

THE ORANG ASLI AND THE UNDRIP

from Rhetoric to Recognition



COLIN NICHOLAS • JENITA ENGI • TEH YEN PING

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Semai man in the headman's house, discussing the
impending logging threat. Kampung Ras, RPS Jernang.
Colin Nicholas 2004

PREFACE

As we were working on the manuscript for this book we got wind from friends in the environmental NGOs that the Protection of Wild Life Act 1972 was going to be replaced by a new law—the Wildlife Conservation Act 2010. Before we could even fathom its impact on the Orang Asli, the bill was already tabled and passed in parliament. It was smooth sailing for the bill because the new act showed that the government was serious in tackling issues of illegal poaching and the trafficking of wildlife as pets or for their meat and body parts that are supposed to have medicinal value.

For the Orang Asli, however, the new Wildlife Conservation Act was a drastic back-step, from its predecessor. The Protection of Wild Life Act allowed the Orang Asli to shoot certain animals and birds for the purpose of consumption in order to provide for their subsistence. Schedule Two (Protected Wild Animals) of the old act lists 491 mammals, marine mammals and reptiles while Schedule Four (Protected Wild Birds) lists 1,033 birds. The lists include both native and (somewhat ludicrously) foreign species.

However, the new Wildlife Conservation Act 2010 (Sixth Schedule, Section 51) lists only 10, yes ten, animals that the Orang Asli can now hunt viz. wild pig, sambar deer, lesser mouse deer, pig-tailed macaque, silvered leaf monkey, dusky leaf monkey, Malayan porcupine, brush-tailed porcupine, white-breasted water-hen and emerald dove.

The new list greatly reduces the number of wildlife species the Orang Asli are now allowed to hunt. The ‘forbidden’ list includes pythons and other snakes, small birds, rodents of various species, jungle fowl, monitor lizard, various species of squirrels, civet cat, bats and flying foxes.

The Orang Asli were not consulted when the amendments were being drafted and the majority of them are still unaware of this new law. Such has become the fate of the Orang Asli. They are the last to know of any development or policies that affect them. And the first to be victims of programmes and policies that are foisted on them. Often

they only find out that their land had been given to developers when the tractors and bulldozers are at their doorstep. Or that loggers have long had their eyes on the timber in their forests only when the surveyors come in to mark out the logging trails.

Such a state of affairs is not unique to the Orang Asli. Their indigenous counterparts in Sabah and Sarawak share the same experience. As do the indigenous peoples all over the world. Tired of having to conform to non-indigenous notions of governance, development, spirituality and basically their way of doing things, indigenous representative began to use all opportunities afforded to them to organize and strategize.

It was no mean feat then that after two decades of discussions, negotiations, compromise and education, the Draft Declaration of the Rights of Indigenous Peoples was agreed upon among themselves. The declaration in turn was adopted by the General Assembly of the United Nations in September 2007 and it is now part of customary international law. Nation states that have endorsed the declaration are expected to incorporate the principles of the UNDRIP into their national laws. Others who did not are still expected to abide by it. The UNDRIP as such has become the standard by which governments are to conduct their dealings with indigenous peoples.

If, for example, the Government of Malaysia had followed through on its good intentions when it triple-endorsed the declaration at the UN, then the Orang Asli would not have been left in the dark when the Wildlife Conservation Act was passed, or when the new land policy for the Orang Asli was approved. The UNDRIP is a good charter for the way the Orang Asli are to be treated and for others to know how to deal with them.

It is also the best instrument the Orang Asli have to reassert and reclaim their rights.

ACKNOWLEDGEMENTS

As the principal author, I am grateful to my co-authors, Jenita and Yen Ping, for helping to finally get this report out in print. Jenita conducted the initial research and several awareness-raising sessions on UNDRIP in the Orang Asli communities. She is also one who never fails to ask a Government Minister or officer why the UNDRIP is not publicised among the civil service personnel, or even in JHEOA. Yen Ping was an intern during the last summer and she did well analysing the gaps between the Federal Constitution, the Aboriginal Peoples Act and other laws vis-à-vis the UNDRIP. None of us are lawyers, so we have tried to stay away from the over-use of legal verbosity.

The content for this book came from several sources, including earlier published works of mine. Other information was culled and improved upon from the various workshops and seminars we conducted. Still other information was the result of papers or reports prepared for seminars on this theme, mostly out of the country.

Support for this book and the work that went in preparation for it came from two sources. The Rainforest Foundation Norway has provided general funding for JOAS since 2007, and we were able to benefit from it directly, especially through its awareness activities on the UNDRIP. For this, we thank especially Anja and Geir who have been responsible for making sure JOAS is financially stable.

Support for the work that went into this work also came from Danida, the Danish International Development Assistance, through its funding to the Mengo-IP project. Again, we benefited both directly and indirectly from the spin-offs of their various projects and their dealings with the Orang Asal. For this we are particularly grateful to Dr. Sundari, Lily Hor, Adelaine and Awang for always remembering to take us into consideration.

Needless to say, but they want us to say it anyway, the views contained here reflect those of the authors and do not necessarily reflect those of the Rainforest Foundation Norway, Danida or Mengo.

Jannie Lasimbang, the chairperson of the UN's Expert Mechanism of the Rights of Indigenous Peoples (EMRIP) organized a workshop on indigenous decision-making, which helped improved my understanding of the topic. Workshops in the Philippines organized by Tebtebba, often jointly with the Asia Indigenous Peoples Pact (AIPP) were also helpful.

An important source of information and feedback on the application of the UNDRIP at the local level has been the road shows conducted by the Orang Asli members of JOAS. These were very effective in informing the communities about the UNDRIP. Those who were regulars on these road shows included Shafie, Yusri, Pak Long, Daud, Ismail, Podeh, and Hamid. We can now safely say that today there are more Orang Asli than JHEOA officers who are truly knowledgeable about the UNDRIP

Towards the end, when it was time to get the book to print I got help from Sze Ning, who put together the initial cover design, and especially from Dr. A. Baer who lives in Oregon, half a day (in world clock terms) away from Malaysia and from whom I was able to get edited manuscripts back within the hour. Often they were full of red Word-tracked corrections. I dread thinking what the readers would say about my English and spelling competence if not for her.

Nevertheless all remaining errors and shortcomings in this book are solely my responsibility.

Colin Nicholas
November 2010

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GLOSSARY

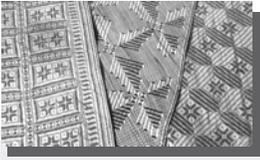
1961 Policy Statement	Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia
Adat	Custom/tradition
APA	Aboriginal Peoples Act 134 of 1974
Asl	Above sea level
Batin	Village head
BKOA	Badan Kemajuan Orang Asli (Orang Asli Development Authority)
COAC	Center for Orang Asli Concerns
DANIDA	Danish International Development Assistance
Dusun	Fruit orchard
EIA	Environmental Impact Assessment
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
Felcra	Federal Land Consolidation and Rehabilitation Authority
FPIC	Free, prior and informed consent.
Garis panduan	Garis Panduan Prosedur Perlantikan Penghulu dan Batin Orang Asli. (Guidelines for the Appointment of Orang Asli Village Heads)
ILO	International Labour Organisation
JBIC	Japanese Bank for International Cooperation
JHEOA	Jabatan Hal Ehwal Orang Asli.

JICA	Japan International Cooperation Agency
JKKK	Jawatankuasa Keselamatan dan Kemajuan Kampung (Village Security and Development Committee)
JOAS	Jaringan Orang Asal SeMalaysia (Indigenous Peoples Network of Malaysia)
Ladang Rakyat	People's Estate (a land development project ala Fel'da in Kelantan)
Mengo-IP	DANIDA-funded project of the Malaysian Environmental NGOs for Indigenous Peoples of Malaysia
NGOs	Non-Governmental Organizations
Orang Asal	Collective name for the Orang Asli and the Natives of Sabah and Sarawak
Orang Asli	Indigenous minority peoples of Peninsular Malaysia
Penghulu	Village head
RFN	Rainforest Foundation Norway
RPS	Rancangan Pengumpulan Semula (Regroupment Scheme)
TOR	Terms of Reference
UMNO	United Malay National Organization
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNWGRD	United Nations Working Group on the Right to Development
WGIP	United Nations Working Group on Indigenous Populations

1



THE UNDRIP AND
MALAYSIA



1 THE UNDRIP AND MALAYSIA

The United Nations Declaration of Rights of the Indigenous Peoples (UNDRIP) presents the “minimum standards for the survival, dignity and well being of the indigenous people of the world” (Article 42). Prior to its formal adoption by the General Assembly on 13 September 2007, the declaration had been in the drafting process for over 20 years.

UNDRIP is the United Nations declaration that had included more consultation and input from states, individuals and non-governmental organisations than any other UN declaration. It is now regarded as customary international law and one that safeguards the rights of indigenous people to maintain their cultures, institutions and spiritual traditions. The United Nations expects the UNDRIP to become a significant tool for eliminating human-rights violations against the planet’s 370 million indigenous people and assisting them in combating discrimination and marginalisation.

The idea for one international declaration on indigenous peoples’ rights came in 1985 when the United Nations Economic and Social Council (ECOSOC) set up the Working Group on Indigenous Peoples (WGIP) to address problems of discrimination faced by them. The WGIP then drafted a human-rights standard to protect indigenous people and this became the Draft Declaration. The draft was finished in 1993 and sent to the Commission on Human Rights which revised the document. However, the declaration remained in its draft form for many years because of the need to get full consensus from indigenous peoples themselves.

The Draft Declaration was finally adopted by the UN Human Rights Council in June 2006. Malaysia, as a member of the Human Rights Council then, supported the Declaration *in toto*. The Human Rights Council then sent the Declaration to the UN General Assembly for approval. However, the General Assembly did not endorse the Draft Declaration on its first vote call, due to the reservations of some African states to some of the language used. Malaysia nevertheless still voted for it on its first call at the General Assembly. Indigenous peoples' representatives then engaged in intense dialogues with these African countries before an agreement on amendments was reached and a second vote was put to the General Assembly in September 2007.

On 13 September 2007, the UN General Assembly adopted the UNDRIP by a vote of 143 to 4, with 11 abstentions (see Appendix 1 for the Declaration). Malaysia, for the *third* time, voted to adopt the declaration as presented. Hence, internationally, Malaysia had told the world that it agreed that indigenous peoples had certain inherent rights and that these rights should be recognised and respected.

However, on the home front, there was virtually no announcement by the government or the relevant authorities that Malaysia had acted as such in terms of recognising the rights of the Orang Asli and the natives of Sabah and Sarawak.

Orang Asal take the initiative

In view of the fact that information about the adoption of the UNDRIP was not given any due importance, the Jaringan Orang Asal SeMalaysia (JOAS)¹ decided to undertake programmes, firstly, to inform and educate its Orang Asal members on this important UN declaration. With financial support from the Rainforest Foundation Norway (RFN) and the Danish International Development Assistance (DANIDA) through the MENGO-IP project², the gaps and compliance of Malaysian laws and policies with the UNDRIP were researched in a series of studies. The results of these studies were then presented to grassroots Orang Asal³ representatives via training sessions and workshops held in the three regions in 2008. A poster-leaflet on the UNDRIP in Malay was also produced by JOAS.

The discussions and suggestions for action were then collected and brought to a national workshop on the UNDRIP held in Kuala Lumpur from 10-13 September 2010. At this workshop a joint-Orang



Figure 1. Bringing attention to the UNDRIP. Members of the Jaringan Orang Asal SeMalaysia at the start of the march to the palace to hand over the memorandum calling for the UNDRIP to be applied to protect indigenous rights. They were stopped by the police despite being cleared to march earlier. The march coincided with a national workshop which focused on the UNDRIP and its impact on the Orang Asal. (Kuala Lumpur. CN-2008)

Asal memorandum was prepared for submission to the Yang DiPertuan Agung (see Appendix 2).

The memorandum called the King's attention to the existence of this declaration and showed how many of its articles were not being enforced or practiced in Malaysia. These included the right to self-determination, the non-recognition of customary or adat lands, forced resettlement, the problem of non-documented Orang Asal and the lack of free, prior and informed consent when Orang Asal lands and resources are appropriated.

However, the memorandum was not delivered to the King as the peaceful procession to the palace to hand over of the memorandum was stopped by the police. Nevertheless, as a result of this police action, there was wide news coverage of the indigenous march and their failed attempt to hand over the memorandum. In an unexpected way, this stoppage of the march by the police caused more publicity by the local and foreign media to the existence of the UNDRIP and of the Orang Asal's demands. This allowed the UNDRIP to be more widely known among the Malaysian public in general.

Equally important, several other key political actors were also made aware of UNDRIP and the Orang Asal's situation and demands. In

particular, certain key members of the Bar Council began taking the opportunity to highlight or quote UNDRIP whenever they spoke up to defend and support the rights of the Orang Asli in particular and the Orang Asal in general

Official Rebuff

Even so, there was still no proactive move from the authorities to recognize the existence of this UN declaration, let alone to take any steps to put its content into practice. On the contrary, Orang Asli leaders were reporting that certain officers of the Department of Orang Asli Affairs (JHEOA)⁴ had challenged them as to the existence of the UNDRIP. This is in direct contrast to Malaysia's position during the adoption process at the United Nations when it voted not once, nor twice, but on *three* occasions in favour of the UNDRIP.

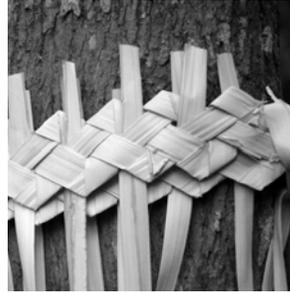
The fear is that because UNDRIP has the status of a declaration and not, say, that of an international convention, the government perhaps regards its obligation to indigenous rights as being non-binding and non-enforceable by the UN. The fact that Malaysia has not ratified the 1989 International Labour Organisation (ILO) Convention No. 169 on Indigenous and Tribal Peoples, which *is* binding on the country if ratified, is perhaps an indication of its non-commitment to Orang Asal rights in Malaysia.

Nevertheless, although not binding on nation-states, UNDRIP does represent the development in customary international law that modern governments are expected to work towards. Thus, while UNDRIP does not have the force of international law, it does provide the moral basis of modern governance and has become customary international law.

Endnotes

1. JOAS is the Malay acronym for the Indigenous Peoples Network of Malaysia.
2. DANIDA-funded project of the Malaysian Environmental NGOs (MENGO) for the Indigenous Peoples of Malaysia.
3. Orang Asal is the collective term used to refer to the Orang Asli of Peninsular Malaysia *and* the Natives of Sabah and Sarawak. The term Orang Asli refers only to the indigenous minority peoples of Peninsular Malaysia .
4. Jabatan Hal Ehwal Orang Asli.

2



THE ORANG ASLI AS
A PEOPLE



2 THE ORANG ASLI AS A PEOPLE

The Orang Asli (“Original Peoples”) are the indigenous minority people of Peninsular Malaysia. They are the descendants of the early inhabitants of the peninsula before the establishment of the Malay kingdoms. They number almost 150,000 today, representing a mere 0.5 per cent of the national population.¹

Anthropologists and administrators have traditionally regarded the Orang Asli as consisting of three main groups—the Negrito (Semang), the Senoi, and the Aboriginal-Malay. Each group is further divided into six subgroups.

Linguistically, some of the northern Orang Asli groups (especially the Senoi and Negrito groups) speak languages, now termed Aslian languages, that suggest a historical link with the indigenous peoples in Burma, Thailand and Indo-China. The members of the Aboriginal-Malay or Proto-Malay groups of the south speak dialects which belong to the same Austronesian family of languages as Malay, with the exceptions of the Semelai and Temoq dialects (which are Austroasiatic).

