Pertanika J. Soc. Sci. & Hum. 22 (S): 183 - 204 (2014)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Exercising the Principle of Free, Prior and Informed Consent (FPIC) in Land Development: An Appraisal with Special Reference to the Orang Asli in Peninsular Malaysia

Rohaida Nordin* and Mohd Syahril Ibrahim

Faculty of Law, Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia

ABSTRACT

Contemporarily, the rights of indigenous peoples are considered to include the right to free, prior and informed consent (FPIC), perceived as mandating consultations and negotiations between indigenous peoples and interested parties, followed by approval from the indigenous communities affected prior to the beginning of initiatives, whether social, political or developmental in nature. The current article considers the situation of the Orang Asli in Malaysia against the growing support for FPIC within international, regional and domestic legal regimes. This paper will be structured as follows: firstly, the exercise of the right to FPIC is defined in the context of the rights of indigenous peoples. Secondly, existing international, regional and domestic legal frameworks that promote FPIC for indigenous peoples are examined. Thirdly, the approach taken by the Malaysian government towards the Orang Asli in relation to FPIC and development projects is surveyed. Lastly, recommendations are made in light of the challenges faced by interested parties when indigenous peoples desire to exercise the right to FPIC.

Keywords: Free, prior and informed consent, indigenous peoples, Orang Asli, land development

INTRODUCTION

Consent, as the basis for relations between States and indigenous peoples, was observed as early as 1975 by the International Court of Justice (ICJ) in its advisory opinion in the *Western Sahara* case. In that case, the ICJ stated that entry into the territory of indigenous peoples required the freely informed consent of that peoples as evidenced by an agreement. Around the world, large-scale infrastructure and extractive industries' projects are being developed at a fast pace. These projects are driven by an ever-increasing demand for

ARTICLE INFO

Article history:
Received: 2 August 2013
Accepted: 11 October 2013

E-mail addresses:
rohaidanordin@ukm.my (Rohaida Nordin),
tresz_addin04@yahoo.com (Mohd Syahril Ibrahim)
* Corresponding author

ISSN: 0128-7702

natural resources, which includes logging for timber, mining for minerals and oil, and damming rivers for hydro-electric power production. Such development projects, however, can lead to massive changes in the lives of people, as they affect the nature of their livelihoods which revolve around the environment in and around the project area. However, if developed sustainably, these projects can bring about benefits for local residents, avoiding negative environmental and social effects. In most cases, such projects lead to violations of human rights, as the development often takes place without any real consideration for the rights and interests of the indigenous peoples and the environments in which they live.

Indigenous peoples have fought for recognition of their right to give or withhold consent for project development by their national governments, the international community and private companies. This right relates directly to the right for indigenous peoples to control their own future and the future of their people. The right to free, prior and informed consent (FPIC) has been stated as the right "to give or withhold their free, prior and informed consent to actions that affect their lands, territories and natural resource" (Tamang, 2004). This right is often violated when there are large-scale development projects, such as mineral resource, timber resource, agricultural or infrastructural development. Often, indigenous peoples and other community members are left out of the planning and decision-making process in these projects. The outcome can be devastating: indigenous peoples and other project-affected communities risk a permanent loss of their livelihoods and cultures, as lands can be damaged or taken without their consent. Resettlement is often forced upon communities while inadequate compensation is offered (Errico, 2006).

The principle of FPIC is recognized to be deeply related to the human rights approach to development which turns subjects, including indigenous peoples, from passive recipients to right-holders and active participants in development programmes.[1] A human rights approach to development has the human being at its main focus, and gives attention to the manner in which development occurs, not simply on the outcome of the project.[2] The United Nations Development Program (UNDP) meaningfully relies on the FPIC of indigenous peoples when incorporating their perspectives in development planning (UNDP, 2005). Additionally, such a connection has also been highlighted by the United Nations (UN) Committee on the Elimination of Racial Discrimination. The issue of FPIC can be addressed as a combination of a right to property and the right to self-determination. In practice, FPIC

[1] The International Workshop on Methodologies regarding FPIC and IP was convened in accordance with Economic and Social Council decision 2004/287 of 22 July 2004, following a recommendation of the Permanent Forum on Indigenous Issues at its third session and was held from 17 to 19 January 2005.

[2] As spelt out in the paper *Engaging indigenous peoples in governance processes: International legal and policy frameworks for engagement* by the UN Forum on Indigenous Issues.

is premised upon the notion that indigenous peoples have the right to determine what use should be made of their lands, territories and resources (Rohaida & Matthew, 2012). The principle of FPIC of indigenous peoples in relation to policies, programmes, projects and procedures affecting their rights and welfare has been widely discussed by inter-governmental organizations and international bodies, and has been the subject of provisions in conventions and international human rights instruments, and is being increasingly recognized in the laws of States (MacKay, 2004).

In Malaysia, the Aboriginal Peoples Act 1954 (APA 1954) acts as the main law for the Orang Asli groups; however, it contains no specific provisions regarding the concept of FPIC to the Orang Asli when development projects affect their land. There is no exclusive right given to the Orang Asli, as they only have rights of occupancy despite having inhabited a particular place for many years. This allowsvarious groups to take advantage of the situation, since the provision does not require the consent of the Orang Asli, unlike the provisions regarding FPIC enshrined in international instruments.

For the purpose of this research, the theoretical analysis will be employed, by looking into the existing legal instruments pertaining to the concept of FPIC to indigenous peoples. This paper will also examine a case study in Malaysia regarding the position of the Orang Asli in order to gain a better understanding of the principle of FPIC to them. This paper will be structured as follows: firstly, the exercise of the right to FPIC is defined in the context of the rights of indigenous peoples; secondly, existing international, regional and domestic legal frameworks that promote FPIC for indigenous peoples are examined; thirdly, the approach taken by the Malaysian government towards the Orang Asli in relation to FPIC and development projects is surveyed; lastly, recommendations are made in light of the challenges faced by interested parties when indigenous peoples desire to exercise the right to FPIC.

