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Natural Resource Management Country Studies

Malaysia

Photo Colin Nicholas

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Natural Resource Management Country Studies

Malaysia Report

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1. Indigenous Peoples of Malaysia

1.1 Indigenous Peoples of Sabah

Based on the 2000 census, an estimated 39 indigenous groups make up about 60 percent of the estimated 2.6 million total population of Sabah. They speak more than 50 languages and 80 dialects, with the Dusunic, Murutic and Paitanic groups the largest among them.

In 1970, the term '*bumiputera*', literally meaning 'sons of the soil' was created primarily to facilitate the implementation of Malaysia's New Economic Policy (NEP)[1]. The special position and privileges as '*bumiputera'* accorded to the Malays in Peninsular Malaysia were extended to all native groups in Sabah and Sarawak in the early 70's (when?) but the term is objectionable to many indigenous peoples of Sabah since they are non-Muslims and non-ethnic Malays. The Indigenous Peoples Network of Malaysia and other indigenous organizations now use the Malay term "*Orang Asal*" or "indigenous/original people" as a collective term to refer to themselves. This term is accepted and used by the Malaysian Human Rights Commission, but there is still debate among some government agencies.

However, indigenous peoples in Sabah often interchange the term "indigenous/*orang asal*" and "native/*anak negeri*", and thereby accept the use of the latter in many legal documents. The Sabah Native Ordinance 1952 outlines who is a 'native'. The definition of 'natives' is wide and includes, *inter alia*, any person whose parents, or at least one parent, is indigenous to Sabah and have (has) been living as a member of a native community. It also includes indigenous peoples of Sarawak, Brunei, Indonesia, Singapore and the Sulu group of islands in the Philippines Archipelago who have settled in Sabah before 1963 and have been members of a native

[1] The NEP was introduced to strengthen unity through (1) reducing and ultimately eradicating poverty by increasing the level of income-expanding opportunities for employment and (2) restructuring society in order to correct the economic imbalance between the different ethnic groups.

community in Sabah for three to five years consecutively preceding the claim to be a native of Sabah.

Basic Information about Sabah

Covering an area of 73,619 square kilometers (73.7 million ha), Sabah is the second largest of the 13 states in the Federation of Malaysia. Sabah occupies the northern part of the island of Borneo and borders Sarawak in the west and Indonesia in the south. Together with Sarawak, Sabah makes up East Malaysia, which is separated from Peninsular Malaysia by the South China Sea. The climate of Sabah is hot and humid throughout the year and is not affected much by severe storms and typhoons. The landscape is highly dissected and steep and about 60 percent of Sabah's area is mountainous. Most of the lowlands are confined to the coastal region. Both the coastal belt and mountainous slopes are heavily forested, and tropical rainforest of one type or another characterizes most of the state. Sabah has been called 'the land of biodiversity' in reference to the State's rich natural resource endowment contributing to one of the highest species-biodiversity in the world.

Archaeologists estimate that Sabah was populated at least 30,000 years ago when the early inhabitants frequented the Madai limestone caves for shelter and food. Hunting and gathering were probably their main economic activities with little or no agriculture. Subsequent documentation of communities living in the coastal plains of Sabah indicates that they were largely self-reliant, producing food and other necessities for themselves. Forest and land were the main resources, which everyone had rights to use, cultivate or occupy. A communal way of life was practised and decision-making was more by consensus than enforced authority.

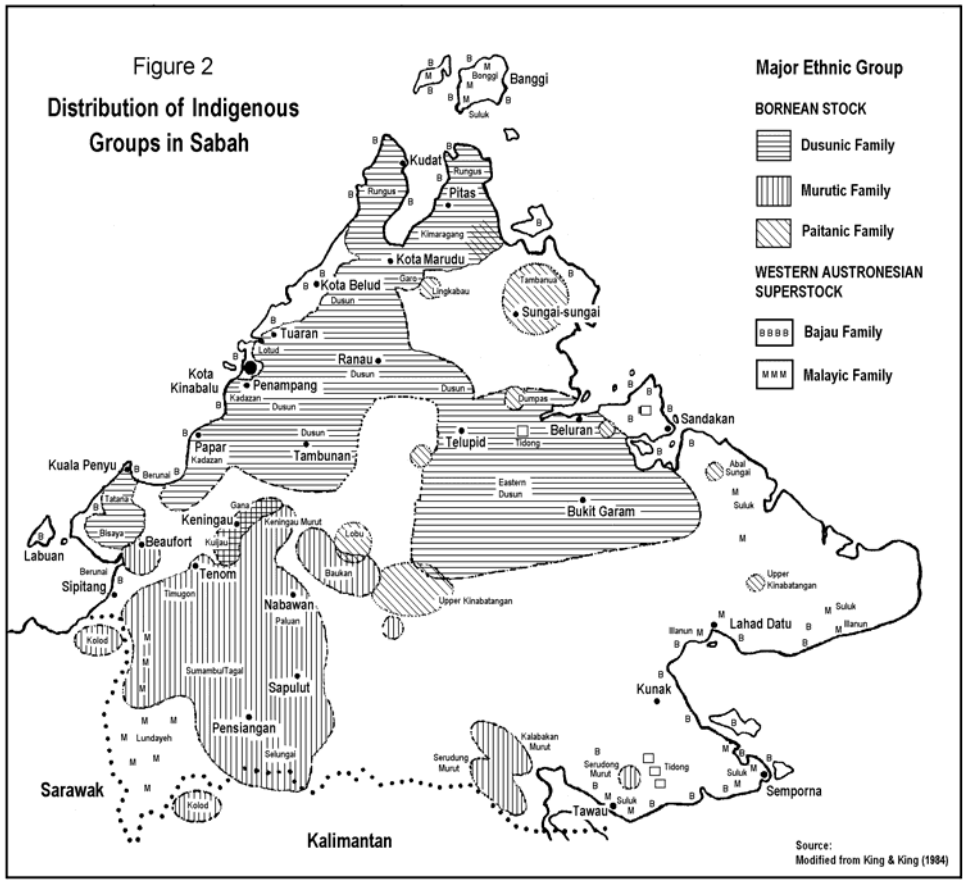
Increasing piracy, invasions, slave-raiding and oppression from the Brunei and Sulu Sultans who considered themselves the owners of the land and the people forced communities to move inland [historical period? Estimated dates?]. As trade developed, combined with feudalism, people had to produce not just for subsistence and for barter, but also to pay poll taxes and custom dues that were imposed by the Sultans, Datus and their functionaries. Very often people responded to these oppressive acts by getting together and fighting back, though not always successfully.

From the 17th until the early 20th century, slavery was a thriving trade while piracy was rife from the 18th century onwards. The commercial potentials of Sabah's natural resources have been a decisive factor in shaping the State's history. Until 1877 Sabah was part of the Brunei Empire, but that year the sultans of Brunei sold the northern part of Borneo (Sabah) to a British trading company. The British government granted the trading company a Royal Charter and the North Borneo Chartered Company was established. In 1888, control was consolidated when North Borneo became a British Protectorate. As any other company, the main objective of the Chartered Company was to secure a profit. The expanding market for tobacco and later rubber stimulated European interest in setting up plantations in Sabah and the Chartered Company realised that to achieve this, it was necessary to clarify legally the boundaries between the land that were used by the natives and those that were available for such plantations. Thus, as part of the aim to develop the agricultural production and to gain access to resources, a system of codification and land titling started under British rule. After the Japanese Occupation during World War II, Sabah became a British Crown Colony in 1946 and the exploitation and control of

Sabah’s natural resources, especially timber and farmland, continued. In August 1963, Sabah became independent but joined the Federation of Malaysia in September 16, in the same year.

Table 1. Sabah's Indigenous Communities

Borneon Group	Sub-Groups
DUSUN	Dusun, Coastal Kadazan, Kimaragang, Eastern/Labuk Kadazan, Suang Lotud, Kuijau, Tatana, Dusun Sungai, Tangara, Bisaya, Rungus, Dumpas and Sonsogon
PAITAN	Tambonuo, Upper Kinabatangan, Sinabu, Lobuu, Rumanau, Abai Sungai and Lingkabau
MURUT	Kolod/Okolod, Gana, Kalabakan, Sabangkung, Serudung, Tagal, Sumambu, Baukan, Nabai, Timugon, Paluan and Lundayeh
DAYAK	Iban
Non-Borneon	**Sub-Groups**
Originally from the Philippines	Bonggi (Palawan), Illanun (Lanao, Mindanao), Suluk (Jolo), Tausug, Bajau (Southern Philippines)
Originally from Indonesia	Bugis (Sulawesi), Idaa'an, Tidung, Cocos (Cocos Islands, Australia) and Kedayan



1.2 The Orang Asli of Peninsular Malaysia

The Orang Asli (lit. Original or First Peoples) are the descendants of the inhabitants who occupied the Malay Peninsula before the establishment of the Malay kingdoms. Comprising 19 ethno-linguistic groups and grouped under Negrito, Senoi or Proto-Malay, today they number 147,312 or 0.5 percent of the national population. While the majority live on the forested slopes of the Main Range, Orang Asli communities are also to be found in the alluvial plains, along the coasts and within urban areas. Once an autonomous people, their history has been one marked by the designs of others coveting their natural resources, labour, knowledge or territory.

Archaeological evidence links most of the Orang Asli to the Hoabinhians who lived between 8,000 and 1,000 BC during the Middle Stone Age. The largely nomadic foraging Negritos are direct descendants of these early people. The Mongoloid Senoi are descendants of both the Hoabinhians and the Neolithic cultivators who entered the Malay Peninsula from the north around 2,000 BC. To this day, the Negrito and Senoi peoples speak Austroasiatic languages of the Mon-Khmer sub-group, manifesting their ancient connection with mainland Southeast Asia.

Between 2,000 and 3,000 years ago, the southerly groups came in contact with the sea-faring peoples from Borneo and the Indonesian islands. Some of these Orang Asli who traded with the Austronesian-speakers assimilated with them, hence the term proto-, or early-, Malays. The exception perhaps is the Orang Kuala group who are said to have migrated from Sumatra about 600 years ago.

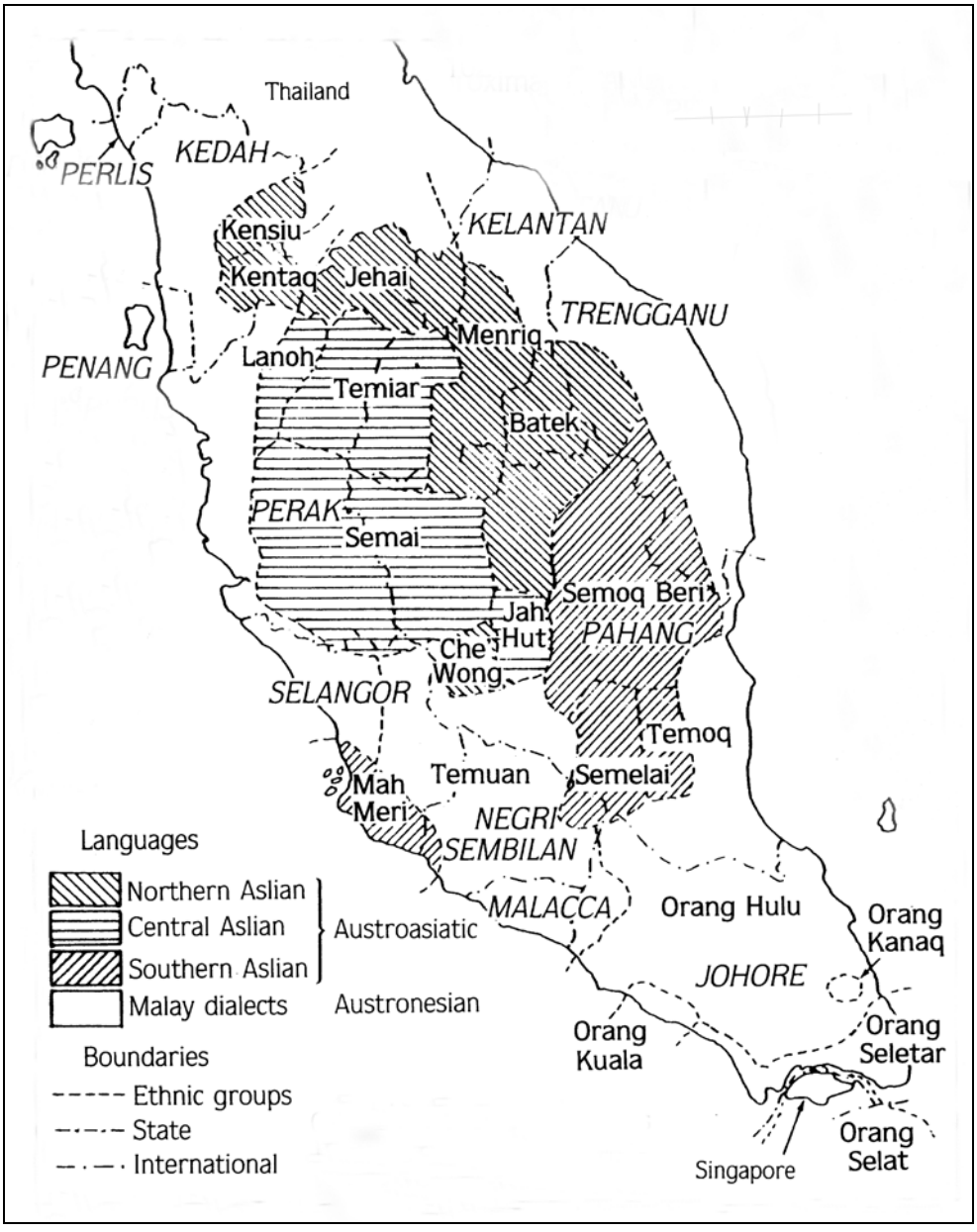
The ancestors of today's Orang Asli never lived in isolation nor were they removed from the political situation of the day. As early as the 5th Century A.D., for instance, the Orang Asli played a significant role in the Malay Peninsula's economic history as collectors and traders of primary products. Being the only ones who had the needed knowledge and skills to locate and extract these commodities, the Orang Asli were sought by traders from India, China and the Mon civilisations in Southern Thailand. Forest products such as resin, camphor, ivory, rattans and even gold were bartered for salt, cloth, beads and iron tools. Sea products – such as the rare black branching coral known to the Malays as *akar bahar* and the famed *tripang* or sea slug used as an ingredient in Chinese soups and medicinal preparations – were also traded by the coastal Orang Asli.