The Orang Asli have varied occupations and ways of life. The Orang Laut, Orang Seletar and Mah Meri, for example, live close to the coast and are mainly fishermen. About 40 per cent of the Orang Asli population—including Semai, Temiar, Chewong, Jah Hut, Semelai and Semoq Beri—however, live close to, or within forested areas. Here they engage in swiddening (hill rice cultivation) and do some hunting and gathering. These communities also trade in petai, durian, rattan and



Figure 2. Jahai siblings. The Orang Asli are defined more by cultural traits than by blood. (Kampung Sungei Salor, Temenggor, Perak. CN-2003)

resins to earn cash incomes. The majority of the Orang Asli however have taken to permanent agriculture and now manage their own rubber or oil palm smallholdings or have them managed by external agencies, often against their wishes.

A very small number, especially among the Negrito groups (e.g., Jahai and Batek) are still semi-nomadic, preferring to take advantage of the seasonal bounties of the forest. A fair number of Orang Asli also live in urban areas and are engaged in both waged and salaried jobs, and there are several professionals among them today.

Orang Asli Defined

Legally, according to Section 3 of the Aboriginal Peoples Act 1954, the Orang Asli are defined as:

- (a) any person whose male parent is or was a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;
- (b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine,

Table 1
Orang Asli Population Breakdown
as of December 2003

Category	Sub-Group	Population
Negrito	Kensiu	232
	Kintak	157
	Jahai	1,843
	Lanoh	350
	Mendriq	164
	Batek	1,255
		4,001
Senoi	Semai	43,892
	Temiar	25,725
	Jah Hut	5,104
	Che Wong	664
	Mah Meri	2,986
	Semaq Beri	3,545
		81,826
Aboriginal Malay	Temuan	22,162
	Semelai	6,418
	Jakun	27,448
	Orang Kanaq	83
	Orang Kuala	4,067
	Orang Seletar	1,407
		61,585
		147,412

Source: JHEOA

habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community;
or

- (c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.

More concisely, an Orang Asli is a member of an aboriginal ethnic group, speaks an aboriginal language, and habitually follows an aboriginal way of life and aboriginal customs and beliefs. This definition would include adopted non-Orang Asli children and the offspring of an Orang Asli and non-Orang Asli union—provided that they satisfy the above conditions.

That is to say, an Orang Asli is defined more by cultural characteristics than by biological heritage. This is not unlike the constitutional definition for ‘Malay’. However, while both the Malays and the Orang Asli, together with the natives of Sabah and Sarawak, are regarded as *bumiputeras*—literally ‘princes of the soil’, a political rather than a constitutional category—it is contended here that the Orang Asli rather than the Malays meet the criteria of ‘indigenous peoples’ as defined by the UN and other world bodies such as the World Bank.

Indigenous People Internationally Defined

However it should first be noted that the prevailing thinking among indigenous peoples at the international level is that a definition of indigenous peoples worldwide is neither possible at the moment nor necessary for the adoption of the UNDRIP. Rather it is much more relevant and constructive to try to outline the major characteristics which can help us to identify who the indigenous peoples and communities are, especially in the context of indigenous peoples in Asia and Africa.²

One of the early accepted ‘criteria’ of indigenous people came from Jose R. Martinez Cobo, the UN Special Rapporteur whose study on the problems of discrimination among the indigenous people helped



Figure 3. With the indigenous women of Asia. The Orang Asli identify themselves as indigenous peoples and have participated in regional and international forums as such. (Baguio City, Philippines. CN-2008).

establish the UN's Working Group on Indigenous Populations (WGIP) that eventually developed the Draft Declaration on the Rights of Indigenous Peoples. According to Cobo, indigenous people are:

The existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; and

who today live more in conformity with their particular social, economic, and cultural customs and traditions than with the institutions of the country of which they now form a part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant.³

This set of criteria did not suit all indigenous peoples. It particularly posed problems for those communities who were forced to be resettled

by the governments of the day for a variety of reasons, including that of the security motive, as in the case of Malaysia. The deliberations at the sessions of the Working Group on Indigenous Populations fine-tuned these criteria and added ‘self-identification’ as one of the important determining principles in the ‘definition’ of indigenous people. The working group’s concept of ‘indigenous people’ is best reflected in the Working Paper on the Concept of “Indigenous People” by its Chairperson-Rapporteur Ms. Erica-Irene A. Daes, as follows:

- (a) Priority in time, with respect to occupation and use of a specific territory;
- (b) voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) self-identification, as well as recognition by other groups, or by state authorities as a distinct collectivity, and
- (d) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

Over time, various bodies and agencies adopted these criteria for their own definition of indigenous peoples. The World Bank, for example, in its Operational Manual for the implementation of its Indigenous Peoples Policy, says that:

For purposes of this policy, the term “Indigenous Peoples” is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees:

- (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories

- (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- (d) an indigenous language, often different from the official language of the country or region.⁴

Furthermore, in apparent appreciation of the reality of the indigenous peoples' situation in some contexts today, the World Bank additionally ensures that,

“A group that has lost “collective attachment to geographically distinct habitats or ancestral territories in the project area” (paragraph 4(b)) because of forced severance remains eligible for coverage under this policy.”⁵

Given that most indigenous peoples live in areas that are largely the last remaining niches of natural resources or environments, the need to defend them from profiteers or land-grabbers became even greater. One such strategy was to demonstrate that, contrary to popular perceptions, indigenous peoples were not destroyers of the environment but rather its stewards and caretakers. This description of indigenous peoples eventually became an important criterion for the definition of indigenous peoples.

The International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, in particular, advanced the view that an additional guiding principle or criterion for the definition of indigenous peoples should include “the maintenance of practices and customs regulating the harmony between communities and the environment in which they live.”⁶

Clearly there is no single definition for indigenous peoples. However, there is now general agreement that indigenous peoples can be identified by several distinct features or criteria apart from the all-important principle of self-identification. Following Barume (2010: 33-34), we can summarise these elements of indigenous peoples' identification as:

- Self-identification;
- Non-dominant status within a wider society;
- History of particular subjugation, marginalization, dispossession, exclusion and discrimination;
- Land rights prior to colonization or occupation by other groups; and
- A land-based culture and willingness to preserve it.

Orang Asli as indigenous peoples

It is evident that the Orang Asli meet all these criteria for the internationally accepted definition of indigenous peoples. As will be seen later, the Orang Asli are still actively resisting cultural assimilation and integration policies, they still lose out in the mainstream interpretation of laws that affect their rights, and their marginalized position is a result of their subjugation and discrimination by a dominant group. Furthermore, they self-identify as indigenous peoples, an identity which even the dominant group accepts (as reflected, for example, in the name given to them collectively—Orang Asli, first or original peoples).

However, perhaps the most important determining criterion for regarding the Orang Asli as indigenous peoples is their attachment to a particular geographical space or ecological niche—and their ‘land-based culture’ that they practice on it, which they also desire to pass on to future generations.

If there is any one single trait that defines indigenous peoples, it is this attachment to their traditional or customary lands. Indigenous peoples have such strong cultural, historical, spiritual and emotional connections to these traditional territories because it is these lands that have shaped the way of life and the identity of the people. Without these lands, indigenous communities are unable to survive as culturally distinct identities, as indigenous peoples (Barume 2010: 45).

This explains why often the Orang Asli are unwilling to be resettled to a new location despite the offer of better amenities in the new place and/or the enticing compensation packages.

The argument follows then, that because the Orang Asli, like indigenous peoples elsewhere, are attached to a particular geographical

space or ecological niche—their traditional or customary land—an Orang Asli of a particular indigenous community can only claim rights of abode to his own community's traditional land. A Semai from a village in Perak, for example, cannot go to a Jakun village in Pahang and assert his rights to customary land there just because he is an Orang Asli. The land there is for the exclusive use of the Jakuns of that village only. Others who are not from that area can only enjoy rights to that particular land if they become members of that community by custom, such as by marrying into the community. Nevertheless, even if they do so, they still have to abide by the customs of that community.

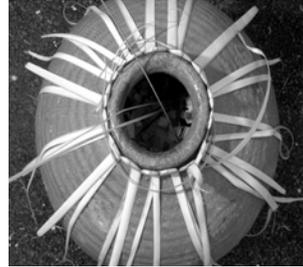
On the other hand, there is no such restriction for the Malays. They can have access to Malay reservation lands in any state or locality. Furthermore, one can also get Malay-bumiputera status even though one was a recent migrant to the country (but as long as one fulfilled the cultural and religious criteria as laid down in the Constitution).⁷ These two characteristics alone explain why the internationally-defined category of indigenous peoples is not attached to the Malays, although politically they are considered *bumiputeras* and have been ascribed with special rights in the Federal Constitution⁸.

Endnotes

1. According to the JHEOA, the Orang Asli population in 2003 stood at 147,412. However, in 2006, the JHEOA quoted a population of 141,230—a 4.2 per cent *decline* (6,182 Orang Asli). No explanation has been put forward for this first-ever drop in numbers. It is however possible that the drop could be due to the fact that statistics only account for Orang Asli residing in Orang Asli villages and areas under the JHEOA's purview. Those who have moved to the towns and cities were excluded from the JHEOA-conducted census.
2. cf. The African Commission, *Report of the Working Group of Experts* (2005), p. 87. Christian Erni (ed)(2009), *The Concept of Indigenous Peoples in Asia: A Resource Book* is also a good reference book for the case of the indigenous peoples in Asia.
3. Jose R. Martinez Cobo, 1986, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/L.566, Paragraph 34.
4. World Bank Group, Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10), July 2005.
5. *Ibid.*

6. The International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, *Indigenous Peoples, Forests and Biodiversity*, IWGIA Document No. 82, 1996, p. 100 (cited in Barume 2010, p. 30.)
7. This is the general practice now although the Federal Constitution clearly states that to enjoy such status, such persons must have one parent who was a citizen of Malaya at Independence in 1957.
8. Furthermore, the Malays have not invoked their identity as indigenous peoples as called for by the UNDRIP. Neither have they attended meetings on indigenous peoples (such as the WGIP) as indigenous peoples. When members of their community did so, they invariably attended as representatives of the state and not of any ethnic group.

3



ORANG ASLI
INDIGENOUSNESS IS
LINKED TO THE LAND



3 ORANG ASLI INDIGENOUSNESS IS LINKED TO THE LAND

We have seen that an important feature of all indigenous peoples is that their culturally distinct identity is linked to their traditional lands. And such lands are geographically specific and uniquely exclusive to each indigenous community.

For this reason too, the Orang Asli have a close physical, cultural and spiritual relationship with their ecological niches. To the Orang Asli, their *adat* or customary land is a living entity, with a spirituality and a sacredness of its own. The land provides assurances for their continued survival; it provides food, clothing, medicines, fuel, and all materials necessary for their existence. The land is also the schoolhouse of their children and the resting-place of their ancestors.

It is the land, more than anything else, which gives life and meaning to their whole being; for it is in the land that their history and identity are contained. It is also the land that ensures their viability as an independent people and provides for their social and cultural development. The Orang Asli, therefore, not only have a material dependence on the land but they also share a spiritual and emotional relationship with it.¹

Ethos on the Land

However, the Orang Asli's relationship to their land is not merely restricted to the material aspects of their culture. Neither is it a purely economic relation. The high regard that the Orang Asli have for their land—a consequence of their realization that their material existence depends on their nurture of, and respect for, the land—has caused them

to evolve an ethos that is invariably homogenous among all Orang Asli.

This ethos represents a quality of being and living which is integrated, humane and egalitarian. It is an ethos that has evolved over a long period of time, amassing the experiences of generations upon generations of Orang Asli. The attitude was to enjoy the fruits of the here and now without risking the next generation and to ensure continual enjoyment of scarce resources in a situation of relative plenty. At the core of this ethos was the concept of balance and harmony—harmony between humans and the environment, and harmony among humans .

The logic of this harmony was based on two principles. The first was a non-aggression pact between humans and nature, an unspoken though carefully observed law that humans would not exploit the latter, that humans would not abuse the latter's generosity, and that humans would not exclude the latter in its relationships.

This reverence for the land meant that it could not be bought and sold as if it were a commodity. The land belonged to the community and was there for its use and nurture. It was therefore inalienable and no individual had the power to alienate it. Because it was the community as a group that exercises rights over the land, the group also controls and regulates the rights and claims of its own members to temporary ownership and use of the land. The exercise of this right over the land is not merely an economic or individual right. Spiritual reverence for the land, in fact, remains a condition when usufructuary rights are accorded.

Thus, when an individual works a piece of land, he or she is in effect re-establishing a personal bond with the earth. At the same time, the individual establishes a legal and spiritual relation to it, and this is recognized by the community, whose rights to it become diminished.

'Ownership' and rights to the use of the land also incorporated a system of obligations on the individual. For instance, no individual was to hold more land that he could use². He was to take necessary measures to ensure that the land was to exist in perpetuity for the use of future generations. He was to adhere strictly to the rituals involved in working on the land. He was also to share with the rest of the community, the common benefits derived from the land. And as soon as he no longer worked on the land, he was to forfeit 'ownership' to it. These and other similar unwritten rules came to embody the customary law pertaining to land.³



Figure 4. Semai children learn about reciprocity. All those who helped in the planting and harvest of the hill padi receive a share of the first harvest in a specially-woven *sumpit baq*. This helps maintain harmonious relations in the community. (Baretechi, Tapah. CN-2003)

Behind all such beliefs, there is a notion that Orang Asli society must maintain the balance between itself and its environment. The healthful community is one which the members, by the medium of the shaman, can make use of Nature without offending her susceptibilities.

Orang Asli Land is Community-specific

Because the customary land of an Orang Asli community is very localized and site-specific, it is not surprising that this specific ecological niche invariably becomes the basis of the communities' subsistence, spirituality, social organisation, history, identity, and culture. It is also the schoolhouse of the children through which the community transmits all these aspects.

For most Orang Asli, the forest is in the centre of the world. Their philosophy is manifested in their myths and legends, in their taboos and cultural practices, in the history contained in the forest lands, and in their reverence for all things sacred that are connected with it. The spirituality, ecology, economics and agriculture that go into opening, planting and harvesting a *selai* (hill-rice field), for example, attest to how the Orang Asli regard and use the forest.

And on these traditional territories, the Orang Asli possess extensive and holistic traditional knowledge of the biological resources found therein. Such knowledge can only have been acquired if they had lived

and retained control of the traditional territory for a very long time. Equally important is the fact that over this traditional territory, the Orang Asli exercise autonomy and control. This is their manifestation of ‘self-determination’.

Changing values

Some may say the above portrayal of the Orang Asli and their attitude towards their traditional territories is highly romantic. Especially in light of Orang Asli individuals today who do not display any of these values and who themselves exploit and damage their resource-laden environments.

Sadly, this is the reality today in some circumstances. The changing resource relations, the prevailing power inequalities, the changing consumption patterns have led to changed indigenous individuals. It is nevertheless important to realise that while there may be indigenous individuals who now regard their traditional territory, or their portion of it, as an economic resource, the majority of Orang Asli communities still retain their indigenous systems and indigenous values.

As such, just because there are certain members of the indigenous community who no longer practice their traditional indigenous value system, this should not negate the credibility and intention of the majority of the Orang Asli to want to own and develop their customary lands in their tradition-inspired way.