THE CONCEPT OF FREE, PRIOR AND INFORMED CONSENT (FPIC)

FPIC is vital to upholding the human rights of indigenous peoples and local communities (Cacas, 2004). In accordance with FPIC, individuals and communities should be informed in appropriate, accessible language about projects that might take place on their land. The principle also seeks to guarantee that indigenous communities are given the opportunity to give, withhold or negotiate land use and related issues. When it has been determined that FPIC should be implemented, an approach for the implementation must be pursued. Such an approach begins with the identification of the specific characteristics of FPIC. These include the following:

Free: Decision-making and information-gathering by potentially affected people(s)/ communities must in no way be limited by coercion, threat, manipulation, or unequal bargaining power. Consent must be entirely voluntary (Goodland, 2004; MacKay, 2004). It also connotes the absence of coercion

and outside pressure, including monetary inducements (unless they are mutually agreed to as part of a settlement process), and "divide and conquer" tactics. It includes the absence of any threats or implied retaliation if the results of the decision are to say "no".

***Prior**:* To be meaningful, consent must be sought after sufficiently, in advance of any decisions by the State or third parties, or any commencement of activities by the project proponent that will affect people(s)/ communities and their lands, territories, and resources. 'Prior' means having sufficient time to allow for information-gathering and full discussion, including translations into traditional languages, before a project starts. It must take place without time pressure or constraints. A plan or project must not begin before this process is fully completed and an agreement is reached.

Informed: Disclosure of information concerning the nature, purpose, expected impacts, risks, and benefits of the proposed development must be made fully and accurately, in a form that is both accessible and understandable to the affected people(s)/ communities with an understanding of how they specifically will benefit, and how these benefits compare to projected impacts and potential worst-case scenarios (and alternatives). Furthermore, potentially affected people(s)/communities must be fully informed of their own rights and understand the legal processes guiding the implementation of the project. Being informed is having all the relevant information available reflecting all views and positions. This includes the input of traditional elders, spiritual leaders, subsistence practitioners and traditional knowledge holders, with adequate time and resources to consider impartial and balanced information about potential risks and benefits.

***Consent**:* Consent does not necessarily mean that every member of the affected people(s)/communities must agree, but rather that consent will be determined pursuant to customary law and practice, or in some other way agreed upon by the community. The affected people(s)/ communities need to specify which person/ entity will represent them, and the project proponents must respect the representative(s) chosen by the community as the only legitimate provider(s) of consent. For many persons, the term "consent" connotes that the consent must be un-coerced and entirely voluntary; for these persons, the term "free" is redundant.

Methodologies on free, prior and informed consent should consider, as their basic objective, the improvement of the living conditions of indigenous peoples and that FPIC necessarily extends to all matters that relate to the life of indigenous peoples. The principle of FPIC encompasses not only a procedure to be elaborated, but also a right associated with indigenous peoples' right to self-determination, treaties and indigenous peoples' rights to lands, territories and natural resources (Perrault, 2006). Procedures concerning FPIC should recognize indigenous customary law where this is relevant, and address the issue of who represents the indigenous peoples. This principle is an evolutionary process

that could lead to co-management and decision-making by indigenous peoples on programmes and projects affecting them. FPIC is particularly relevant for the prevention of conflict and for peace-building (Motoc, 2004).

The definition of FPIC for local communities varies by context, and is generally described as a consultative process whereby potentially affected communities engage in an open and informed dialogue with individuals interested in pursuing activities in the area(s) occupied or traditionally used by the affected community. Discussions should occur prior to, and continue throughout, the time the activity is conducted, and communities should have the right to withhold consent at decision-making points during the project cycle. At no time should consent be coerced.

The implementation of the principle of the FPIC presents a number of practical problems. For example, the term "free", "prior" and "informed consent" practically seems to be difficult to understand, not to mention how is consent given, and who gives the consent in a diverse community. In implementing FPIC, how do we ensure a balance between the State, the general public interest, and affected community interests, particularly in the distribution of benefits? Another issue is related to the person who is put in charge in providing information and impact assessments on projects that affect indigenous communities. Another related problem is the methods used to reach the indigenous peoples in obtaining information that affect their rights as a whole. Lastly, if their rights to give or withhold FPIC are neglected, what form of redress should be available to indigenous peoples? Thus, it could potentially create more problems and challenges in ensuring that the indigenous peoples can freely exercise the principle of FPIC (Bulan, 2010).

By determining each meaning of FPIC holistically, its implementation can be more effective, and thus,. give a clear argument that the indigenous peoples' right to FPIC is vital, as it affects their communities at large. In the next section, the paper will briefly explain the concept of FPIC and its relationship with sustainable development concepts.

FPIC AND SUSTAINABLE DEVELOPMENT

Sustainable development is a complex and ever-expanding concept, incorporating social, cultural, economic, political and environmental issues – though essentially, sustainable development is a political concept. It promotes a strategy for development that seeks to marry environmental protection with economic and social development. Sustainable development has consistently recognized the importance of indigenous peoples and their rights as provided in Agenda 21[3].

[3] Section 3 of Agenda 21 provides for arrangements to be made to strengthen the active participation of indigenous peoples and their communities in the national formulation of policies, laws and programmes relating to resources management and other development processes that may affect them and their initiation of proposals for such policies and programmes.

