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CUSTOMARY LAND RIGHTS OF ORANG ASLI: A CASE STUDY IN KAMPUNG PARIT GONG, NEGERI SEMBILAN, MALAYSIA

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ABSTRACT

The Orang Asli group forms a minority community in Peninsular Malaysia, whose livelihood mostly depends on their land and the surrounding area. Dispute over customary land rights of Orang Asli has been continual in Malaysia although Malaysian Courts, in several cases, have upheld the Common Law rights of Orang Asli to their customary lands. This poses a challenge to some Orang Asli communities and State Governments. Based on focus group discussion, profiling survey, and library research methods, this paper analyses the land rights of Orang Asli in Peninsular Malaysia, by placing focus on Orang Asli in Kampung Parit Gong, Jelebu, Negeri Sembilan. The findings indicate that the Kampung Parit Gong Orang Asli community has been strictly adhering to the customs of ‘*Adat Perpatih*’ since yesteryears, and that they highly value the land, both

through usage of land and by inheritance. Several important concerns were raised by the Orang Asli in Kampung Parit Gong, particularly on the security over their rights on the said customary land and the guarantee of their future generations' socio-economic well-being. Having said that, this paper proposes several legal and administrative measures to not only address the uprising issues, but also to ascertain that the rights of Orang Asli residing in Peninsular Malaysia are safeguarded.

Keywords: Orang Asli, Customary Land Rights, Kampung Parit Gong, Negeri Sembilan.

INTRODUCTION

The Orang Asli has a significant place in Malaysian history. Their inhabitation in Peninsular Malaysia dates back to more than 50,000 years (Ricaux et al., 2006; Macaulay et al., 2005). This community is classified into three main categories namely the *Negrito*, *Proto-Malay*, and *Senoi*, which can be further subdivided into 18 subgroups (Nordin et al., 2016). The Negritos, as it had been documented, had stepped into the Southeast Asia region between the end of Last Glacial Maximum and the Neolithic expansion of Holocene (44,000-63,000 years ago) (Ricaux et al., 2006; Macaulay, 2005).¹ Next, the *Senoi* refers to the Mongoloid people and they are the descendants of Hoabinhians and Neolithic agriculturists, who came into the Malay Peninsula from the northern region approximately 4,000 years ago (Nicholas, 2000). As for the Proto Malay groups, they have been dwelling around the southern region of the peninsula since at least 3,000 years ago. A certain sub-group of the Proto Malay, known as Orang Kuala, hailed from Sumatera around 500 years ago (Nicholas, 2000).

¹ Ricaux et al. (2006) and Macaulay et al. (2005) suggested that the Negritos in the peninsula are direct descendants of the Hoabinhians who lived between 8000 BC and 1000 BC during the age called the Middle Stone Age. They are considered as one of the principal 'relic' groups in Southeast Asia from an archaeological, osteological, morphological and genetic perspective. Another view believed that the Negritos arrived in the peninsula in 1000 BC or what was known as the Mesolithic era or at least 25,000 years ago.

The Orang Asli or an aborigine, as stipulated in Section 3 of the Aboriginal Peoples Act 1954 [Act 134] (APA), refers to a person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language, habitually adheres to the aboriginal way of life, customs, and beliefs, and includes a descendant through males of such person. The definition of an aborigine also includes any person of any race adopted when an infant by aborigines who has been brought up as an aborigine and adopted its culture, as well as a child of any union between an aborigine female and male of another race. Put simply, the primary distinctions between Orang Asli and the main population are their culture, language, and social organisation. In this regard, their perspective towards land is unique in the sense that it has cultural and religious symbiosis, thus demanding the utmost protection.

As compared with other communities in Malaysia, the Orang Asli are considered as the minority, marginalised and remain at the lowest level amongst the society, even after more than 60 years since Malaysia has gained her independence. This can be seen where one-third out of the Orang Asli population are living in poverty (Economic Planning Unit, 2015), with household food insecurity. These have triggered the issues of malnutrition and chronic energy deficiency amongst them (Hasni et al., 2017; Pei et al., 2018; Ching et al. 2016), resulting many to suffer from poor health, unreasonably high number of deaths in childbirth, including high infant mortality rates as well as a lower life expectancy compared to Malaysia's total average. In addition, there is also a higher number of reported rates of infectious and parasitic diseases and malnutrition amongst the Orang Asli (Nicholas, 2000; Lim et al., 2009).