Some of the Orang Asli groups also played very dominant roles in the administration and defence of earlier political systems in the Malay Peninsula. Thus when Parameswara with his following appeared in Malacca from Tumasek (as Singapore was called) and later established one of the first Malay kingdoms, there was already a small fishing village at the site, whose population included the Orang Laut. In fact, Hang Tuah, the most famous Laksamana in Malay folklore, was himself of Orang Laut background. For centuries to follow, the Orang Laut devotion to the Malay rulers of Malacca, aided via judicious marriages into the royal family itself, was a crucial factor in the kingdom's preservation and prosperity. Marriages between Malay rulers and Orang Asli brides were also not uncommon. Aspiring heirs in Negri Sembilan, for example, had to resort to claiming Orang Asli (matrilineal) ancestry in order to be eligible for hereditary positions.

Orang Asli Population, 1999

Sub-Group	Population
Negrito	
Kensiu	254
Kintak	150
Jahai	1,244
Lanoh	173
Mendriq	167
Batek	1,519
	3,507
Seno	
Semai	34,248
Temiar	17,706
Jah Hut	2,594
Che Wong	234
Mah Meri	3,503
Semaq Beri	2,348
	60,633
Aboriginal Malay	
Temuan	18,560
Semelai	5,026
Jakun	21,484
Orang Kanaq	73
Orang Kuala	3,221
Orang Seletar	1,037
	49,401
	113,541

Distribution Map of the Orang Asli Groups



However, the rise of the Malay sultanates coincided with a trade in Orang Asli slaves that prompted many Orang Asli groups to retreat further inland and to avoid contact with outsiders. For the most part, from this time, the Orang Asli lived in remote communities, each within a specific geographical space (such as a river valley) and isolated from the others. They identified themselves by their specific ecological niche, which they called their customary or *adat* land, and developed a close affinity with it. Much of the basis of their culture and religion is derived from this close association with their particular environment. Their basic economic activities – hunting, gathering, foraging, swiddening and some trade – remained unchanged for a long time. Some Orang Asli still practise these activities with little modification.

Colonial Impact/The Emergency

For the most part, prior to the early 1900s, the Orang Asli were regarded as pagans and *kafirs* (unbelievers) and were called various names such as the much-despised *sakai* (slave or dependent) and *orang liar* (wild men). Except as excellent material for anthropological research or as ripe subjects for the zeal of missionaries, the Orang Asli were of no particular importance to the successive colonial rulers and were generally ignored administratively.

One positive effect of British colonial rule on the Orang Asli was the abolition of slavery and debt-bondage. On the other hand, the British colonialists were also of the view that Orang Asli were defenceless creatures with limited intelligence, and consequently declared that the Orang Asli should remain in isolation from the rest of the Malayan population and be given protection. This was the onset of a long-term attitude of paternalism towards the Orang Asli.

In the period leading up to the Japanese Occupation (1942-1945), the British administrator's contact with the Orang Asli was largely confined to the creation of aboriginal reserves and preventing the forest dwellers from felling trees or hunting protected animals. This attitude changed substantially only with the Emergency of 1948-1960 during which the Orang Asli were known to provide food, labour and intelligence to the communist insurgents, or had even joined their ranks. In an attempt to stop this relationship, the colonial authorities uprooted whole Orang Asli villages and moved the inhabitants to hastily-prepared resettlement camps. A few hundred Orang Asli died in these crowded and sun-baked camps, mainly due to mental depression rather than diseases. This caused Orang Asli resentment and antger towards the government and provoked a few of them to increase their support for the insurgents.

The Colonial Government was then forced to devise ways to win over the Orang Asli to their side. The Department of Aborigines was established and the post of Adviser on Aborigines created. The Aboriginal Peoples Act, which had both protection and control measures over the Orang Asli, was enacted in 1954. The dreaded resettlement camps were replaced by ‘patterned settlements’ (later to be called ‘regroupment schemes’) established close to, though not always within, their traditional homelands, and where a small shop and medical facilities were available within the watchful sight of the security forces. The strategy nevertheless proved successful and Orang Asli support for the insurgents eventually waned. When the Emergency was declared officially over in 1960 a period of much more active and direct involvement by the state in the affairs and lives of the Orang Asli begun.

Modernisation and Integration with the Mainstream

In 1961, a year after the end of the Emergency, the Government resolved that it should 'adopt suitable measures designed for their [Orang Asli] protection and advancement with a view to their ultimate integration with the Malay section of the community.' This policy of integration into the Malay mainstream was to be achieved by promoting economic development projects among the Orang Asli, delivered mainly through the agency of the Department of Orang Asli Affairs (JHEOA). However, the onset of the Second Emergency (1968-1978) that saw the communist insurgents operating once again from the forest homelands of the Orang Asli, forcing the authorities to give priority, yet again, to security. As a result more Orang Asli settlements, especially along the forested spine of the peninsula, were removed from their traditional environment and relocated into large new regroupment schemes, not unlike the Felda schemes for landless settlers.

Even after the communist insurgency formally ended in 1989, the policy of regroupment remained with the rationale that the perceived nomadism of the Orang Asli made it difficult and uneconomic for the government to bring development to them. Nevertheless, while the expressed goals of the government remain largely unchanged – viz. to improve the wellbeing and to integrate the Orang Asli with the national society – there were significant changes in the way these were to be achieved. Changes included the introduction of privatisation as a tool for the development of Orang Asli areas, their participation in tourism, and the development of an entrepreneurial class of Orang Asli youth. The strategy also involved efforts at introducing a value system based on Islam for the integration of the Orang Asli with the wider society in general and the Malays in particular.

The rapid pace of modernisation in and around their traditional territories has affected the way of life of many Orang Asli communities. Developments in social services have also improved their condition, especially in regards to access to health and educational facilities. Nevertheless, as a community, the Orang Asli still lag far behind other Malaysians in all indicators of wellbeing. This is likely to change for the better as greater self-awareness and self-confidence have resulted in more Orang Asli becoming increasingly vocal and pro-active in seeking their rightful dues and in improving their situation. Despite the vast changes occurring around them, the Orang Asli remain a distinct and proud community.

2. Indigenous Natural Resource Management System in Sabah

Sabah's natural resources comprising various landform, soils, climate and vegetation provide a diverse agro-ecosystem for the many indigenous communities. The majority of indigenous communities are subsistence farmers practising diversified agriculture, including cultivation of wet and hill rice, vegetables and fruit trees. Rural indigenous farmers often pursue a wide range of livelihood strategies where parts of the production system serve as subsistence and others as income generation. Rotational agriculture (or swiddening) however is becoming increasingly rare while permanent agriculture practices (both annual and perennial crops) as well as off-farm activities are becoming economically more important. Apart from farming, many of the land-based indigenous communities rely on the diverse forest resources for their food, medicine, fuel, building materials and other household needs. Along the coastline and river mouths, there are many fishing communities who derive their cash incomes both from agriculture as well as fish sold at the market.

2.1 Concepts and Principles of Indigenous Natural Resource Management

Natural resources to indigenous peoples in Sabah include land, forest, agricultural areas, and rivers and coastal areas, in which land is central and often understood to encompass all these natural resources collectively. Traditional communities have a close relationship to land and resources and see themselves as part of the whole ecosystem. Natural resources are significant not only as a means of production but also as part of indigenous peoples' spiritual and cultural traditions, giving them their identity as peoples. Indigenous knowledge, innovations and practices on natural resource management is a little understood yet highly complex system, one that is closely interlinked with other indigenous systems. It incorporates a keen awareness of the environment, an appreciation for conservation and continuity, encourages sustainable innovation, and places the well being of the community as the focus of all activities.

2.2 Framework and Institution of Indigenous Natural Resource Management

The goals of indigenous natural resource management are economic self-sufficiency and environmental sustainability. The indigenous natural resource management system is closely linked with other indigenous systems such as social, cultural, spiritual, economic, governance, juridical, health, technological and learning systems. Management of natural resources through the *adat* has been established for generations and unwritten laws are transmitted by parents and elders in the community. *Adat* management of resources is also an integral part of community institutional control over lands and resources. Traditionally the Council of Elders governs the management of natural resources through customary laws and socialization of the whole community. The Council of Elders is composed of the village head, elders and the *bobohizan* (priests/priestesses).

Natural resource management involves both physical and spiritual realms and its practices are manifested by every indigenous person in their daily activities such that it has become a way of life for the community. The balance between the spiritual and physical realms will determine the

condition of the universe and the immediate environment of communities, including the circumstances and conditions of the people.

In spiritual terms, the "hot" (*ahasu*) condition symbolizes tragedy resulting in sickness, death or bad luck. It is believed that this condition comes about when members of the community go against set rules – be they socio-cultural, spiritual or those that relate to the environment. When the condition is *ahasu*, traditional communities believe that only the *bobohizan* can restore the balance through ceremonies.

For the physical realm, the village head and elders instruct and enforce the *adat* to ensure that the whole community not only manages resources in a responsible manner but also passes on the knowledge to the next generation. In the past, the *ketua kampong* and elders were selected based on their wisdom and expertise. They make decisions on a consensus basis, taking the interest of the community as whole into consideration. A big part of their role was to manage the natural resources of the community to ensure sustainability and fairness.

The institution of the Council of Elders has now disappeared, having been replaced by the *JKKK* or Village Development and Security Committee. Members of this committee used to be elected by the community but in recent years, their appointment has been based on allegiance to the political party in power. Although the Council of Elders no longer exists in most indigenous communities, the *bobohizan* and knowledgeable elders are still called upon to perform the ceremonies. Today, the government recognizes only the village head (*ketua kampong)* as the traditional authority, in charge of the administration of the customary juridical system. However, as s/he is also in the employ of the government, his (most of the village heads are men, with a just a handful of women *ketua kampong*) power is gradually being taken away. Their role as instructors and enforcers of the *adat* has diminished, and many are relegated to routine settling of family disputes and some inter-village conflicts. The management of natural resources is very often neglected.