On this basis, sustainable development policy approaches relevant to indigenous peoples should include two main features. Firstly, recognition and respect for legal measures aimed at the equal protection of indigenous rights and interests. Such legal measures may include legislation aimed at the recognition of land rights and the protection of cultural heritage as well as of indigenous knowledge systems through intellectual property law. In the event that such legislation fails to provide equal protection, a sustainable development approach should incorporate wider measures of protection to address this failure. It is noteworthy that international law standards are not only relevant to nation-States. There is a growing expectation that regional governments, administrative bodies and even corporations have a role in achieving human rights standards.

The second feature of a sustainable development approach relevant to indigenous peoples should be the incorporation of self-determination. Critically, self-determination is not an outcome, it is a process. This process is aimed at handing control of the economic, social, political and cultural development of indigenous peoples. While this may seem like a monumental task, it begins with respect for and incorporation of traditional decision making processes, the active participation of indigenous peoples in decisions which affect their rights and interests, and the opportunity to provide or withhold their informed consent for such decisions . Thus, should the development projects affect indigenous peoples, it must be ensured that the rights of the indigenous peoples are protected and preserved.

LEGAL FRAMEWORK OF INDIGENOUS PEOPLES' RIGHT TO FPIC

This section aims to analyze the existing legal frameworks that govern the indigenous peoples' right to FPIC. Thus, the scope of the discussion will focus on the three (3) levels of legal frameworks. Firstly, the discussion will look into the international legal framework such as the provision in UNDRIP and ILO 169. Next, the provision from regional legal frameworks such as The Inter-American Commission on Human Rights (IACHR) and The Inter-American Development Bank's (IADB) 1990 will be examined. Lastly, the discussion will focus on the national legal frameworks that govern indigenous peoples' right to FPIC. It should noted that since judicial recognition regarding the right of the Orang Asli to FPIC in land development is yet to be recognized, the international treaties such as UNDRIP and regional frameworks are the unfailing sources, of which the spirit of the law is embracedand applied by Malaysia constitution, as they are well-served to encounter the issues surrounding indigenous peoples particularly relating to the right to FPIC. These frameworks are important yardsticks to measure whether they are practical and compatible to be used within the Malaysian context of the Orang Asli right of FPIC.

International Legal Framework. Under international law, FPIC is one of the

basic rights enjoyed by indigenous peoples who have established distinct cultures, settlements and civilizations in countries across the world, long before the formation of present nation-States. It recognizes two basic facts: the first, that indigenous peoples have always had and still have rights over their lands, territories and resources; and the second, that indigenous peoples have the right to determine their own direction, priorities and processes of development and lifestyles.

The application of FPIC in relation to indigenous peoples, is formally and explicitly recognized in international law in various declarations and conventions, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP); ILO Convention No. 169 on Indigenous and Tribal Peoples 1989 (ILO 169); and the Convention on Biological Diversity (CBD) (Rohaida, 2010).

i. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The UNDRIP is a universal instrument adopted by the UN General Assembly on 13th September, 2007. In his comments to the UN Permanent Forum on Indigenous Issues, Permanent Forum member, Smith (2009) stated that the Declaration is formulated as a principle of law and, as such, is part of binding international law and a source of international law which, according to the Statue of the International Court of Justice Article 38, should be applied by the Court (Rubis, 2010). The provisions of the UNDRIP explicitly affirm the right to FPIC and States' obligations to obtain it in many of its provisions, including:

> ***Article 10*** *affirms that indigenous peoples shall not be forcibly removed or relocated from their lands or territories without their FPIC;*
>
> ***Articles 19*** *affirms that States must obtain the FPIC of indigenous peoples before adopting and implementing legislative or administrative measures which may affect them;*
>
> ***Article 29*** *affirms that indigenous peoples must give their FPIC before hazardous materials are stored or disposed of on their lands;*
>
> ***Article 32*** *affirms that States must obtain FPIC prior to the approval of any development projects affecting indigenous peoples' lands and resources, "particularly in connection with the development, utilization or exploitation of mineral, water or other resources".*

Other provisions in the UNDRIP do not make reference to FPIC explicitly, but instead include language that has been interpreted as requiring FPIC, such as in Article 26 which explicitly addresses the right of indigenous peoples to natural resources. The pertinent language includes:

"[i]ndigenous peoples have the rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," and "[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use ... States shall give legal recognition and protection to these lands, territories and resources.".

It is interesting to note that in American law, the language recognizing the right to property in the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man has been interpreted as requiring that the State to ensures that prior informed consent is obtained from indigenous peoples and other local communities with significant ties to natural resources before carrying out any activity that may adversely impact their ability to enjoy these resources. Articles 25 and 31 of the Declaration on the Rights of Indigenous Peoples also address the relationship of indigenous peoples to natural resources. Article 25 states, "[i] ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard." Thus, it can be said that Article 26 requires the State to obtain prior informed consent from the indigenous peoples before any activities are conducted.

To what extent does the Declaration embrace an absolute right to FPIC? Although Articles 10 and 29 clearly prohibit action without consent, and contain no language qualifying the right to FPIC, the language utilized in Article 46 can be interpreted as providing opportunities for State action in the public interest under very limited conditions. Article 46 states that the exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, in accordance with human rights obligations. Any such limitation shall be *non-discriminatory and strictly necessary* solely for the purpose of *securing due recognition and respect* for the rights and freedoms of others, and for *meeting the just and most compelling* requirements of a democratic society.

ii. International Labor Organization Convention No.169 on Indigenous and Tribal Peoples (ILO 169).

The ILO 169 emphasizes on the shift to improve the living conditions of indigenous peoples worldwide after the amendment of the ILO 107[4] in the conceptual approach

[4] Indigenous and Tribal Populations Convention, 1957 (No. 107) of the International Labour Organization (ILO) is an international instrument adopted to protect Indigenous populations from oppression and discrimination. The convention was drafted in the wake of rising concern about human rights following World War II. It is legally binding in the countries that have ratified it, but has since been amended in many countries by ILO Convention 169.

to indigenous and tribal peoples towards one based on respect for their specific identity and their right to participate in the decision-making process in all questions and programmes directly affecting them; that is to say, to participate in decision making for the determination of their own futures.