In relation to education, the Orang Asli also contributed to the high numbers of primary and secondary school dropouts, with poor academic performance amongst them (SUHAKAM, 2010; Md Nor et al., 2011; Abdullah et al., 2013). These suggest a serious inequality amongst the communities in Malaysia, particularly amongst the Orang Asli. On a different note, the issue of land security of the Orang Asli, including the legal recognition of their land rights as well as the status of land ownership on which they live are also complicated.

As such, this paper probed into the customary land rights of Orang Asli residing in Kampung Parit Gong, Negeri Sembilan. This paper,

in particular, unravels the position of Orang Asli under the Malaysian Law, the legal position of customary land rights of Orang Asli, and the customary land of Orang Asli in Kampung Parit Gong.

This study employed focus group discussion, profiling survey, and library research methods. Focus group discussion is when people from related backgrounds are grouped and asked about their perceptions, beliefs, and ideas (Herd Publication, 2016). This method was conducted at Kampung Parit Gong on 12th February 2019 by involving 11 villagers from the Board of Custom (*Lembaga Adat*), namely *Tok Batin*, *Tok Mangku*, *Tok Jekerah*, *Tok Jenang*, *Panglima Hitam*, *Panglima Balai*, *Panglima Gajah*, *Panglima Tua*, *Panglima Kencang*, and *Panglima Kecil*. Next, a profiling survey was performed on 120 Kampung Parit Gong dwellers to gather their demographic information, including education background, employment, and monthly income. Lastly, this study employed the library research method comprising content analysis of statutes, particularly the Aboriginal 1954 Peoples Act (APA) and the Federal Constitution, reported cases, and secondary data (e.g., books, journals, and online resources).

POSITION OF ORANG ASLI UNDER MALAYSIAN LAW

Under the international legal framework, protection of the rights of indigenous peoples are acknowledged in several international instruments, amongst others, the United Nations Declaration on the Right of Indigenous People 2007 (UNDRIP), and the Convention on Biological Diversity 1992, which are relevant to Malaysia. The UNDRIP requires states to, amongst others, provide strong protection of lands and resources rights to the indigenous people, as well as impose a duty on the state to respect the special relationship between indigenous people and their customary land, with due regard to their cultural and spiritual welfare (UNDRIP). The UNDRIP holds a persuasive authority on Malaysia as a United Nations Member to provide statutory protection to not only the tradition and culture of the Orang Asli, but also their customary land rights.

The special placement of the Orang Asli group is stipulated under the Federal Constitution by virtue of Article 8 (5) (c) that enables positive discrimination for the ‘protection, well-being or advancement’ of

this particular group. This provision indicates an implicit intention of the Constitution for protecting the welfare of the Orang Asli (Yunus, 2018) which enables states within the Federation to act accordingly in addressing obstacles faced by the Orang Asli communities in attaining equality and be on par with society. Since the welfare of Orang Asli comes under the purview of the Federal Government, the related enacted laws could be passed by the Parliament as stipulated under Item 16, Ninth Schedule of the Federal Constitution (Subramaniam, 2015). Additionally, the Federal Constitution stipulates the Senate in the Parliament to compose members who 'are capable of representing the interests of aborigines'.²

The Federal Constitution protects the rights of Orang Asli, such as that stipulated under Article 5(1) of the Federal Constitution whereby "no person shall be deprived of his life or personal liberty save in accordance with law". The Court of Appeal in *Tan Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 had made a wider interpretation to this provision by stating that "the expression of *life* appearing in Article 5(1) of the Federal Constitution does not refer to mere existence. It incorporates all facets that are integral to life itself and those matters that go to form the quality of life that includes the right to live in a reasonably healthy and pollution-free environment". The interpretation of such rights to life encapsulates the right of Orang Asli to livelihood.

