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**SELF-DETERMINATION AND FREE, PRIOR AND INFORMED
CONSENT OF THE ORANG ASLI**

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Abstract

Free, Prior and Informed Consent (FPIC) plays a vital role in translating indigenous peoples' right to self-determination into practice. Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognised the right to self-determination of indigenous peoples. Irrespective of any current recognition, the right to self-determination of indigenous peoples, including those of the Orang Asli (aboriginal peoples) in Peninsula Malaysia, are still at stake. The main objective of this article is to critically evaluate the compatibility of FPIC and the right to self-determination of the Orang Asli by looking at standards in international law. This article is a socio-legal study and adopts a qualitative approach. The current study analyses the concept of the right to self-determination of indigenous peoples under international law. The study also discusses the definition of FPIC as a manifestation of the right to self-determination. As this study focuses on the position of Malaysia's legal framework towards the Orang Asli, it will evaluate the elements of FPIC as manifestations of the right to self-determination of the Orang Asli's pursuant to Malaysian law as compared to the international law standards. Ultimately, suitable recommendations and possible solutions to improve the recognition of the right to self-determination of the Orang Asli will be presented. This is vital to ensure that protection of the Orang Asli's right to self-determination is compatible with international law and thus assists the Malaysian State in meeting her duties and obligations under international law.

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Keywords: FPIC, Indigenous peoples, Orang Asli, self-determination, UNDRIP.



1. Introduction

On September 13 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (Sixty-first General Assembly Plenary 107th & 108th Meetings). It received overwhelming support from all members for the adoption of UNDRIP, including Malaysia. Four states voted against it: Canada, Australia, New Zealand and the United States (Sixty-first General Assembly Plenary 107th & 108th Meetings, 2010). These opposing states later altered their stance on UNDRIP to one of support. UNDRIP is considered a “soft law” under international law which has no legally binding on states (Davis, 2008). According to Charters (2006), UNDRIP requires only a moral obligation as opposed to legal obligations. Nevertheless, UNDRIP’s preamble, “Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by states in accordance with the Charter” and Article 46 (3) UNDRIP recommend that governments respect all of UNDRIP’s provisions as they are consistent with the provisions of the United Nations Charter.

2. Problem Statement

While the rights of indigenous people are recognised under international law, the Orang Asli, as the indigenous minority peoples in Peninsular Malaysia, face a lack of recognition of their right to customary land issues, and are marginalised and dominated by the majority (Nordin & Ibrahim, 2014; Human Rights Commission of Malaysia, 2013 & Hasan, 2009). The provisions of the Malaysian Aboriginal Peoples Act (APA) 1954 have arguably inadequate to provide full protection for the Orang Asli as compared to the standards set out in both UNDRIP and international law. This is due to lacunae within the APA itself. Both of these factors restrict the recognition of the right to self-determination of the Orang Asli in terms of legal protection, which in turn affects their protection in practice. The lacunae in the APA weaken the position of the Orang Asli.

3. Research Questions

- 1) What is the concept of self-determination of indigenous people in international law?
- 2) What is the definition of free, prior and informed consent in international law?
- 3) To what extent the Malaysian law on Orang Asli is compatible with international law standards?

4. Purpose of the Study

The main objective of this article is to critically evaluate the compatibility of the right to self-determination and the principle of FPIC of Orang Asli by looking at standards in international law. To achieve this objective, discussion in this article analyses the concept of the right to self-determination of indigenous peoples and FPIC under international law. The study also evaluates the Malaysia’s legal framework of the Orang Asli pursuant to Malaysian law as compared to the standards of international law. The study ultimately presents suitable recommendations and possible solutions for enhancing recognition of the rights of the Orang Asli to self-determination.

5. Research Methods

This article is a socio-legal study and adopts qualitative approach. The study used library research to collect relevant literatures from primary and secondary source. The data obtained from the literatures were analysed using qualitative approach.