The Convention has 32 operative articles and is based on two fundamental concepts: consultation and participation. It is premised on the belief that indigenous and tribal peoples should have the right to be consulted when legislative and administrative measures which may affect them are being considered; that they should have the right to participate at all levels of decision making concerning them; and that they should have the right to decide their own development priorities. Consultation refers to the process and/or procedure by which indigenous peoples participate in decision making by States on issues which impact and affect their lives. Thus, it is clear that the right of 'consultation' referred to in ILO 169 is not the same as FPIC. The latter sets a standard for "effective participation in decision making", while the former provides for a right to be informed and heard on any particular issue, but not necessarily a right to consent to State action before it is undertaken. For example, compare ILO 169 Article 6 with UNDRIP Article 19. Article 19 sets forth clearly that the purpose of State consultation and cooperation with indigenous peoples is *"in order to obtain their free, prior, and informed consent…"* Having said that, the author believes the right to consultation complements FPIC, therefore promoting the right to participate for indigenous peoples in decision making processes. Similar to Article 18 and 19 of UNDRIP, Article 6 (1) (a) of ILO 169 requires the government to consult the peoples concerned, through their representative institutions, whenever consideration is being given to legislative or administrative measures that may affect them directly. Thus, before adopting any legal or administrative measures that might affect indigenous peoples directly, the government must have open, frank and meaningful discussions with the people concerned. Article 6(2) requires that consultation be undertaken *"in good faith ... in a form appropriate to the circumstances, with the objective of achieving agreement or consent."* This does not require consent, but does require that it be the objective of consultations. This is often overlooked when examining complaints filed by indigenous peoples under the provisions of ILO 169 (ILO 169, A.24), but it is an important requirement of the Convention that establishes, at a minimum, a moral obligation to seek and obtain consent (ILO 169, A.24).

Unlike the UNDRIP, the indigenous peoples' right to consultation in ILO 169 extends even to decisions about natural resources that remain under State ownership. Consultation is required to ascertain whether and to what degree their interests would be prejudiced before undertaking or permitting any developmental programmes for the exploration and exploitation of such resources pertaining to their land (ILO 169,

A.15(2)). Similar to the UNDRIP, ILO 169 also provides that relocation if indigenous peoples shall take place only with the FPIC (ILO 169, A.16 (2)).

iii. Convention on Biological Diversity (1992).

The Convention on Biological Diversity (CBD) was inspired by the world community's growing commitment to sustainable development. It represents a dramatic step forward in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources. This clearly protects the rights of the affected groups, including the indigenous and local communities. Article 8(j) for example, requires that the traditional knowledge of indigenous and local communities may only be used with their "approval", which has subsequently been interpreted to mean with their prior informed consent, or FPIC. Thus, the convention promotes the rights for affected groups including the indigenous people to give approval when the actions would affect them (Rohaida *et al.*, 2012).

iv. Other International Instruments.

Other international instruments have been utilized to bolster the rights of indigenous peoples at the domestic level. For example, in 2001, the UN Committee on Economic, Social and Cultural Rights deliberated on the issue pertaining to traditional land in Columbia, and noted, "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem." It then recommended that the State "ensure the participation of indigenous peoples in decisions affecting their lives. The Committee particularly urges the State party to the ICESCR to consult and seek the consent of the indigenous peoples concerned …"

REGIONAL LEGAL FRAMEWORKS

The indigenous peoples' rights to FPIC as enshrined in international legal frameworks such as UNDRIP and ILO 169 is followed by the regional level in their principle related to FPIC itself. It can be seen in the following discussions.

i. The Inter-American Commission on Human Rights (IACHR).

The Inter-American Commission on Human Rights (IACHR) has developed considerable jurisprudence on FPIC. In 1999, finding that Nicaragua had violated, among others, the right to property by granting logging concessions on indigenous lands in Nicaragua, the Commission held that the State "is actively responsible for violations of the right to property … by granting a concession … without the consent of the Awas Tingni indigenous community." (IACHR, 1999).

The same approach was used in 2002 in the *Mary and Carrie Dann Case*, where the IACHR found that Inter-American human rights law requires "special measures to

ensure recognition of the particular and collective interest that indigenous peoples have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation." The Commission concludes that the United States in its treatment of the Danns and their land rights had violated Articles II (right to equality before the law), XVIII (right to a fair trial), and XXIII (right to property) of the American Declaration on the Rights and Duties of Man. The IACHR also in their conclusion stated that any determination of indigenous peoples' interests in land must be based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This is to include: 1) members must be fully and accurately informed, and 2) members must have an effective opportunity to participate as individuals and as collectives.

ii. The Inter-American Development Bank's (IADB) 1990.

The Inter-American Development Bank's (IADB) 1990 Strategies and Procedures on Socio-Cultural Issues as Related to the Environment provides that: "[i]n general the IADB will not support projects affecting tribal lands and territories, unless the tribal society is in agreement". The IADB is presently formulating a binding operational policy on indigenous peoples, and preliminary strategy papers on this policy include FPIC (IADB, 2004). Thus, FPIC is already included in the IADB's policy on Involuntary Resettlement as stated in Section IV.

NATIONAL LEGAL FRAMEWORKS

The Philippines, Malaysia, Australia, Venezuela, and Peru have national legislations on the FPIC of indigenous peoples for all activities affecting their lands and territories.

i. Indigenous Peoples Rights Act (1997).

In the Philippines, the *Indigenous Peoples Rights Act* (1997) recognizes the right of FPIC of indigenous peoples for all activities affecting their lands and territories including:

a. Exploration, development and use of natural resources;
b. Research-bio prospecting;
c. Displacement and relocation;
d. Archaeological explorations;
e. Policies affecting indigenous peoples such Executive order 263 (Community Based Forest Management);
f. Entry of Military.

