

having voice, which require attention. Our view is that all of these domains need to be understood from the lens of culture if access and engagement is to be truly inclusive for Aboriginal Peoples. If Victoria is to truly 'close the gap' in health, wellbeing, educational and socio-economic outcomes for Aboriginal and non-Indigenous communities, it needs to create a cultural landscape which is respectful, equitable, honourable and therefore culturally safe. Co-creating such a landscape is a matter of urgency if future generations of Aboriginal peoples are to thrive and contribute to general society.

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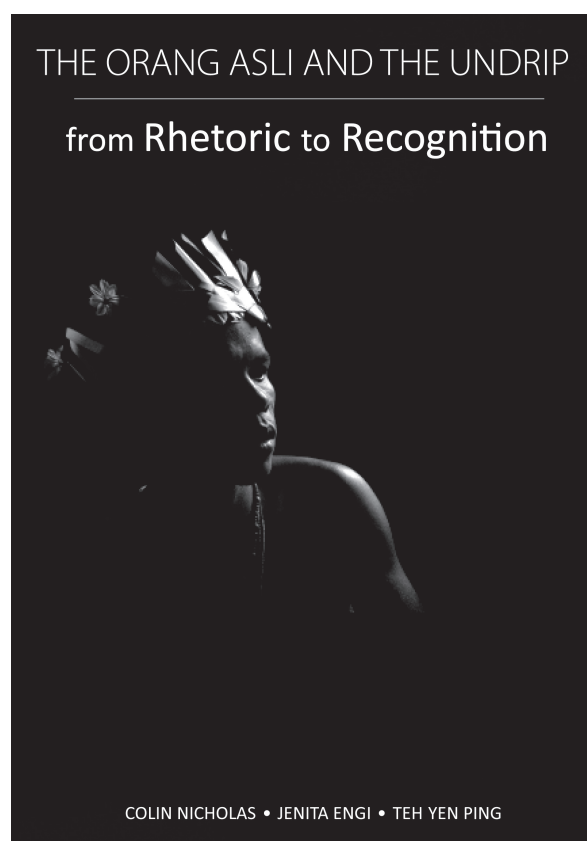
- 1 *Children, Youth and Families Act 2005* (Vic).
- 2 Department of Human Services (Vic) 'The Best Interests framework for vulnerable children and youth' (Best Interests Series, 2007).
- 3 Victorian Aboriginal Child Care Agency. Policy and Procedures Manual. (Melbourne: 2010).
- 4 Robyn Williams 'Cultural safety - what does it mean for our work practice?' (1999) 23(2) *Australia and New Zealand Journal of Public Health*, 212.
- 5 W.E.H Stanner, *The Dreaming and Other Essays* (Black Inc., 2009) 206-211.
- 6 Balert Boorron, 'The State of Victoria's Children 2009: Aboriginal children and Young People in Victoria', (Report, Department of Education and Early Childhood Development (Vic) 2010).
- 7 Australian Early Intervention Development Index, *FAQ: About the AEDI*, (1 April 2011) <http://www.rch.org.au/aedi/faq.cfm?doc_id=13327>.
- 8 Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators (2009) Productivity Commission. <http://www.pc.gov.au/_data/assets/pdf_file/0003/90129/key-indicators-2009.pdf>.
- 9 Victorian Aboriginal Child Care Agency, 'Aboriginal Cultural Competence Framework', (Report, Department of Human Services (VIC), 2008) <http://www.cyf.vic.gov.au/_data/assets/pdf_file/0008/312668/framework_cultural_support_2008.pdf>.
- 10 Social Inclusion Unit, 'A Stronger, Fairer Australia: National Statement on Social Inclusion' Report, Department of the Prime Minister and Cabinet (2009) <<http://www.socialinclusion.gov.au/Resources/Documents/ReportAStrongerFairerAustralia.pdf>>.

