to determine areas to be designated as aboriginal area or aboriginal reserve. These areas are exclusively set up by the APA for the Orang Asli to the extent that people other than Orang Asli can be prohibited by the law from entering the area. These lands can be alienated to any of the designated member of the Orang Asli. However, even though the land was alienated, Section 9 restricts any Orang Asli from land dealings. Without the consent of the Director General of JAKOA, any land dealings executed by the Orang Asli shall be void. This particular situation creates a specific exclusion from the right to land dealings as provided by the National Land Code and the freedom to enter into contract as provided by the Contracts Act 1950.

The power to make reservation lands comes together with the power of excision. The power to excise either aboriginal area, aboriginal reserve or aboriginal alienated land is provided by Section 12 of the APA. The only remedy for the Orang Asli for their loss of occupancy on the land is in the form of compensation as prescribed by the APA. The amount of compensation and the process that follows are not based on the Land Acquisition Act 1960 (Revised 1992) but based on the discretion of the State Authority. The use of the word ‘may’ rather than ‘shall’ in Section 12 denotes the absolute power of the State Authority in deciding whether to grant compensation or not. The situation differs when an alienated land is acquired for the purpose of setting up aboriginal reserve. In this situation, Section 13 of the APA provides that the Land Acquisition Act will be used to determine compensation. In comparison, this can be seen as a double standard against the aboriginal people.

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<sup>56</sup>Noor Atiqah Sulaiman, “Orang Asli Tetap Pilihan Utama Jawat Ketua Pengarah JAKOA,” *Harian Metro*, May 19, 2021, <https://www.hmetro.com.my/mutakhir/2021/05/707692/orang-asli-tetap-pilihan-utama-jawat-ketua-pengarah-jakoa>.

The simplicity of the provision in excising lands occupied by the Orang Asli should be criticised. Its simplicity justifies forced relocations of the Orang Asli to make way for development projects,<sup>57</sup> and it fails to take into consideration the intrinsic and extrinsic value of the customary land that intertwines with the aboriginal livelihood, custom, culture, spiritual connections and religious beliefs. In relation to this, it can be argued that the APA does not adequately protect the Orang Asli's customary lands, free prior and informed consent (FPIC), and self-governance, which can be considered as the pillars of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Although Malaysia has twice endorsed the UNDRIP, state authorities have not taken adequate measures to protect the rights of the Orang Asli, including their customary lands, free prior and informed consent (FPIC), and self-governance. Despite Parliament's trust in the JAKOA to assist the Orang Asli, their communities still struggle with encroachment on their customary lands by state-sponsored commercial development projects, mining and forest conversion for private corporations' palm oil plantations.<sup>58</sup>

By juxtaposing the mentioned provisions of the APA against the Trust Doctrine, the APA as a legislation fails to be an instrument that can be used and relied on to ensure the protection of the Malaysian aborigines. Unless the highlighted issues above can be legislatively addressed, both the Trust Doctrine evident in the preamble of the APA, and the country's endorsement of UNDRIP can never be fulfilled. These somewhat oppressive situations coupled together with the Orang Asli's ever-increasing awareness of their rights will undoubtedly result in clashes and disputes between the State and the Orang Asli.

All in all, it is submitted that the argument above highlights the conflicts between the APA and other legislation and international declarations, underscoring the need for legislative reforms to protect the Orang Asli's rights and promote equitable development.

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<sup>57</sup>The International Work Group for Indigenous Affairs (IWGIA), accessed May 1, 2023, <http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2013/Malaysia.pdf>.

## POSITIVE JUDICIAL TREATMENT OF ORANG ASLI RIGHTS

Despite the criticisms above, there have been several important court rulings in favour of the Orang Asli's land rights in Malaysia, indicating a positive development in Malaysian courts' interpretation and translation of the Trust Doctrine for the Orang Asli. These rulings will be discussed in further detail below.

The *Koperasi Kijang Mas & 3 Ors v Kerajaan Negeri Perak*<sup>59</sup> case is the earliest known case discussing Orang Asli's rights. A logging concession was granted by the State Government of Perak to a company to log areas that included lands previously designated as Aboriginal Reserves for Orang Asli Regroupment Settlement Plans.

