Orang Asli Issues: Environmental Blueprint First
Friday, 17 June 2016 11:16AM

Contributed by Roger Chan Weng Keng, Chairperson, Environmental and Climate Change Committee (ECCC), Bar Council, Malaysia

Environmental law paper presented on 27th day of April, 2016 at Cebu City Marriot Hotel, Cebu, Philippines at an International Conference on the rights protection of farmers and indigenous people in the process of the development and utilisation of natural resources in Asia, co-organised by Konrad-Adenauer-Stiftung (Rule of Law Programme Asia), Tsinghua University (School of Law), University of Cebu (College of Law) and Oceana Philippines.

Abstract
The plight of Orang Asli, the indigenous peoples of West Malaysia is inextricably linked to the environment. It is therefore necessary before addressing the myriad Orang Asli issues to first address the environment as an anterior issue. An environmental blueprint is suggested which consists of seven core elements based on environmental human rights principles so as first to preserve the environment, thus setting out the directions in addressing Orang Asli issues in accordance with international standards.

Orang Asli Issues in Malaysia: The Need to Formulate an Environmental Blueprint

The inspiration for the title was found on a t-shirt presented to me by an anonymous donor. On it was printed in bold, #GetAsli. All nuances point to the Orang Asli, a term used in ordinary parlance to describe the indigenous peoples of West Malaysia. It must be noted here though that the term Orang Asal is also compendiously used to loosely describe indigenous peoples in both West and East Malaysia. #GetAsli connotes an underlying message that all is not well with the Orang Asli. It seems that they need help because a fundraising dinner was recently organised to raise money for them. If we scrutinise the Orang Asli a bit they include a host of many different groups of aboriginal peoples known by names such as Temuan, Orang Seletar, Orang Kuala Semai, Mah Meri, Lanoh, Jahai, Semelai, Bateq, Chewong and the like[1], depending on the location you find them. To attempt a separate analysis of each of them in the context of the challenges and problems they face is not the purpose of this article, though it appears to be so. It should be assumed here that the plight of these people is already too well-known and persistently documented in many sources and commentaries that deal with it, and often repeatedly argued in similar language elsewhere.

Suffice to say, as a matter of observation, this range from the tide of modernisation that impedes the rights of Orang Asli to enjoyment of their land to outright encroachment and displacement as a community. In the process an endless string of social, economic, cultural and political issues come into play, which threatens a way of life.

That way of life is inextricably linked to the environment and as such requires an environmental blueprint to sustain it. The thrust of this paper’s argument is that the environment must be treated as an anterior issue before we can address all other issues of the day that relate to the Orang Asli community in Malaysia. The point is land is often said to be a habitat of the Orang Asli but if land were to suffer irreversible environmental destruction, then whole communities could be destroyed as well. Even Principle 13 of the Rio Declaration on Environment and Development where States support the development of national law for liability and compensation for victims of pollution and other environmental damage, may not be useful in the context of the Orang Asli who has to survive on sustainable land and forest.

The Case for an Environmental Blueprint in the Context of Orang Asli Issues in Malaysia: Its Object and Justification

The object of the blueprint must then be the preservation of a culture, an identity and a way of life of a community. It is within common knowledge that the Orang Asli community in Malaysia stretches back at least a few thousand years[2]. But what justify the preservation of such a culture can be found in human rights to life. Arguably so, because human rights which is based on equality and justice, comes into aid when bad laws are enacted or enforcement of good laws are lacking. This directly brings us to the very basis of an environmental blueprint: Environmental Human Rights. The next question is to formulate this blueprint.

Formulating the Environmental Blueprint

Addressing Vulnerability

1 The first and arguably a good starting point would be recognition of vulnerable groups such as the Orang Asli. Orang Asli would be the first to suffer or to suffer more than others for many kinds of environmental degradation because of their cultural and economic dependence on environmental resources, derived for example from their foraging areas including catchment areas and rivers. This recognition was explained by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in his report A/HRC/15/37, para 71, when he mentioned “in recognition of the special ties that indigenous peoples maintain with the natural habitats of the territories in which they live, international standards widely acknowledge indigenous peoples’ ‘right to the conservation and protection of the environment’ and of the ‘productive capacity of their lands or territories and resources’ (United Nations Declaration on the Rights of Indigenous Peoples, (UNDRIP) article 29.1) and at the same time called for the adoption of ‘special measures...for safeguarding’ their environment (ILO Convention No 169, article 4.1).”