PACOS Trust, a leading indigenous organisation, and many indigenous communities in Sabah have to come to accept the setting up of committees to manage natural resources as an approach in community organizing. Resources Management Committees are formed through community meetings, often having women, youth and elders as members, and are functioning well with various activities. However, there is also a growing realization and reflection on the importance of strengthening traditional institutions and to ensure that indigenous natural resource management systems once again become vibrant and relevant systems and where customary laws and the *adat* are put in place to guide community members in education (knowledge transmission) and monitoring within indigenous territories.

2.3 Indigenous Natural Resource Management Practices

The indigenous concept and principles on the use and ownership of natural resource management are realized though a variety of practices that embody spiritual beliefs and respect for natural resources. Box 1 illustrates some examples of these practices that are still used today.

Box 1: Examples of Indigenous Resource Management Practices

Lands and Forest

Traditional ownership of a plot of land is based on mutual agreement within the community. Land ownership can be confirmed by a headman and is identified by the presence of certain signs such as fruit trees or the burial grounds of ancestors. Boundaries are marked by certain trees, a large rock/megalith, and the *rolok* bush or by reference to rivers or streams. To ensure that forest resources are not taken without permission of the owner, certain signs – understood by most indigenous communities – are placed strategically around the lands.

To ensure that forests are healthy and productive, unnecessary cleaning and cutting of trees is prohibited. The opening of farmland is usually on a small scale and restricted to areas of secondary forest growth. When fertility of the land for hill paddy cultivation is reduced, a fallow period is observed to give the land a rest and to restore its fertility.

Wildlife – Seeds, Plants (including medicinal plants) and Animals

To ensure that wildlife continues to exist, selective hunting is practiced whereby only matured animals and game are hunted. In the same way, knowledge on seed selection and storage, maintained in particular by women, are important management strategies at the household and community level. A practice of leaving the last fruits to ensure continuity of plant varieties is still maintained by many communities. Indigenous peoples believe that medicinal plants have spirits and that respect is necessary before taking any plants. The concept of "use and protect" ensures plants and animals with medicinal properties are not over-harvested and practices such as taking only what is needed still prevail among indigenous communities.

River, Water and Aquatic Life

When the number of fish is on the decline in rivers and inland waters, a communal understanding can be proclaimed through the practice of *managal,* the marking of a stretch of river as "no fishing" zone for a certain period of time (six months to a year). The proclamation is performed through a ceremony called the *monogit*, where the community slaughters a pig and eat it together to mark the period of abstinence.
What is the ceremony called? It is unclear if it is managel or monogit (Managal is the practice, monogit is the religious ceremony

Natural Resource Management and Indigenous Spirituality

Indigenous concepts of resources management are based on the worldview that all matters have a spirit (*moinat*) and therefore ought to be treated with respect. As such, the arbitrary taking of life is prohibited – whether plants, animals, birds, and arbitrary destruction of the environment through logging, clearing of land and other activities that will disrupt harmony and cause conflict between the spiritual and physical realm is likewise banned. Indigenous spirituality is thus the expression of respect for spiritual being, social relations and the environment in which they manifest.

2.4 Inter-Generational Transfer of Knowledge

The village head, or *ketua kampong*, presides over community meetings and hearings and plays a major role in ensuring that the traditional land boundaries, and the exclusive ownership of certain natural resources according to customary laws, are adhered to.

The maintenance and transfer of knowledge is a responsibility of every individual in the community, although parents and elders play a particularly strong role. Such knowledge is learned orally through constant references/repetitions, by encouraging children to observe and to put them into practice in their daily life. Herbalists, carpenters and priests/priestesses acquire and pass their knowledge through apprenticeship. They learn not only their trade but also study the natural resources important to their work, and the traditional knowledge concerning the management of those resources.

Communities are aware that the traditional knowledge on natural resource management is eroding gradually due to several political, economic and socio-cultural factors that are impacting on the lives of indigenous communities. This includes consumerism, cultural borrowing and exposure to other influences brought on by the arrival of roads, western education models, cash economy and mass media. All these have changed indigenous peoples' perceptions on natural resource management. The separation of the younger generation from their immediate environment and the compartmentalized way of thinking also means that they are no longer accustomed to the holistic approach inherent in the indigenous concept of natural resource management. This leads to a lack of reflection on the concepts and principles of community-based resource management.

3. Legal and Policy Framework on Natural Resource Management

This Chapter reviews and analyzes current laws and policies regarding natural resource management, land tenure and resource access, with a view to identifying gaps with respect to the recognition of indigenous peoples' rights.

3.1 State and Federal Constitution

The indigenous peoples, or "natives", of Sabah are accorded special rights and privileges under Article 153 of the Federal Constitution. Further, Article 161A(5) provides that State law in Sabah and Sarawak may provide for the reservation of land for natives or for giving preferential treatment in regards to the appropriation of land by the State.

The Federal Constitution specifies the division of powers between the state and federal governments. The Constitution's Ninth Schedule divides the various responsibilities, privileges, and jurisdictions into three lists: List 1, the Federal List; List 2, the State List; and List 3, the Concurrent List. Article 73(b) of the Federal Constitution also empower the States of Sabah and Sarawak to enact their own laws though their State Legislative Assemblies.

3.2 Natural Resource Management Laws in Sabah

In Sabah, there is no single law or policy that governs natural resource management. Resources are compartmentalized (e.g. according to land, fisheries, forests, parks, wildlife, water, plantations and biodiversity). Any given law and its accompanying 'rules' govern the management of a particular resource under a specific department created to administer the law. Many laws on natural resource management also overlap in their jurisdiction and this requires inter-departmental and inter-ministerial coordination.

3.2.1 *Land Ordinance, 1930*

A whole section of the Land Ordinance is dedicated to Native Lands (Part IV, Section 64 to 86), with some other relevant sections also found in the main body of the law. The law also covers various sections on sub-surface and surface resources, as well as seas and coastal areas.

Section 15 on Native Customary Rights (NCR) is also provided in the Land Ordinance. NCR to land includes:

- Land possessed by customary tenure;
- Land planted with 20 or more fruit trees per acre;
- Fruit trees, sago, rattan and other plants of economic value that are planted, upkept and regularly enjoyed as personal property;
- Grazing land stocked with cattle or horses;
- Land that has been cultivated or built on within 3 years;

- Burial grounds and shrines; and
- Rights of way for people and animals.

Customary tenure is defined as the lawful possession of land by natives by occupation or cultivation *continuously* for three or more consecutive years or by title deed. However in practice land titles are seen to be an indefeasible right of ownership. All land is considered to be state-owned and claims to non-state ownership have to be registered and approved by the state. Section 15 was an attempt to incorporate indigenous peoples' customary law on land ownership into the land law. However, due to the lack understanding of indigenous peoples' concept of land and natural resource management and the misrepresentation of customary law, this has resulted in inconsistencies and gaps within the process of land delineation. Section 15 clearly outlines the criteria for NCR, but practical experiences in the titling of indigenous peoples' land have shown that many problems remain which hinder access to these rights, one key one being the failure to take into consideration indigenous natural resource management realities such as fallow period in rotational agriculture cycle (non-continuous cultivation).

A further serious concern is the use of Section 28 to supersede Section 15 of the Ordinance because it allows the Governor to alienate land for "public purpose". What "public purpose" may be is not well defined. Indigenous peoples have asked for Section 28 to be repealed because in many instances in the 1980's it was been used to alienate NCR land to government statutory bodies without compensation, and at the privatization of such lands in the 1990's ownership did not revert to the rightful owner but was made the private property of companies and individuals. This was the case for the Sabah Forest Industries and the Sabah Land Development Board.

Non-implementation of existing safeguards is a further concern. Section 13 of the Ordinance requires the posting of a notice and validation in the area concerned in any application for land ownership. In reality this has not happened, with the posting of notices only in the district offices of the Lands and Survey Department, where indigenous people did not regularly visit or visit at all.

Section 17 states "except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law...." However, this subsection has often been circumvented and many indigenous peoples have lost their traditional land in deals that did not benefit the indigenous owner. A controversial addition under Section 12(5) to allow sub-lease of native titles up to 99 years is now being reviewed.

Section 23 and 24 give the right to sub-surface and surface resources such as minerals, timber or other forest produce or any earth, gravel, stones, coral, shell, guano, sand, loam or clay, or any bricks, lime, cement or other commodities manufactured from these materials to the state.

Most indigenous people have opted for individual native titles over their land, mainly because this is the most strongly promoted by the government. However, the Land Ordinance provides for other forms of title, including a communal title or native reserve, and simply registering land with NCR. Section 76 provides for the (Chief) Minister Communal Titles "in cases where a claim to customary tenure of land has been established or a claim to native customary rights has

been dealt with by a grant of land and such land is held for the common use and benefit of natives and is not assigned to any individual as his private property". The Director of Lands and Survey will hold the title in trust for the community concerned, without power of sale. Section 78 provides for the gazetting of Natives Reserves by the Governor if he thinks it necessary to protect the present and future interests and well-being of the natives of Sabah or any community. The Native Reserve would be held in trust by any person appointed by the Governor, and in most cases these are the district officer and the village head.

3.2.2 *Land Acquisition Ordinance*

As mentioned, any land may be subjected to compulsory acquisition by the State deemed for "public purpose". Under Section 2(h) a broad definition of "public purpose" is provided, including resettlement, conservation and exploitation of natural resources. The Ordinance does provide explicitly for the determination of claims to compensation, although in many cases indigenous communities have lost Native Customary Rights land through such acquisition without compensation. This is because Section 9 allows only 3 months for the owner to register their interest and serve a notice to the authorized officer after which claims to compensation are considered invalid.

3.2.3 *Inland Fisheries and Aquaculture Enactment 2003*

Under Part V of the Enactment on Riverine Fishing and Fisheries, Sections 35, 36 and 37 relate to Community Fisheries Management Zones. Section 35 allows for the declaration and recognition of indigenous system of resource management, while Section 36 and 37 create a new protocol by providing for the creation of a committee to administer such zones, and by introducing punishment related to the Community Fisheries Zone.

As mentioned earlier, although the law itself is very progressive in recognizing community system of managing riverine resources (by creating committees under Section 36 and 37), it has in a sense contributed to the weakening of the traditional authority for the *Tagal* system (see also 4.1.3). Even though the state Fisheries Department has done an admirable job in promoting *Tagal*, by NOT specifying the need for equal partnership and equal decision-making by the community in the all developments in inland fisheries, the success of the traditional *Tagal* system was in a sense taken over by the Department.

3.2.4 *Forest Enactment, 1968 and Forest Rules, 1969*

There is no provision in the Forest Enactment 1968 for the recognition of indigenous land rights. However, the enactment allows indigenous peoples to use forest resources for livelihood, including use for the benefit of the individual and the community and their traditional way of life (Section 41). Prior to the declaration of an area as a Forest Reserve, Section 8 and 9 require an enquiry to ensure that "local inhabitants" are made aware of the intention and to settle any claims. These two provisions represent the two biggest areas of contention for communities,

particularly regarding the process followed in the 'enquiries' and settlement of claims. Such enquiries and subsequent settlements were rarely done in accordance with the requirements. Several communities claim that their objections were never recorded and in fact they suffered repression as a consequence to their objections. Today, the area gazetted as forest reserves (49 percent of the total land area of Sabah) is already established and there is no provision within the Enactment for appeals or settlement of claims.

3.2.5 *Parks Enactment, 1984*

The objectives and functions of the (Department of) Sabah Parks, among others, are to preserve significant geographical, biological or historical features for the benefit, education and enjoyment of present and future generations and to provide accommodation and amenities without disturbing the environment of the Parks. It controls, manages and maintains all areas legislated under the Parks Enactment 1984, which includes both inland and marine ecosystems. However, Section 20 of the Parks (Amendment) Enactment 2002 empowers the Parks Board of Trustees to also carry out bio-prospecting and tree plantations as well as developing commercial and industrial enterprises.

The Law, however, does not provide for the participation of indigenous peoples in collaborative management of the Parks.

3.2.6 *Conservation of the Environment Enactment 1996 and the Environment Protection Enactment 2002*

The Conservation of the Environment Enactment was enacted in 1996 and came into force on 1st August 1998 coinciding with the establishment of the Department of Environmental Protection. The Enactment has been amended twice to strengthen certain provisions, in particular providing for heavier penalties for causing serious environmental degradation, mainly directed at large companies opening up tracts of land for plantations. However the Department of Environmental Protection lacks staff and resources and has not had any significant impact in realizing its mandate. The Department was the main body responsible to drawing up the Sabah Biodiversity Enactment 2000. The Environment Protection Enactment enacted in 2002 to complement the Conservation of the Environment Enactment is still not in force. The Conservation of Environment the Enactment also has no provision for indigenous peoples' rights and in fact, in several sections, restrictions are imposed on the use of land (Section 28) and activities affecting vegetation (Section 33).