The significance of the IPRA of the Philippines is primarily in the policy and rights framework that it establishes for the recognition of territorial, land and resource rights of indigenous peoples and the requirement for FPIC for all developments affecting them. This clearly defines their rights - not as individual rights, but collective rights, with attendant rights to self-governance and self-directed

development. Aside from being an important strategy for peace and security, FPIC is really but "best development practice" and "best governance practice" - in short, sustainable development in practice. Since the World Bank principles were adopted into its policies, it gives a good guideline for the Philippines as well as other countries that have adopted this "best" development and governance practice.

ii. Australian National Legal Framework.

In five states of Australia, consent has been obtained through statutory indigenous-controlled Land Councils in the mining area for more than 30 years. These consent procedures were reviewed by the National Institute of Economic and Industry Research in 1999, which found that they had been successful in safeguarding aboriginal control over aboriginal land and have also provided a process of negotiation by which an increasing proportion of aboriginal land in the territory had been made available for mineral exploration. Consent is obtained through statutory, indigenous-controlled Land Councils, which may not consent to a mining license unless: they are satisfied that the traditional Aboriginal owners of the land in question understand the nature of the activity and any terms or conditions and, as a group, and satisfied that the terms and conditions prove reasonable, and they agree on the terms and conditions with the miner. Similar numbers cases could also be found for mining on Aboriginal lands in Canada, where indigenous peoples have negotiated agreements giving their consent.

iii. Malaysian Charter on Human Rights.

In the preamble of the Malaysian Charter on Human Rights, it is clearly stated that recognition and respect of the right to political, social, cultural and economic self-determination of all peoples are fundamental to the protection of dignity and equality; and to justice, peace and freedom in our country. The relevant provisions are:

> ***Article 4 – Development.*** *The right to holistic development is a basic human right. In order to attain socially equitable and environmentally sustainable development, there must be respect for civil and political rights as well as social, cultural and economic self-determination of all people. The peoples' participation in the development process is essential to ensure that development is socially just and culturally appropriate.*

> ***Article 7 – Environment.*** *All peoples and nations have a right to participate in decisions regarding local, regional, and global environmental issues such as nuclear arsenals, storage, transportation, and dumping of toxic wastes, pollution, and location of hazardous industries.*

It is suggested from the above provisions that all peoples, include the Orang Asli have a right to take part in decision making that may affect their lives. Indirectly, the concept of FPIC is stipulated in this Charter that

needs to be well observed by all interest groups.

In West Malaysia, Sarawak State passed the Sarawak Biodiversity Centre Ordinance 1977, and then the 1998 Sarawak Biodiversity (Access, Collection and Research) Regulations. The Sarawak Council is responsible for regulating access, collection, research, protection, utilization, and export of the State's biological resources. In 2004, the Sabah State of Malaysia in its "Framework for Incorporating Indigenous Communities within the Rules Accompanying the Sabah Biodiversity Enactment 2000" created a system rule that ensures indigenous peoples "shall all times and in perpetuity, be legitimate creators, users and custodians of traditional knowledge, and shall collectively benefit from the use of such knowledge."

From the preceding it can be seen that FPIC is an established feature of international human rights norms and development policies pertaining to indigenous peoples. Indigenous peoples' right to FPIC is clearly recognized under a range of universal and regional human rights instruments as well as in domestic law. As the principle of FPIC is well recognized internationally, the discussion will focus on the application of the right of FPIC for the Orang Asli in Malaysia, and to analyze whether or not the right to FPIC is recognized in the next section.

FPIC IN THE MALAYSIAN CONTEXT REGARDING THE ORANG ASLI

Malaysia consists of two landmasses separated by the South China Sea. The first, Peninsular Malaysia, is located between Thailand to the north and Singapore to the south. The second landmass consists of the states of Sabah and Sarawak on Borneo, the world's third largest island. The Malaysian governmental system is based upon a constitutional monarchy and a three-tier governance system comprised of the local, state and federal governments. The nation was formed as a federation in 1963 with Malaya, Singapore, Sarawak and Sabah joining together as Malaysia. Singapore later withdrew from this federation in 1965. The indigenous peoples of Malaysia, collectively known as Orang Asal, comprise the Orang Asli groups of Peninsular Malaysia as well as natives of Sabah and Sarawak. For the purposes of this article, the author will focus on the Orang Asli in Peninsular Malaysia only.

As discussed in the previous section, the UNDRIP contains extensive provisions for the recognition and protection of indigenous lands, territories and resources, including the principle that indigenous peoples shall have the right of consultation, participation and FPIC in matters affecting their lands, territories and resources.

Malaysia voted in favor of the UNDRIP, both at the Human Rights Council and at the General Assembly with no reservations (Yogeswaran, 2008; Yogeswaran, 2011). Although the UNDRIP is stated to be non-

binding, Malaysia's vote in favor of the UNDRIP creates a moral obligation and genuine expectation for it to pursue the standards contained in the UNDRIP in the spirit of partnership and mutual respect (UNDRIP, para 24; Yogeswaran, 2011). With its strong support for the passage of the UNDRIP from the UN Human Rights Council to the General Assembly, Malaysia has a special obligation to show that the principles and articles of UNDRIP are upheld within the State. While Malaysia is one of the nations that have agreed to the principles of the UNDRIP, Malaysia has only signed and ratified the Convention on Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), opting not to ratify other instruments including the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. The ILO 169 places special emphasis on the principles of consultation and participation, but Malaysia is not a signatory, nor has the government ratified the ICCPR. On the other hand, Malaysia has been more progressive in endorsing environmental treaties, amongst them the Convention on Biological Diversity (CBD), which provides several articles, most notably Article 8(j) for the protection of indigenous peoples' resources. In part fulfillment of its obligations under the CBD, the Malaysian Government has established a committee concerned with access, benefit□sharing and traditional knowledge, with three government agencies led by the Conservation and Environmental Management Division.