On the contrary, the changes in their situation that the Orang Asli have experienced of late have been the result of various external factors that were beyond the control of the Orang Asli. To understand how the Orang Asli reached their situation today, we need to take a step back to see the role history played.

Endnotes

1. Much of this section is taken from Colin Nicholas (1988), ‘The Material and Cultural Basis of the Indigenous Social Order’, pp. 11-22.
2. The use of only the male pronoun is for simplicity of prose. Both genders are included in this description.
3. In contemporary legal language, we say that the individual only exercises usufructuary rights, not ownership per se over the land used. However, the concept of usufructuary rights completely ignores the other non-legal obligations and responsibilities that the community demands of the user of land.



4

THE ORANG ASLI IN HISTORICAL CONTEXT



4 THE ORANG ASLI IN HISTORICAL CONTEXT

The Orang Asli were not always an impoverished and dependent people. As the first peoples on this peninsula, they were very much participants and actors in the political and economic structure of the early civilisations.¹ Nevertheless, each flux of immigrant peoples—who invariably coveted the Orang Asli’s resources—perceived the usefulness of the Orang Asli differently, and dealt with them accordingly. Thus from an early situation of being in control of their society and their resources, they were reduced to mere savages and wards of the sultans by the time of British colonialism.

Early Perceptions of the Orang Asli

The term *Sakai*—used variously to mean slave, dependent or savage, but never used by the Orang Asli to refer to themselves—appeared in European literature in the eighteenth century to designate the non-Muslim indigenous groups of the Malay Peninsula that were the object of slave raids. It is clear from the literature that the ancestors of today’s Orang Asli neither lived in isolation nor were they divorced from the political situation of the day.² Relations with the other communities ranged from being regarded as non-humans to being given due deference in view of their ruling status.

The literature is dotted with references to the manner in which the Orang Asli were being perceived. For instance, Skeat and Blagden (1906: 103) reported that the colonial administrators concluded that “the hillmen of Negri Sembilan never indulge in the luxury of a bath.”

Harrison (1986: 44) considered the “semi-wild Sakais” to be “as shy as most beasts of the forest ... they would be most reluctant to leave their own part of the forest and might have little or nothing to do with the Sakais in the next valley.”

Bird (1980: 13-15), writing in the 1880s, informs us that the Orang Asli were called indiscriminately Kafirs or infidels by the Malays and that the Orang Asli “were interesting to them only in so far as they can use them for bearing burdens, clearing jungle, procuring gutta, and in child-stealing....”

Numerous authors (e.g. Mikluho-Maclay 1878, Swettenham 1880, Clifford 1897, and Wray 1903) relate how the Orang Asli were hunted down like wild beasts, the men killed off, and the women and children carried off into slavery.

The forested hinterlands were nevertheless the habitat not of Malays but of the forest dwellers, the ancestors of today’s Orang Asli, and it was they who were the major collectors of local products (Andaya and Andaya 1982: 10-11). Malay settlement, as a rule, had developed along the rivers and coasts rather than the hinterland, and Malays themselves rarely ventured beyond the fringes of the jungle. Roberts (1899: 3), for example, noted that “from the junction of the Telom and Seram rivers, few Malay houses were found at long intervals, but above that there are none whatever, the whole of it being Sakai country.”

It has been noted by Dunn (1975: 109) that the Orang Asli have played a significant role in the Malay Peninsula’s economic history as collectors and primary traders as early as the fifth century A.D. Andaya and Andaya (1982: 11) have concurred, suggesting an internal trading network had linked the periphery of the forest with the hinterland. By this means, goods were bartered and passed from one group of Orang Asli forest dwellers to another, sometimes over forest tracks but most often along rivers. Various items were traded.

Abdullah (1985: 257), for example, mentions that the Jakun of Pahang traded in ivory, resin, camphor and rattans. And as the Chinese market developed, and the list of sea products came to include such items 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, it was the Orang Laut who could locate with unerring accuracy the desired products (Andaya and



Figure 5. Batek selling their harvest of gaharu wood. Because of their intimate knowledge, of the forest and their skills in extracting its products, the Orang Asli are still the best people for collecting forest resources. (Kampung Kuala Koh, Kelantan. CN-2004)

Andaya 1982: 13). Without their swimming and diving skills it would have been impossible to source these products.

The Malays also prudently tapped the knowledge of the Orang Asli in selecting potential spots for mining (Gullick (1989: 151, citing Perak Government Gazettes 1889: 633 and 1894: 337). This is also alluded to by Mohamed Ibrahim Munshi (1975: 17-18) who noted that “some Jakuns earn money by pointing out rivers or streams where there is tin, etc.” In fact, during a trip to Pahang, Munshi Abdullah in 1838 saw Jakun not only bringing resins, rattans and aromatic wood to trade with Malays but also working in Malay gold mines (Andaya and Andaya 1982: 133-4).

Autonomy and Political Dominance

However, the Orang Asli were not always merely collectors and labourers for the ruling Malays. On the contrary, there is much evidence in the literature to show that some of the Orang Asli groups played very dominant roles in the administration and defence of established political systems in the Malay Peninsula.

Andaya and Andaya (1982: 49-50) argue that when the Malay newcomers arrived with an established system and political ranks, there

were already Orang Asli groups in the Malacca region to whom such concepts would have been familiar. Thus when Parameswara appeared in Malacca with his following, there was already a small fishing village at the site, whose population included Orang Asli and Orang Laut. Parameswara tightened his links with the Orang Laut by bringing their leaders into the political hierarchy and, via judicious marriages, into the royal family itself. For hundreds of years the Orang Laut devotion to the Malay rulers of Malacca was a crucial factor in the kingdom's preservation and prosperity. In fact, Hang Tuah, the most famous Laksamana in Malay folklore, was himself of Orang Laut background (Andaya and Andaya 1982: 70).³

The State of Rembau (in Negeri Sembilan) also presents us with the curious anomaly of an Orang Asli chief reigning over a population of Malays. Wilkinson (1908 cited in Hooker 1970: 22, fn. 4) informs how the Dato' (of the State of Rembau) would have to be an Orang Asli ("Sakai") in the direct female line. Although, by blood he must be largely a Malay - owing to the law of exogamy—his claims to heirship was by virtue of the Orang Asli element in his ancestry. The Dato' of Johor is also a "Sakai" in this sense.

Preceding Rembau, the Orang Asli in Malacca also had political control over their territories. Newbold (1839, II: 117-126) gives accounts of how Jakuns and Bidoandas [sic] came to be penghulus and chiefs in Malacca with titles such as Lelah Maharajah and Setia Rajah. The Bidoandas also enjoyed certain special privileges and were even exempted from capital punishment for serious crimes.

The *Hikayat Abdullah* (1985: 260-1) also relates how four Orang Asli tribes had been holding dominion over Naning (in Malacca) since early Portuguese times. In 1642, when the Dutch Governor of Malacca sought to appoint a Ruler of Naning, all the Naning folk ("the very old and the young included") had debated the matter and concluded that: "We should like Datok Seraja Merah of the Biduanda Tribe to be our ruler." Datok Seraja Merah was subsequently appointed Ruler of Naning and upon his death sometime later, he was succeeded by his sister's son, also of the Biduanda tribe.

In the south, we are told that in the mid-17th century, the Sultan of Johor went to the Orang Asli kampung at Ulu Beranang (in Negeri Sembilan) where he met Puteri Mayang Selida. He married her, and

brought her to Johor whereupon they had four sons born to them (Buyong Adil 1981: 4). The Legend of the White Semang in Perak also relates how Nakhoda Kasim of Johor had gone to Perak and married an Orang Asli woman who was thought to have supernatural endowments and eventually founded the Perak sultanate (Maxwell 1882).

In Pahang, too, being able to trace your lineage along an Orang Asli blood line appears to have been important enough for great care and accuracy to be taken in recording genealogies. For example, Endang—the pen name of an Orang Asli leader in Pahang—cites the *Sejarah Batin Simpok and Batin Simpai* (The Annals of Batin Simpok and Batin Simpai), still being passed down in oral tradition, where the genealogies and lines of inheritance are still very clear—this being concrete evidence of the autonomous nature of Orang Asli society in the not too distant past (*Berita Harian* 24.6.97). Endang also recalls that the Orang Asli in Pahang had similar status as in Malacca and Negri Sembilan where, for example, the Tok Batin (Orang Asli village head or chief) had the same standing as that of a Ruler or Raja of the Orang Asli. He was the judge and the reference point for all matters of customs and tradition, which was highly developed.

Among northern Orang Asli groups, Mikhulo-Maclay (1878: 215) recorded that “The Orang Sakai and the Orang Semang consider themselves the *original inhabitants* and independent of the Malay Rajahs, and so they are in fact in their woods.” Noone (1936: 61-2) also noted that the Temiar, prior to the intervention of British rule, “pursued the independent existence of a hill people on the Main Range.” In his opinion, it was the decision of the British Government that the boundaries of the states of Perak and Kelantan should be defined by the watershed that has made the (Ple-)Temiar the subjects of anybody.

Orang Asli as Subjects

That the Orang Asli became subjects of anybody can be seen in the manner in which titles now came to be bestowed on Orang Asli leaders in exchange for favours or responsibilities, rather than the Orang Asli being the bestower of such titles or privileges. Edo (1997: 8) gives a list of titles given to Orang Asli leaders on behalf of the Sultan of Perak and suggests that this reflects that “the Orang Asli had received political endorsement of their Malay allies even in the 19th century,

and probably in the period before.”⁴

In Woh (Tapah), Semai elders still remember the titles given, as well as when the Sultan had given seven elephants to the headmen in the area to help the Orang Asli transport rattan and tin (the latter which they worked with the Chinese) for the Sultan.

Without doubt, there had been a change in the relationship between the Orang Asli and the Malays, especially among the elites of both groups. It is possible that, with the sultanates and the Malay system of political ascendancy becoming more firmly entrenched in the Peninsula, the need to resort to using the precondition of Orang Asli lineage, for example, no longer arose. On the contrary, it seems likely that the Malay aristocrats chose to step up their exploitation of the Orang Asli and their resources in the general pursuit of greater wealth.

The general aversion of the Orang Asli to submission to, or to control by, other communities is evident in the response of the Orang Asli to intrusions into their lives. At one extreme, as Newbold (1839: 397) notes for instance, attempts to domesticate the Jakuns (who are “extremely proud and will not submit for any length of time, to servile officers or to much control”) generally ended in the Jakun’s disappearance on the slightest coercion. At the other extreme, Clifford (1992: 103-4) refers to a seemingly recalcitrant response from another group of Orang Asli in Kelantan, that had “frequently committed depredations on Malays entering the district.”

The British Road to Paternalism

Nevertheless, it has been argued that the onset of British rule was also the beginning of the Orang Asli experiencing paternalism. This was due in part, as Harper (1997: 5) notes, to European ethnography that seemed bent on looking to the Orang Asli for evidence of the prevailing theories of social evolution. Out of this, Harper observed, emerged a pervasive assumption that for the most part the Orang Asli represented an early stage of Malay development, and only in their eventual absorption in the Malay community would they find culmination of a slow march towards a settled, civilised existence.

Also, a recurring motif of colonial writings was that until the British intervened, Malay relations with the Orang Asli were those of master and slave (Harper 1997: 5). The autonomous Orang Asli

chiefdoms of early Malayan history, with their highly evolved political and economic systems, apparently did not weigh much for the British administrators.⁵

British paternalism is perhaps best illustrated by the comments made by the British Resident when, towards the end of the last century, he was asked to decide on the application of two Orang Asli for title to their fruit orchards in Selangor: ‘They must be provisionally treated as children and protected accordingly, until they are capable of taking care of themselves.’ (Sel. Sec/2852/1895).

Nonetheless, Colonial rule brought about some administrative changes, with laws being enacted to outlaw certain “uncivilised” activities such as slavery and debt-bondage while other laws were also enacted to control the extraction of natural resources and the alienation of land. And while the imposition of colonial rule removed some of the violence from trade (Harper 1997: 7), the control of the British rulers began to permeate every facet of living in the Peninsula. By the mid-nineteenth century, for example, Malay and Orang Laut participation in sea-borne trade had been all but eliminated by the British (Andaya and Andaya 1982: 122-3).

It was nevertheless clear that for the British, their economic interest in the region were their main priority.⁶ As far as the Orang Asli were concerned, it has been suggested that ethnographic portrayals of the indigenous communities as defenceless creatures with limited intelligence and capacity for self-reliance helped to justify British intervention into their lives, essentially by turning the colonial power into a “protector” of the Orang Asli (Dodge 1981: 8-9, Loh 1993: 33-4). Ironically, also, while it sought to free Orang Asli from slavery and debt-bondage, the colonial government at the same time agreed that the Orang Asli should be regarded as ‘wards’ of the Sultans (Howell 1991: 5).⁷

Direct intervention into the affairs of the Orang Asli began in concert with H.D. Noone’s *Aboriginal Tribes Enactment* (State of Perak, Enactment No. 3 of 1939). This closely followed his rather detailed *Report on the Settlement and Welfare of Ple-Temiar Senoi of the Perak-Kelantan Watershed* (1936), which sought to perpetuate the view of the British colonialists that the Orang Asli should remain in isolation from the rest of the Malayan population and be given protection.

Noone called for the establishment of large aboriginal land reservations where the Orang Asli would be free to live according to their own tradition and laws. He also proposed the creation of “patterned settlements” in less accessible areas, where the Orang Asli could be taught agricultural skills. He further sought the encouragement and development of aboriginal arts and crafts and the creation of other forms of employment among the Orang Asli. Several protective measures were also proposed, such as the banning of alcohol in Orang Asli reserves and the controlled peddling of wares by outsiders. Although not implemented by the government of the day, his ‘Proposed Aboriginal Policy’ did, however, lay the groundwork for future government policy towards the Orang Asli.

Orang Asli reserves were also mooted by the colonial power but their establishment was forestalled by the war with the Japanese (Harper 1997: 11). While the period during, and following, the Japanese Occupation opened the eyes of the colonial administration to the existence, special situation and usefulness of the Orang Asli, it was to be the Emergency that actually brought the Orang Asli directly into the plans of the government.⁸

The Emergency

The Orang Asli were not unaffected bystanders during the Emergency. On the contrary, several Orang Asli lost their lives or were injured—both civilians as well as Orang Asli who decided to take up arms on either side of the warring parties.⁹ The events of the Emergency and its impact on the Orang Asli are well-documented (e.g. Jones 1968, Short 1975, Carey 1976, Leary 1995). Briefly, the war turned its attention to the Orang Asli when the insurgents were no longer able to get help from their sympathisers in the rural areas, and the Brigg’s Plan—which involved relocating much of the rural population into closely-guarded “new villages”—successfully cut the link between the two parties. Consequently, the insurgents were forced to operate from areas in deep forests, where they sought the help of the Orang Asli, some of who were old acquaintances from the time of the Japanese Occupation. The Orang Asli were known to provide food, labour and intelligence to the insurgents, while a few even joined their ranks.

The Colonial Government quickly saw the importance of the Orang Asli in winning the war and created the post of Adviser on



Figure 6. Malayan security forces setting out for an operation. It was the Emergency of 1948-1960 that brought the Orang Asli to the attention of national politics. (Fort Brooke, Kelantan. Roy Follows, ca. 1953)

Aborigines. However, initial attempts at controlling the Orang Asli proved disastrous for both sides. In an attempt to prevent the insurgents from getting support from the Orang Asli, the British herded them into hastily-built resettlement camps. A few hundred Orang Asli died in these crowded and sun-baked camps mainly due to mental depression rather than diseases.