6. Findings

6.1. The Right to Self-Determination Within an International Legal Framework

Article 3 of UNDRIP recognises the right to self-determination of indigenous peoples as follows: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This provision is identical to Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) that recognises the right to self-determination of all peoples. As discussed in Hassan @ Yahya & Nordin (2016) & Hassan @ Yahya & Nordin (2017), the provision of the right to self-determination covers four main dimensions, such as the freedom of indigenous people to determine their political status and freedom to pursue their economic, social and cultural developments. Daes (1996) added that these dimensions are also closely aligned with recognition of the right to natural resources.

Article 4 of UNDRIP, however, limits the scope of the right to self-determination to include only the right to autonomy or self-government, that is, in matters relating to indigenous peoples’ internal and local affairs, as well as ways and means of financing their autonomous functions. Nordin et al. (2012) stated that Article 4 sets a limit to indigenous peoples’ right to self-determination whereby it applies only to internal aspects, whereas other peoples’ rights include the right to secession. In addition, Article 46 of UNDRIP requires adherence to the principle of sovereignty and territorial integrity of the country in question. This condition reflects that there is an imbalance in the recognition of the right to self-determination of all peoples, including the right of separation. This approach is contrary to the principle of equality and it discriminates against indigenous peoples in many situations even though indigenous peoples may never have dreamed of separation as it is outlined under international law (Daes, 1993).

The right to self-determination receives attention from the International Court of Justice (ICJ). The ICJ, in the case of *Portugal v. Australia (East Timor case)* (1996), ruled that the right to self-determination is erga omnes which refers to rights and obligations that are applicable to everyone. The right to self-determination should be recognised for all people, including indigenous peoples.

Some international law experts such as Anaya (2004) hold that the right to self-determination has received the status of “jus cogens,” a peremptory norm under international law (Hannum, 1990). The implications of “jus cogens” were provided under Article 53, Vienna Convention on the Law of Treaties 1969, whereby any treaty which conflicts with the principle of “jus cogens” is regarded as void. The right to self-determination can be understood as independence, integrity and honour but it also covers human rights, especially when these rights have been recognised in the two international covenants of the ICCPR and ICESCR (McCorquodale, 2000). Therefore, there is no doubt that the right to self-determination of people is a concept that has been accepted under international law and that it also should be applied in the context of indigenous peoples.

In indigenous people's context, they hope that their right to self-determination is defined according to the principles of justice and equality. Representatives from the National Aboriginal and Islanders Legal Services Secretariat of Australia suggested that the definition of the right to self-determination is in the original form and genuine (Chávez, 1999). The definition also needs to be based on the principles of equality and non-discrimination (Chávez, 1999). Representatives from the Saami Council further described the concept of the right to self-determination as dynamic and not static (Chávez, 1999). This permits the right of self-determination to fit in many situations and be recognised beyond the traditional context, namely regarding secession. Further, Daes (2001a) outlined the right to self-determination of indigenous peoples as independence, integrity and respect for indigenous peoples. This also allows indigenous peoples to have freedom to live according to their customs and beliefs and to be respected by the majority. The implementation of that right can be tested by assessing whether indigenous peoples have the freedom to choose and determine their own way of life (Daes, 2001b).

Recognition of the right to self-determination can be measured in different ways. It may include the level of autonomy held by indigenous peoples, the economic dimension of self-determination and participation in decision-making. For the purpose of this article, the study evaluates the participation of the Orang Asli through the principle of FPIC. The principle of FPIC can be said to be a manifestation of the rights of indigenous people to self-determination.