For a long time, the advocates at international consultations on indigenous issues have consisted of representatives of NGOs working among indigenous peoples, who may or may not be indigenous peoples themselves working alongside government officials. PACOS Trust, COAC (Centre for Orang Asli Concerns) and SAM (Sahabat Alam Malaysia) are among the examples that have been the voice of the minority indigenous peoples at many international forums for many years, and have performed tremendous work in creating awareness of the plight of Malaysia's indigenous peoples. In recent years, in response to international developments, there has been an increase in multi-stakeholder consultations linked to both government and non-governmental institutions involving issues affecting indigenous peoples. This has created an avenue for indigenous peoples' leaders, through their cultural associations, to join the consultations as representatives of their own communities. The real respect and contribution for indigenous voices in policy implementations remains to be seen.

Having said that, international law also recognizes the right of States to act in the public interest under certain conditions. However, no official interpretation of international law existsto describe specifically *how* the rights to FPIC of indigenous peoples and other local communities relate legally, or to the rights of States to manage natural resources in the public interest in practice.

Be that as it may, the implementation of the indigenous peoples' right to FPIC in Peninsular Malaysia is slightly different (Noor Ashikin Hamid *et al.*, 2011). It has and needs to be seen in the wider perspective of the circumstances which involve this community. 'Orang Asli' is the homogenous term given to all eighteen (18) non-Malay indigenous groups on the Malay Peninsula, which total around 180,000 people. Orang Asli land rights are governed by the Aboriginal People's Act of 1954 (APA 1954). Under this Act, the State may declare an area customarily and currently inhabited by the Orang Asli to be an "aboriginal area." The Orang Asli have exclusive rights of occupancy of this customary land and use of its natural resources, but have no rights of ownership (APA, S8 (1). They cannot sell, lease, or grant this land without permission from the Commissioner of Aboriginal Affairs (APA, S9), a post which has never been held by an Orang Asli. The government may take the land at any time, and must only pay compensation for the value of the crops and dwelling on the land, not the land itself (APA, S.12).

It is important in this section to look into the evolution of the Orang Asli rights to land and natural resources, especially to the right of FPIC. The APA 1954 contains no specific provision concerning FPIC. As discussed before, there is no exclusive right given to the Orang Asli, as they only have the right of occupancy, despite having inhabited a particular place for many years. For example, Section 6(3) and Section 7(3) of the APA give complete power to the State to revoke, wholly or partly, the declaration of Aboriginal Area and Aboriginal Reserves without FPIC. If the land is acquired by the State and affects the Orang Asli, compensation can be given by virtue of Section 11. However, in Section 12, it is stated that compensation made by the State is not obligatory. The State has discretionary power whether or not to grant the compensation to the affected Orang Asli. It is clearly stated that the provision does not require the consent of the Orang Asli, unlike the provisions regarding FPIC enshrined in international instruments (Yogeswaran, 2008).

In a 1998 case, *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors*, 52 Orang Asli claimed right over the land which was alienated to the Johor Corporation. The high court ruled that the Orang Asli is entitled to compensation only for what is over the land, and not for the value of land itself. Nevertheless, in a 2002 case, *Sagong bin Tasi v. Selangor State Government*, the Malaysian High Court declared that the Orang Asli have a proprietary interest in their customary lands, including the right to use and derive profit from the land. The Court further declared that Orang Asli land fell under the Land Acquisition Act 1960, which governs all land acquisitions in Malaysia, and that the government taking of the land required compensation in the same manner as imposed upon non-Orang Asli land. The Court of Appeal affirmed the decision.

It can be said that the land right given to the Orang Asli is only to the right of

occupancy, and not of ownership, as the land is subjected to specific provisions within the Land Acquisition Act, 1960. Thus, the Orang Asli cannot exercise the concept of FPIC as originally, they do not have the right of ownership on the land. This is a sad situation as it seemingly contradicts the principles that serve as the foundation for the recognition of FPIC within the text of international instruments. While Malaysia voted in favor of the UNDRIP, the implementation of the soft law instrument is merely persuasive in nature, and not legally binding. However, the Malaysian government has a moral obligation to comply with the international instruments and it must move forward in the area of indigenous rights, by meeting international standards if it wishes to gain the respect of the international community.

Many civil society groups, including the Malaysian Bar Association, have strongly supported the Orang Asli rights. The Bar Association issued a press release urging the government to "formally recognize, protect and guarantee [Orang Asli] rights to all their ancestral lands," and to withdraw any proposed legislation that would limit these rights. Commentators such as Ragunath Kesavan, as a former president of Malaysian Bar Council (2009-2011) also insist for the government to uphold its commitments under the UNDRIP, which states that indigenous peoples have "the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" (UNDRIP, A.26(1)).

CHALLENGES AND RECOMMENDATIONS

This section deals with the challenges in implementing the principle of FPIC to indigenous peoples. It may vary from the government's involvement as well as the durations of the negotiation process. This section also will provide recommendations in promoting the indigenous rights to FPIC that need to be observed by the relevant bodies.

Claiming the right to FPIC can be a challenging task, as FPIC is an ongoing process and negotiations can take a number of years. Project-affected communities may have to demand their participation in negotiations, or in the case of indigenous peoples, that their right to FPIC is respected. These rights are often not automatically recognized (Satterthwaite & Hurwitz, 2005). Some governments, companies and financiers have made progress towards respecting this right and have policies and commitments which are applied when developing a project. However, for many developers, FPIC is still something many fail to respect, implement or fully understand. Also, there may be national laws in a country which changes the manner in which FPIC can be claimed. It is important for project-affected communities to obtain advice on the local laws of their country.