3.2.7 Wildlife Conservation Enactment 1997 and the Wildlife Regulation 1998

The Wildlife Conservation Enactment 1997 recognises community hunting areas (Section 32) and honorary wildlife wardens (Section 7) from the community. The training of these wardens and the procedures to set aside community hunting areas that were developed by the Wildlife

Department and DANCED strongly emphasize indigenous knowledge on wildlife management and conservation.

As in the all the other Ordinances and Enactments to reserve land for specific purposes, the Wildlife Conservation Enactment under Section 9 outlines the necessity for a notice to explain the purpose and call for settlement of claims. Section 9(2)(c) in particular requires explanation of "native or traditional rights that will continue to be exercisable after the coming into effect of the declaration of the proposed sanctuary". Section 9(2)(d) also requires a summary of representations made by communities likely to be affected. The main weakness of these provisions is the relatively short period of 90 days to be published in the government *Gazette* and posted in the office of the Lands and Survey Department located in town centres.

No specific provision exists with respect to indigenous knowledge under the Wildlife Conservation Enactment 1997 . Many of the plant species that are used in traditional medicines are considered protected species and would require a license to collect, a requirement for indigenous communities as well as others. It is not clear whether this restriction has affected the indigenous health practices of communities.

The Wildlife Conservation Enactment under Section 68 provides for the right of traditional owners of caves to collect edible bird's nest and complements the Birds Nest Ordinance 1914.

3.2.8 Water Resources Enactment, 1998

The Enactment recognises private water rights, which includes the water rights of indigenous peoples. It takes into consideration the economic and social impact on the owner or occupier of the land when making a water resources management decision, implying the necessity to examine land ownership and occupation rights of indigenous peoples. A requirement for consultation also means that the government is obliged to involve indigenous peoples in the management of catchment areas and water bodies. The process for, and right to, appeal are also stipulated in the law. (Section 16 on private rights to water states that the owner or occupier of land or premises may, free of charge and without requiring a license under this Enactment, exercise a private right to take, use and control, sufficient for household and subsistence agricultural purposes.)

Although the Enactment appears progressive with respect to management of water resources, there are gaps with respect to setting aside water protection areas. In Section 36, interest to protect areas precedes the rights of indigenous peoples to land and does not recognize the fact that indigenous peoples may have been traditionally protecting the area adequately. An example is a case in Bundu, where communities have managed to stop large-scale loggers from entering their watershed area upstream. The area remained pristine but the declaration of the area as a water protection area did not stop logging companies from attempting to enter and devastate the entire area, creating havoc to peoples' lives in the process.

3.2.9 Sabah Forestry Development Authority (SAFODA) Enactment, 1981

There are a number of state agencies created in Sabah, especially during the economic boom of the 1980's, concerned with use of natural resources. Many of the lands alienated to these state agencies were indigenous peoples' lands claimed under native customary rights. They were acquired under Section 28 of the Land Ordinance 1930 or under the Compulsory Land Acquisition Act, with little or no compensation. These agencies include Sabah Forest Industries (SFI) and the Sabah Land Development Board (SLDB). In the 1990's these state agencies were privatized whereupon the alienated lands became private property. Of the many state agencies created in the 1980's only the Rural Development Corporation (KPD), the Sabah Rubber Industry Board and the Sabah Forestry Development Authority (SAFODA) remain as full government agencies.

Section 39(1) of the SAFODA Enactment provides for compulsory acquisition of land. Although there are also provisions for appeals, the lack of mechanisms for notifying the owners on the ground effectively prevented the indigenous peoples affected to record and settle land disputes in an organised manner. An anomalous section, Section 47, SAFODA is deemed a Native entity for the purpose of any law relating to land.

3.2.10 Biodiversity Enactment, 2000

Although the draft Sabah Biodiversity Enactment did not undergo much public scrutiny prior to its adoption in 2000, sustained efforts by indigenous organizations to engage the government and to raise issues on recognition of rights to lands and resources, traditional knowledge and benefit-sharing has resulted in a number of progressive sections within the law.

The law contains eight important sections that are relevant to indigenous peoples. Section 9(1)(j) of the Enactment provides for a system to ensure that the indigenous peoples and other local communities are, at all times and in perpetuity, the legitimate creators, users and custodians of traditional knowledge, and collectively benefit from the use of such knowledge. It also recognizes rights to biological resources in land claimed under NCR [Section 16(b)], and has provisions to ensure that any activities related to the collection of biological resources do not negatively impact the livelihood, quality of life and the way of life of indigenous peoples [Section 20(3) and Section 25(1)(b)].

The Sabah Biodiversity Enactment 2000 (SBE2000) however cannot be implemented until the Rules that accompany the Enactment are formulated and adopted. In 2004, indigenous organizations again went through a series of consultations with communities, NGOs and the government to produce the draft Rules related to sections relevant to indigenous peoples. The lack of any real movement towards adopting the Rules by the government indicates either low priority on these matters or the reluctance to impose restrictions on the state's "green gold". The SBE2000 signifies a potential coordinating body for natural resource management in the state and recognizing this, indigenous peoples have asked that they be part of the decision-making body i.e. the Sabah Biodiversity Council.

3.2.11 Other Laws

There are several other relevant laws on natural resource management but they are less applied. These include the Birds Nest Ordinance 1914; Cattle, Grazing and Pounds Ordinance, 1952; Country Land Utilisation Ordinance, 1962; Drainage and Irrigation Ordinance, 1956; Fauna Conservation Ordinance, 1963; Town and Country Planning Ordinance, 1950; Water Supply Ordinance, 1961; and the Cultural Heritage (Conservation) Enactment, 1997.

Apart from these, a number of Federal natural resource management laws that are applicable to Sabah and Sarawak include the Environmental Quality Act, 1974; Continental Shelf Act 1966; Fisheries Act 1985; Pesticides Act 1974 and the Petroleum Development Act 1974.

3.3 Policies on Natural Resource Management

3.3.1 Sabah Forest Policy 1954

The State Forest Policy 1954 underscores the Sabah Government's commitment towards natural forest management, conservation and reforestation. It strongly emphasizes the need for sustainable forest management, forest legislation, use of non-wood forest products, conservation of biodiversity, community forestry, recreation and tourism.

Under the policy, communities may cultivate within forest reserves, move inside the forest freely and collect any forest produce. They are allowed to reside within the limits of forest reserves and are encouraged to participate in forest management through a joint forest management approach. The latest action taken by the Sabah Forestry Department to legally recognize cultivation within forest reserves is by approving Occupation Permits. Under the Sustainable Forest Management System, areas may be set aside for community forest areas. License agreements between Forest Management Unit holders and the Sabah Forestry Department also recognise customary use of resources by indigenous communities.

All research and collection of specimens inside forest reserves requires a permit from the Sabah Forestry Department. However, enforcement is a huge task as 49 percent of Sabah's total land area of 74,000 sq. km has been gazetted as forest reserves. It is therefore still possible to acquire plant and animal specimens and relevant knowledge on the use of such specimens from community without the knowledge of the department and for it to be brought out of Sabah undetected.

3.3.2 Sabah Conservation Strategy 1992

Focusing on wise land use as the key to conservation and development in Sabah in the 1990s, the Strategy calls for the establishment of a variety of protected areas, as well as improved management of resources on a regional basis. The Strategy proposes a variety of actions covering land-use, land revenue, multiple use management, water catchments areas, community

forests, timber production, damaged forests, illegal logging, plantation forestry, biodiversity, mining, ecotourism, land applications, Environmental Impact Assessments, coastal development and others. For example, the Strategy calls for the preparation of a series of maps to assist in environmentally-friendly land-use planning. "Environmentally sensitive" areas also need to be identified and reserved. Implementation of these strategies supports conservation efforts covering the entire country both at State and National levels.

3.3.3 National Policies

Federal policies that are also relevant include the National Development Policy, the 5-yearly Malaysia Plans, National Agriculture Policy, National Environment Policy, National Forest Policy, National Mining Policy, Soil Conservation Action Plan and the National Biodiversity Conservation Policy**.**

4. The interface between Indigenous and Statutory Systems and Laws on Natural Resource Management

This Chapter is devoted to assessing the interface between indigenous and State systems and laws on natural resources management with a view to identifying gaps and challenges for further action. It will look at current efforts to combine indigenous systems with other systems on natural resource management to illustrate the need to further develop such initiatives; as well as examining and illustrating the current and potential roles of government, NGOs, community organisations and donors in improving natural resource management in Malaysia. Recognizing the need for indigenous peoples' involvement in natural resource management, Section 4.2 will highlight mechanisms and issues for effective participation.

4.1 Indigenous Peoples and the State Legal and Policy Framework

4.1.1 Ownership Rights Framework

The key to access and control of resources is recognition of land rights. Existing laws on natural resource management do have some provisions for the recognition of native customary rights to land, and for settlement of claims arising from the need to gain consent of first or existing settlers. As illustrated in the Sabah Land Ordinance however, the interpretation of rightful occupation does not coincide with indigenous peoples' concepts and customary law on land ownership.

The recognition of collective rights for indigenous peoples would mean the preservation of collective identity. Collective rights include access to, and control over, lands and resources, and also participation in, and control over, decision-making. This has led to the dispossession of traditional lands, the main source of material and spiritual well-being of indigenous communities.

4.1.2 Use Rights Framework

Access to resources in many cases may be granted but this right is not consistent between the different laws, and is further complicated by gaps in the existing laws. Communities candidly refer to their continued use of resources as the "close one eye" policy, indicating the fact that it is not an official policy of the government. The Sabah Parks is developing a policy to create "Traditional Use Zones" within the Crocker Range Park, but this policy would be invalid without legal reform to allow it to be official. Continued use of resources in an unofficial manner leaves communities vulnerable to strict enforcement of existing laws, and such use must be made legally defensible. Explicit legal and policy attempts to do so, such as the policy to set aside “Community Forest Areas” under the Sustainable Forest Management System, are rendered useless as they are not implemented Forest Management Unit holders.

4.1.3 Incorporation vs Recognition of Customary Law

Recognition of indigenous resource management to date has been characterized by attempts to incorporate an aspect of the traditional management system into state/national laws. For example the customary *tagal* system of resource management was incorporated into the Sabah Inland Fisheries and Aquaculture Enactment 2003. However, such a strategy may not necessarily capture indigenous concepts adequately, a situation illustrated by the incomplete incorporation of indigenous land ownership into the definition of native customary rights to land in the Sabah Land Ordinance. There is no requirement to recognize of customary law per se.

Part of this unwillingness to recognize customary law stems from the fact that customary law in general, and on natural resource management in particular, is not well-understood or undocumented, and there is often fear of recognizing it from the side of governments. Past efforts of the government to recognize customary law has thus involved some form of codification to lessen this fear of the unknown, a process which is inappropriate and rejected by communities as it ignores the diverse nature of customary laws of communities.

The other weakness is the tendency to form committees to manage resources, taking away the control that was traditionally held by the community. Although such committees may in fact allow more participation, particularly from women and youth, it nevertheless means that the already-weakened traditional structure is increasingly sidelined. In the long run, it will further dis-empower indigenous communities in their aspiration for self-determination and a pluralistic society.

4.1.4 Consultation vs Consent

Provisions and procedures for obtaining consent are implicitly or explicitly contained in most laws relating to lands to be set aside for native titles and protected areas, or the rights to access and use resources found therein. It is assumed that in Sabah where the rural areas are traditionally occupied by indigenous peoples, the spirit of these laws is to give priority to indigenous peoples' claim to lands and resources. Settlement of claims is also expected prior to gazetting of lands, and the granting of a title or permit. But apart from the fact mentioned earlier about the non-compliance with these provisions to provide adequate notice, the gap in the law also lies in the requirement for *consultation* rather than *consent*. The State assumes control and authority on how lands and resources are managed, and its authority pre-empts indigenous authority. Consent from indigenous communities is secondary to the government plans for land use – they are consulted about the use of their lands but do not necessarily have to give consent.