6.2. Free, Prior And Informed Consent (FPIC) Within an International Legal Framework

FPIC is a principle that has been recognised by international law. Each element in FPIC should be defined for a comprehensive understanding. The elements of FPIC can be defined as follows:

1. Free: Free in this context means not being influenced by any factor, coercion, intimidation or being forced or manipulated by certain parties (Permanent Forum on Indigenous Issues Fourth Session, 2005). FPIC is invalid if it is obtained by way of force or undue influence.
2. Prior: The second element ensures that the consent of indigenous peoples can be obtained in advance prior to the carrying out of any project or activity (Permanent Forum on Indigenous Issues Fourth Session, 2005). In addition, a sufficient period of time should be allocated for the process to get permission to involve all segments of society, including the representative voices of women, youth and children (Permanent Forum on Indigenous Issues Fourth Session, 2005). The timeline is also important for the project supervisor to provide indigenous peoples with information relating to the project.
3. Informed: This element requires transparency, that is, the ability to request further details on a project that will be implemented. According to Permanent Forum of Indigenous Peoples reports, the criteria that are fulfilled for transparent elements are (1) nature, size and scope of the project or activity, (2) objectives, (3) a period of time, (4) the locations involved and affected, (5) the assessment of impacts, such as economic, social, cultural, environmental, potential risks and benefits for equal sharing, (6) the parties involved in executing the project and (7) the procedures related to the project (Permanent Forum on Indigenous Issues Fourth Session, 2005). Such information is important to the granting of consent, including among women, youth and children

(Permanent Forum on Indigenous Issues Fourth Session, 2005). Therefore, the information conveyed to the indigenous peoples should be transparent, accurate and understandable.

4. Consent: Indigenous peoples' consent can be gained in two ways, namely via a process of consultation and/or participation. Both of these methods share the common characteristic that they shall be conducted in good faith and with full participation in order to form the best mechanism for obtaining consent (Permanent Forum on Indigenous Issues Fourth Session, 2005). There is a significant duty involved in gaining consent from indigenous peoples as the development of a project has the potential to affect their lives.

As discussed in many literatures such as MacInnes (2017), Hanna & Vanclay (2013), the recognition of FPIC can be seen in several international instruments. Article 16, Conventions concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) recognises the application of the principle of FPIC where the government must seek consent from indigenous peoples before removing them from their customary lands. This provision requires that the places to which they are moved be at least equivalent to their places of origin and to have a similar level quality and legal status (Article 16 (4), ILO No 169). In addition, the government must negotiate with and seek the participation (Article 16, ILO No 169) of indigenous peoples regarding development (Article 2, ILO No 169) in several areas, including the development of natural resources and soil (Article 15, ILO No 169) with good faith (Article 16(2) ILO No 169) (Article 16, 2, 15, ILO No 169).

In comparison to ILO No 169, the provisions of FPIC in UNDRIP are better as they cover all aspects with the additional element of 'prior' that is absent from Article 16 (2) of ILO No 169. Article 10 of UNDRIP provides that indigenous peoples cannot be removed from their ancestral land unless the principle of FPIC is complied with and all compensations have been paid to the indigenous peoples involved. In the case of indigenous peoples' land being seized, taken, used, occupied or damaged without their FPIC, Article 28 of UNDRIP provides that the indigenous peoples are entitled to claim such restitution or compensation that is reasonable and fair. If mutual agreement has been reached, compensation may also be paid in the form of land, territories and natural resources to value equivalent to that which has been taken (Article 32 (2) UNDRIP).

Compensation in the form of land is important to the indigenous peoples as it represents their identity in a way that does not hold a monetary value. In addition to the ancestral lands, the principle of FPIC is also required to protect the values, customs and culture of indigenous peoples through Article 11 (2) UNDRIP. If the government fails to acquire FPIC, indigenous peoples have the right to claim damages because the government has violated their rights of traditions and customs (Article 11 (2) UNDRIP).