BOOK REVIEW

THE ORANG ASLI AND THE UNDRIP: FROM RHETORIC TO RECOGNITION

Colin Nicholas, Jenita Engi and Teh Yen Ping
Center for Orang Asli Concerns and Jaringan Orang Asal SeMalaysia, ISBN 9789834324865 (RM20) (163) (2010)

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INTRODUCTION

Malaysia has undoubtedly seen some progress in terms of Indigenous rights both internationally and domestically. Internationally, Malaysia unreservedly voted for the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') both at the Human Rights Council and General Assembly levels. Domestically, Malaysian courts have applied the doctrine of common law native title to Indigenous customary land rights claims, drawing inspiration from international jurisprudence including the landmark Australian High Court decision of *Mabo v Queensland (No 2)*.¹ Despite these developments, Orang Asli, the Indigenous minority peoples of Peninsular Malaysia, continue to face formidable challenges

in gaining due State recognition of their rights as Indigenous peoples and to their lands and resources. Unlike Australia, recognition of common law native title by the Courts has not seen legislative intervention for the recognition of Orang Asli land rights. Instead, the State persists on contesting Orang Asli claims to customary lands and pursuing paternalistic developmental policies that risk the loss of Orang Asli customary lands and consequently, Orang Asli well-being, identity and culture. In addition, Orang Asli are still 'administered' by the paternalistic and outmoded *Aboriginal Peoples Act 1954* (Malaysia), that grants the State excessive control over Orang Asli and their lands in the name of 'protection, well-being and advancement of aboriginal peoples of West Malaysia'.²

This book critically examines the domestic application of the UNDRIP to Orang Asli. It draws on earlier published works by the principal author and the authors' participation in various workshops and seminars on themes related to this book. The principal author, Dr Colin Nicholas, is a renowned and passionate researcher on a wide array of Orang Asli matters who has appeared as an expert witness in Orang Asli customary land claims. He is also the coordinator of the publisher, the Center for Orang Asli Concerns ('COAC'), a non-governmental organisation that facilitates initiatives 'at Orang Asli self-development and in defence of their rights'.³ COAC's deep and sustained involvement with Orang Asli is reflected throughout the book, particularly by its detailed accounts of Orang Asli experiences. Dr Nicholas's background in development studies, political sociology and resource economics involving Orang Asli sets the general perspectives of the book.

ORANG ASLI AS AN INDIGENOUS MINORITY IN MALAYSIA

As with Indigenous Australians, Orang Asli face past and present social and economic deprivation. Orang Asli (literally translated from the Malay language, 'Original Peoples') is a term that collectively refers to 18 Indigenous minority ethnic sub-groups of Peninsular Malaysia, officially classified under three main groups, namely, *Negrito*, *Senoi* and Aboriginal Malay. They only number around 141,000, close to only 0.5% of the Malaysian population, of which 50% are in poverty (the national average is 3.8%). In this regard, Chapters 2, 4 and 5 of the book provide the necessary context and background of Orang Asli within the nation state. In comparison to Australia, the added twist in Malaysia is the existence of three other privileged and constitutionally-defined ethnic groups, namely the Malays and natives of

Sabah and Sarawak. The natives of Sabah and Sarawak are indigenous to the island of Borneo, having no 'traditional connection' with the lands of Peninsular Malaysia. At the time of first recorded European contact, these lands are widely regarded as having been occupied mostly by Malay kingdoms and Orang Asli.

The politically and numerically dominant Malays, who account for around 50% of the population of Malaysia, possess special constitutional rights in respect of reservation of quotas in the public service, education and for the operation of regulated trade or business (art 153) and lands (art 89). These special rights form part of a pre-Independence political compromise between the three major ethnic groups in Malaya, namely the Malays, Chinese and Indians, which included the achievement of substantive equality by way of affirmative action in favour of the Malays after independence from British rule in 1957. On the other hand, the minority Orang Asli, whose history in the Malay Peninsula predates the establishment of the Malay kingdoms, do not enjoy such rights. Constitutionally, Orang Asli appear to be wards of the State with provisions empowering the Federal Government to legislate for their 'protection, well-being and advancement' (art 8(5)(c)).

The authors introduce the complex dynamics of Indigenous identity in Malaysia in Chapter 2. They contend that while Orang Asli fulfil all criteria for the various definitions of Indigenous peoples at international fora, the majority ethnic Malays in Peninsular Malaysia, ascribed special rights under the *Malaysian Constitution* and the privileged political status as *bumiputera* (literally, princes of the soil), fall short of this criteria. In support of this argument, the authors point to the cultural and religious constitutional criteria to qualify as a 'Malay', their lack of a special attachment to a particular geographical space and non-self-identification as being 'Indigenous' at international fora. This argument dovetails with Chapter 9, where the authors assert that the non-recognition of Orang Asli as Indigenous peoples by the State and disparate treatment of Orang Asli compared to the Malays in practice and under the *Malaysian Constitution* are the root causes of their predicament.