The Malaysian Federal Constitution (FC) has a unique provision for preferential treatment and positive discrimination in favor of Malays, natives and the Orang Asli (FC, A.153 (8) (b)). The policy is based upon the premise that the Orang

Asli is historically disadvantaged, and it is aimed towards correcting the social and economic imbalance. This should enable States to promote more minority indigenous peoples into positions in the civil service or organizations dedicated to looking after the interests of the Orang Asli.[5] There is a tremendous challenge for governments to hear and to really listen to indigenous voices, and to take their perspectives into account in formulating policies and in entering into any binding agreements which might adversely affect indigenous rights to avoid further marginalization of the poor.

Ensuring access to information is another crucial duty of the government. There must be continuous, wider dissemination of information and an adequate period should be given to ensure that informed decisions are made. Unfortunately, the usual scenario in almost all cases of development is, little information is available to the public. In the Murum Report, for instance, the Malaysian Human Right Commission (SUHAKAM) recommends that information be made public from the time plans are mooted, rather than making them available after they are finalized, to give affected people ample time to highlight their concerns.

In Malaysia, the government can recognize the Orang Asli's land rights via the introduction of specific legislation that would regulate such matters. The drafting of this legislation should consider indigenous issues holistically, and with regards to the rights of indigenous people contained in the UNDRIP. The Declaration protects *inter alia*, which is the collective rights of indigenous peoples; the right to self-determination; the right to FPIC when making decisions that affect indigenous peoples; the right to determine their own priorities; and the right to the protection of the indigenous culture, values and identities. The experiences of other common law jurisdictions, such as Australia, Canada and New Zealand, should be considered in the drafting of a statute recognizing the rights of the Orang Asli in Peninsular Malaysia (Yogeswaran, 2007).

Furthermore, the government should consult and involve the Orang Asli representatives in its process of acquiring indigenous land. Even though the State Authority under the provision of Land Acquisition Act 1960 has the power to take possession of any private land, it does not allow the authority to violate other rights in relation to private property. Fair compensation must be made to the affected Orang Asli. The State should carry out consultations and negotiations with indigenous peoples whenever it seeks to acquire indigenous land, in a manner similar to the policy of mutual respect taken by Canadian State authority in dealing with indigenous land. The 1997 decision of the Canadian Supreme Court in the *Calder (1997)* case stressed the importance of consultation, negotiation and adequate compensation as preconditions of acquiring indigenous land.

[5] For instance, in the JHEOA, Department for the Welfare of Aboriginal People, the high level administrative officers who determine the policies are mainly Malays. The few Orang Asli personnel are only in the lower rung of the administrative ladder.

Another example is the Waitangi Tribunal in New Zealand, whereby the New Zealand government interpreted the Waitangi Treaty as establishing a partnership between the Maoris and the State, requiring the holding of adequate consultations between State authority and Maori community before any land acquisition is made (Cheah, 2004). Moreover, this concept was also emphasized in the UNDRIP whereby it confers *inter alia* the right to the Orang Asli to participate in decision making in matters which would affect their rights, through representatives chosen by themselves (UNDRIP, A.18), and hopes that the State shall consult and cooperate in good faith with the Orang Asli in order to obtain their FPIC before adopting and implementing any legislative or administrative measures that may affect them.

Another suggestion is to apply the UNDRIP. A direct application of the Declaration as a binding instrument on the Malaysian courts may be difficult. However, the persuasive authority of the Declaration on the Malaysian courts cannot be denied, given the special position of the Orang Asli and their lands under the Federal Constitution and Malaysia's strong support for the declaration of the United Nations. Therefore, the Malaysian courts may rely on the provisions of the Declaration in giving effect to the constitutional protection afforded to the Orang Asli in any land rights claim. The government's vote in favor of this Declaration can be seen as an expression of willingness to discard of the many outdated Orang Asli laws and policies, and to replace them with the ones that are in line with the Declaration (Yogeswaran, 2008).

Indigenous peoples are recognized as possessing rights to FPIC and generally, the following steps can be suggested to bring activities in Malaysia into compliance with international standards in this regard:

- Indigenous peoples should insist that any consultation processes, including that of sharing information, includes the right to say "no".
- Indigenous peoples need to continually strengthen and renew their knowledge of customs and traditions, as these not only contain the principles of access to their lands and territories, but also in order to reaffirm their collective identity as indigenous peoples.
- Indigenous peoples should be prepared to engage private and independent financial and legal advisors who can safeguard their interests, and to insist upon this as part of the obligations of the prospective investor.

With hopes that the indigenous rights to FPIC would be well observed by the community at large and the specific interest groups, mutual compromise between parties in reaching agreements especially when the rights of the indigenous peoples are at stake is important.

CONCLUSION

Today, indigenous peoples in many parts of the world are in the process of trying to renegotiate their relations with States and

with new private sector operators seeking access to the resources on their lands. They are asserting their right to FPIC as expressed through their representative institutions in dealing with the many interested parties. They are seeking support from international human rights bodies to find new ways of being recognized by international and national laws and systems of decision making without losing their autonomy and values (Colchester & Mackay, 2004).

In fact, without the sort of substantive participation that FPIC mandates, the tenure security of rural communities will remain at the mercy of decisions made by others. It is well documented that such insecurity perpetuates poverty. In contrast, with the bargaining power that FPIC provisions bring them, indigenous communities can demand direct compensation for damages or a continuing share of the profits of resource extraction. They can even require the backers of development to invest part of the profits from these ventures to meet community needs. In this respect, FPIC is a tool for greater equity and a natural pathway towards co-management roles for local communities in large development projects.