FPIC is also required if the government plans to introduce a law or any administrative matters that might affect indigenous peoples. According to Article 19 of UNDRIP, the government are required to negotiate and cooperate in good faith with the indigenous peoples. In terms of development, the government must obtain FPIC in good faith prior to approving any project that affects the ancestral lands, territories and natural resources of indigenous peoples. This shall be made in accordance with UNDRIP Article 32 (2) which requires compliance with the principle of FPIC, particularly in regard to the project development, utilisation or exploitation of mineral, water and other resources. Further, the term 'good

faith' in Articles 19 and 32 (2) requires the government to be transparent in obtaining FPIC from indigenous peoples. Article 32 (3) of UNDRIP also requires the government to provide an effective mechanism to minimise any undesirable impacts such as pollution, poor economy, sensitive culture and others. This is important to preserve the environment as it affects the traditional life of indigenous peoples who are reliant upon the forests and natural resources. Therefore, governments shall comply with the principle of FPIC, as it forms part of the manifestation of the right to self-determination of indigenous peoples, including of the Orang Asli in Malaysia.

6.3. The Orang Asli in The Malaysian Legal Framework

Recognition of the rights of the Orang Asli can be found in various legal instruments. The main legal source is the Federal Constitution. Article 153 of the Federal Constitution recognises the special position of Malays and Natives of Sabah and Sarawak. Although the Orang Asli are not included in the provisions of Article 153 of the Constitution, special protection for the Orang Asli can be found in Article 8 (5) (c) of the Federal Constitution that provides "for the protection, well-being or advancement of Aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service." The provisions of Article 8 (5) (c) allow discrimination in favour of the Orang Asli with emphasis placed on development, including reservation of land. The Ninth Schedule, Item 16 of the Federal Constitution supports this provision that includes planning for the development the principle of FPIC is not embedded in this provision.

In addition, the APA of 1954 is a significant act aimed at protection of the rights of the Orang Asli. The APA contains 19 sections including a definition of indigenous people, the various rights of the Orang Asli and the administration of Jabatan Kemajuan Orang Asli (JAKOA). The main purpose of the act is to provide for the protection, welfare and progress of the Orang Asli in Peninsular Malaysia. However, the provisions in APA is inadequate to provide full protection for the Orang Asli. Provisions on the principle of FPIC are not provided in this act. It gives absolute power, for example, to the government to revoke, wholly or partly, the aboriginal area or aboriginal reserved land under section 6(3) and 7(3) of the APA (Nordin & Ibrahim, 2014). This is contrary to the principle of FPIC as enshrined under UNDRIP.

The APA was originally drafted as a means of preventing the Communists from obtaining the help of the Orang Asli and to prevent communist propaganda from being spread in the community (Nicholas, Engi & Ping, 2010). Therefore, the government made efforts to prevent any form of dissemination, including the control over appointment of Batin (Nicholas, Engi & Ping, 2010). Inconsistent with the concept of self-determination and the spirit of UNDRIP, Dentan et al. (1996) were critical of APA as an act containing "paternalistic" elements. This "paternalistic" approach has negative implications for the Orang Asli to the extent that they are regarded as ward of the state, not as indigenous peoples with a right to their ancestral land, in addition to other rights (Idrus, 2010; Nicholas, Engi & Ping, 2010; Nicholas & Baer, 2007). In fact, Nordin and Witbrodt (2012) classified the APA as a platform for JAKOA to control the Orang Asli. This statement is in line with the opinion of Hooker (1996), who claimed that the APA denies the rights of the Orang Asli, particularly in the administration of and in all matters relating to their

customary land. This element of paternalism and control by JAKOA highlights how the principle of FPIC is disregarded in the APA.

Besides the Federal Constitution and the APA, it is also necessary to refer to other acts when seeking to evaluate the rights and protection of the Orang Asli. One example of an act related to the Orang Asli is the Wildlife Protection Act 1972 (the Wildlife Conservation Act 2010). In relation to this, the Orang Asli were also not consulted in the amendment involving the Wildlife Conservation Act 1972. In 2010, the act was amended to reduce the number of species that can be hunted by the Orang Asli, from 100 to 10 (Subramaniam, 2011). Based on FPIC under UNDRIP and the international law standard discussed earlier, government representatives are obliged to obtain FPIC from the Orang Asli in the process of amendment to the Wildlife Conservation Act 1972 due to its direct impact on the Orang Asli. The implication of the intended amendment concerns forest products, including hunted animals that represent a source of livelihood for the Orang Asli. Therefore, Subramaniam (2011) criticised the government when amendments were made unilaterally without the involvement of the Orang Asli in the decision-making process having been secured.