4.1.5 Conflicting Provisions

Section 28 of the Land Ordinance 1930 continues to represent the most significant reason for indigenous peoples' dispossession of land in Sabah. This section is used widely to set aside land for "public purpose", wherein public purpose is interpreted as activities that are in line with the government's economic interest. This includes large-scale oil palm and tree plantations.

Within the Land Ordinance itself, provisions for the recognition of native customary rights land under Section 15 is considered secondary to the legal right to gazette provided for in Section 28.

Land titles, which are considered as the strongest proof of rights to land, can also be subjected to acquisition for public good through the Land Acquisition Ordinance.

4.1.6 Conflict in Development Paradigms

Differing concepts about the fundamental purpose and meaning of development lie at the heart of conflicts over land and natural resource management use. As far as the State is concerned, the 'use' of natural resources is mainly for exploitation to finance infrastructure development and other expenditures of the state. There is no regard for indigenous peoples' own concepts of development, which are often considered unproductive, and therefore indigenous peoples' customary use of natural resources is not encouraged or developed.

Policies on large-scale development through exploitation of natural resource management have resulted in either social exclusion or discrimination of indigenous peoples, or loss of cultures and way of life. The majority of indigenous peoples in Sabah still live in rural areas, but increasingly migrating – either temporarily or permanently – to urban areas as livelihood deteriorates due to natural resources exploitation and insecure land tenure.

Indigenous peoples are increasingly joining, or are forced to accept, mainstream development and commercialization. This poses a challenge to natural resource management especially in and around sensitive areas. The gazetting or declaration of parks and other protected areas under the current laws is also an important factor leading to unresolved conflicts between the State and indigenous communities, due to loss of access to or restricted use of resources within these areas.

4.1.7 Recognition of Indigenous Natural Resource Management System

The underlying conflict between concepts on the appropriate use of resources by the State and indigenous peoples undermine recognition of indigenous natural resource management. The State views resources in a compartmentalized manner and separates the management of resources rather than conceptualizing resources management in a holistic way. The ecosystem approach is much closer to the concept of indigenous communities, employing traditional knowledge systems in the management of resources.

Traditional knowledge about the management of resources such as seeds, medicines and other biological resources is recognized in the Sabah Biodiversity Enactment 2000 but implementation is not possible as there are still no rules to accompany the Enactment. In the meantime, a Community Protocol on research and access to resources has been implemented by communities.

The fact remains that the indigenous concept of using and at the same time protecting the environment is not well accepted by the government. Ecologically sound practices such as rotational agriculture in upland areas are still considered destructive and discouraged, yet alternatives are not provided. At the same time, inputs such as chemical fertilisers and pesticides continue to form the bulk of government agricultural subsidies.

4.1.8 Repressing the Nurturers

Enforcement of existing natural resource management laws is also a challenge for many departments because of limited human and financial resources. In the past, particularly when dealing with conflicting claims by indigenous peoples over resources, the police and army personnel were used in suppressing communities attempting to protect their rights to resources. Such direct and violent suppression often happens when lands and resources has been given to private corporations as logging concessions, plantations, dams and mining.

The positive provisions within natural resource management laws described above are seldom used and instead communities who are often the protector and nurturers of natural resources are the ones arrested and charged for a criminal offence under the penal code.

4.2 Harnessing Indigenous Natural Resource Management

One tool to assist in management of resources through the indigenous NRM system is zoning according to traditional use, with the involvement of communities as the mapping and other related activities. Community boundary mapping and resource mapping can be established using modern instruments such as GPS, and employing up-to-date satellite images for developing GIS. Zoning of areas can be crucial in implementing resource management that has been traditionally practiced but has not been recorded or done in a systematic way. Such zoning and mapping must be done locally with in-depth discussions involving those knowledgeable about the community area.

Customary laws may not be adequate to meet new challenges and issues with regards to access and control of resources. When communities in Sabah realized that there was no comprehensive *adat* to regulate access and control over community resources, in particular by researchers and bio-pirates, they developed a community protocol for this purpose. Traditionally, indigenous communities monitor and assess their own resources on the level of responsibility and needs of the community. Since most communities do not own instruments such as early-warning systems, they usually rely on their observation and traditional knowledge to monitor and assess the condition of community resources. Hence the development of a community protocol was to equip communities with tools generally available to the government and the encroachers.

4.3 Engaging Institutions

Cooperation between Donors, Government, NGOs and Community Organisations

While it is extremely important to engage all players in the management of natural resources, indigenous communities must be accorded recognition as "rights-holders" over indigenous territories. Whereever possible, when indigenous peoples' organisations have sufficient organizational capacity to bring together various institutions, they should be encouraged to lead in such multi-sector cooperation. The role of each institution should be clearly outlines and

specified. This section examines engagements and cooperation between various bodies with indigenous communities.

From the experiences in a number of such engagements in Sabah, some of the lessons learned are:

- Community consultations must not be misused or misinterpreted;
- It is necessary to work to ensure inter-departmental coordination;
- It is important to ensure that in bilateral aid, the donor adheres to their policy on indigenous peoples that is based on accepted international human rights standards, and to apply this policy to help raise awareness of the departments being aided;
- Sufficient time must be set aside to ensure indigenous communities understand the issues at hand and that NGOs working with indigenous peoples should be able to provide sufficient information for the communities to make informed decisions in a culturally appropriate manner; and
- Hiring of consultants, especially those dealing with communities, should take careful consideration to ensure that the person is willing to listen to other perspectives, especially community perspectives.

Community Protocol and the SBE 2000

In an effort to find ways to protect indigenous knowledge and access to biodiversity in the traditional lands of indigenous communities, a series of community workshops were organised by PACOS Trust between 1998 – 2000, under the Sabah Anti-Biopiracy Programme. These consultations resulted in the formulation of a Community Protocol. The Community Protocol is aimed at getting bio-prospectors, specimen collectors and researchers to respect communities' ways of life and indigenous knowledge. After getting wide feedback from communities, government departments and NGOs, the protocol was finalised and printed as a poster for wide dissemination. Regional workshops and training were also encouraged and organized by donors of the programme. Then in 2000, as part of an effort to advocate for a law and policy on Biodiversity, the PACOS Trust, together with communities involved in drafting the protocol, called for a seminar with relevant NGOs and government departments, in particular the Sabah Museum and the Environmental Conservation Department. It was at this seminar that the draft SBE 2000 was revealed. Although there was no opportunity given to communities to comment on the draft Sabah Biodiversity Enactment (SBE) which was circulated for comments for only one month, PACOS Trust felt that their effort to engage communities, NGOs and government has resulted in the inclusion of a number of good sections within the SBE2000 adopted in November 2000.

4.3.1 NGOs

Non-governmental organizations in Sabah have been key players in bridging the gaps in understanding of donors and the government, as well as providing indigenous communities information and knowledge regarding respect to indigenous peoples and natural resource management. In particular the PACOS Trust, a community based NGO, has not only helped enhance capacities of indigenous peoples in negotiation, it has also played a role in enhancing capacities of government departments.

It is important to note that NGOs that wish to support indigenous peoples' struggle for the recognition of their rights have to be consistent – both in bridging the communication gap that often exists and also in building communities to effectively and independently engage with government and companies in the long term.

Watershed Conservation – Training of Government Staff by PACOS Trust

Between February 2002 and March 2004, PACOS Trust was commissioned by the Drainage and Irrigation Department (DID) of Sabah with financial support from both the Sabah government and DANIDA, to provide training on community participation to the staff of DID. The training was aimed at providing the necessary skills, knowledge and sensitivity to the DID staff to ensure effective participation of indigenous communities in its effort to consult with them on the proposed Water Resources Master Plan. Such training was possible due to a strong support by the Director of DID and the Chief Technical Advisor from DANIDA.

Although the Master Plan 1994 and the Water Resources Enactment 1998 only provide limited protection for indigenous peoples, the fact that the DID is implementing the consultation clause in the Enactment has enabled indigenous communities to understand these provisions and express their concerns to the department. The DID recognized that without the assistance of PACOS Trust, which is experienced in establishing rapport and gaining the trust of communities, the consultation with affected communities would not have been possible.

4.3.2 Government

Several government departments have implemented the existing provisions in various natural resource management laws and policies which respect indigenous peoples' customary practices. However, the government still tends to undermine indigenous peoples' customary rights and often views indigenous resource management system with disdain. There is a great potential therefore for further recognition of indigenous peoples' rights to avoid costly conflicts that could undermine natural resource management in Sabah.

Implementation of the Customary *Tagal* system

Indigenous peoples in Sabah have practiced the *Tagal* system for generations to control over-harvesting of fish resources from rivers. It involves an agreement by the whole community on the conditions, areas, duration and fines with which the *Tagal* is to be enforced. Every member of the community is expected to monitor the implementation while the enforcement of punishment would usually be the responsibility of the village headman using the indigenous juridical system. A ceremony to mark the beginning and the end of the *Tagal* is a part of the whole system. The Fisheries Department had for years been trying to control over-fishing in rivers in Sabah, with little success. The posting of signboards along riverbanks detailing department rules, however, did not deter offenders.

A pilot initiative by the department using the *Tagal* system to control fishing and a subsequent study in Kampung Babagon in Penampang district in 2000, was observed to be successful. In 2002, having concluded that this indigenous resource management is effective in the conservation and protection of fish resources, the Department decided to incorporate the *Tagal* system into a new bill, which was

subsequently adopted as the Sabah Inland Fisheries and Aquaculture Enactment 2003. In its implementation of this Enactment, the Fisheries Department organized seminars and workshops and supervised the enforcement of the *Tagal* system. It also carried out research on freshwater fish, replenished fish stocks in rivers, and continued to assess the effectiveness of the system. Currently, 212 areas involving 107 rivers in 11 districts in Sabah are revitalizing this traditional practice and are being coordinated and systematically managed. Awareness-raising efforts and cooperation between the villagers and the government are also ongoing.

4.3.3 Community Organisations

Since the traditional institution in indigenous communities no longer exists, many village chiefs and elders have had to take on the role of ensuring the continued management of natural resources. Some communities have now established Community or Peoples' Organisations to facilitate various tasks, including securing land rights where they been contravened or compromised. Indigenous communities consistently state that they are not anti-development, and community organizations have an important role in expressing a community's own aspirations with respect to the management and development of natural resource in its territories. Participation and the informed consent of communities are key in such efforts. Community organisations also have an important role to protect natural resources from being exploited.

Community Organisation Reclaiming Traditional Lands

Under Section 28 of the Sabah Land Ordinance, 4,940 hectares of native customary rights (NCR) land were acquired by SAFODA in Kanibongan for the planting of *Acacia Mangium* in 1983. The Rungus indigenous communities were given oral assurances that the land would be returned to the people after the trees were harvested. However, the agreement was never fulfilled and the people were told that the government would be developing the land further.

The communities involved organised several actions to protest this through a network of 21 villages under the leadership of KK Muringkat, the village headman and chairperson of the network. Their strategies include lobbying political leaders and organizing community land rights workshops with PACOS to raise awareness and to get support from other communities in other districts. Becoming more courageous after meeting with other communities facing similar problems, the network met with lawyers, the Malaysian Human Rights Commission and the Sabah Chief Minister in 2003. Finally, their struggle for the restitution of their land paid off and the communities' traditional lands were degazetted from the land vested in SAFODA on 1st March 2005.

4.3.4 Donors

Prior to 1997, participation of NGOs and community organizations in project planning and implementation were very rare in Sabah. Technical cooperation between Germany (via GTZ) and the Sabah Government (Forestry Department) to develop the Sustainable Forest Management System at a pilot site in Deramakot Forest Reserve represented the turning point in incorporating a "social component" in bilateral support to the State. Similar projects funded by the Danish development agency, DANIDA, and several government departments in Sabah further enhanced the participation of indigenous communities and NGOs. Technical cooperation with DANCED (and later DANIDA) which has firm commitment to a policy on indigenous peoples led to active participation of PACOS Trust and the community in the various pilot areas. The Japanese International Cooperation Agency (JICA) which does not currently have a policy on indigenous peoples' policy have a potential to formulate such a policy through the Borneon Biodiversity Ecosystem and Conservation (BBEC), a project between the Sabah government and JICA.