The State Government had breached the Act, according to the Ipoh High Court and the company had no right to conduct forestry operations in certain areas. The Orang Asli did not lose their exclusive rights to the forest products in the areas despite the fact that the lands had not yet been formally gazetted. The judge ruled that the state government's designation of such sites as aboriginal reserves was more important than statutory gazettement.

The next case to consider is *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*<sup>60</sup> (Adong No.1), where the plaintiffs were leaders and representatives of Orang Asli families who resided in the vicinity of the Sungai Linggiu catchment area in the Johor state. The defendants were the State of Johor and its Director of Lands and Mines, who had acquired 53,273 acres of land to construct a dam for water supply to Johor and Singapore. The plaintiffs claimed compensation from Singapore paid to Johor, arguing that the land was their traditional and ancestral territory, vital for their livelihoods, and that they held property and legal rights to it under the common law, statutes, and the Federal Constitution. The High Court acknowledged the evidence

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<sup>58</sup>Siva Barathi Marimuthu and Asril Amirul Zakariah, "The Sufficiency of Malaysia's Environmental Laws for the Protection of the Tasik Chini UNESCO Biosphere Reserve," *Australian Journal of Asian Law* 21 (2020): 25-37.

<sup>59</sup>[1991] CLJ 486.

<sup>60</sup>[1997] 1 MLJ 418.

presented in various historical and judicial documents establishing the plaintiffs' continuous occupation and habitation of the land since ancient times. The presiding judge referred to legal precedents from several cases in India, Africa and North America<sup>61</sup> ultimately relying on the decision of the High Court of Australia in *Mabo (No 2)*.<sup>62</sup> The Federal Court and the Court of Appeal upheld Mokhtar Sidin JCA's ruling that since they had enjoyed their property rights continuously for a long time, the Orang Asli possessed a common law claim to their ancestral lands. In his decision, Mokhtar Sidin JCA noted that:

"...before the introduction of the Torrens land system, these lands were unclaimed land in the present sense but were 'kawasansaka' to the aboriginal people. On the introduction of the Torrens system, all the 'kawasansaka' became state land but the aboriginal people were given the freedom to roam about these lands and harvest the fruits of the jungle. Some of these lands have been gazetted as forest reserves. The plaintiffs, however, continue to live in and/or depend upon this unalienated land. It was not denied that some of them had lived on these lands, and all of them still consider the jungle as their domain to hunt and extract the produce of the jungle just like their forefathers had done."<sup>63</sup>

In the case of *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* (Adong No.2),<sup>64</sup> the Court of Appeal fully supported the High Court's verdict, declaring that "these opinions align with the legal precedents established by our courts and the rulings of other jurisdictions, which we hold in high regard." This represents a significant milestone in Malaysian jurisprudence concerning the rights of the indigenous peoples. The courts acknowledged foreign judgments that have a positive impact on such matters. The Adong ruling was subsequently reinforced in *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*,<sup>65</sup> in which the principles laid down in Adong were reaffirmed, along with clarification of other issues.

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<sup>61</sup>The court referred to *Worcester*, 31 US 515 (1832), *Re Southern Rhodesia* [1918] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, *Calder* [1973] SCR 313, and *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1980) 107 DLR (3d) 513.

<sup>62</sup>(1992) 107 CLR 1.

<sup>63</sup>(1992) 107 CLR 41.

<sup>64</sup>[1998] 2 MLJ 158.

<sup>65</sup>[2002] 2 MLJ 591.

In *Sagong No.1*<sup>66</sup> case, the Orang Asli families (Temuan tribe) had been displaced from a 38,477-acre strip of land that ran through their designated aboriginal reserve and other customary lands they inhabited. The land in question was located in Dengkil, Selangor (Kampong Bukit Tampo), and had been designated as an indigenous region or a home to the aboriginals. In March 1996, the land was acquired for the construction of a portion of the highway that led to the Kuala Lumpur International Airport (KLIA). Similar to *Adong*, the plaintiffs in this case defended their claims using the Federal Constitution, legislation, and common law legal rights. Based on common law norms, they asserted native title and usufructuary rights over the land. The plaintiffs contended that they had long-standing customary and property rights over the land since it was their ancestral and customary land, which they had lived on with their predecessors.