Later, realising their folly, and recognising that the key to ending the war lay in “winning over” the Orang Asli to the government’s side, a Department of Aborigines was established and “jungle forts” were set up in Orang Asli areas, introducing the Orang Asli to elementary health facilities, education and basic consumer items.

This period also saw the first important attempt at legislation to protect the Orang Asli with the enactment of the Aboriginal Peoples Ordinance in 1954. This Ordinance (later amended in 1967 and 1974 to conform to changes mainly in terminology) was a milestone in the administration of the Orang Asli, as it indicated that the government had officially recognised its responsibility to the Orang Asli.

At about the same time, the Department for Aboriginal Affairs was enlarged in order to make it an effective force. But, as the former

Commissioner for Orang Asli Affairs noted, the only reason for such re-organisation was to ensure a better control over the Orang Asli and to make sure that they would have less inclination and few, if any, opportunities to support the insurgents (Carey 1976: 312).

Later, in an apparent reversal of the government's policy towards the Orang Asli, the jungle forts were abandoned and replaced by "patterned settlements" (later to be called "regroupment schemes"). Here, a number of Orang Asli communities were resettled in areas that were more accessible to the Department officials and the security forces and yet close to, though not always within, their traditional homelands. The schemes promised the Orang Asli wooden stilt-houses as well as modern amenities such as schools, clinics and shops. They were also required to grow cash crops (such as rubber and oil palm) and practise animal husbandry so as to be able to participate in the cash economy.

Ignoring the varying impacts the colonial plan had on the Orang Asli, the strategy nevertheless proved successful in that Orang Asli support for the insurgents waned and the Emergency formally ended in 1960. However, for the Orang Asli, this spelled the beginning of a more active and direct involvement of the state into their affairs and lives.¹⁰

The Aboriginal Peoples Act

As mentioned above, the Emergency also saw the enactment of the Aboriginal Peoples Ordinance 1954. Later revised as the Aboriginal Peoples Act 1974, the Act is unique in that it is the only piece of legislation that is directed at a particular ethnic community. For that matter, the Department of Aborigines, or the JHEOA as it is called today, is also the only government department that is to cater for a particular ethnic group.

As it was enacted during the height of the Emergency, the Aboriginal Peoples Act basically served to prevent the communist insurgents from getting help from the Orang Asli, and vice-versa. It was also aimed at preventing the insurgents from imparting their ideology to the Orang Asli. For this reason, there are provisions in the Act that allow the Minister concerned to prohibit any non-Orang Asli from entering an Orang Asli area, or to prohibit the entry of any written or printed material (or anything capable of conveying a message), among others. Even in the appointment of headmen, the Minister has the final say. The Act treats the Orang Asli as if they were a people needing the

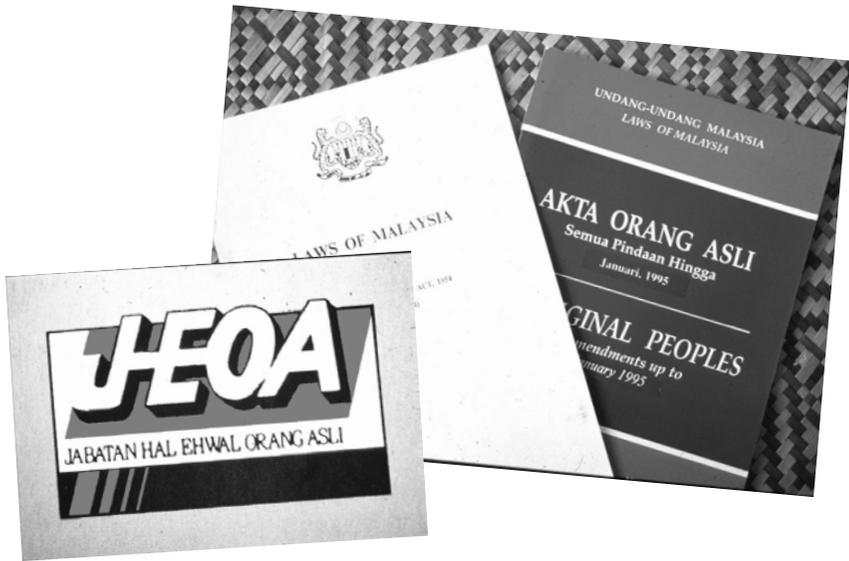


Figure 7. Two instruments of control. The Orang Asli’s strategic position in the Emergency resulted in the establishment of the Department of Aborigines (now called the JHEOA) and the introduction of the Aboriginal Peoples Act (1954) – two major contributory factors that began the control and domination of them by others.

“protection” of the authorities to safeguard their wellbeing.

Nevertheless, the Act does recognise some rights of the Orang Asli. For example, it stipulates that no Orang Asli child shall be precluded from attending any school only by reason of being an Orang Asli. It also states that no Orang Asli child attending any school shall be obliged to attend any religious instruction without the prior consent of his parents or guardian. Generally also, the Act allows the right of the Orang Asli to follow their own way of life.

And 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 any 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.

Thus, the Aboriginal Peoples Act laid down certain ground rules for the treatment of Orang Asli and their lands. Effectively, it accords the Minister concerned, or the Director-General of the Department of Orang Asli Affairs (JHEOA), the final say in all matters concerning the administration of the Orang Asli. In matters concerning land, the state authority has the final say. The development objective of the Act, therefore, appears to have been subsumed by both the security motive and the tendency to regard the Orang Asli as wards of the government.

The Contest for Resources

The impact of the Emergency aside, colonial rule particularly affected the position of the Orang Asli vis-à-vis their traditional land and their rights to forest resources. However, the debate on the “contest for the forests” preceded the Emergency and had been sustained, on occasion passionately, by foresters on the one side and government officials sympathetic to the cause of the Orang Asli on the other.

Harper (1997) discusses the matter in historical detail and suggests that the advent of colonial rule began a process by which not only new economic pressures, but new ideological concerns, led to a steady assertion of dominion over the Orang Asli, which brought challenges to their position as forest exploiters as well as unprecedented social change (1997: 28).

Then, the colonial government needed to exercise absolute control over the forests for two reasons: *economic* (its ability to appropriate natural resources and the incomes there from) and *political* (restraining and assimilating isolated Orang Asli communities with ambitions of autonomy). Thus, forest-clearings (for agriculture, development) were favoured more than wilderness (*selais*, *adat* lands). With this came the perception (later translated into law and practice) that the Orang Asli were considered as squatters on state land and plunderers of state resources.

Laws and regulations were then enacted that placed Orang Asli rights to forests and forest resources at a lower priority than the state’s desire to control and extract profit from them. In fact, forest development and conservation projects are still constrained by laws and regulations that prevent the recognition of indigenous peoples’ practices and

rights. The value of customary systems for controlling local forest management practices is either underestimated or misunderstood. The legal mechanisms for acknowledging local people's rights over forest lands and resources remain dramatically underdeveloped (cf. Michol, *et al*, 2000: 159).

Such regulations effectively inform the Orang Asli, in no uncertain terms, that their traditional territories—over which they previously had dominion and autonomy—are no longer under their control.

To aggravate the situation, Orang Asli also experienced discrimination in the manner the rights to their lands were being considered. Means (1985: 639-70) had noted that:

... by 1913, certain areas of the Peninsula were designated as “Malay reservations” where only Malays could own or lease land. These reservations provided substantial protection for the customary holdings of Malays, whose titles were legally recognised in perpetuity. By contrast, no such protection was extended to any of the aborigines. Instead, aboriginal lands were deemed to be crown lands of the Malay rulers, and were treated as if they were unoccupied. ... (the aborigines) were permitted to live on “unoccupied lands” by sufferance, as dependants of the Malay rulers. Naturally, these assumptions were not shared by the aborigines, who remained blissfully unaware of their presumed status in law and its bearing on land use and property rights. Noone (1936: 62) also noted that on the current state map of Perak large areas of exclusive Ple-Temiar land were designated “Malay Reservation”—and most of it was unsurveyed. “If we are to have a reservation,” he added, “let us at least reserve the land for the people who occupy it.”¹¹

Sadly, with Independence in 1957 and especially with the establishment of a specific government agency—the JHEOA—to handle all matters concerning the Orang Asli, the decline of Orang Asli autonomy and polity took a steep dive, if the principles of UNDRIP as a benchmark for Orang Asli progress and self-determination are to be taken seriously.

Endnotes

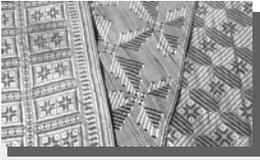
1. This section first appeared in Colin Nicholas (2000), *The Orang Asli and the Contest for Resources: Orang Asli Politics, Development and Identity in Peninsular Malaysia*, pp. 69-90.
2. The ancestors of today's Orang Asli are generally referred to as "aborigines" in the older literature, apart from "Sakai" and the respective terms used to identify them such as "Jacoons", "Biduanda" and "Orang Laut". However, for our purpose here, the term Orang Asli will be used to refer to both the present day Orang Asli as well as their ancestors, unless specifically identified.
3. According to Leonard Andaya (*Leaves of the Same Tree* (2010), pp. 70-71), "The special relationship between the Malayu and the Orang Laut assured the success of the Malayu polities from the seventh to the mid-eighteenth century."
4. The giving of titles to Orang Asli and other leaders appears to have been a common practice during the rule of the Malay Sultans. Linehan (1973: 50), for example, states that in 1738 when Sultan Sulaiman visited Kuala Endau, "the headmen of the nine proto-Malay tribes (Suku Biduanda) came before him and he gave them titles." Swettenham (1880: 59) also mentions that "the headman of the Slim orang Jakun, or Sakeis as they are called, is blessed with the title of "Mentri".
5. Bah Akeh, a Semai elder in Tapah, reduces the whole Orang Asli problem today to British short-sightedness when they first arrived on our shores. "For," he opined, "if they had looked harder and further inland, they would have seen us and this country would have been called 'Tanah Orang Asli' instead of 'Tanah Melayu'" — an allusion to the belief that the root of Orang Asli problems today is that they are not recognised as the duly legitimate indigenous or 'original' people of this land.
6. The records of the early travellers continually reiterate that before British enterprise opened up the interior the Malays had barely penetrated beyond the big rivers, coasts and estuaries. Present kampongs, such as Sungkai, Slim, Tapah all followed British intervention and were founded moreover by non-Peninsular Malays (Mendilings, Achinese, etc.) who intermarried with the Orang Asli (Noone 1936: 62, fn. 1).
7. Earlier Noone (1936: 62), seem to view the matter of "wards" of the Sultan differently. From the point of view of the British Government, he noted, the Ple-Temiar have been assumed to be the subjects of the Sultans of Perak and Kelantan. But he acknowledged that "the whole question is very open... (since) The Ple-Temiar are not Mohammedans [and therefore not Malay], and there is no reason to suppose that they shew [sic] any tendency to become such in bulk."

8. Nagata (1997: 95) contends that “although the British colonial government virtually ignored the welfare of the Orang Asli until the Emergency forced it to recognise them, a few of these states were already dealing with them (e.g. the office of To’ Mikong and To’ Pangku in the case of Kelantan and Perak). Many of these practices fell into disuse as a result of the establishment of the federal Orang Asli department.... It is therefore misleading to assume that the administration of the Orang Asli affairs began solely as a result of the Emergency.”
9. Khoo and Adnan (1984: 233) provide statistics on the number of Orang Asli injured or killed during the Emergency, as follows: Orang Asli terrorists: 60 killed, 6 injured, 57 surrendered, 5 captured. Orang Asli civilians: 69 killed, 15 injured, 53 missing. Auxiliary Police or Home Guard: 4 killed, 5 injured. Special Constable: 1 injured.
10. According to an editorial in the Straits Times of 1st July 1955 (cited in Leary 1991: 44), the Emergency has had, at least for the non-Orang Asli citizens, one salutary effect: “It has focused attention on a group of people toward whom the popular attitude has been one of indifference mixed with contempt. In the definition of Malay peoples, the Aborigines were not included. They were part of the animal life around the fringes of the jungle.... All the people of Malaya have staked their claims and asserted their inalienable rights except our dispossessed hosts driven into the jungle fringes ... The old policy of treating them as interesting museum pieces to be protected and preserved could only mean the extinction of the real sons of the soil.”
11. For Noone, the first point to be decided is the right of the Orang Asli to be regarded as full subjects of the Malay Rulers, to whom benefits that are enjoyed by the Sultan’s other subjects, if they are to be the full subjects of that rule, should be extended (Noone 1936: 62). This situation exposed the anomaly in the treatment of Orang Asli as Malays. They were apparently acceptable as Malays culturally and politically, but when it came to being eligible for lots in Malay Reservations, they were not accepted. This was to be an issue that was persistently raised in later years.

5



THE ORANG ASLI SITUATION TODAY



5 THE ORANG ASLI SITUATION TODAY

Differing from an earlier time when they were able to determine the fate of sultans and their sultanates, the Orang Asli today have been relegated to the rank of the most marginalized and impoverished of Malaysians.

Trailing behind the mainstream society

Statistics provided in the Government's 10th Malaysia Plan (2011-2015) in fact, reveal that 50 percent of the 29,990 Orang Asli households in existence live below the poverty line. Of these, about 5,700 households (19 percent) are considered to be hardcore poor. In contrast, the national poverty rate is a commendable 3.8 per cent, with only 0.7 percent being hardcore poor.

This level of Orang Asli poverty is reflected in the absence of basic amenities and infrastructure in the sizeable number of their villages. While there has been some improvement in the provision of amenities in recent years, the Orang Asli still lag far behind the rest of the country in terms of access to basic infrastructure (including the provision of electricity, potable water and roads).¹

In terms of health, the Orang Asli also fare badly when compared to the general population. For example, Orang Asli have 5.5 times the incidence of tuberculosis as the national average. And despite their very small population size, Orang Asli had 53.6 per cent of the malaria cases recorded in Peninsular Malaysia in 2003 (JHEOA 2005:



Figure 8. Marginalized physically and politically. The Orang Asli rank among the poorest of Malaysians. They have no political or economic power. As a result, they must overcome tremendous obstacles to obtain their rights as human beings and as indigenous peoples. (Kampung Kabu, Muadzam Shah, Pahang. CN 2009)

22). The incidence of leprosy is also on the increase among the Orang Asli, from 8.74 reported cases per 100,000 of the population in 1998 to 19.63 in 2002 (JHEOA Gombak Hospital 2004). Also, the 'old' diseases and infections that have plagued Orang Asli for as long as they can remember still plague them today. These include skin infections such as scabies, worm infestation, diarrhoea (sometimes resulting in death), and goitre. Eighty per cent of Orang Asli children were also found to be undernourished and stunted, and many of the children also had intestinal worms and protozoa, anaemia, dental caries, and vitamin A deficiency.²

Poverty exacerbates the health problems faced by the Orang Asli. This include malnourishment, high incidences of infectious diseases (eg., tuberculosis, leprosy, malaria) and the perpetual problem with intestinal parasitic infections (Baer, 1999). Studies carried out after these socioeconomic developments have constantly reported high prevalence of intestinal parasitic infections in Orang Asli communities, with some communities reaching 100% prevalence (Al-Mekhlafi *et al.*, 2006).

In terms of education, while the overall enrolment of the Orang Asli in schools has improved significantly, the actual number of years an Orang Asli remains in school leaves much to be desired. Studies done by the JHEOA and by independent consultants all reveal that the dropout rate among the Orang Asli schoolchildren, at all levels, is disproportionately high compared to the national average. In 2007, it was found that 36.2 per cent of Orang Asli primary schoolchildren did not continue on to secondary level.³ In 2007, 59.7 per cent of student who had enrolled in primary school 12 years earlier did not complete their secondary education.