However, it has been narrowly interpreted by the Court of Appeal in the latter case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals* [1997] 4 CLJ 253. In this case, the respondents claimed that if the Bakun Hydro-Electric Project is carried through, their fundamental rights would be adversely affected, wherein the adverse environmental impact would affect their livelihood. Nevertheless, the Court of Appeal held that deprivation of the life of respondents under Article 5 (1) of the Federal Constitution was in accordance with law since there is a law that permits such deprivation. Based on these two cases, the right of Orang Asli to their livelihood should be grounded as an integral part of life.

A specific legislation known as the Aboriginal Peoples Act 1954 (APA) was passed by the Malaysian Parliament to address problems faced by Orang Asli residing in Peninsular Malaysia. In fact, the APA preamble highlights its very goal "to provide for the protection, well-being, and advancement of the aboriginal peoples of Peninsular Malaysia".

Hence, APA offers, amongst others, the definition of aborigines, the dealings in land by aborigines, the compensation provisions for impairment and extinguishment land use of the aborigines, as well as other miscellaneous provisions pertaining to the welfare of the aborigines. The APA is considered as a 'human rights' statute by the Court of Appeal in *Sagong Tasi's* case,³ mainly because it comprises an all-inclusive depiction concerning the human rights of aborigines. In line with this, the Jabatan Kemajuan Orang Asli (JAKOA), a Federal agency, was established in order to look into the welfare and administration of the Orang Asli.

Notwithstanding the constitutional guarantee and the existing statutory provisions, the Orang Asli communities seem to face continuous challenges in maintaining their identity and ecosystem, especially in defending their customary land against deprivation and acquisition by other parties. This despite the Malaysian Superior Courts, in several cases, having upheld the rights of Orang Asli pertaining to customary and ancestral lands in adherence to Common Law. One of the factors which caused these challenges is that the Orang Asli has no registrable title to the customary lands. Thus, it leads to the insecurity of the customary land tenure to be unfavourably affected with regards to their land rights and interests (Hamzah, 2013). Moreover, lack of constitutional duty of the government to recognise lands of Orang Asli also contributed to these challenges (Subramaniam, 2013). The Orang Asli communities, in addition, suffer from vulnerabilities in regard to several aspects, such as languages, laws, customs, and institutions, in comparison to other races (Subramaniam, 2013).

LEGAL POSITION OF CUSTOMARY LAND RIGHTS OF ORANG ASLI IN MALAYSIA

From the stance of Orang Asli, the very concept of land tends to be vastly diverse as it includes not only its economic value, but also social, cultural, religious, and historical significances. As far as the Orang Asli communities are concerned, their customary land is commonly termed as *tanah saka* or *tanah adat*, which possesses sacred quality inherited from their forefathers since time immemorial (Hamzah, 2013). The customary land includes land that they use for

³ See *Sagong bin Tasi v Kerajaan Negeri Selangor* [2005] 6 MLJ 289.

occupation, the areas that they commonly have access for resources or foraging areas (*kawasan rayau*), as well as land use for burial or other ritual purposes (Communal Right). This understanding contradicts the concept of land ownership under the land administration system in Malaysia, which identifies land ownership based on registration of title, as provided under the National Land Code 1965.

The APA does not specifically define customary land. For example, in the case of *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418, the term *kawasan saka* was decided as referring to the 'traditional and ancestral land', which in this case is related to the area of land that they 'depended on to forage for their livelihood in accordance with their tradition'. This definition of customary land was further discussed for the case of *Sagong bin Tasi v Kerajaan Negeri Selangor* [2005] 6 MLJ 289, which associated customary land with the land that the Temuan tribe has occupied continuously for generations. By virtue of the abovementioned cases, the court had given judicial recognition to the customary land rights of Orang Asli in Peninsular Malaysia (Cheah, 2004). The case of *Adong*⁴ has paved the way for the Orang Asli communities to affirm their rights to customary territories in courts beyond the written laws (Subramaniam, 2018).

The decisions had been further affirmed by the Federal Court in the cases of *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677 and *Bato' Bagi v Kerajaan Negeri Sarawak* [2011] 6 MLJ 297. These decisions have paved paths for the judicial recognition of customary land upheld by Orang Asli in Peninsular Malaysia, as well as other natives dwelling in Sarawak and Sabah. A vital implication of this recognition is that the acquisition process of Orang Asli customary land must follow strictly the due process, while payment of compensation must be awarded in accordance with statutory provisions.