The Court held that the Orang Asli had a legal right to the land. Based on their current occupation and a long-standing historic link, the property was regarded as customary and ancestral land belonging to the Temuan tribe. As a part of their tradition, the plaintiffs had constantly preserved and used the property to the exclusion of others, and the land had been passed down to them according to their traditions, from generation to generation. This meant that the land fits the definition of “land occupied under customary right”<sup>67</sup> as outlined in the Land Acquisition Act 1960.<sup>68</sup> Unlike the Australian Native Title Act 1963 that followed suit after *Mabo*, the Aboriginal Peoples Act 1954 did not extinguish the common law rights of the Orang Asli. Therefore, despite the defendants’ argument that the plaintiffs had lost their traditional identity due to modernisation, their eviction from the lands was unlawful, and the defendants were found liable.

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<sup>66</sup>[2002] 2 MLJ 591.

<sup>67</sup> Section 2, Land Acquisition Act 1960.

<sup>68</sup> Act 486.

In *Kerajaan Negeri Selangor v Sagong Tasi and Ors* (Sagong No.2) (Court of Appeal),<sup>69</sup> the term “customary communal title” was used to describe the Orang Asli’s rights to the land. Gopal Sri Ram SCA held that, based on the common law doctrine of indigenous title, the plaintiffs had ownership of the lands in question under a customary community title of a permanent nature, which conferred proprietary rights and entitled them to compensation under the Land Acquisition Act 1960. They were also eligible for trespassing damages and exemplary damages in addition to the ungazetted land included in this settlement. Eventually, the parties reached an amicable settlement for the amount of RM6.5 million. In the case of *Bato Bagi & 6 Yang Lain v Kerajaan Negeri Sarawak*,<sup>70</sup> a group of indigenous people challenged the constitutionality of the new Sarawak Land Code, which changed the land tenure legal framework with regard to native customary rights by allowing the minister to extinguish any customary rights. The plaintiffs argued that the new land code violated their fundamental rights protected by Articles 5, 8, 13, and 153 of the Federal Constitution of Malaysia, including the right to life and liberty, the right to equality, the right to property, and their indigenous rights. The Federal Court of Malaysia reviewed the new Sarawak Land Code and held that the compensation mechanisms offered by the Code for the extinguishment of the native customary rights were sufficient. Therefore, the Federal Court dismissed the plaintiffs’ appeal and refused to answer the question of the constitutionality of the code.

These cases provide a solid foundation for the recognition of Orang Asli’s customary rights in Malaysia and have led to numerous other cases<sup>71</sup> concerning Orang Asli’s rights being brought before the courts. In regard to the Trust Doctrine, there were no instances which the Malaysian court directly quoted the term ‘Trust Doctrine’. However, in both cases of *Sagong* and *Bato Bagi*, the court had expressly mentioned the position of the Orang Asli and natives (for states in Borneo) as fiduciary to the State.

In *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* (Sagong No.1), Mohd Noor Ahmad J expressly mentioned that the State Authority owes fiduciary duty towards the Orang Asli based on three grounds, which are, by the reason of constitutional and statutory provisions, the purpose of the establishment of the JAKOA (previously referred to as JHEOA) and based on historical documents that show the acceptance of the State as trustee for the Orang Asli.<sup>72</sup>

In *Bato Bagi & 6 Yang Lain v Kerajaan Negeri Sarawak*, Richard Malanjum CJ stated:

“As for the argument that the Government stands in a fiduciary position to protect the interests of the natives, I am of the view that such a notion has been accepted by our Courts. (See: *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors*. It has also been adopted in foreign jurisdictions. (See for instance the Supreme Court of Canada in *Delgamuukw v. British Columbia* [1997] 3 SCR 1010). It is therefore not unheard of that the Government ought to protect the interests of the natives and stand in a fiduciary position vis-à-vis the natives.”<sup>73</sup>

The direct reference to the term fiduciary in describing the rights of the Orang Asli clearly shows the acceptance of the Malaysian courts to the philosophy and notion of the Trust Doctrine. By looking at the trend of judgments, it can be said that the Trust Doctrine is firmly entrenched and likely to endure. In reflection on the situation of the natives in the US, where the doctrine originated, the same flow of events occurred and the parallels are striking. In both the US and Malaysia, together with Australia as evident in *Mabo*, the plight of the aborigines started with the extinguishment of rights, followed by the creation of the State-ward relationship, the betrayal of the fiduciary duty, the act of seeking justice through the courts and finally the recognition of rights by the courts.