However, merely attending school is not fully indicative of educational attainment. Pass rates among Orang Asli schoolchildren have not been encouraging, though they has been increasing over the years. Furthermore, a significant number of Orang Asli children have never been to school at all and so do not figure in the statistics. For example, in 2007, a total of 7,029 Orang Asli children aged below 12 years had never been to school at all.⁴ This figure itself is believed to be an under-estimate.

Not in control of their lives

To any observer of Orang Asli affairs, and to the Orang Asli themselves, it is evident that the Orang Asli are no longer in control of their own lives. The general perception of the authorities is that the Orang Asli are backward communities in need of government largesse and direction. As will be discussed in the next section, such a perception follows from the expressed objective of the government (and it follows, that of the JHEOA) of ‘integrating the Orang Asli with the mainstream society’. The assumption is that the Orang Asli need to be governed as they are incapable of developing themselves. Such ‘governing’ over the Orang Asli is achieved via the JHEOA, a unique government agency that was once responsible for all things related to the Orang Asli.

In fact, it has become the common stance of successive Director-Generals of the JHEOA to consider the Orang Asli as children or wards of the state, whom the government needs to provide for “from the womb to the grave”.

The JHEOA is still largely run by non-Orang Asli and this further adds ammunition to the allegation that the JHEOA exists to subvert

the interest of the Orang Asli in favour of the dominant members of society. In reserving for itself the role of godparent of all the Orang Asli, the JHEOA has also been accused of misrepresenting the Orang Asli in decision-making processes that affect Orang Asli lives and lands. An analysis of the JHEOA plans and programmes for Orang Asli development invariably reveals the absence of autonomy-augmenting objectives.

The JHEOA has also been accused of usurping traditional institutions of leadership such as the *Lembaga Adat* and in its place instituted the Village Security and Development Committees (JKKK) or installed village headmen (*batin*) who are frequently perceived to be pro-JHEOA or pro-Government. The JHEOA's 'Procedure and Guidelines for the Appointment of Village Headmen' grants them the opportunity to exercise such discretion should the JHEOA need to apply it (JHEOA 1998).

In a survey of 12 Orang Asli villages in 2003 on the issue of local government (Nicholas, *et al* 2005), most of the respondents felt that the batins seldom state the problems faced by the villagers to the respective authorities. Even worse, the respondents felt that some batins see it as their duty to convince the villagers to support the programmes of the JHEOA. Thus, for example, in the event that the state wants a particular piece of Orang Asli land, it is not uncommon to find the JHEOA convincing the *batin*, if it cannot convince the community, to accept the State Government's proposals. And, invariably, the *batin*'s consent is deemed to be the same as having obtained consent from the community.⁵

In fact, in the appointment of the Orang Asli senator, the JHEOA takes it upon itself to recommend to the minister concerned who, in the opinion of the JHEOA, is the best person to represent the Orang Asli in parliament. This occurs despite the fact that the particular candidate may not have the support of the Orang Asli, or may even be despised by the majority of the Orang Asli (as was the case for one candidate). The appointment of the current Orang Asli senator was also the subject of protests (albeit from Orang Asli who were also vying for the position).

The JHEOA's perceived role as the Orang Asli's legal guardian also makes it useful for the states to obtain its consent, on behalf of the Orang Asli, should the state want to acquire any Orang Asli land. In all

land disputes involving the Orang Asli and the state, the JHEOA has invariably sided with the government side. This has prompted some Orang Asli to comment that the JHEOA is not a “public servant” but a “government servant!” In fact, at times, the JHEOA acts as if it is a political party. This is clearly evidenced during election time, as was the case in the 2010 Hulu Selangor and Galas by-elections, when the JHEOA used its officers and its resources actively and aggressively to campaign for the candidate from the ruling party in the federal government.

There is also a general pervasive assumption (among the public and even among some government agencies) that for any kind of relations or dealings between the Orang Asli and the local government agencies, the Orang Asli must do this via the JHEOA. This has been the practice for a long time and many, including officers in the JHEOA, seem to believe that the law says so. In some instances, this has caused problems for the Orang Asli, especially when JHEOA officers are slow to act on their requests or use administrative foot-dragging to sabotage Orang Asli interests in favour of the government or a private developer. The egregious case of not gazetting Orang Asli lands that have been approved for gazetting, even if such approvals were given more than three decades ago, is a case in point.

Rights to land and resources not recognised

Ask any Orang Asli what the main problem his community faces and the answer will invariably be the non-recognition of their community rights to their adat or customary lands. A review of the land-ownership status of the Orang Asli living in the 869 villages in the peninsula will immediately reveal why this so. Orang Asli have found their lands being whittled away, or else the lands they assumed were theirs by custom and usage are no longer seen as theirs in the eyes of the authorities.

Table 2 overleaf, with data from the JHEOA and the Ministry of Lands and Mines demonstrates this phenomenon. To date, only 19,222.15 hectares have been gazetted as Orang Asli reserves in accordance with the Aboriginal Peoples Act. This represents only 15.1 per cent of the total land area (127,698.54 hectares) in 2003 that, in the eyes of the authorities, are Orang Asli inhabited places, Orang Asli areas or Orang Asli reserves as stipulated in the same Aboriginal Peoples Act.

Table 2
Orang Asli Land Status
as at 31.12.2003 (hectares)

Land status	Hectares	Percentage
Gazetted Orang Asli Reserves	19,222.15	15.1
Approved for gazetting, but not gazetted as yet	28,760.86	22.5
Applied for gazetting, but not approved yet	79,715.53	62.4
Total Orang Asli lands with some form of recognition	127,698.54	100.00

Source: JHEOA

The sad fact is that only 15.1 per cent of all recognised Orang Asli lands were duly gazetted as Orang Asli reserves. Another 22.5 per cent (28,760.86 hectares) had been duly approved for gazetting as reserves but, alas, the actual administrative formality was not done. In some cases, the approval for gazetting was given in the mid-1960s or mid-1970s, according to the JHEOA's *Data Tanah* (1990), but to date the actual gazetting was never effected.

In some other cases, such as in Kuala Krau, Pahang, lands that were approved for gazetting in the past became re-classified as "*Tanah Kerajaan*" or government land (JHEOA *Data Klasifikasi Kampung* 1997), frequently without the knowledge or consent of the Orang Asli concerned.

What is also of concern is that even the area of Orang Asli gazetted reserves have been decreasing over the years. From Table 3 on the next page, it will be seen that a total of 1,444.81 hectares of gazetted Orang Asli reserves were de-gazetted from 1990 to 2003..

Table 3
Change in Orang Asli Land Status
1990-2003 (hectares)

LAND STATUS	1990	2003	CHANGE/ LOSS (1990-2003)
Gazetted Orang Asli Reserves	20,666.96	19,222.15	-1,444.81
Approved for gazetting, but not gazetted as yet	36,076.33	28,760.86	-7,315.47
Total Orang Asli land with some legal status	56,743.29	47,983.01	-8,760.28
Applied for gazetting, but not approved yet	67,019.46	79,715.53	12,696.07
TOTAL	123,762.75	127,698.54	3,935.79

Source: JHEOA

Furthermore, another 7,315.47 hectares of Orang Asli lands that were approved for gazetting, were not only never gazetted but their 'approved' status was eventually revoked. Thus, from 1990 to 2003, at least 8,760.28 hectares of recognized Orang Asli lands had their status retracted.

In the same period, nevertheless, there was an increase of applications for Orang Asli reserves, from 67,019.46 hectares in 1990 to 79,715.53 hectare in 2003. It should be noted however that the majority of these new applications for gazetting were to replace Orang Asli lands that were degazetted for development projects (such as the KLIA and Selangor Dam projects) or for new resettlement schemes. Even so, the status of these lands is that of mere 'applications'. They do not have the legal weight of the second category ('approved for gazetting but not

gazetted yet') which, it should be added, in itself is also not a category guaranteed to secure Orang Asli lands.

As a consequence of not being accorded rights to their lands, whole Orang Asli communities are often subject to relocation and resettlement to make way for a development project of a public or private nature. The presumption is that these areas are often chosen because such lands are deemed to be state land or, at best, gazetted Orang Asli reserves where little by way of compensation need to be forked out.

Resettlement and regroupment programmes for the Orang Asli also invariably mean a loss of traditional lands for the affected Orang Asli. In such cases, they stand to lose from 70 to 80 per cent of their traditional territories. This was the case, for example, in the resettlement for the Sungai Selangor Dam in KKB. Here, one of the two villages involved—Kampung Gerachi—had a total of 404.86 hectares that was approved for gazetting in 1965.

However, the actually gazetting was *never* done. When the dam project was introduced, the Orang Asli of Gerachi were promised 2.4 hectares per family in the new resettlement area. With 37 families, this meant that the new resettlement site would have 88.8 hectares for the community. This represents only 21.9 per cent of their traditional lands. Even so, there is some dispute as to whether the full 2.4 hectares per family have been duly delivered.

Apart from having to deal with the problems associated with resettlement and relocation, Orang Asli also have to contend with the issue of compensation when they agree, either voluntarily or otherwise, to give up their traditional territories for others. In cases where the Orang Asli are recognised as the inhabitants of the land to be acquired (i.e., where the area to be acquired is a gazetted Orang Asli reserve or an Orang Asli inhabited area), compensation is invariably paid according to the narrow interpretation of the Aboriginal Peoples Act. In real terms, this means compensation being paid for the loss of dwellings or crops introduced onto the land by the Orang Asli concerned. Never has compensation been paid for the value of the land itself.

Because Orang Asli traditional territories are not legally titled with permanent tenure, nor are they vigilantly protected by the state authorities, there is much scope for encroachment by outsiders. These outsiders range from corporations, politically-connected organisations

or individuals, and even recent immigrants. Orang Asli traditional areas have also been carved up and given to government agencies (e.g. Felcra) or programmes (e.g. *Ladang Rakyat* in Kelantan) for agricultural development where the beneficiaries are not Orang Asli but outsiders.

If the lands per se of the Orang Asli are not immediately sought after by others, chances are the resources found therein will be their target. The Forest Department, for example, has a long track record of not recognising Orang Asli rights to their traditional forest resources, especially timber. Orang Asli have been arrested and placed in the lockup on at least two instances (in Buluh Nipis and Sungei Miak, Pahang and in Sungkai, Perak) for stopping logging activities on their land. In other areas, Orang Asli look on haplessly as the loggers destroy their ecological niches and leave them with dust to scrape out from their eyes while the favoured license-holders rake in the ringgits.

More recently, in December 2009, the Orang Asli land ‘problem’ took a new twist with the introduction of the Dasar Pemberilikan Tanah Orang Asli (Policy to Give Land Titles to Orang Asli) by the Ministry of Rural Development, the ministry currently responsible for Orang Asli affairs. As we shall see later, this policy, while purporting to ‘give’ Orang Asli permanent individual titles to land, in reality will cause them not only to lose about 74,000 hectares of their recognised land, but they also will be subject to several conditions that will further reduce their control and autonomy over the remaining lands.

Subject to a dominant culture

It is evident that the Orang Asli are no longer the independent, autonomous peoples they once were during or before the founding of the Malay sultanates. On the contrary, in terms of the maintenance, development and regard for Orang Asli identity (including their culture, language and religion), a clear gap is evident between the rights and protections enjoyed by the Orang Asli and that of the dominant group, the Malays. That is to say, Orang Asli identity markers do not get the protection and regard that the Malays get.

For example, the near absence of significant state-sponsored actions to protect and promote Orang Asli spiritualities, traditions, territories, and languages contrasts sharply with the institutionalised and heavily sponsored recognition given to Malay culture, religion, and political status.



Figure 9. Protesting the policy to 'give' Orang Asli land. More than 2000 Orang Asli gathered in the administrative capital to voice their opposition to the way policies are foisted on them without their free, prior and informed consent. (Prime Minister's Department, Putrajaya, CN-2010)

On the contrary, Orang Asli development is being officially equated with them having to leave their old ways and embracing that of Malays. This not only extends to the curriculum in schools, to the programme to convert all Orang Asli to Islam (JHEOA 1983), to the subjugation of their social and legal systems to the 'modern' one, but also to having their lives, livelihoods and lands subjugated to control by others now in dominant positions.

Orang Asli activism today

However, in the face of such threats to their lives and identity, the Orang Asli are no longer choosing to pick up their belongings and fleeing further upriver. Neither are they acquiescing to the authority of a polity that does not have their interest at heart. Orang Asli have increasingly reacted and responded in various ways to reverse the trend of denying their rights as enshrined in the UNDRIP.

They have challenged the authorities directly and have participated in local and international meetings to debate, publicize and demand their rights. They have lobbied and demonstrated. They have resorted to collaborating with both ruling and opposition political parties. But

more importantly, they have networked and educated themselves on the history of their people. They have created a greater awareness of the injustices to their situation today.

They also now realise that their situation is a result of prejudices, policies and programmes that were foisted on them and that these were tools used in the goal of suppressing a once-proud and dignified people.

The next section looks at some of the policies and strategies of the authorities and their effect on Orang Asli autonomy and identity.

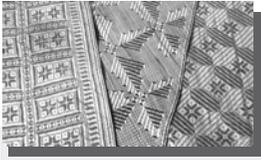
Endnotes

1. The status of the Orang Asli's socioeconomic situation, as well as their current political situation is discussed in greater detail in Nicholas (2010), *Orang Asli: Rights, Problems & Solutions*.
2. A fuller discussion on the health status of the Orang Asli can be obtained from Nicholas and Baer (2009), *Health Care for the Orang Asli: Consequences of Paternalism and Non-Recognition*, and from Baer (2010), *Orang Asli (Indigenous Malaysian) Biomedical Bibliography*.
3. Suhakam (2010), *Laporan status hak pendidikan kanak-kanak Orang Asli*, p. 24.
4. *Ibid.*, p. 25.
5. A clear illustration of this can be seen in the way the batin was coerced into accepting the Kelau Dam project in Pahang. This is discussed in detail in the chapter on free, prior and informed consent

6



DEVELOPMENT POLICIES AND STRATEGIES FOR THE ORANG ASLI



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The Orang Asli have endured a whole gamut of development strategies foisted on them. These strategies appear to match the dictates of particular policies that both directly and indirectly set the manner by which the Orang Asli were to be developed. All these, in turn, were manifestations of a development philosophy that essentially adopted the classical ‘stages of growth’ model of W.W. Rostow (1960)—whereby all peoples are expected to ‘modernize’ from their backward or primitive stage through a set process.

Integration

With this in mind, the policy of “integration with the mainstream” was officially adopted by the Malaysian government in 1961 via its “Statement of Policy Regarding the Long Term Administration of the Aborigine Peoples in the Federation of Malaya”. The main thrust of the policy was that the Government should “adopt suitable measures designed for their protection and advancement with a view to their ultimate integration with the *Malay* section of the community”.

In later official communications, the objective of the policy statement was variously changed to “ultimate integration with the wider Malaysian society” or integration “with more advanced sections of the population” or “with the national mainstream.” In effect, we maintain that this policy of “integration with the mainstream” is in reality no different from one of assimilation, which is in direct conflict with Article 8(1) of the UNDRIP (Nicholas 2000, 101-102).

Sedentism/Regroupment

Especially since 1979, a new policy has been in place to resettle or regroup several Orang Asli villagers into a bigger group settlement scheme organized along the lines of the agriculture-based Federal Land Development Authority (Felda) model. A total of 25 such regroupment schemes were planned and to date most have been executed, with varying levels of implementation and success.