In *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] 5 MLJ 268, the High Court ruled that the customary land of the Plaintiffs, who are the Semelai people, to include the rights to exclusively occupy and use the land and its resources, including the surrounding areas used by them to search for resources. The Court further held that the right to hunt and forage for resources in the forest subsist regardless on whether the people are settled in a permanent place with modern facilities, such as schools and hospitals or not. That

⁴ See *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418.

the extent of land right to comprise the foraging areas however has been reversed by the Court of Appeal in an appeal to the High Court judgment - *Ketua Pengarah Jabatan Hal Ehwal Ehwat Orang Asli v Mohamad bin Nohing (Batin Kampung Bukit Rok)* [2015] 6 MLJ 527. Vernon Ong JCA on appeal followed the position in *Sagong Tasi* stating that “whilst actual physical presence on the land is not necessary, there can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering”.

In attaining secure land rights, judicial recognition per se is insufficient since it depends on a case-to-case basis. Besides, different treatments prescribed by the respective state on this issue have created further uncertainties. A similar concern was shared by the communities residing in Kampung Parit Gong during the focus group discussion performed in this study. For example, the Federal Court in *TR Sandah* [2017] 3 CLJ 1 refused to recognise the Dayak native customs *pemakai menoa* and *pulau galau* in their claim over native customary rights (NCR). Since it fails to fully appreciate the customary land system, this view receives a number of criticisms where the Courts did accept the principles that the customary rights are based on the custom and practice of the native. Still they refused to adhere to these principles (Bulan & Locklear, 2009). As such, it contradicts the basic principle of common law on the land rights recognition of the indigenous people, whereby these rights are determined based on customs.

However, in the case of *Yebet bt Saman & Ors v Foong Kwai Long & Ors* [2015] 2 MLJ 498, the Court of Appeal stressed that the customary land rights of Orang Asli under the common law may co-exist with APA. Similarly, in *Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor* [2016] 8 MLJ 289, the Jakun community are required to vacate the area of land which is part of the Endau-Rompin National Park, Johor based on a general notice. To this end, the Jakun community applied to the Court for a judicial review to, amongst others, quash the notice made by the state land authority and declare that they indeed have customary land rights over a particular area of land in the National Park, their village, including the surrounding areas in which they have maintained their respective traditional connection with the lands, based on their customs and practices. Based on the evidence tendered by the Jakun community, the High Court held that

they had established their common law customary land rights, both on the settlement and ‘hunting and foraging’ areas.

To put differently, the customary land rights of the indigenous people include the right to access to resources via hunting, fishing and foraging with a condition that such activities must be reflected as the integral part of their custom and traditional activities, ‘which [have] long been the primary source and essence of their very existence and will continue to be essential to their future livelihood’.⁵

Moreover, in the case of *Mesara Long Chik & Anor v Pengarah Tanah dan Galian Pahang & Ors* [2018] 1 LNS 1009, a sub-group of Orang Asli Senoi community, known as the Semoq Beri community, applied to the High Court for the latter to declare that they have the rights and interest over a 12-acre piece of land in Maran. Although they had moved from the area, they argued that they inherited the said land from their ancestors and continue to attend the land since it has been planted with different types of fruit trees. As such, they would return to collect the fruits from the said area during the fruiting season to be sold as their source of income. Prior to the proceeding before the Court, they had applied to the state authority for land grant since 1985 and 1989. However, they were declined accordingly. Still, a temporary license was granted in 2004 by the state authority after their fruit trees were destroyed, but only to an individual, instead of to the community. The High Court allowed the claim for compensation made by the Plaintiffs, which was the alternative prayer by the Plaintiffs for the loss of the Plaintiffs’ interests and rights over their customary inherited land on the ground that they have successfully proven the previous and continuous use and occupation of the land. Therefore, the actual practice by the Orang Asli is crucial to determine the extent of their rights.