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<sup>73</sup> [2011] MYFC 36.

## **POSSIBLE EXPANSION OF THE TRUST DOCTRINE**

The Trust Doctrine, which recognises the fiduciary duty owed by the state towards the Orang Asli, has the potential to be expanded beyond the realm of physical and property rights to include the protection and conservation of the forest environment and traditional knowledge. Given that the Orang Asli are forest dwellers, they possess a wealth of traditional knowledge that is closely tied to the forest. This knowledge is highly valuable and can be commercialised. Thus, by extending the scope of the Trust Doctrine to encompass the protection and conservation of traditional knowledge, the Orang Asli can benefit from the commercialisation of their traditional knowledge. In doing so, not only will their rights be protected, but the forest environment will also be safeguarded. It is therefore imperative that the Trust Doctrine be expanded to include the realm of traditional knowledge in order to ensure the protection and preservation of the forest environment while also taking care of the interests of the Orang Asli.

In the perspective of environmental law in Malaysia, the doctrine of Public Trust outlines the responsibility of governments for the sustainable management and use of biological diversity. initially laid out under Principle VI of the National Policy of Biological Diversity 1998, which categorically declares the duty of the government in a manner that can achieve sustainable development of biological diversity in the country. The mandate to work closely through collaboration with scientists, business people, and the general public should be read along with Objective IV, which is to preserve the unique biological variety for the sake of current and future generations. The combined operations of Principle VI and Objectives IV of the Policy must necessarily be construed to imply the existence of a broader duty in the nature of public trust. Thus, the court should judicially recognise the doctrine as an implied duty imposed on the government despite the absence of an express provision on the public Trust Doctrine in the existing legislation relating to biodiversity management and utilisation.

The need to recognise, protect, and uphold indigenous communities' rights to continued access to biological resources is closely related to the principle of sustainable management and use of biological diversity. This is necessary not only to ensure the survival of their culture<sup>74</sup> but also to preserve their knowledge of the uses biological resources can be put to, particularly in the medical and pharmaceutical fields.<sup>75</sup> The Convention on Biological Diversity mandates that this information, which is now referred to as customary knowledge, be properly safeguarded.<sup>76</sup>

Traditional knowledge protection calls for much more than just a statement of policy.<sup>77</sup> It needs legislative recognition, which will serve as the foundation for the development of the features essential to its protection, such as a national database, ownership registration, a dispute resolution mechanism to settle competing claims, and procedures for decision-making processes, particularly with regard to Access and Benefit Sharing. It is rather puzzling that the current legal framework with special reference to the Akta Orang Asli makes no particularly specific strategy or action commitment<sup>78</sup> on Traditional Knowledge.<sup>79</sup>

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<sup>74</sup> See Abdul Latiff and Zakri Abdul Hamid, "Biodiversity and Traditional Knowledge? The Malaysian Experience," in *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions*, eds. Sophia Twarog and Promila Kapoor, (New York and Geneva: United Nations: 2004).

<sup>75</sup> Ashish Kothari, "Traditional Knowledge And Sustainable Development." International Institute for Sustainable Development (2007).

<sup>76</sup> Although Principle (VII) of the National Policy on Biodiversity 1998 took cognizance of TK, it was in a rather oblique way. There is no specific mention of 'traditional knowledge' among the 15 strategies for effective management of biological diversity outlined in the Policy, none either directly or indirectly refers to traditional knowledge. Even Strategy 9, that is to undertake "review and update existing legislation" to reflect biological diversity needs is silent on TK.

<sup>77</sup> Strategy 1 of NPBD 1998 is also for the establishment of an inventory of traditional knowledge on the use of species and genetic diversity: similarly, the Action Plan for Strategy 9 calls for identification of areas where new legislation or enhancement of present legislation are needed, among others, for "intellectual property and other ownership rights."