The policy is premised on the assumption that the Orang Asli are a nomadic or dispersed people and that the main impediment to their progress is that they do not stay in one place long enough so that development benefits can be brought to them. Resettlement and regrouping are therefore necessary in order for the government to provide assistance to them. This argument is of course flawed but it has not stopped the authorities from using it to remove the Orang Asli from their lands and transferring these to private corporations or others. Such actions go against Article 10 of the UNDRIP.

Modernization/Multi-Agency Approach

For most of its existence, JHEOA had been a one-agency department responsible for all aspects of Orang Asli needs. There has been much criticism of this approach, especially since the department did not have the resources or the trained personnel to carry out its functions effectively. Since the mid-1990s, however, the JHEOA has been soliciting the services of other agencies—including the Ministries of Education and Health as well as federal agencies such as the Federal Land Consolidation and Rehabilitation Authority (Felcra) and the Rubber Smallholders Development Authority (Risda)—to help carry out its premeditated policies..

The JHEOA came up with a 10-point strategy to “place the Orang Asli firmly on the path of development in a way that is non-compulsive in nature and allows them to set their own pace”. The ten points, as outlined in the English version of the Program summary, are:

Modernizing their way of life and living conditions, by introducing modern agricultural methods and other economic activities like commerce and industry.

Upgrading medical and health services, including having better-equipped clinics in interior areas,

to bring about a healthy and energetic Orang Asli community.

Improving educational and skill development facilities, including programs to provide better hostel facilities for both primary and secondary students.

Inculcating the desire among Orang Asli youth to become successful entrepreneurs by showing and sometimes opening doors of opportunity for them.

Getting Orang Asli in interior areas to accept Regrouping Schemes as an effective means of improving their living standards and turning their settlements into economically viable units.

Encouraging the development of growth centres through the restructuring of forest-fringe Orang Asli *kampung*s, including the establishment of institutions such as Area Farmers Organizations and cooperatives.

Gearing up Orang Asli culture and arts, not only to preserve their traditions, but also as tourist attractions.

Eradicating poverty, or at least reducing the number of hardcore poor among the Orang Asli.

Introducing privatization as a tool in the development of Orang Asli areas.

Ascertaining a more effective form of development management in line with the direction in which the Orang Asli community is progressing.

Of all the above “strategies” for Orang Asli development, perhaps that of “privatization of development” has the most bearing on Orang Asli livelihoods and security. In essence this allows a private corporation to extract and exploit all resources in the community’s resource base in exchange for promised, if not delivered, proper housing and infrastructure plus an economic project. Invariably this means allowing the corporation to log Orang Asli traditional forests and with part of the proceeds to build houses for the Orang Asli as well as to plant about

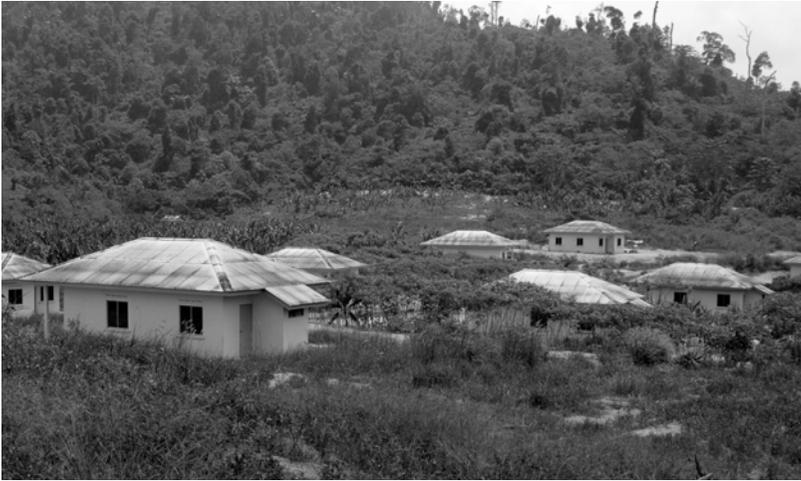


Figure 10. The promise not kept. After logging and removing the timber, the private contractor reneged on the agreement to establish oil palm small-holdings for the Orang Asli. The government had to intervene to rescue the deal it itself had negotiated. (Kampung Selai, Bekok, Johor. CN-2004)

6 acres of oil palm or rubber per family. However, in reality, the track record of such projects is very poor: the corporations tend to abscond as soon as the timber resources have been exploited. This was the case in Kampung Peta on the edge of the Endau-Rompin National Park, and in five villages that make up the Bekok Regroupment Scheme in Johor.

From time to time, the JHEOA has devised new mission statements and programme strategies but, in essence, they all basically stay true to the 10-point programme outlined above. This strategy in turn has its foundation in the outdated growth-by-modernisation formulae for achieving Orang Asli integration with the mainstream society.

Islamization and Assimilation

The Orang Asli have become the target of institutionalized Islamic missionary activity, particularly after 1980 when a seminar on Islamic *dakwah* among the Orang Asli was organized by the Malaysian Islamic Welfare Organization (Perkim). The recommendations were largely accepted by the JHEOA in a policy statement in 1983. The expressed objectives of the policy are two-pronged: “the Islamization of the whole Orang Asli community and the integration/assimilation of the Orang Asli with the Malays” (JHEOA 1983, 2). This is in clear violation of Article 11 of the UNDRIP.



Figure 11. Orang Asli culture takes second stage. Although this was billed a national Orang Asli cultural festival, Malay dances were presented first, in probable conformity with the National Culture Policy putting Malays foremost. (Kampung Sungei Bumbun, Pulau Carey, CN-2007)

The *dakwah* or missionary program involves the implementation of a “positive discrimination” policy towards Orang Asli who converted, with material benefits given both individually and via development projects. Community development officers were also stationed in the Orang Asli villages whose sole objective was to try to convert the Orang Asli. Nobuta (2009) has meticulously documented the implementation of this policy and its subsequent impacts on Orang Asli by a case study of one Temuan community.

National Culture Policy

Introduced in 1970, the National Culture Policy emphasized the incorporation or assimilation of the non-Malays into Malays. This is not unlike the objective of the JHEOA for the Orang Asli in the 1960s. However, the 1970 policy was later changed to a *Bangsa Malaysia* policy which purported to emphasize a Malaysian rather than a Malay identity for the country. The 1971 National Culture Policy defined three principles as guidelines for Malaysian national culture:

- The National Culture must be based on the indigenous [Malay] culture.

- Suitable elements from the other cultures may be accepted as part of the national culture.
- Islam is an important component in the moulding of the National Culture.

Clearly the role and status of Orang Asli culture was meant to be suppressed by such a policy,. And it was.

The New economic Policy (NEP)

Introduced by Malaysia's second Prime Minister, Tun Abdul Razak, the New Economic Policy (NEP) was a 20-year plan (1970-1990) with a 2-prong objective. The first was to eradicate poverty among all races. The second was to restructure the economy to ensure that the Malay community is fairly and proportionately represented in the modern and more productive sectors of the economy. The goal for the latter was to achieve 30 per cent Malay economic ownership by 1990. This policy gave legitimacy to an array of affirmative action policies, premised on ethnicity, ranging from special schools for Malay students, to quotas for University admission, preferential promotion of Malays in the Civil Service and educational institutions, plus licences, permits, loans and grants to encourage Malay participation in business activities, and so forth (Devaraj 2010).

When the NEP ended in 1990, the government felt that its objectives were not fully met. Hence the introduction of the National Development Policy in 1991 which had similar goals.. Although the NEP did decrease the income disparity among the races, the general perception is that it has reduced the non-Malays to the status of second class citizens. The Orang Asli certainly feel this way. In fact, given their level of marginalization and exclusion from the general society, some are wont to regard themselves as third class citizens.

New Economic Model (NEM)

In light of the recent global economic recession and the decline in external stimuli for growth, the current Prime Minister, Najib Tun Razak, unveiled an economic plan in 2010 that aimed to “transform the Malaysian economy to become one with high incomes and quality growth” by 2020. The plan is to double the per capita annual income in Malaysia from RM 23,100.00 to RM 49,500.00 by shifting affirmative

Table 4
Change in the policy orientation
between NEP and NEM

The Father (NEP)	The Son (NEM)
Massive land schemes to provide agricultural lots to thousands of landless Malay farmers.	Involvement of the corporate sector in agriculture. Small farmers are being crowded out
Massive expansion of roads to serve rural areas.	Toll highways with favourable terms for the concessionaries.
Massive expansion of the public health services	Cannibalization of the public health sector in the form of lucrative contracts for favoured companies.
Restriction on the scope of the private sector to outpatient clinics	Massive expansion of the private sector in health, spearheaded by GLCs. Strong emphasis on health tourism as a major growth sector.
Public provision of subsidized tertiary education.	Massive expansion of private education with very lax quality control by the government
Employment provident fund set up to provide for workers after retirement.	EPF funds used to bail-out crony companies; benefits to members reduced.
Progressive taxation. Companies taxed 40% of profits up till 1988.	Company tax has been reduced in stages to its current 25%. We appear to be chasing Singapore's 19%! Government intent on bringing in the GST.
Premised on an assessment that the free market will not be able to achieve certain societal goals, thus necessitating the intervention of government.	Premised on the neo-liberal position that the unfettered market is the only way to advance the economy of the country.
BN leaders represented the socio-economic elite. but they were not direct major beneficiaries of the government's policies.	BN leaders are deeply embroiled in business activities. They are the primary beneficiaries of government policies.

Source: Kumar Devaraj (2010)

action from being ethnically-based to being need-based and hence making the economy more competitive and more market and investor friendly. More importantly, the NEM seeks to empower the private sector, especially large corporations. This is clearly illustrated in the 4 on the previous page which shows the shift in policy targets between the NEP and NEM. Such a policy shift in the economic management of the economy will also have a far reaching impact on the Orang Asli.

Development Corridors

The heavy reliance on the private sector to spur growth and incomes has now been given an added boost to the still ongoing economic programme of the former Prime Minister, Abdullah Badawi.—the Development Corridors launched in 2007.

These development corridors encompass medium-term economic master plans that aim to transform marginal areas into developed economic regions by 2025. And while we are told that they are designed to meet the specific needs of households, including providing income support and basic amenities with an emphasis on education, skills training and income generating activities, there are major flaws in the conceptualization and realization of the plans. Three of the five Development Corridors (the other two are in Sabah and Sarawak) directly affect the Orang Asli. They are tabulated as below:

Given the high cost of investment involved, it is clear that the development projects will be given or carried out by huge corporations. Sime Darby, reportedly the world's largest oil palm plantation company, has also seen the “opportunity” to further expand their agricultural land base under the NCER for example—invariably at the expense of the Orang Asli who are still regarded by the government dictates as “tenants at will” squatting on state land.

New Orang Asli Land Policy

There have been several attempts in the past at introducing land policies for the Orang Asli, all purportedly to accommodate the Orang Asli's demand for recognition of their customary lands. But given the motivation and designs of the government in the past to enforce policies and programmes such as those discussed above, it is not surprising that the Orang Asli are more likely these days to scrutinise any new deal being offered.

Table 5
Development Corridors in
Orang Asli areas

Corridor	Areas covered	Focus Industries	Target Investment
East Coast Economic Region (ECER)	Kelantan, Terengganu, Pahang and district of Mersing in Johor	Oil, Gas and Petrochemical; Tourism; Agriculture; Manufacturing; and Education	Approx. USD 35 billion in investment for the next 12 years
Iskandar Development Region (IDR)	Southern Johor	Healthcare, Logistics, Tourism, Education, Creative industry, and Financial Advisory & Consulting	Approx. USD 15 billion by 2010
Northern Corridor Economic Region (NCER)	Perlis, Kedah, Penang and northern Perak	Agriculture, Tourism, Manufacturing, Logistics, Infrastructure, Human Capital, and Environment	Approx. USD 55 billion

The latest proposal by the Federal Government best illustrates this contention. In December 2009, the National Land Council approved the *Dasar Pemberimilikan Tanah Orang Asli* (Policy to Give Orang Asli Land Titles) which sought to ‘give’ 29,990 Orang Asli households permanent (individual) titles to agricultural lots varying in size from 2 to 6 acres (0.8 to 2.4 hectares). Each household would also be given up to a quarter acre (0.1 hectare) for their house and orchard (*dusun*).

The catch is that all other Orang Asli traditional lands—this includes aboriginal areas, areas applied for gazetting but not approved yet, and all other areas claimed by the Orang Asli as their *adat* or customary lands—will be forfeited to the government. Orang Asli will not be allowed to take the government to court over these lands, nor will they be entitled to compensation. In effect, while ‘giving’ the Orang Asli

about 50,000 hectares, the Orang Asli will collectively lose rights to about 73,762 hectares that are already recognised by the government. This means a loss of 59.6 per cent of their government-recognised customary lands! The title of the new policy is clearly a misnomer.

The new policy also stipulates that the newly acquired titled lands of the Orang Asli will have to be developed and managed by an external agency, and these development costs will be borne by the Orang Asli land owner himself or herself. The Orang Asli themselves will have no say on who the land developer and manager will be. The JHEOA, which will be corporatised as the Badan Kemajuan Orang Asli (BKOA, Orang Asli Development Authority), will in all likelihood be the ‘private company’ that will be given the contract. Basically, the Orang Asli will become idle share-holders in the scheme, receiving a periodic dividend that is sure to be far below the income they would get if they were to manage their own smallholding.

It is not surprising therefore that the majority of the Orang Asli are not in favour of this policy, and have expressed this opposition vocally and demonstratively. But it appears the government is determined to pursue this policy and is proposing to amend the Aboriginal Peoples Act (Act 134) to accommodate these policy changes. The allocation of RM100 in the 2011 Budget for boundary demarcation and for corporatising the JHEOA into the BKOA, as announced by the Prime Minister on 15 October 2010, also reveals that the government is misguidedly going ahead with this policy despite the on-going opposition to it from the Orang Asli community.

The 1961 Statement of Policy

Given these severe problems, it would seem that there is nothing good in terms of policy and programmes that the government has come up with for the Orang Asli. On the contrary, despite all the seemingly hostile policies and programmes that the government has put in place for the supposed development of the Orang Asli, one policy that was introduced in 1961 through the JHEOA stands out as conforming closely with the UNDRIP, much more than those discussed above.