CUSTOMARY LAND OF ORANG ASLI IN KAMPUNG PARIT GONG

In 2015, Orang Asli constitutes 0.96 percent of the total population of Negeri Sembilan (1,098,500 at 2015) (Mohd Salleh, 2017). They live

⁵ See *Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor* [2016] 8 MLJ 289.

in 67 villages with a total population of 10,563. The Temuan descent represents 75 percent of the total population of Orang Asli in Negeri Sembilan whose number had reached 7,884. Another subgroup of the Orang Asli living in Negeri Sembilan is the Semelai, who live near the border with Pahang. Both Temuan and Semelai are under the class of Proto-Malay, one of three groupings of Orang Asli.

The Orang Asli in Kampung Parit Gong derives from the Temuan tribe who are the descendants of the earliest population in Negeri Sembilan. Historically, they have settled in the area for about 5,000 years, having arrived from the surrounding regions of Sumatera and Kalimantan (Borneo) (Alias, 2009; Dentan et al., 1997). Physically, it is quite difficult to distinguish between the Temuan tribe from Malays and their language may be regarded as a dialect of Malay, except several distinctive terms of their own and a slightly different accent (Dentan et al., 1997).

As far as Kampung Parit Gong is concerned, it is located in the *luak* (Adat district) of Jelevu, where the Undang resides in Kuala Kelawang (Raffie'i, 1973). It is situated in the mukim of Simpang Pertang within the district of Jelevu, Negeri Sembilan. It is about 2½ miles from Pertang and about 15 miles from Kuala Kelawang; the administrative town of the district. The access road to the Kampung from the main road is tarred and can be reached by car. The Kampung is equipped with basic infrastructure, such as water supply and electricity, internet line, schools, clinic, and community hall. There is also a dewan *adat* built by the community for their traditional ceremonies.

The initial establishment of the community in Kampung Parit Gong was over a century ago in the jungle area, led by a *Batin* Bani and his followers from Tampin. The resettlement process of the community at the present location ensued in 1972, where they were given '*rumah rancang*' (Raffie'i, 1973). At present, 92 houses have been erected in Kampung Parit Gong, which are occupied by 120 families. The total population is approximately 510. Based on the profiling survey that was carried out, most of the villagers are self-employed, while a few are rubber tappers, small-holder farmers, and public servants. In relation to their income, only a small number of them earn RM1,000 and above with a majority of them earning RM1,000 and below. Most of the families have children or dependents from one to five, and economically, they are still considered to be trapped in poverty. Since

most of them are self-employed, they need land and forests to carry out agricultural activities, as well as to seek other sources of income.

The community practises *Adat Perpati*. The customary *adat* of Negeri Sembilan which is not quite the same as other forms of customs such as *Adat Temenggung*. As compared with formal laws, the scope of customs is wider and comprise rules, practices, and conduct for daily communications and relationship amongst family and members of the society. Some customs may be enforceable in a court of law.

Adat Perpatih is a combination of *Adat Minangkabau* (Tarik Baleh/Simumbang Jatuah), *Adat Langkah Benar* (Adat Siak), and *Adat Benar* (Adat Orang Asal). The practice of *Adat Perpatih* was introduced by the Minangkabau people from Sumatera about a hundred years ago. Nonetheless, *Adat Perpatih* practised in Negeri Sembilan slightly differs from that practised in Minangkabau, Sumatera due to adaptation to the local customs of the Orang Asli, known as *Adat Benar* (Salleh, 2017). *Adat Perpatih* upholds matrilineal concepts, whereby ancestral property can be inherited and belong to the tribe as a joint property rather than individual property (Salleh, 2017). As such, women are privileged in regards to the inheritance of property. *Adat Perpatih* additionally governs wide-ranging aspects of life including politics, economy, culture, moral and others.

The Kampung is headed by a *Batin* and aided by a *Mangku*. These leaders are assisted by *Menteri*, *Jenang*, *Jekerah*, and *Panglima* (Focus Group Discussion, 12 February 2019). The appointment of leaders in Kampung Parit Gong is made in accordance with the *Adat Perpatih* which follow the maternal lineage. Under the system, all leadership offices i.e. *Batin*, *Sandang/Tok Mangku* and *Jenang* must be passed on from a man to his sister's son (*anak buah*) (Focus Group Discussion, 12 February 2019). Hood Salleh, a renowned anthropologist on the Orang Asli communities, enlisted several conditions to be satisfied in this appointment. First, the person to be appointed must be of rightful clan (*perut*) affiliation and rightful base (*telapak*). Second, the person must be an adult without serious physical or mental handicap, virtuous in the sense that he is not greedy (*hikap*), and possesses sound knowledge of traditions (*adat*) (Salleh, 1989). Decisions on the appointment of traditional offices are made by the community through consultation with the community members (Focus Group Discussion, 12 February 2019; Anuar & Fathil, 2019).