DANCED and Capacity Building of the Sabah Wildlife Department to Ensure Participation of Indigenous Peoples

The approval by the Danish government through DANCED of support to a capacity building project for the Sabah Wildlife Department (SWD) initiated a project which included a community component aimed at obtaining better understanding of various aspects of hunting and wildlife management by rural indigenous communities in Sabah.

In the Wildlife Conservation Enactment 1997 there are two provisions that relate to the participation of local communities in sustainable wildlife management – the Animal *Kampung* (Village) Hunting License, AKHL (Section 32) and Honorary Wildlife Warden - HWW (Section 7). These two provisions involve developing an understanding of indigenous knowledge on wildlife management. In November 2001 the Sabah Wildlife Department Capacity Building Project and PACOS TRUST initiated the Pilot Project on AKHL and HWW. Two indigenous communities were selected as pilot areas and the main objectives of the Pilot Project were to develop a model for the issuing of AKHLs to local communities in Sabah, to develop appropriate wildlife management mechanisms and to appoint a number of community Honorary Wildlife Wardens.

In cooperation with the local communities, mechanisms for participation in, and administration of, hunting and wildlife management were developed, including the formation of a Community Wildlife Committee; the appointment of a number of HWWs to assist SWD in implementing the Wildlife Conservation Enactment; an agreement on hunting quota stating the types and number of animals that be hunted; development of a Community Hunting Protocol; and the development of a Hunter Ledger to be filled out by the communities to manage and monitor hunting quotas. The experiences gained during the implementation of the Pilot Project show that local communities are willing to participate and compromise on natural resource management even if it means a restriction to their hunting activities when it ensures recognition of their rights to manage their wildlife resources and assists them in developing appropriate wildlife management mechanisms.

This potential role of donors in facilitating engagement between indigenous peoples and governments is very significant in Sabah.

4.4 Participation in Natural Resource Management

As demonstrated, the Sabah Government has articulated the need for participation by indigenous peoples in natural resource management through a variety of enactments and laws. Indigenous peoples themselves have created and strengthened many opportunities for participation, particularly when capacities are enhanced and openness is expressed by the government. Workshops, seminars and conferences organized by government departments, the academia and NGOs are important venues to articulate opinions, (although these have sometime been criticized as inappropriate for indigenous peoples as English is often used and the venue chosen is often not conducive for discussions). Communities have also called several dialogues but government representatives have not reciprocated by attending these meetings, thus denying themselves the opportunity to also listen to, and see the conditions, that indigenous peoples are subject to.

Another mechanism for participation is through the submission of written comments on natural resource management. This has not proved effective for either the government and indigenous peoples – the government being poor in providing relevant information in an appropriate form, and communities being inarticulate and unable to process feedback in the short time-frame often required for these comments. The role of NGOs in facilitating this process and bridging the gap has, however, made this mechanism more effective.

More recently, the condition attached by donors to development cooperation (see 4.3.4) has given rise to more direct participation of indigenous peoples in the implementation of pilot projects. However, the weakness of these pilot projects lies in the lack of commitment by both donors and the government departments involved to enabling the replication of the projects in areas outside of the pilot areas. The issue is not only about funding but about acceptance. It could be that to these pilot projects are "alien" solutions in natural resource management issues and do not capture the minds and hearts of both government departments and communities. Yet it is possible, and potentially very successful. An example of an initiative that received tremendous support is the implementation of the *Tagal* system (see 4.3.2), which has been accepted without further injection of funds.

Participation would be ensured if decision making with prior informed consent was recognized throughout the process. In many instances, the opportunities to express opinions ‘granted’ to indigenous peoples are mere lip service and often made to pacify communities. Sadly, input on natural resource management is often ignored.

Women's Participation in Natural Resource Management

The Convention on Biological Diversity recognizes the important role of women and women's knowledge in conserving and nurturing biodiversity. Yet, development projects are often targeted for men and the recognition of women's knowledge by institutions still has a long way to go.

Nevertheless, after years of struggle, some changes have been achieved. Female heads of households, including single mothers, are now recognized by law and there are now more opportunities in capacity-enhancement for women (for example in food processing and teachers training).

However, projects and programmes are seldom designed to take into consideration active participation of women. For example, women are asked to cook during functions and women with children are not given necessary childcare support. If they do participate, they are not encouraged to speak and their ideas are not actively sought.

Development of Rules for the SBE2000

As mentioned in the example in the box above, the Sabah Biodiversity Enactment was adopted in November 2000. However, it could not be implemented until the Rules to the Enactment were formulated and adopted.

PACOS Trust thus undertook several consultations with communities and government to develop the Rules accompanying the Sabah Biodiversity Enactment 2000 in order to fulfil the requirements of section 9(1)(j) which requires the creation of a 'system' that ensures indigenous peoples *"… shall all times and in perpetuity, be the legitimate creators, users and custodians of traditional knowledge, and shall collectively benefit from the use of such knowledge."*

This system also draws upon the requirements of the various relevant international legal instruments, some of which have come into force subsequent to the passing of the Enactment. The result of an extensive consultation process with representatives from over 40 indigenous communities, the system provides a culturally appropriate means for the dissemination of information, the obtaining of consent on mutually agreed terms, in accordance with customary law and the equitable sharing of benefits with indigenous communities. Practical benefits include increased efficiency in collection efforts and effective monitoring of illegal collection activities, poverty alleviation and the realization of human food security and health and cultural integrity within indigenous communities.

5. Challenges and Drawbacks

This Chapter will focus on the challenges and drawbacks in the implementation of laws and policies on natural resource management and the perception and responses by communities. A section also highlights a number of cases to illustrate these challenges.

5.1 Implementation of Laws and Policies on Indigenous Resource Management System

As seen in section 2, there are numerous laws and policies that accorded certain recognition to indigenous peoples but this information was not popularized or effectively disseminated. As a result, many indigenous peoples lost their land and resources especially when companies, government statutory bodies and outsiders took advantage of this lack of information. One important example is the requirement for making claims for native customary rights to indigenous lands. Here the Lands and Survey Department failed to provide information about a form (LSF 1898) that would make the process easy for indigenous peoples to secure their rights to their lands.

Another challenge is actual contravention of the laws themselves (such as use of Section 28 of the Land Ordinance 1930) or in the course of implementation (when the government failed to settle NCR claims prior to the gazetting of forest reserves). The implementation of policies and strategies by the government has also failed to take into consideration the rich knowledge and experiences of indigenous peoples in natural resource management that has been handed down over generations.

It is only recently that remedies have been taken when certain actors decided to have a more serious look at these laws. However, the damage had been done and the indigenous resource management system continued to erode as the alienation of land for resource exploitation occurred actively between the 1970's and 1980's. Today, 49 percent of Sabah total land area of 74,000 sq. km has been allocated as Forest Reserves mainly for commercial logging, while 12 percent is for plantations.

5.2 Community Perceptions and Responses

Contradictions between policies and implementation have served to confuse the people. One example is in Bundu in the Tambunan district where villagers were shocked to be told that the area which they have been protecting for generations and which had been gazetted as a watershed area was given out by the government to loggers. The logging activities devastated the catchment area and silted the river which they relied on for irrigating their paddy fields.

The situations within indigenous communities have also made it difficult to understand and appreciate the laws and policies. Although traditional institutions have been replaced by a so-called Village Development and Security Committee that is supposed to be composed of more educated and informed representatives, this has worked against the community. Very little

information is actually transmitted to the ordinary members of the community, especially those in the rural areas, and if there is, the information is often biased towards the government. As a result there is little reflection on the policies and laws and how they affect indigenous rights.

Many communities are convinced that the laws and policies do not function and cannot guarantee their rights to manage natural resources. Petitions to relevant departments have been sent and when these failed to get a response, some communities have made police reports or press statements to draw attention to the disrespect of indigenous peoples' rights or exploitation of natural resources. Often the government response has been to reprimand communities, to voice its displeasure or threaten communities using laws that are unfair resulting in further conflict. Some communities have thus resorted to filing court cases against the encroaching company or the government. Three such cases that will be illustrated here are: Bundu in Tambunan, Tongod in the Kinabatangan district (see 5.3.2) and Desa Montoki in the Ranau district.

5.3 Cases illustrating Challenges and Drawbacks

5.3.1 Coordination between Government Departments

The Sabah Wildlife Department Pilot Project mentioned earlier (see 4.3.4) highlighted some of the major constraints preventing local communities from exercising their rights to participate in natural resource management as stipulated in various enactments and policies described earlier. In this case, the Forest Management Unit holder, namely the Sabah Foundation, which was granted a 100-year term to manage the area sustainably is not willing to recognize the community hunting area, as the Sabah Foundation plans to allow logging there. There is now an ongoing dialogue between the Sabah Wildlife Department, communities and relevant government agencies to make the Forest Management Unit holders comply with their obligations under the Sustainable Forest Management System and for them to recognize the importance of involvement of local communities in natural resource management.

5.3.2 Non-recognition of Indigenous Peoples' Rights to Land

On 6 September 1999, the government issued and registered a Country Lease to a company for the cultivation of oil palm on NCR land belonging to the Dusun Minokok indigenous communities in Tongod in the Kinabatangan district, thus alienating their land from them. The communities had been residing as a native community in the Tongod Region for seven generations. They inhabited the Tongod Region even before the formation of the Colonial Government of North Borneo and have established villages in various localities along the tributaries of Tongod River. As natives of Sabah, and by virtue of their long and continuous occupation and use of the land upon which they have continuously cultivated and resided, the community acquired NCR, native titles and usufructuary rights over the land. The communities' customary and proprietary rights were not extinguished by any enacted law or any law subsequently enacted.

For years, the government informed the community that it was undertaking a settlement scheme for the benefit of the communities such as the Tongod Regional Planning Study (TRPS) and that upon completion of the Study, the land occupied, used and enjoyed by the community would be allocated to them. Further, the government led or misled the community to believe that their land applications submitted and accepted since 1985 would be kept in abeyance pending the finalization of the TPRS and that until then there was no necessity to submit land applications.

The community filed a case against the company and the government, in which the court decided in favour of the community and ruled that the alienation through the issue of the Country Lease was unconstitutional, violating Article 161A (5) of the Federal Constitution with regard to the special positions of natives in the State of Sabah. It further decided that the government ought to have exercised their powers under Article 8(5) of the Federal Constitution and the Sabah Land Ordinance (Cap. 68) to protect the NCR land. The action of the government was thus discriminatory, unfair and unconstitutional having violated Article 8 of the Federal Constitution that guarantees equality of all peoples before the law and Article 13 of the Federal Constitution which guarantees that no person shall be deprived of his property without adequate compensation.

5.3.3 Implementing Resource Use Rights

In 2004, Sabah Parks drew up a management plan for the Crocker Range Park (CRP). Within the boundaries of the Park are a number of communities that have existed long before the State came into being. After a series of consultations, two proposals were made with regards to the settlement of claims by indigenous peoples. One is the establishment of "Traditional Use Zones" for areas such as community hunting areas and watershed areas, both of which will remain as such within the CRP and will be jointly managed. Another is the excision of land, particularly traditional agricultural areas.

Communities will be accorded rights to the resources within the Traditional Use Zones. However, the Parks Enactment and the categorization of CRP as a strict protected area (IUCN category II), currently does recognize the utilization of resources and the involvement of communities in management committees. The challenge lies in the amendment of the law to accommodate these needs amidst debate within various government departments that are not supportive of such moves within protected areas. A Collaborative Management Learning Network in Southeast Asia could help bridge the gap in terms of laws and policies for the recognition of resource use rights within protected areas.

5.3.4 Resettlement of Communities – GRID, Gana

Although the Forest Enactment and forest policies allows indigenous communities to remain within forest reserves, the resettlement of communities does occur as seen in the Gana Resettlement and Integrated Development (GRID) project implemented in Kampung Gana, Kota Marudu in 1997. The project cost RM 8,765,000.00 (USD2.3m) and has brought about physical and socio-economic changes to the Dusun Sonsogon indigenous community. The expressed goal of the project is to ensure sustainable use of forest resources in the area as well as in the Lingkabau Forest Reserve (LFR) while improving the standard of living of the local

communities. It is planned that the local population are to be the main players in the management of the area and directly benefits from the forest produce. The key issue is the management of natural resources to ensure that all forest resources within the commercial forest reserves are managed on a sustainable yield basis for economic, social and environmental purposes

To affected indigenous communities, the GRID project means the resettlement of communities living inside the forest reserve. The people living in or near a forest reserve can be the greatest threat to its survival, but can also be its strongest supporters and enablers. A forest reserve is more likely to survive if it has the support of the local people and working with local people is the only way to achieve long term forest protection. The Sabah Forestry Department recognizes that this can only be accomplished with active cooperation and participation of the communities bordering forest reserves.