Called the *Statement of Policy Regarding the Administration of the Orang Asli of Peninsula Malaysia* (hereafter called the ‘1961 Policy Statement’), it has several ‘broad principles’ that assures the Orang Asli of their wide-ranging rights. Among these are:

The aborigines ... must be allowed to benefit on an equal footing from the rights and opportunities which the law grants to the other sections of community.... special measures should be adopted for the protection of institutions, customs, mode of life, person, property and labour of the aborigine people. [1(a)]

The social, economic, and cultural development of the aborigines should be promoted with the ultimate object of natural integration as opposed to artificial assimilation.... Due account must be taken of the cultural and religious values and of the forms of social control. [1(b)]

The aborigines shall be allowed to retain their own customs, political system, laws and institutions when they are not incompatible with the national legal system. [1(c)]

The special position of aborigines in respect of land usage and land rights shall be recognized.... Aborigines will not be moved from their traditional areas without their full consent. [1(d)]

Measures should be taken to ensure that they have the opportunity to acquire education at all levels on an equal footing with the other sections of the population. At the same time care must be taken to ensure that their own dialects are preserved and measures should be introduced to enable the teaching of these dialects. [1(e)]

Adequate health services should be provided ... and special facilities should be provided for the training of their own people as health workers and medical personnel. [1(g)]

In all matters concerning the welfare and development of the aboriginal peoples Government will seek the collaboration of the communities concerned or their representatives. [1(j)]

In the implementation of forest conservation requirements the special position of these communities be acknowledged provided any relaxation exercised in their favour will not be

detrimental to the effective and proper implementation of accepted Forest policy and objectives. [2(iii)(a)]

The basic requirements for settled agriculture are a sufficiency of food crops and a dependable cash crop.... This requires a degree of permanency of occupation, and advance in agricultural technique and the choice of suitable sites. [2(iii)(b)]

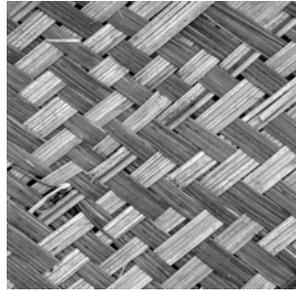
Although the JHEOA has introduced a number of action plans and programme summaries for the attainment of the goals and principles as outlined in the 1961 Policy Statement, this policy statement remains as the *only* official policy governing the administration and development of the Orang Asli that is still in force today.

This was confirmed by the then Deputy Director-General of the JHEOA in his sworn testimony in the Shah Alam High Court during the hearing of the *Sagong Tasi* case in 2001. He also testified that there is no evidence of withdrawal of this policy thus far and as such it is still in force (Notes of Evidence, Shah Alam High Court, 2001).

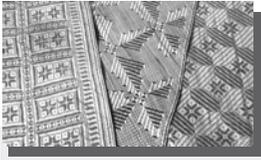
This being so, it is clear that the intention of the Government in 1961 was to accord the Orang Asli with various rights, including the rights to their traditional lands and to their culture, in accordance with the deliberations of the 1953 Legislative Council hearings when the Aboriginal Peoples Bill (which later became the Aboriginal Peoples Act 1954) was debated and eventually passed. In fact, Dato Onn Jaafar in moving the Bill to the Legislative Council on 27 October 1953, reiterated that it was to be a “comprehensive legislation for the protection of aborigines throughout the Federation.”

Thus the 1961 *Statement of Policy Regarding the Administration of the Orang Asli of Peninsula Malaysia* puts in clear, unambiguous terms how the legislators of the Aboriginal Peoples Act intended the Orang Asli to be treated by further enumerating those rights in writing. The next chapter shows how the courts interpreted the rights of the Orang Asli, especially to their traditional lands.

7



ORANG ASLI RIGHTS IN THE CONSTITUTION AND THE COURTS



7 ORANG ASLI RIGHTS IN THE CONSTITUTION AND THE COURTS

Orang Asli legal commentators have long pointed out that there is a glaring omission in the categories of people that are accorded special privileges under Article 153 of the Federal Constitution¹. Despite being the indigenous peoples of Peninsular Malaysia, the Orang Asli are not made the beneficiaries of the special position assured to the Malays and the natives of Sabah and Sarawak by this article. This article states the mandatory duty for the Yang DiPetuan Agung to safe-guard the special position of these ‘bumiputeras’ in specific areas of economic activity, education and employment.

The Orang Asli are, in fact, mentioned in only five places in the Federal Constitution, but in a rather unclear way so that it has become increasingly difficult to argue for the same rights and privileges that are accorded to, for example, the Malays (based on their claim to indigeneity). The five places where the Orang Asli are specifically mentioned in the Federal Constitution are:

Article 8(1), which legitimizes discriminatory legislation in favour of Orang Asli by way of provisions in the law of their protection, well-being and advancement (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.

Article 8(5)(c), which allows for positive discrimination in favour of the aborigines for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation



Figure 12. Original but not special. The Orang Asli are not accorded the special position of Article 153(1) of the Federal Constitution even though the government is obligated to discriminate positively towards them (Article 8(5)(c)). Nevertheless, the Orang Asli are considered Bumiputera (which is not a constitutional term). (Kampung Sungai Tuba, Endau, Johor. CN-2006)

of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

Article 45(2), which provide for the appointment of Senators ‘capable of representing the interest of the aborigines’.

Article 160(2) which rather unhelpfully defines an aborigine as ‘an aborigine of the Malay Peninsula’ and

Ninth Schedule; List 1 (16) that vests upon the Federal Government legislative authority for the ‘welfare of the aborigines’.

An indirect reference to Orang Asli is inferentially made in Article 89 regarding Malay Reservations, which would appear to authorize reservation of such lands in favour of ‘natives of the state’ besides Malays. But in reality, the government has chosen to interpret the vagueness in the Constitution in its favour, rather than to protect the rights and interests of the Orang Asli bumiputeras. Thus, while the Constitution does authorise the government to enact laws that are favour the Orang Asli “for their protection, wellbeing and advancement” it has not done so.

But the mere absence of the term Orang Asli in other parts of the Constitution does not nullify Orang Asli rights that are inherent in

them being human, Malaysian and of Orang Asli origin. In fact, Linda Liow (1980) is of the opinion that Article 8(5)(c) is unique in that it is what is called a “protective discrimination” clause. The rationale of protective discrimination is that any declaration of equality is an empty verbal formula, unless affirmative obligations are placed on the state to take positive steps to ameliorate group differences. A mere declaration without any further requirement of state participation in the advancement of a depressed community is therefore inadequate, and merely perpetuates established inequalities.²

Protections in the Federal Constitution

The Orang Asli are referred to as ‘aborigine’ in Article 160(2) of the Federal Constitution. They are separate from the other indigenous groups also mentioned therein, the Malays and the natives of Sabah and Sarawak who are unambiguously accorded special privileges and protection under Articles 153 and 161A. Article 153 in fact imposes a responsibility that enables, indeed obliges, the Yang DiPertuan Agung, to provide these special privileges.

While the Federal Constitution does not explicitly state that the Orang Asli do not enjoy such clearly defined provisions of special privileges and protection, it does nevertheless provide some recognition of their special status. More specifically, the Federal Constitution provides that the ‘aborigine’ is within the responsibilities and powers of the Federal Government as distinct from the State Governments (Ninth Schedule, Federal List No. 16). This is a provision that enjoins the Federal Government with all powers and responsibilities. And as we discussed above,

Article 8(5)(c) in fact, enables the Government to provide “for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.” As mentioned above, this is in fact a clear reference to protective discrimination and is a call for affirmative obligations in favour of the Orang Asli.

Nevertheless, it is in the reservation and alienation of lands for the Orang Asli that the Federal Constitution appears not to be on their side. Federal authorities frequently assert that, because the Federal

Constitution provides that all matters pertaining to land comes under the purview of the individual states (Ninth Schedule, State List No. 2), this provision hinders the establishment of land reserves for the Orang Asli as provided in Article 8(5)(c).³

However, as contended by Rachagan (1990: 103), Lim (1997: 3-4) and others, the Federal Constitution does actually contain adequate provisions for the Federal Government to establish these land reserves. Specifically, the acquisition of land for the creation of reserves for Orang Asli comes within the meaning of the definition of “Federal purposes” contained in Article 160(2). Article 83 of the Federal Constitution, on the other hand, provides for the acquisition of land for Federal purposes. Article 83(1) states:

If the Federal Government is satisfied that land in a State, not being alienated land, is needed for federal purposes, that Government may, after consultation with the State Government, require the State Government, and it shall then be the duty of that Government, to cause to be made to the Federation, or to such public authority as the Federal Government may direct, such grant of the land as the Federal Government may direct:

Provided that the Federal Government shall not require the grant of any land reserved for a State purpose unless it is satisfied that it is in the national interest so to do.

The powers of acquisition as detailed in Article 83 of the Federal Constitution are moreover not fettered. That is, the land may be acquired in perpetuity and without restrictions as to the use of the land. Hence, not only is the Federal Government empowered to obtain land for Orang Asli reserves, it may also acquire for the Orang Asli exclusive rights over particular tracts of land for specific purposes such as fishing, hunting, gathering, logging, mining, settlement, and such. These are powers vested in the Federal Constitution but, sadly, they are yet to be exercised in favour of the Orang Asli to any significant extent (Rachagan 1990: 105).

Thus, aside from the general rights accorded to Malaysian citizens, including rights to property, association and religion, under the Federal Constitution, the Federal Constitution also stipulates special rights and protections to be accorded to the Orang Asli community.

National Laws, Enactments and Relevant Judicial Decisions

The Aboriginal Peoples Act (1954, revised 1974) is the only law that specifically refers to the Orang Asli. The traditional way of interpreting this Act, with regard to reserving land for Orang Asli, has been to accept that 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 perception is that 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 any 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, when such displacement occurs, the state is not obliged to pay any compensation or allocate an alternative site to the affected Orang Asli; it *may* only do so. That is, in matters concerning Orang Asli land, the state authority has the final say.

The practice has also been to accept that the Aboriginal Peoples Act accords 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, including the appointment of headmen, entry or removal of individuals into Orang Asli settlements, and even deciding on the name of the ethnic subgroup an Orang Asli belongs to!

Clearly, the provisions of the Aboriginal Peoples Act have been narrowly interpreted and applied, invariably in favour of the authorities’ position for their own interests. All this in spite of the preamble of the Aboriginal Peoples Act specifically stating that this is to be “*an Act to provide for the protection, well-being and advancement of the aboriginal peoples of West Malaysia*”.

In contrast, several court decisions in matters concerning Orang Asli rights to their traditional land and resources have interpreted the Aboriginal Peoples Act in a manner that ensures its compliance with the Federal Constitution. As can be seen from the summaries of the precedent-setting judgments below, the courts have (largely) thus far been proactive and clear as far as the recognition of Orang Asli rights is concerned.

*Ruled: 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 v Kerajaan Negeri Perak & 2 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 Orang Asli 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 had not been gazetted. Justice Malek in a strong opinion held that gazettement was not a mandatory requirement. The approval of the State Government for the lands to be aboriginal



Figure 13. Logging continues despite legal victory. The courts have ruled that the Orang Asli have first rights to forest produce from their lands. This includes timber. (RPS Banun, Perak. CN-2001)

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 predatory many other interests.

Ruled: Orang Asli have proprietary interest on the land (Adong bin Kuwau & Ors v State Government 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 which 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



Figure 14. Batin Adong Kuwau. He led his people to challenge the government and the JHEOA over the loss of his people's community forest and their source of livelihood. (Kampung Sayong Pinang, Linggiu, Johor. (CN-2004)

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.

*Ruled: Orang Asli have proprietary interest in the land
(Sagong Tasi & 6 Ors v Kerajaan Negeri Selangor & 3 Ors)*

Sagong Tasi was among 23 family heads from Bukit Tampoi in Dengkil, Selangor who had 38.4 acres (15.5 hectares) 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 these, 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 Council⁴, the Temuans took their case to the courts. They asserted that they are the owners of the land by custom, the holders of native title to the land and the holders of usufructuary rights (i.e., the 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 Noor ruled that the Temuans did have native title under common law over their lands. And compensation was therefore 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, Justice Gopal Sri Ram sitting in the Court of Appeal 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 proprietary 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.⁵

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*. This decision was again upheld in the case of an Orang Laut community in Masai, Johor.

Sagong Tasi decision applied
(*Khalip Bachik & Anor. v Johor Lands and Mines Director & 2 Ors.*)

In 1993, the Orang Laut community at Stulang Laut in Johor Baru were asked to resettle in Kuala Masai to make way for a big commercial and port development. The state had also agreed to gazette the Kuala Masai land as an Orang Asli reserve.

Eight families among them followed the Christian faith and they set about building a chapel on their new land in Kuala Masai. In 2005, the JHEOA and the Johor Bahru Land Administrator rejected the community's application to do so stating that the land belonged to the government and the Orang Laut had no right to build a chapel. They then set about demolishing the chapel in a "high-handed" manner ten days before the celebration of Christmas.

The Orang Laut plaintiffs, Khalip Bachik and Kelah Bin Lah, then took their case to court citing the Johor Lands and Mines director, the Johor Bahru City Council and the Director-General of the JHEOA as defendants. Among the nine declarations and orders sought with regard to the land at Stulang Laut, they held that they were owners by custom, holders of native title and holders of usufructuary rights. High Court Judge Zakiah Kassim granted them this declaration as well as all the



Figure 15. Dabak Chabat and Sagong Tasi (gesturing). After 14 years of legal battles, the Temuan finally got the justice and the dignity they sought. But the courts are somewhat reluctant to take this victory as a precedent in deciding other cases. (Kampung Bukit Tampoi, Selangor. CN-2010)

other orders and declarations sought. She ruled that the defendants had trespassed onto the Orang Laut's land and that they had no right to tear down the chapel. The judge also found that the fact that the land was not gazetted as Orang Asli land, even though this was approved to be gazetted in 2000, did not absolve the defendants. In another order that was reminiscent of *Sagong Tasi*, the judge stated that since the Orang Asli were removed from the original land, the state government should compensate them for it according to the market value.

Fiduciary Duty and Compliance with the Federal Constitution

Given the court decisions above, it should be evident that the Orang Asli have been accorded certain 'special' rights both under the Federal Constitution, the Aboriginal Peoples Act as well as in the 1961 Policy Statement.⁶

Unfortunately, in practical terms, the Federal Constitution and the Aboriginal Peoples Act have been interpreted by administrators and the authorities in a manner that denies the Orang Asli the enjoyment of these rights. Even the clear directions given in the 1961 Policy

Statement have been whittled down or ignored completely, especially when action plans are drawn up. This is especially so in the area of Orang Asli customary land rights.

This issue was taken up by the Court of Appeal in the Sagong Tasi case (September 2005). Acknowledging that the purpose of the Aboriginal Peoples Act 1954 was to “protect and uplift the First Peoples of this country”, Judge Gopal Sri Ram 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, he said, 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. 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 Orang Asli, the latter’s rights in the land were placed in serious jeopardy.

The practice to date has been to use the Aboriginal Peoples 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. But by reading the relevant phrase as "the State Authority *shall* grant *adequate* compensation therefor." In so doing, 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 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 (the Federal Constitution) that such modification as the present, must be done. That is why we can resort to this extraordinary method of interpretation."⁷

The judgment of the Court of Appeal in the case of *Sagong Tasi and 6 Ors v Kerajaan Negeri Selangor and 3 Ors* is without doubt a landmark decision in many aspects. It also shows that our local laws can protect the rights of the Orang Asli to their traditional lands and resources *if we only want them to*.

Do the Courts Really Want To?

One would expect that decisions like *Sagong Tasi* and *Adong Kuwau* would become legal precedents for similar cases involving other Orang Asli. It would only be a matter for the Orang Asli claimants to provide sufficient evidence to establish their claim to native title under common law. Alas, in some cases, the judgments that are being written display lack of knowledge of these precedent-setting decisions or else they are based on arguments that appear to go against the grain of these decisions.

The Kampung Jias case

One case in point is that of *Pedik bin Busu & 2 Others v Gua Musang District Office & 2 Ors* (2008), popularly called the Kampung Jias case. In July 2007, the Temiar plaintiffs, led by the headman Penghulu Pedik bin Busu, filed a summons against the Yang Dipertua Majlis Daerah Gua Musang, the Penolong Pentadbir Tanah dan Jajahan Gua Musang and the State Government of Kelantan over the demolition of a church building erected on Orang Asli ancestral land beside the house of Penghulu Pedik in Kampung Jias.⁸

Five weeks earlier, about 20 uniformed officers from the Majlis Daerah Gua Musang (the Gua Musang District Council), accompanied by about 100 armed police personnel appeared in Kampung Jias. They began destroying and demolishing the church building by force, using a bulldozer. Within an hour, the church building was completely destroyed and demolished. During that time, most of the men were not at home and the Penghulu Pedik himself was in Pahang.