Although forests and land are both terrestrial resources, they are treated differently under Malaysia's federal legal structure.<sup>80</sup> The rights of the indigenous people may be significantly impacted by this arbitrary difference. Indigenous people's rights to their "forested land" may only exist as a common law right of usufruct, which is the right to "live from the produce of the land itself but not to the land itself," if they lack a proprietary tenurial right over their "forested land," which may then end up becoming a reserved forest under the relevant state forest laws.<sup>81</sup>

In conclusion, the Trust Doctrine and Public Trust doctrine play significant roles in environmental law in Malaysia. The Trust Doctrine recognises the fiduciary duty owed by the state towards the Orang Asli, and it has the potential to be expanded to include the protection and conservation of the forest environment and traditional knowledge. This expansion could benefit the Orang Asli by allowing them to benefit from the commercialisation of their traditional knowledge while also safeguarding the forest environment. Meanwhile, the Public Trust doctrine spells out the government's duty towards sustainable management and utilisation of biological diversity, and it should be recognised as an implied duty imposed on the government despite the absence of an express provision. It is imperative that legislative action be taken to ensure the protection and preservation of the forest environment while also taking care of the interests of the Orang Asli.

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<sup>78</sup>A clear policy or law on traditional knowledge is important as it protects indigenous cultural heritage, respects their rights, prevents conflicts, enables fair benefit-sharing, and promotes sustainable development.

<sup>79</sup>Puzzling because Malaysia was one of the active initiators of the Charter of Indigenous Tribal People of the Tropical Forest 1992 which was signed in Kuala Lumpur and the Sabah Declaration 1995 both of which advocated the strong protection of indigenous rights. See also Srividya Ragavan, "Protection of Traditional Knowledge," *Minnesota Intellectual Property Law Review* 2, no. 2 (2001). Also, the enlightening "Rights Regime" proposed by Nijar GS (1995) in Zakri Abdul Hamid (Ed.), *Prospects in Biodiversity Prospecting* (Bangi: Genetics Society of Malaysia, Universiti Kebangsaan Malaysia, 1995), 225-265.

<sup>80</sup>, Muhammad Yusuf Saleem, "Environmental Issues In A Federation: The Case of Malaysia," *Intellectual Discourse IIUM* 13.2 (2005).

<sup>81</sup> Per Mokhtar Sidin JCA in *Adong bin Kuwana & Ors v Kerajaan Johor & Anor* [1997] 1 MLJ 418 at pp 429-430.

## CONCLUSION

In conclusion, the Trust Doctrine in Malaysia represents an important legal framework for protecting the Orang Asli and conserving the forest. While the doctrine is recognised by the courts in Malaysia, its implementation remains limited and its scope has not yet been fully explored. An analysis of the Malaysian law in comparison to the Trust Doctrine reveals that there are gaps and inconsistencies in the legal framework that need to be addressed in order to fully protect the rights of the Orang Asli.

The Trust Doctrine has the potential to be expanded beyond the realm of physical and property rights to include the protection and conservation of the forest environment and traditional knowledge. This would require legislative recognition and the establishment of features such as a National Data Base, Registration of Ownership, Dispute Resolution Mechanism, and procedures for participation in decision-making. The Orang Asli communities possess a wealth of traditional knowledge that is closely tied to the forest, and the commercialisation of this knowledge could provide significant benefits to their community while also safeguarding the forest environment.

While the Trust Doctrine has been recognised as an implied duty imposed on the government, it is imperative that the doctrine be more widely accepted and applied by the courts in Malaysia. This would require a greater understanding of the Trust Doctrine and its potential to protect the rights of the Orang Asli and the environment. With its potential to address the challenges facing the Orang Asli and the forest environment, the Trust Doctrine should be considered an essential component of Malaysia's legal framework for environmental protection and conservation.

This article provides valuable insights into the legal framework surrounding indigenous people's rights in both the United States and Malaysia. By examining landmark cases and the use of the Trust Doctrine, it highlights the challenges faced by indigenous peoples in asserting their rights in the face of development and modernisation. This understanding can assist policymakers, legal practitioners, and concerned individuals in promoting the protection and preservation of indigenous peoples' rights in both countries and beyond.<sup>82</sup>

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<sup>82</sup> In her article Izawati Wook, "Indigenous Land Disputes and Law Reform in India: Lessons for Malaysia," *IIUM Law Journal* 23, no. 2 (2015): 289-308 made a comparative analysis of the processes and mechanisms adopted in the relevant law reform in India and its relevance to Malaysia as models for practical applications of indigenous peoples' rights. The article provides 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.