In line with the progressive development of the Orang Asli community, apart from the customary appointment, each village has an administrative committee structure presided over by a chairperson. Their appointments are made by a government department specific for the Orang Asli affairs which was established under APA. This committee mainly functions to assist in the administration and management of a village. These two community leadership structures are expected to complement each other.

Based on the discussions with the people of Parit Gong, it is observed that a communal concept of living is very important in Parit Gong. Every member of the community is responsible for the sustainability of the community in particular to safeguard their land, ensuring that their generation have a place to call home regardless how far they may have left the village and the community.

In Kampung Parit Gong, the land of Orang Asli is composed of three types; customary, ancestral, and foraging land types. The outcomes obtained from the focus group discussion revealed that their customary and ancestral lands have been gazetted as an aboriginal reserve, as initiated by the Orang Asli at Kampung Parit Gong in 1960. However, it was only in 2015 that the government gazetted 700 acres of the land in Kampung Parit Gong as an 'Orang Asli Reserved Area' (Focus Group Discussion, 12 February 2019).

In adherence to the *Adat Perpatih*, the ancestral land in Kampung Parit Gong is passed to daughters for care taking, serving as a trustee to the community land. On the other hand, the sons are expected to work and accumulate their own property (Focus Group Discussion, 12 February 2019). A son who is married may work the land belonging to his wife. As for the male from outside the community marrying a female from the community, he is expected to live in his wife's village and to work the land belonging to his wife. He is expected to support the village leadership as well (Focus Group Discussion, 12 February 2019).

Sale or exchange of such land is strictly prohibited, except for some dire cases like when the owner badly needs money, such as bearing costly medical treatment, but this is extremely rare. Such land can only be sold to other members of the community. The customary board at Kampung Parit Gong is required to serve as witness for the sale (Focus Group Discussion, 12 February 2019).

According to Batin of Parit Gong, nowadays it is quite difficult for the Batin to allocate certain areas of land to new families who are landless due to the scarcity of land in the village. In relation to this, the headmen and elders in the communities always stress the importance of maximising the use of land and no land should be left unattended. Otherwise they might lose the land and the younger generation would be affected.

Orang Asli still regard their former settlement in the forest surrounding the present villages as an area belonging to their community. They refer to these particular areas of land as *tanah pusako*, which means ancestral land inherited from their *nenek moyang* (ancestors). Each parcel of land belongs to a family unit and the members know the boundary of each parcel which is normally marked by using certain natural boundaries such as rivers or a certain type of tree. These areas of land are commonly planted with a variety of fruit trees which provide a relatively good yearly income.

The surrounding area is a foraging area where the Orang Asli can freely roam to find food or additional source of income. Unlike ancestral land that belongs to family units in the communities, the foraging areas are not owned by anyone but may be considered as common access. Although relatively only a small number of villagers venture into the forest areas to find various sources, it remains as an important source of income for them (Focus Group Discussion, 12 February 2019). This reflects the overdependence of the Orang Asli upon land and forest for their livelihood, identity and local environment besides their significance in determining Orang Asli's culture and customs (Kardooni et al., 2014). At the time of this study, they were in the midst of applying for the foraging area to be gazetted as they have been working on the land for nearly five decades (Focus Group Discussion, 12 February 2019).