5.3.5 Information Dissemination

Two initiatives by PACOS Trust in 2004 (a process to draft both the Rules that would accompany the Sabah Biodiversity Enactment 2000 and the Crocker Range Park Management Plan), demonstrated commendable efforts in information dissemination, particularly to indigenous communities. In the past, various government officials and politicians have repeatedly expressed the need to take the views of indigenous peoples seriously, but this was always seen as merely lip service.

When the Crocker Range Management Plan was unveiled, only three months were set aside for comments. Sabah Parks was unable to provide official translation of the documents, but were open and willing to financially support the document to be translated into Malay. PACOS Trust undertook this challenge to translate, disseminate and collect feedback from affected communities within this stipulated timeframe. It is yet to be established whether the comments that were painstakingly collated by PACOS Trust and submitted to the Sabah Parks would be taken into consideration and incorporated into a revised management plan.

Responding to concerns by some government departments and communities, PACOS also initiated the dissemination of the Biodiversity Enactment and drafted the Rules related to the provisions on indigenous peoples' rights. It was heartening to observe the active participation of many government departments, research institutes and NGOs in the drafting of the Rules.

5.3.6 Provisions and Mechanism for Obtaining Consent

Obtaining the consent of communities for the declaration or gazetting of protected areas such as watersheds, forest reserves, sanctuaries and parks has failed dismally in the past. In more recent Enactments such as the Sabah Biodiversity Enactment 2000, stronger provisions for obtaining consent from communities can serve as a test as to whether this will change. Internationally, the principle of Free, Prior Informed Consent (FPIC) is gaining acceptance and mechanisms are being drawn up to ensure that genuine consent is obtained from indigenous communities. FPIC

gives indigenous peoples the right to be consulted and provide (or deny) their consent, to negotiate terms of agreement and to decline a project that is not beneficial.

A big challenge remains in ensuring that existing laws and policies are amended to include FPIC provisions, and to include provisions for redress and restitution to those communities whose claims were not settled when their lands and resources were taken for protected areas.

5.3.7 Interpretation of the Laws

Section 15 of the Sabah Land Ordinance 1930 was adopted from a standard law by the British colonial rulers and has not been changed much in the subsequent years. Among the contentious elements in the definition of Native Customary Rights (NCR) under section 15 (b) is the number of fruit trees per acre of land to be found when ascertaining NCR. Even though indigenous communities and organizations have repeatedly asked the government to amend the section as it was not an appropriate indicator, these fell into deaf ears and a recent amendment instead increased the number of fruit trees from 15 to 50 per acre.

Indigenous communities have also been voicing their petition to repeal Section 28 of the Sabah Land Ordinance and have sent memoranda to the national Human Rights Commission and the Sabah Chief Minister. However, due to the low capacity in negotiation skills and the lack of sustained efforts on the part of communities, this has not been successfully achieved to date.

5.3.8 Enhancing Capacity of Indigenous Communities

Enhancing capacities among indigenous communities is also a big challenge because of the lack of resources and support for such efforts. Very few NGOs and support groups have the time or patience to do capacity enhancement in a manner that is sensitive to communities. Many young people who have had some formal education have either left or are seldom in the community.

Others who received tertiary education often see the efforts of their elders and members of the community to assert their rights over natural resources as futile or backward. Even though there are now more opportunities to engage with the authorities, many are unable to do so because these engagements are mainly based on conditions established by the government. Often meetings are held in 5-star hotels, conducted in English and further constrained by a limited number of invitations given at short notice. As such, these meetings do not build indigenous peoples' capacities but instead can be disempowering. Capacity enhancement through building of community organizations also takes much effort, resources and long-term partnerships.

5.3.9 Erosion of Indigenous Resource Management System

Natural resources are now viewed as an individual property rather than being collectively owned by the community. This has created competition in some communities leading to unsustainable resource utilization. An example is the extraction of timber in a community forest by individuals

for self-gain. The challenge to be met is re-establishing communal responsibility and revitalizing the indigenous resource management system so that resources can be utilised in a sustainable manner for the wellbeing of the community.

Another drawback is non-genuine project development by some communities. In some instances, indigenous landowners have applied for various projects stated as forest management when the real intention is the extraction of timber. An example is application for logging rights in water catchments system for a gravity-fed water management project resulting in the destruction of the area. Another example is for application for the establishment of less suitable grazing reserves in steeply forested areas instead of low-lying hilly grassland areas. These areas are abandoned after the commercial logs were extracted. The challenge is both in effective enforcement and in building understanding to overcome the desire for short-term monetary gains.

There are also many instances where communities facilitate illegal felling timber in their native reserves in return for various favours from a logging company such as the repair of the drainage and irrigation for their rice fields or the repair of football fields. Such an idea stemmed for example in the early 1990's in Sabah, when the Forest Department sanctioned logging in return for building wooden houses to replace traditional houses. The challenges would involve good dialogue with the community to ascertain their needs and for the government to respond appropriately to these needs in a timely manner.

5.3.10 Use of Police in Land Conflicts

The involvement of the police in resource conflict is a serious and on-going issue in Sabah, and is in direct contravention of national and state law. The following illustrates how the police was involved in a land-grabbing incident by a Chinese businessman, Mr. Ooi Say Tuan, in the indigenous village of Kg. Togudon in the Penampang district.

On 26 July 2005, two police personnel came to the house of Mr. Kopit Tayu, an indigenous person from the Dusun indigenous group, to arrest him. He was not told any reason for his arrest and only upon reaching the Penampang police station was he informed of the accusation against him for stealing the belongings of Mr. Ooi Say Tuan. Mr. Kopit was held for 7 days.

Then on 25 August 2005, a plainclothes policeman and Mr. Ooi came to the house of Mr. Martin Galagub at 7:30 pm asking him to go to the police station to discuss about the land in which he has built his house. Martin was threatened that his non-compliance would result in actions against him. At the police station, Martin and the village headmen Mr. Gamato Galagub, were forced by Ooi to consent to compensation of RM7,800 (USD2053) and to sign a letter of agreement between Martin and Ooi, a letter written by Sergeant Hassan Sani.

On 26 September 2005, Mr. Soikun Sumporo received a call from a police officer from the Penampang Police Station ordering him to come to the station without giving any reasons. At the station, Sergeant David Jamilong informed him that he and his family are ordered to leave their present house within 7 days as the land they are living in Kg. Togudon was owned by Ooi. The next day Ooi and 7 others arrived at Soikun's house to forcibly evict him.

5.3.11 National Implementation of International Instruments

Current issues on natural resources management are being actively debated at the international level, particularly at the processes related to the UN Convention on Biological Diversity (CBD). In line with usual international compartmentalization of issues, indigenous issues are being discussed separately at the UN Permanent Forum on Indigenous Issues (PFII), leading to inconsistency in debates and agreements across the two fora.

Malaysia ratified the CBD and is also often represented at the PFII. However the representations at these fora do not reflect the decentralized manner in which the States operate. As such, government delegates from Sabah and Sarawak, where the majority of indigenous peoples reside and where laws and policies on natural resource management are enacted separately, are not included in the official national delegation. For example, none of the government departments from Sabah were officially invited to the 7th Conference of Parties that was hosted by Malaysia in 2004. The opportunity accorded in terms of understanding international debate on indigenous peoples and natural resource management are not maximized, making it even a bigger challenge to effect national implementation of international instruments.

5.3.12 Impact of Natural Resources Development on Women

In a study conducted by PACOS in the Bundu village in Sabah in 2001, women said that the depletion of natural resources has made it more difficult for them to go about their traditional activities such as the preparation of food and making of handicrafts. Women also feel more burdened with the responsibility of looking for increasingly scarce income-generating alternatives, especially if they are denied access to natural resources for food, water and fuel (firewood).

Also since the health of the family is often the responsibility of women, the burden is placed on them to keep families healthy in the face of a deteriorating environment. Once the forest resource is too far away or too dangerous for them to get, some of the traditional social reproductive roles of women are taken over by men. Thus the independence of women erodes as they increasingly depend on men to accompany or assist them in getting the scarce resources for the daily needs of the family or for handicrafts.

6. Laws on Natural Resource Management affecting the Orang Asli

This Chapter will focus on the Orang Asli, the indigenous peoples in Peninsular Malaysia. It attempts to demonstrate that while the various laws affecting Orang Asli rights to their traditional lands and resources may not be explicit in protecting these rights, there is actually enough in our local laws to support recognition of this inalienable right – if we only want to do so.

The hierarchy of legislation in Malaysia is as follows:

1. The Federal Constitution;
2. Acts passed by Parliament;
3. Regulations and other subsidiary legislation passed by the executive (Ministerial Regulations);
4. State laws and regulations.

Ironically, as we shall see for the case of the Orang Asli of Peninsular Malaysia, it is the last category – state laws and regulations – that effectively take precedence in determining Orang Asli rights to their traditional land and resources.

6.1 State Laws and Regulations

Several laws and regulations affect the status of the Orang Asli even though they may not directly concern them or mention them specifically. Some examples are Town and Country Planning Act 1976 (Act No. 172) and the Local Government Act 1976 (Act No. 171) – both of which effectively remove any semblance of autonomy that the Orang Asli may have had over their traditional lands.

The following laws, however, have a greater bearing on the Orang Asli insofar as the management and control of their territories and the resources found therein are concerned:

- National Land Code 1965 (Act No. 56)
- Land Conservation Act 1960 (Act No. 385), revised 1989
- Land (Group Settlement Areas) Act 1960 (Act No. 530), revised 1994
- Protection of Wildlife Act 1972 (Act No. 76), revised 1976, 1991
- National Parks Act 1980 (Act No.226)
- Aboriginal Peoples Act 1954 (Act No. 134), revised 1974

The **National Land Code** established a uniform system of tenure under which title to an interest in land depends on registration. This act applies only to the Peninsula and deals with matters of tenure, title, and land transfer. Under the Act, authority over all land, mineral, and rock material is given to the respective states.

The **Land Conservation Act 1960** consolidates the law relating to the conservation of hill lands and the protection of soil from erosion and the inroad of silt. Section 5 provides that no person shall plant any hill land with short term crops (i.e. crops that normally complete their life cycle

within two years after planting) without an annual permit from the Collector of Land Revenue. Section 6 goes on to prohibit the clearing of hill land. These provisions are detrimental to Orang Asli communities who live in forest and forest fringe areas and who still depend on the traditional swiddens for their subsistence.

The **Land (Group Settlement Areas) Act 1960** enables land agencies such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and other agencies such as the Pahang Tenggara Development Authority (DARA) to take over State land and to develop them for the purpose of land settlement which culminates in the issue of titles to the settlers. Frequently Orang Asli traditional areas have been converted to such land schemes with them not enjoying both the fruits of the programme nor being entitled to such titles for the land.

A law that expressly mentions the Orang Asli (or 'aboriginal community') is the **Protection of Wildlife Act 1972 (Act 76).** Wildlife Reserves and Sanctuaries may be declared by the state under this legislation. In such areas, an Orang Asli may shoot, kill or take certain wildlife for the purpose of providing food for himself or his family.

Another law that is applicable to the Orang Asli is the **National Forestry Act 1984**, which provides for the administration, management and conservation of forests and forestry development in the states. It also states that forest produce is property of the state and that harvesting requires a license. Basically, it treats the Orang Asli harvesters of such forest produce (e.g. rattan and *petai*) as labourers of the traders who hold the necessary licences (or 'bund' as they are called in Perak) from the Forest Department.

The **National Parks Act (Act 226) 1980** is an act to provide for the establishment and control of National Parks and for matters connected therewith. While usufructuary rights of the Orang Asli may not be curtailed in such parks, their right to own and control their traditional territories certainly come under serious jeopardy.