VICTIMS OF CIRCUMSTANCES

While many Orang Asli continue to enjoy a special attachment to their traditional lands, as discussed by Chapter 3, this enjoyment is challenged by internal and external factors outside the control of the Orang Asli. Chapters 4 and 5 trace, narrate and evaluate the impact

of each flux of immigrants, British colonialism and the State with regards to the Orang Asli. The chapters map their relegation from meaningful participants and actors in early Malayan civilisations, to their present status as marginalised and impoverished Malaysians, subject to State control and constantly threatened by integration with the Malay section of society. Against this backdrop, the non-recognition and whittling away of customary lands and resources by way of public or private development continue to a primary concern facing the Orang Asli community.

GAPS IN POLICIES, LAWS AND PRACTICE

Chapter 6 reviews the various State development policies and strategies on Orang Asli, contending that these policies, in violation of the basic tenets of the UNDRIP, set the manner by which Orang Asli communities are to be developed. This is followed by an examination of the provisions of the *Malaysian Constitution*, national laws and judicial decisions involving Orang Asli in Chapter 7. The authors argue that the common law recognition of Orang Asli customary land rights in the cases of *Adong bin Kuwau* and *Sagong bin Tasi*⁴ have not realised their full potential, as subsequent cases 'display a lack of knowledge of these precedent-setting decisions or... are based on arguments that appear to go against the grain of these decisions'.⁵ This chapter sets out the cases in a manner accessible to a wide cross-section of readers. As a result, its attempt to analyse the gap between common law Orang Asli customary land rights and the UNDRIP falls short of being a piece of legal analysis. The authors did not engage in any comparative analysis with Australian and North American jurisprudence on native title, despite its pivotal role in the recognition of common law Orang Asli customary land rights in Malaysia. This is largely due to the fact the book was not intended to be a legal academic resource, but rather, to be accessible to a non-legal audience.⁶

In Chapter 8, the authors provide insights into the gap between the endorsement and implementation of the UNDRIP in Malaysia. They discuss the disturbing trend for the State to not only ignore the intentions behind the UNDRIP, but to also neutralise or negate the implementation of the UNDRIP in its interaction with the Orang Asli. Using two case studies, Chapter 10 illustrates the problems Orang Asli face with domestic implementation of the UNDRIP, highlighting principles of Indigenous decision-making and free, prior and informed consent. The authors conclude by identifying options towards recognition of Orang Asli and their lands, and emphasising the need for internalisation of the UNDRIP into the psyche of wider Malaysian society.

Despite its self-acknowledged limitations in terms of strict legal analysis and some typographical errors, this book nonetheless provides a concise, informative and practical depiction and assessment of the multi-dimensional challenges Orang Asli face in realising the aspirations in the UNDRIP within the Malaysian context. In addition, there are two lessons that Australians can draw from this book. Firstly, Australia becoming a signatory to the UNDRIP in 2009 will be little more than a symbolic gesture if there is no political will on the part of the State to implement its standards. Secondly, disparate institutionalised affirmative action in achieving substantive equality can function to exacerbate and legitimise discrimination against vulnerable groups including Indigenous minorities.

Yogeswaran Subramaniam, a member of the Malaysian Bar Committee on Orang Asli Rights, is currently pursuing a doctoral thesis in the reform of Orang Asli land rights at the Faculty of Law, University of New South Wales.

1 (1992) 175 CLR 1; see, eg, *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418; *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591.

2 *Aboriginal Peoples Act 1954* (Malaysia) Preamble.

3 Center for Orang Asli Concerns, *About COAC and our position on information sharing*, <http://www.coac.org.my/codenavial/portals/coacv2/code/main/main_art.php?parentID=0&artID=11374563787944>.

4 above n 1.

5 Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: From rhetoric to recognition* (COAC, 2010), 84.

6 *Ibid.*