As a community that holds a unique relationship with their customary land, security of land tenure has been a concern of the Orang Asli in Kampung Parit Gong. A long delay was noted in the gazetting process of the land inhabited by Orang Asli in Kampung Parit Gong, whereby the duration for the application to be approved was extended for decades since its submission in the year 1960. Section 7 (1) of the APA stipulates that "the State Authority may, by notification in

the Gazette, declare any area exclusively inhabited by aborigines to be an aboriginal reserve, provided when it appears unlikely that the aborigines will remain permanently in that place, it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and an aboriginal reserve may be constituted within an aboriginal area". This provision bestows the power of the State Authority to declare any area inhabited solely by aborigines to be an aboriginal reserve. Although Section 7 (1) offers protection for the lands of Orang Asli, the State Authority also has the power to completely or partially revoke such declaration by making notification in the Gazette, as stipulated under Section 7 (3) of the APA. This is also a highly concerned matter by the Orang Asli in Kampung Parit Gong (Focus Group Discussion, 12 February 2019).

In *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] CLJ 486, the High Court held that the Orang Asli have exclusive rights to forest produce in declared aboriginal reserves, notwithstanding when it is still awaiting gazettal after state approval. As such, the state cannot issue logging permits in such areas to any person other than the Orang Asli. In addition, the court in *Sagong (No 1)* which followed North American common law held that, it is the duty of the state authority to create reserves as a fiduciary since it has legal powers and responsibilities to protect the people.⁶ The intention of the creation of the reserves under the law, amongst others, is to prohibit the alienation of land in aboriginal areas to a non-aborigine or dealings by the state with regards to land for the benefit of non-aborigines. This reflects the permanent nature of the title vested in the aboriginal peoples.

The court in *Sagong (No 1)* did not accept the argument that in the event the state authority does not exercise the power, the aborigines would have neither the title nor interest in the land. Such an argument would have frustrated the purpose of the Act, that is, to protect the welfare of the aboriginal people. Since land is a very valuable socio-economic commodity, the court also considered that it would not be the intention of the legislature to deprive people, particularly the

⁶ *Sagong (No 1)* [2002] 2 MLJ 591; *Sagong (No 2)* [2005] 6 MLJ 289: the courts viewed that both state and federal governments were in breach of their fiduciary duties upon failure to gazette the Orang Asli land. This is also partly based on the fact that the government has knowledge that the land was occupied by the communities. The government is also aware that failure to gazette the land will affect the communities seriously and expose them to serious loss.

orang Asli of their customary title at common law.⁷ To this end, any actions of both the federal government and state authorities affecting the interests of Orang Asli in terms of excision of the reservations and order to leave the reserved land must be made with great caution by prioritising these interests as their priorities. Nonetheless, these interests have not been given adequate consideration, such as when the Orang Asli's interest in accessing resources co-exist with other interests in reserves (Wook, 2015).

The Orang Asli community in Kampung Parit Gong is also in need of assistance and support by the federal government through relevant agencies, including the Federal Land Development Authority (FELDA), the Rubber Industry Smallholders Development Authority (RISDA), as well as the Federal Land Consolidation and Rehabilitation Authority (FELCRA).⁸

They highly appreciate if the government can assist them in encompassing consultative participation and active engagement. This is in consonance with the suggestion by Wook (2019) that there must be provisions for a just process that provide opportunity for Orang Asli to participate in decision-making process with special consideration on their norms and decision-making institutions (Wook, 2019). It is also essential that any decision taken by the government in relation to the development of Orang Asli should not adversely affect the uniqueness and the special conditions of Orang Asli (Aiken & Leigh, 2011).

CONCLUSION

Based on the outcomes derived from the discussion, it seems that the Orang Asli community dwelling in Kampung Parit Gong is a well-organised community and strongly adheres to the *Adat Perpatih* practised in their society. They also greatly appreciate the land indicated through the use of the land for agricultural activities and

⁷ See *Sagong (No 2)* [2005] 6 MLJ 289.

⁸ There is an issue of coordination among the government sectors providing services to the Orang Asli in which data involving Orang Asli was not shared and the visits by various government sectors were not coordinated, see, Masron et al., 2013).

custom of inheritance based on *Adat Perpatih*. Nevertheless, there are loopholes in safeguarding their customary land rights and the socio-economic well-being of their future generation, as discussed above. Therefore, a provision in the existing law that reckons the customary land right of Orang Asli for their sustainable living is indeed necessary. Support and assistance provided by the government in various aspects may be enhanced, for example, in terms of implementing consultative participation and active engagement with Orang Asli in decision-making process that are bound to affect them.

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