Even though Malaysia has a unique system for the governance of the Orang Asli, it should not impede the State from acting in accordance with moral obligations arising from international instruments, especially with regards to the exercise of the right to FPIC by the Orang Asli. To date, countries like the Philippines (Congress of the Philippines, 1997) and Australia (Commonwealth of Australia, 1976) have enacted laws requiring that FPIC be obtained by the government for projects within the ancestral domains of indigenous peoples. The right to FPIC must to be respected by all parties, as it is in line with the principle of human rights and the sustainable development of indigenous peoples.

REFERENCES

Aboriginal Peoples Act 1954.

Adong bin Kuwau & Ors v The Government of Johore (1997), 1 MLJ 418 (HC).

Ashikin Hamid, Noraida Harun, & Shariffah Nuriadah. (2011). Judicial Recognition Of The Orang Asli Land Rights In West Malaysia: Triumph And Hope, *7 CLJ.*

Bulan, R. (2010). *Indigenous Peoples and the Right to Participate in Decision Making in Malaysia*. Paper presented for International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making, Chiang Mai, Thailand.

Calder v British Columbia [1997] SCR 313.

Casas, A. (2004). Prior Informed Consent in the Convention on Biological Diversity - Bonn Guidelines: National Implementation in Colombia. *Sustainable Development Law and Policy,* 4(2). Retrieved from http://pdf.wri.org/ref/casas_04_prior.pdf

Colchester, M., & Mackay, F. (2004). In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent. *Forest Peoples Programmme*.

Convention on Biological Diversity (1992).

Convention on Elimination of Discrimination against Women (CEDAW).

Convention on the Rights of the Child (CRC).

Cheah, W. L. (2004). *Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestones or False Start?* Retrieved 8 August, 2008 from http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/cheah

Errico, S. (2006). The World Bank and Indigenous Peoples: The Operational Policy On Indigenous Peoples (O.P. 4.10.). Between Indigenous Peoples' Rights To Traditional Lands And To Free, Prior, And Informed Consent. *Int'l J. on Minority & Group Rts.,13, 367.*

Federal Constitution.

Goodland, R. (2004). Free, and prior informed consent and the world bank group. *Sustainable Development Law and Policy, 4*(2), 66-74.

Indigenous Peoples Rights Act (1997).

International Labour Organization Convention No.169 on Indigenous Peoples (ILO 169).

Indigenous and Tribal Populations Convention, 1957 (No. 107).

MacKay, F. (2004). Indigenous people's right to free, prior and informed consent and the world bank's extractive industries review. *Sustainable Development Law and Policy,* Summer 2004, 43-65.

Mary And Carrie Dann v United States (2002) Report Nº 75/02.

Motoc, A. J. (2004). Legal Commentary On The Concept Of Free, Prior And Informed Consent. Commission on Human Rights.

Perrault, A. (2006). Partnerships for Success In Protected Areas: The Public Interest And Local Community Rights to Prior Informed Consent (Pic) *Geo. Int'l Envtl. L. Rev., 19, 475.*

Rohaida Nordin, & Matthew Albert Witbrodt. (2012). Self-Determination of Indigenous Peoples: The Case of the Orang Asli. *Asia Pacific Law Review*, *20*(2), 189-210.

Rohaida Nordin, Kamal Halili Hassan, & Zinatul Ashiqin Zainol. (2012). Traditional Knowledge Documentation: Preventing or Promoting Biopiracy. *Pertanika Journal of Social Sciences and Humanities, 20*(S), 11-22.

Rohaida Nordin, (2010). The Rights of the Indigenous Peoples: Development of Minimum International Standards. *Quarterly Law Review, 3,* QLR: 94-114.

Rubis, J. (2010). *Frameworks for and Implementation of FPIC over land and knowledge in Sarawak, Malaysia.*

Sabah Biodiversity Enactment 2000.

Sagong Tasi and Ors v State of Selangor and Ors [2002] 2 MLJ 591.

Sarawak Biodiversity (Access, Collection and Research) Regulations 1998.

Sarawak Biodiversity Centre Ordinance 1977.

Satterthwaite, M., & Hurwitz, D. (2005). The Right Of Indigenous Peoples To Meaningful Consent In Extractive Industry Projects *Ariz. J. Int'l & Comp. L. 1,* 22.

Smith, C. (2009). *Report on indigenous fishing rights in the seas with case studies from Australia and Norway*. Retrieved from http://www.arcticgovernance.org/report-on- indigenous-fishing-rights-in-the-seas-with-case-studies-from-australia-and-norway.4778307-142902.html

Statue of the International Court of Justice.

Tamang, P. (2005). *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices***.** Paper presented at Workshop on Free, Prior and Infwormed Consent and Indigenous Peoples, organized by the Secretariat of UNPFII, ,UN Headquarter, New York, USA.

The Inter-American Commission on Human Rights (IACHR).

The Inter-American Development Bank's ('IADB') 1990.

The International Covenant on Civil and Political Rights (ICCPR).

The Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001). Inter-Am. Ct. H.R., (Ser. C) No. 79.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

UN Committee on the Elimination of Racial Discrimination.

United Nation Development Program (UNDP).

Western Sahara case (1975) I.C.J. 12.

Yogeswaran Subramaniam (2007). A Review of The Orang Asli Cases and Property Rights: An Aboriginal Tittle Perspective. *Malayan Law Journal, 7*, xxi.

Yogeswaran Subramaniam (2008). The United Nations Declaration On The Rights Of Indigenous Peoples: Additional Enforceable Land Rights For The Orang Asli? *MLJA, 2, 75.*

Yogeswaran Subramaniam (2011). The 'UNDRIP' and the Malaysian Constitution: Is Special Recognition and Protection of the Orang Asli Customary Lands Permissible? *MLJA, 2, 126.*