The **Aboriginal Peoples Act (1954, revised 1974)** is the only law that specifically refers to the Orang Asli. While the Act provides for the establishment of Orang Asli Areas and Orang Asli Reserves, it also grants the state authority the right to order any Orang Asli community to leave – and stay out of – an area. In effect, the best security that an Orang Asli can get is one of 'tenant-at-will'. That is to say, an Orang Asli is allowed to remain in a particular area only at the pleasure of the state authority. If at such time the state wishes to re-acquire the land, it can revoke its status and the Orang Asli are left with no other legal recourse but to move elsewhere. Furthermore, in the event of such displacement occurring, the state is not obliged to pay any compensation or allocate an alternative site, and *may* only do so.

Thus, the Aboriginal Peoples Act laid down certain ground rules for the treatment of Orang Asli and their lands. Effectively, it accorded the Minister concerned – or his representative, the Director-General of the Department of Orang Asli Affairs (JHEOA) – the final say in all matters concerning the administration of the Orang Asli and in matters concerning land, to the state authority.

All these laws give the Federal and State Governments a tremendous amount of leverage *against* the Orang Asli. (This, at least, is how the above laws, and especially the Aboriginal Peoples Act were interpreted – until, that is, the October 2005 decision of the Court of Appeal in the Sagong Tasi case, as discussed below.) Even supposedly sustainable and rights-respecting initiatives such as the Malaysian Timber Certification Council (MTCC) prefer to hide behind the catch-all clause "subject to national laws" knowing full well that such national laws generally favour the interests and greed of the well-placed and well-heeled rather than the Orang Asli inhabitants of the areas they now seek to exploit or appropriate.

6.2 The Federal Constitution, Land, Natural Resources and the Orang Asli

The welfare of the Orang Asli comes under the Federal List in the Federal Constitution, while land and forest matters come under the State List. Also, as every state is independent under the Constitution, federal legislation in most cases is not binding on the states.

On the contrary, the Federal Constitution accords substantial powers over land use and natural resource management to the respective States. Although under the Constitution the Federal Government is empowered to make laws it deems necessary to ensure continuity throughout the country, the Federal Government often serves merely as a coordinating entity. As such, federal agencies like the Department of Orang Asli Affairs (JHEOA) would consequently assume only a liaison and cooperative role with respect to the state authorities.

In fact, this line of rationalising – that while the Orang Asli are a federal concern, all matters pertaining to land reside in the state over which they have no say or influence – is an oft-heard explanation whenever those responsible for gazetting or reserving lands for the Orang Asli are asked for the reason for the dismal progress in this matter. That there is a glaring precedent in the case of FELDA (which effectively utilises the Land (Group Settlement Areas) Act of 1960 to direct states to give up some of their land for landless settlers in their development schemes) is somehow lost on these administrators and decision-makers.

The crux of the problem lies in the fact that with forests being such a valuable productive resource in the country, it is in the interest of the States to maintain control over their forest lands. Creating Orang Asli reserves in their now-valuable land banks would effectively deny the State of a revenue-generating facility as such reserves would now come under the purview of the Federal Government. Thus, it does not make economic sense for the States to gazette lands for the Orang Asli.

This is, of course, based on the presumption that States enjoy the legal right to those lands that are contested by the Orang Asli as their own. But as we shall see below, this perception is steadily giving way to an interpretation of natural resource laws that are bound to bring changes to the way traditional territories are controlled and managed.

6.3 The Changing Status of the Orang Asli in Natural Resource Law

6.3.1 Only Orang Asli have rights to forest produce in Orang Asli areas

(Koperasi Kijang Mas v Kerajaan Negeri Perak)

In 1992, the Ipoh High Court, in deciding the case of Koperasi Kijang Mas & 3 others versus Kerajaan Negeri Perak & two others, held that the State Government of Perak had breached the Aboriginal Peoples Act, 1954 (revised 1974) when it accepted Syarikat Samudera Budi Sdn. Bhd's tender to log certain areas in Kuala Kangsar. These areas included lands which have been approved by the State Government as Aboriginal Reserves namely the regroupment schemes of RPS Sungei Banun and RPS Pos Legap. The High Court went on further to hold that Syarikat Samudera accordingly had no rights to carry on logging activities and that only Orang Asli as defined in the Aboriginal Peoples Act had the right to the forest produce in these reserves.

An important point canvassed by the State Government was that the lands, although approved as Aboriginal Reserves, had not been gazetted. Justice Malek, in a strong opinion, held that gazetting was not a mandatory requirement for the recognition of reserves and the relevant laws therein. The approval of the State Government for the lands to be aboriginal reserves had, without the necessity of gazetting, created the reserves and thereafter only Orang Asli have exclusive rights to the forest products in the reserves.

This decision has important implications for Orang Asli land rights as official sources indicate that some 29,144.18 hectares of aboriginal lands in 2002 have been approved, but are yet to be gazetted. In respect of these lands therefore, Orang Asli have some measure of statutory protection from encroachment and displacement by many other interests.

6.3.2 Orang Asli have proprietary interest on the land

Adong bin Kuwau v. State of Johor

In 1997, the Johor High Court awarded compensation to 52 Jakuns for the loss of 53,273 acres of ancestral lands. The state government had taken the forested land and leased it to the Public Utilities Board of Singapore who subsequently constructed a dam to supply water to both Johor and Singapore.

Justice Mokhtar concluded that the Jakuns had proprietary rights *over* their lands, but no alienable interest *in* the land itself. That is to say, while the Jakuns may not hold title to their traditional lands, they nevertheless have the right to use it for their subsistence and other needs. In this instance, the court ruled that while certain lands are reserved for aboriginal peoples, they also have recognized rights to hunt and gather over additional lands – the "right to continue to live on their lands, as their forefathers had lived."

Such proprietary rights were protected by Article 13 of the Federal Constitution, which required the payment of "adequate compensation" for any taking of property. In accordance with this, the

Jakuns were awarded a sum of RM26.5 million for their loss of income for the next 25 years. With interest accrued, the final payment was RM38 million. This judgment was upheld by the Court of Appeal in 1998, with no leave being granted for appeal to the Federal Court.

6.3.3 Orang Asli have proprietary interest in the land

Sagong Tasi v Kerajaan Negeri Selangor

Sagong Tasi was among 23 family heads from Bukit Tampoi in Dengkil, Selangor who had 38 acres of their land taken from them for the construction of the Nilai-Banting highway linking with the new Kuala Lumpur International Airport in 1995. Some also had their crops and dwellings destroyed. While they were paid a nominal amount for the crops and dwellings, there was no compensation for the land. The authorities maintained that the Orang Asli were mere tenants on state land and as such were not entitled to compensation under the Land Acquisition Act 1960.

With the help of a pro bono team of lawyers from the Bar Council, the Temuans took their case to the courts. They asserted that are the owners of the land by custom, the holders of native title to the land and the holders of usufructuary rights (i.e. right to use and derive profit) to the land. They also maintained that that their customary and propriety rights over the land which they and their forefathers have occupied and cultivated for a long time were not extinguished by any law.

In April 2002, Justice Mohd ruled that the Temuans did have native title under common law over their lands. As such compensation was to be paid to them in accordance with the Land Acquisition Act, 1960. The four defendants (the Selangor state government, United Engineers Malaysia (UEM), Malaysian Highway Authority (LLM), and the Federal Government) appealed.

In October 2005, Court of Appeal Judge Gopal Sri Ram, sitting with two others, unanimously threw out the appeal and held that the High Court was not misdirected when it decided, based on a large quantity of evidence and fact that was not challenged, to rule that the Temuans did indeed have propriety rights over their customary lands. As such, these lands should be treated as titled lands and therefore subject to compensation under the Land Acquisition Act.

Thus it can be seen that the Orang Asli were deemed to be in possession on titled rights to their lands all this while – only that the state and federal authorities chose to impose their interpretation of the natural resource laws to their own advantage. Unfortunately, this was a right that had to be challenged in court and not one that was conceded with magnanimity as befitting a position that is just and equitable.

Earlier, we noted that in the hierarchy of legislations in Malaysia, the State laws and regulations appear to be given greater weight and authority over the Federal Constitution. That this is so was clearly elaborated by Justice Gopal in his judgement of October 2005.

His 59-page judgment in the Court of Appeal is more than just an affirmation of the rights of the Orang Asli to their traditional lands. It was a condemnation of the way the Orang Asli have been treated by the authorities and a wake-up call to the government to fulfil its fiduciary responsibility towards the community. In his words, “Here you have a case where the very

authority – the State – that is enjoined by the law to protect the aborigines, turned upon them and permitted them to be treated in a most shoddy, cruel and oppressive manner."

6.4 Failure in Fiduciary Duty

Acknowledging that the purpose of the Aboriginal Peoples Act 1954 was to "protect and uplift the First Peoples of this country", Judge Gopal asserted that "it was therefore fundamentally a human rights statute, acquiring a quasi-constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation."

This was in keeping with the early debates and discussions as recorded in the Federal Legislative Assembly hansards, newspapers of the day and archival records which clearly showed that Orang Asli lands were to be recognized. For example, as noted in the judgment, when the Orang Asli representative, Tok Pangku Pandak Hamid, asked the Minister of Education if the government had any plans to ensure that the hereditary lands of the Aborigines are reserved for their use, Enche Mohd Khir Johari replied:

> "Steps are now being taken to create these reserves and there are also in existence others which were gazetted prior to the introduction of the Ordinance…. At the moment there are in existence in the Federation, 58 Gazetted Aborigine Reserves covering in all approximately 30 square miles, and including some 5,200 aborigines. An additional 120 areas are currently under consideration, with a view to gazetting as Reserves. They cover about 389 sq. miles and include approximately 21,000 aborigines."

Alas, as the court was later to find out, none of these good intentions were realized. In the case of Bukit Tampoi, the Temuans faced both under-gazettement as well as non-gazettement of their lands. Thus, as a result of the state and federal governments' neglect in both under-gazetting and not gazetting areas which they knew were inhabited by the Temuans, the latter's rights in the land were placed in serious jeopardy. For the state and federal governments now to say that no compensation is payable to the Temuans because the disputed lands were not gazetted, is to add insult to injury – injury caused by their own neglect and failure. This prompted Judge Gopal to comment that, "I am yet to see a clearer case of a party taking advantage of its own wrong."

6.5 Making the Aboriginal Peoples Act compliant with the Federal Constitution

The practice to date has been to use the 1954 Act as the legal basis for compensating the Orang Asli only for their crops and dwellings whenever their lands are taken. The 1954 Act has also been used to argue that the Orang Asli do not hold proprietary interest *in* their land, and that the state governments exercise wide powers as to the disposal and compensation of these lands. The Orang Asli as such are only tenants-at-will, living on state land at the state's largesse.

Citing a number of legal precedents and justification, Judge Gopal reversed this interpretation. In light of the obvious conflict between the 1954 Act and the Federal Constitution, wherein Article 13(2) states that, "No law shall provide for compulsory acquisition or use of property without

adequate compensation," he ruled that relevant portions of the 1954 Act *had to be brought into conformity with the Constitution*.

This is achieved, he says, by not reading the words in section 12 of the 1954 Act, "The State Authority may grant compensation therefor" as conferring a discretion on the State Authority whether to grant compensation or not. Rather it is by reading the relevant phrase as "the State Authority shall grant adequate compensation therefore", that the modification is complete.

This is a pro-active move that has the positive effect of restoring justice to a community that has long been denied of their rights by the narrow interpretation of natural resource laws.

The judge added that, “I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the Federation that such modifications as the present must be done.”

6.6 Conclusion and Recommendations

For the Orang Asli, the judgment of the Court of Appeal in the case of *Sagong Tasi and 6 Ors v Kerajaan Negeri Selangor and 3 Orang Asli* is without doubt a landmark decision in many respects. It shows that there are enough laws to protect the rights of the indigenous peoples to their traditional lands and resources *if the government has the will to do so.* Indigenous peoples are increasingly pressured to file cases in the court and this is proving expensive – not just for indigenous communities but also for the government. For the government losing a case can be a cause for embarrassment and bad publicity that can be avoided by being pro-active and reviewing policies and laws that denies indigenous peoples their rights to resources.

Various recommendations have already been made in the different chapters. However, indigenous peoples and governments present at a local consultation to validate the preliminary report of this research have unanimously agreed on:

The formation of an Inter-Ministerial Committee, or a body that has sufficient authority, at the state and national level to review the various policies and laws on natural resource management and indigenous peoples, with a view of streamlining such laws and policies to protect indigenous rights. The Committee is also expected to identify sections that should be amended and the obstacles to the implementation of such laws and policies.

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