The government took further steps to introduce policies aimed at strengthening efforts to provide better levels of protection and welfare to the Orang Asli. An important policy concerning the Orang Asli is the Statement of Policy Regarding The Administration of the Aboriginal Peoples of the Federation of Malaya, 1961 (Jabatan Kemajuan Orang Asli, 1961). Among this policy's objectives were the integration and assimilation of the Orang Asli with the mainstream communities in Peninsular Malaysia. This policy also emphasised their equal rights and opportunities next to other Malaysians. For that purpose, the government proposed with a majority appropriate standards to protect and develop the lives of the Orang Asli. This policy also highlighted the economic and development progress of the Orang Asli.

While there is no specific provision under Malaysian law recognising the principle of FPIC, the provisions of paragraph (d) of the Policy 1961 indicate the element of FPIC as requiring the consent of the Orang Asli prior to them being moved out of an area or away from their ancestral land (Jabatan Kemajuan Orang Asli, 1961). However, the provisions of Policy 1961 did not provide clarification on mechanisms and guidelines for how consent from the Orang Asli could be obtained. In addition, enforcement of Policy 1961 is ambiguous compared to the APA or other laws. The policy is relatively hard to implement and may in fact hinder recognition of the Orang Asli's right to self-determination. Unlike the recognition of FPIC contained within Article 10 of UNDRIP, the provisions of paragraph (d), Policy 1961 still do not meet the requisite criteria for the recognition of the right to self-determination.

The recognition of the Orang Asli's right to self-determination can be established through examination of legal cases. One of the most important cases is that of *Adong bin Kuwau & Ors vs. Johor State Government & Anor*, [1997] 1 MLJ 418 that recognises the land rights of the Orang Asli. Mokhtar J, in this case, pronounced that the Orang Asli have rights to their ancestral land, including the right to move freely on it without any interference. However, Mohd Nor J, in the case of *Sagong bin Tasi v Selangor State Government* [2002] 2 MLJ, went further, recognising not only the rights of the Orang Asli on the land, like plants and crops, but also including the recognition of their interest in the land itself. However, this level of recognition remains inadequate if the principle of FPIC is not taken into consideration and the right to self-determination of the Orang Asli is not fully recognised. This is in line

with the finding reported in the Report of The National Inquiry Into The Land Rights of Indigenous Peoples (Human Rights Commission of Malaysia, 2013)

The above analysis concluded that the legal position in Malaysia, namely the law regarding the theory on FPIC, is still insufficient compared to the recognition given under UNDRIP. The government should respect the principle of FPIC and the right to self-determination as endorsed by UNDRIP because Malaysia supported the announcement of UNDRIP by the General Assembly of the United Nations. However, the implementation of FPIC remains a challenge in reality because there is no provision for it in written law.

7. Conclusion

In conclusion, the recognition of right of Orang Asli through the medium of FPIC is still inadequate compared to the international law standards. The government has to observe the elements of FPIC and take into consideration the participation of the Orang Asli in decision-making processes. In the absence of any provision in domestic law that obliges compliance with the elements of FPIC, the government should respect the recognition accorded to indigenous peoples through the provisions of UNDRIP. Therefore, this article suggests that the APA be amended. Any such amendment of the APA should recognise the right to self-determination and insert the principle of FPIC as enshrined in the UNDRIP. In order to guarantee the rights of the Orang Asli in practice, the government and private sector should observe the laws and regulations that recognise the rights of the Orang Asli. This is fundamental to ensuring that protection of the rights of the Orang Asli are compatible with the standards of international law and thus assist the Malaysian State in meeting her international law duties and obligations.

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