Removing Interference with Enjoyment of Human Rights

2 The recognition that environmental harm violates the right to life and interferes with enjoyment of human rights must not only be an essential component but must also be practised upon principles of non-discrimination in the context of Orang Asli right to a sustainable environment. Though para 1 of the proclamation of the 1972 Stockholm Declaration states that
“both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights — even the right to life itself”, it can be said that such rights lose their meaning if practised in a discriminatory manner.

Underlining the Wide Range of Climate Change Implications and Solutions
3 The implications to enjoyment of human rights to health, life, food and water cannot be overstated. Extreme weather conditions can pose direct and indirect threats to many rights and in underlining this concern States should extend climate change related protection to indigenous peoples. Towards this end due regard and respect must be accorded to large tracts of Orang Asli foraging territories so as to create a natural ‘carbon-sink’ to counter the effect of climate change. In this connection measures to counter corruption among forestry officers and timber concessionaires must go in tandem.

Strengthening Environmental Tribunals such as the Environmental Courts
4 This is an important social-environmental institution that should not be left out in any blueprint. The European Courts of Human Rights in the case of Fadeyeva v Russia (application No 55723/00), the African Commission on Human and Peoples’ Rights in the case of Social and Economic Rights Action Center v Nigeria (Ogoniland Case), communication No. 155/96, decision para 67 , and the Inter-American Court of Human Rights in Saramaka People v Suriname, Series C No. 172, judgement of 28 November 2007, paras 95, 158 for example have found that environmental harm are violations of rights to privacy, life and property, among others. In Malaysia bold steps have recently been taken by the judiciary in ‘civilising’ environmental laws where much of its enforcement used to lie in the hands of the Public Prosecutor in terms of prosecution of environmental offences. By Practice Directions No 7/2015[3] Establishment of Environmental Court (Civil), the public now have access to remedies in respect of claims for compensation for damage to property due to activities that are damaging to the environment, claims for compensation for personal injury due to activities that are damaging to the environment, and infringement of an individual's legal rights in the enjoyment of his land or nuisance arising from sound, water and air pollution and/or vibrations.

Incorporating Principle 10 of the 1992 Rio Declaration
5 Principle 10 ensures environmental protection and sustainability. It says “Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Principle 10 in effect provides the three pillars of information, participation and remedy, but sadly this has taken a step backwards in Malaysia with use of laws such as the Official Secrets Act 1972[4] and the Sedition Act 1948.

Ensuring Consultation with the Orang Asli Community
6 The government must always consult the Orang Asli community whenever there are decisions to be made in respect of environmental issues that affect them directly. Consultation is provided for in the International Labour Organisation (“ILO”) Convention No 169. It will be good to see consultation being documented, be made public and transparent in this regard, and their outcomes and reasoning reported for wider dissemination to the public. The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) expresses this right to consultation in similar language in the form of free, prior and informed consent. In this regard, it must be stressed that environmental tools such as Environmental Impact Assessment Studies should be revisited and improved to take into account genuine and not tardy consultation.

Ensuring All Rights under Procedural Human Rights Instruments are Upheld
7 These are rights of freedom of speech, peaceful assembly and association. When we take a closer look at these rights, they contribute to sound environmental policymaking because they allow people to gather and discuss candidly about environmental issues. These rights are found in the Universal Declaration of Human Rights (Articles 7, 8, 19, 20 and 21) and also the International Covenant on Civil and Political Rights (Articles 2, 19, 21, 22 and 25). Though they make no mention of environmental issues undoubtedly they are rights relevant to environmental purposes too.

Conclusion
The aforesaid should form the core elements of an environmental blueprint. These elements are crucial in setting out the directions in addressing Orang Asli issues in accordance with international standards. The first thing that blueprint does is to preserve the environment, hence their survival. It must come first before even addressing the long list of Orang Asli issues or before even trying to find a balance between economic development and environmental protection, and then call that balance sustainable development.

The views expressed are entirely that of the author.[1] Report of the National Inquiry into the Land Rights of Indigenous Peoples, National Human Rights Commission of Malaysia, Suhakam, 2013. Chapter 2 Page 17,
[3] This practice direction ushers in environmental cases of a civil nature into the Environmental Court of Malaysia. It also introduces the Environmental High Court.
[4] Laws such as these prohibit dissemination of information by virtue of the fact that it is official secret whereas laws like the Sedition Act 1948 create a sense of fear to speak out on environmental issues even if they do not mention environmental issues.