On 15.07.2009, the High Court allowed several of the orders sought in the Originating Summons. The Majlis Daerah Gua Musang was also ordered to pay exemplary damages to the Orang Asli. Of particular interest to us here, however, is the manner in which the judge made his decision. His reasoning and orders, delivered in Malay, can be summed up as:

The demolition was not legal because it was done before the expiry of the 30-day notice given to the Orang Asli as required under section 425 of the National Land Code. If it was done after the 30 days, then the demolition would be legal.

The possession of the land by the Orang Asli is legal even though it is not *adat* or traditional land, and that there is no title to it.

The Orang Asli have the right to practice the religion of their choice. They also have the right to build a prayer house even though it is not their custom or tradition to do so.

However, they must comply with the provisions of the Street, Drainage and Buildings Act 1974, and because they did not do so, the building is not legal.

It is also clear that the land in question is government land (*tanah kerajaan*) because no title under the National Land Code has been issued or given to the Orang Asli. The Orang Asli plaintiffs did not

provide any proof that titles have been issued to them for the said land.

The Sagong Tasi case refers to customary land as provided for under s.4(2)(a) of the National Land Code. The question here is, whether the land in question is Orang Asli customary land? The answer is no. The said land is still part of a regroupment scheme (RPS) that has yet to be granted a title. It is not customary land. As such, the Street, Drainage and Building Act 1974 applies.

Thus, what would have been accepted as native title land under the *Sagong Tasi* decision—especially since the government itself had already acknowledged such status by treating it as a regroupment scheme exclusively for Orang Asli participants—is now allowed to be subjugated to lower laws that have very little significance, by way of hierarchy of authority, on the determination of whether the said land was customary land or not.

On the contrary, the judge appears to be making the mistake that Justice Gopal Sri Ram warned of in his *Sagong Tasi* decision, that, essentially, you cannot make the Orang Asli victims of your own negligence or incompetence. In this case, the failure to gazette or title the said land was not the fault of the Orang Asli, rather the failure of the government in its fiduciary duty towards them. The judge seems to have missed this point. At least in this case, the judge gave us the benefit of scrutinizing his reasoning, which would be important at the appeal stage, where this matter

The Kampung Pasu case

Another case worth noting is that of *Wet bin Ket & Anorr v Temerloh Land and District Office & Anor* (2007). This case was brought by Wet bin Ket and his son, Yaman bin Wet from the Jahut community in Kampung Pasu against the Temerloh Land and District Office and Government of Pahang.⁹

Their counsel argued that Wet and Yaman and their ancestors have been living in Kampung Pasu since the 1920s. This fact was not rebutted by the respondents. In July 2003, they proceeded to build a church which also doubled as a community hall. The Land Administrator of Temerloh immediately served them a warning notice that the erection of



Figure 16. Filing yet another case against the authorities. The non-application of the UNDRIP and a regressive reading of the Constitution brings much uncertainty for any remedy in law for Orang Asli justice. (Temerloh High Court, Pahang. CN-2007)

the building as a place of worship on the land constitutes encroachment upon government land. But they went ahead with the construction of the place of worship as they believed that it was their customary land and further believed in the freedom to practise their religion.

However, three and a half years later, on 30 Nov 2006, they and their fellow villagers discovered that their church-cum-community building was demolished by the officers from the Temerloh Land and District Office. They then made a police report and also reported this incident to the then Prime Minister Abdullah Ahmad Badawi. As a result of his intervention, the Orang Asli church was given a compensation of RM35,000 by the Government of Malaysia to rebuild the place of worship and community hall.

After reconstructing a new building for the purposes of a place of worship, the parishioners applied for water and electricity but that application was rejected by the Temerloh Land and District office. Their lead counsel argued that the rejection of water and electricity goes against the grain of Article 5 of the Federal Constitution which states, "...no person shall be deprived of his life or personal liberty..."; and this includes native customary rights to livelihood and in Article 11(1)

that “Every person has the right to profess and practice his religion...” He also cited Article 11(3)(c) which states that “...every religious group has the right to acquire and own property and administer it in accordance with the law...”. He also argued that the church building and community halls were protected by the Aboriginal Peoples’ Act 1954 under customary rights and that they are not encumbered by land laws enacted subsequent to that.

Furthermore, he submitted that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) should be given due respect in our country so as to establish the welfare and development of aboriginal people, such as the Orang Asli.

But the Temerloh Land and District Office argued that the reasons for not supplying water and electricity to them was that was that the building was erected on a land not gazetted as an Orang Asli land. Also the building was erected as a place of worship without the approval of the Land Office.

The Judicial Commissioner then ruled that the decision to cut the water and electricity supply was proper because the building was illegally erected. He added that under Section 6 and 7 of the Aboriginal Peoples Act, the state authority was empowered to gazette an area as Orang Asli reserve land. However, in this case, the land or area was not gazetted for the Orang Asli and as such, the decision made by the Temerloh District Land Administrator is proper. The application was therefore dismissed.

Again, the precedents set by the earlier judgments, especially *Sagong Tasi*, were not considered let alone applied. But at least in this case, again, the judge gave us the benefit of scrutinizing his reasoning, which would also be important at the appeal stage, where this matter currently rests.

The Kampung Tanam case

In another Orang Asli land rights case, *Cheleh bin Sampat & 11 Ors v Chan Wooi Loon (2009)*, popularly known as the Kampung Tanam case, 12 Jakun plaintiffs brought the case against a private individual who was encroaching on their land and claiming it as his. After a 9-year wait, the Orang Asli plaintiffs heard the Sessions Court judge rule as follows:

Today has been set for a decision and having read the submissions of the lawyers and with the attendance of the lawyer for the plaintiffs, who is also mentioning for the defendant's lawyer. Whereby it has been judged that the claims of the plaintiffs towards the defendant is hereby rejected with costs.¹⁰

This was the *full* judgment.

Needless to say, this judgment did not refer to, or take into account, the UNDRIP. We can also safely conclude that none of the rulings in the Orang Asli cases mentioned above cited or referred to the UNDRIP. It could be due to the fact that at the time the cases were being heard, the UNDRIP was still under deliberation and it was still a 'Draft Declaration'. However, in the precedent-setting native customary rights case in Sarawak, *Nor anak Nyawai & 3 Ors v Borneo Pulp Plantation & 2 Ors (2001)*, the Draft Declaration was indeed cited.

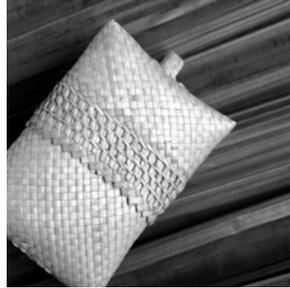
Endnotes

1. Reservation of quotas in respect of services, permits, etc., for Malays and natives of any of the states of Sabah and Sarawak
2. Liow Sook Ching (1980), *The Constitutional and Legal Position of the Orang Asli of Peninsular Malaysia*, p. 40-41.
3. Prior to Independence in 1957, however, the Orang Asli were the 'responsibility' of the states.
4. The legal team comprised Dato' Dr. Cyrus Das, Gerald Gomez, Rashid Ismail, Shamila Sekaran, Leena Ghosh. They were later joined by Steven Thiru and David Matthew in the appeal stages.
5. The defendants obtained leave to appeal to the Federal Court but a change of government in the state in March 2008 set events into motion that eventually led to the state government withdrawing from the appeal. This forced the other defendants to negotiate a settlement which culminated in March 2010 with the Orang Asli plaintiffs being paid RM6.5 million in compensation for the lands acquired. The events leading to the settlement is discussed in Nicholas (2010), *Political will and the resolution of the Orang Asli problem*, pp 221-224.
6. Various legal commentators have argued that the Right to Life argument alone should suffice for any judge to rule in favour of securing Orang Asli welfare and survival. Article 5(1) of the Federal Constitution clearly attributes it as a fundamental liberty. The Right to Life cannot be treated

as you would treat the Right to Property. Unlike property, the Right to Life cannot be extinguished by law, nor can it ever be compensated or replaced once it is lost.

7. Para 39 of *Sagong Tasi* Court of Appeal judgement.
8. Notes from this case are from Lim Heng Seng and Moses Soo (2010), 'Orang Asli Land and Religious Rights: The Kelantan Situation'
9. Taken from: *MySinChew* (5.1.2010), Court rejects Orang Asli church bid for utilities.
10. In the original Malay, it read as: Tindakan ini telah ditetapkan untuk Keputusan pada hari ini DAN SETELAH MEMBACA hujah-hujah peguamcara DAN dengan kehadiran Peguamcara bagi pihak Palintif-Plaintif menyebut bagi pihak Peguamcara Defendan. MAKA ADALAH DIHAKIMI BAHAWA Tuntutan Plaintiff-Plaintif terhadap Defendan adalah ditolak dengan kos. [Emphasis as in the original]

8



THE GOVERNMENT
OF MALAYSIA AND
THE UNDRIP



8 THE GOVERNMENT OF MALAYSIA AND THE UNDRIP

We have seen how the Malaysian courts perceive Orang Asli rights and how, even when they did not specifically refer to the UNDRIP, they did in fact keep to the spirit of the declaration, especially insofar as the Orang Asli's land rights are concerned. Not in all cases but commendably in some.

The development in the law for Orang Asli rights, through its progressive judgments in the courts, shows that there is some (enforced) compliance with the UNDRIP, even though the UNDRIP was not mentioned in the court proceedings. This suggests that there are enough positive elements in Malaysian laws, policies and the Federal Constitution to achieve the same outcomes as would we obtain by relying on the UNDRIP as our yardstick.

On the other hand, judgments are still being written that show a complete lack of knowledge of both the UNDRIP and of the progressive rulings the Malaysian courts have produced recently in recognition of Orang Asli rights.

But the judiciary is not a good indicator of the government's stance towards the UNDRIP. While some judges are independent and try to apply the latest developments in the law to ensure that justice is done, other judges see themselves as civil servants and prefer not to bite the hand that feeds them.

More importantly, how the government perceives the UNDRIP and what it proposes to do with it, is a totally different matter. This is

especially so because, having voted for its full adoption *three* times at the UN level, the government is morally obliged to follow through its internationally-declared intention of supporting indigenous rights.¹

The Government's Obligation in UNDRIP

The concurrent rights of the Orang Asli, as indigenous peoples, are enumerated (and governed) in several documents, both nationally relevant and internationally applicable, viz. the Federal Constitution; national laws, enactments and relevant judicial decisions; government policy statements; and international documents and declarations specific to indigenous peoples (such as the UNDRIP and ILO Convention No. 169).

Most of the rights enumerated in the UNDRIP can be argued to be applicable to the Malaysian case if the Constitution and laws are given a progressive reading and if policies (such as the 1961 Policy Statement on the Administration of the Orang Asli) are applied. However there is one fundamental principle in the UNDRIP that the Government of Malaysia has yet to openly endorse locally: to accord a 'people' status to the Orang Asli with the right to self-determination.

It is this principle of self-determination to which Orang Asli aspire. It is not a call for sovereignty or secession. In very broad terms, in the context of the Orang Asli, the call for the right to self-determination generally includes, but is not be limited to, the following rights:

- the right to the ownership of their lands as the territorial base for the existence of their populations;
- the right to use, manage and dispose of all natural resources found within their ancestral lands;
- the right to control their own economies, and the right to economic prosperity;
- the right to restore, manage, develop and practise their culture, language, traditions and way of life in accordance with their worldview, and to educate their children to them;
- the right to determine and to uphold indigenous political and social systems;

- the right to form alliances and federations with other indigenous peoples for the attainment of common goals; and
- the right to a life of peace and security.

Self-determination, therefore, not only involves restoring to the indigenous peoples their ownership and control over traditional territories, but also involves allowing them to re-establish their indigenous social order and indigenous systems as they themselves determine it.

How the government treats the UNDRIP—whether it intends to use it willingly to protect the rights of the Orang Asli, or whether it gives only lip-service to the adoption of the UNDRIP—can be gleaned from some of the actions it has taken, or not taken, thus far.

The Gap between Endorsement and Implementation

We have tried diligently to find instances where the UNDRIP is actively and consciously being applied by the government but the more we do, the more we find the opposite is true. There is, in fact, an increasing trend not only to go against the intent of the UNDRIP but, more dishearteningly, to neutralise or negate the implementation of the UNDRIP principles in the treatment of the Orang Asli in Malaysia.

Playing with the Law

The government has not provided a clear indicator as to how to treat the Orang Asli and their claims when they come before a court to assert their rights, especially with regard to their claims to their customary lands.

Despite the rulings in *Koperasi Kijang Mas*, *Adong Kuwau* and *Sagong Tasi*, Orang Asli are still losing their cases in court, not due to lack of a legal or moral basis, but largely because there is no clear leadership from the government that the rights enshrined in the UNDRIP are inalienable rights to be enjoyed by the Orang Asli.

The government, in fact, proceeds on the presumption that these landmark judgments are not legal precedents, rather they pertain to

specific situations in a particular territory. Therefore, the whole native title argument must be argued by the Orang Asli each time they file a case for a disputed territory.

The onus has always been on the Orang Asli to prove that they own the land, rather than on the government to demonstrate when and how it came to take possession legally of Orang Asli customary lands. This is the situation despite the fact that for most, if not all, Orang Asli territories, no legal extinguishment of their proprietary rights has occurred according to international law or as allowed for in the UNDRIP.

On the contrary, the government has even gone to the extent of suggesting that a subordinate law should take precedence over the Constitution and Common Law, including customary international law as reflected in instruments such as the UNDRIP. This the government did when it argued in the Federal Court appeal of the *Sagong Tasi* case that Section 6 of the Civil Law Act should apply in the case of Orang Asli seeking proprietary right to their customary lands.²

The argument is that if there is a specific law that relates to the specific issue at hand, then that law should take precedence over other (higher) legal authorities, including the Constitution. Many legal minds would immediately see the flaw in this argument but the fact that the government chose to adopt it suggests its opposition to applying the UNDRIP to the case of Orang Asli land rights.³

Non-recognition of Orang Asli indigenous systems by the government?

Another clear manifestation or indication of the non-conformity of local practice with the UNDRIP is in the lack of official recognition of Orang Asli customary law and indigenous systems.

There is no Orang Asli native court system in the peninsular, for example, as we have in the Bornean states of Sabah and Sarawak. On the contrary, the indigenous institutions of the Orang Asli are being subverted by the power of the government, such as in the regulation requiring Orang Asli village heads to be elected and appointed according to guidelines set by the JHEOA.⁴

Orang Asli cultures, spiritualities and languages are not given sincere government support, encouragement or endorsement. The



Figure 17. Blessing the village. Orang Asli cultures, including their spiritualities, are seen as good enough for tourism but not good enough to be part of the core national culture. The government's programme of 'changing the mindset' of the Orang Asli often means changing their religion. (Hari Moyang at Kampung Sungei Bumbun, Pulau Carey. CN-2005)

official objective of assimilation and integration into the mainstream society—with the attendant programmes of conversion to Islam and subjection to the mainstream educational curriculum—all attest to the subjugation of Orang Asli indigeneity. Even when in the few situations Orang Asli culture is used and promoted, it is done in the context of tourism appeal, or to project a multi-cultural, multi-ethnic image of Malaysia. Aspects of Orang Asli culture, especially their dances, are even performed by others at these events.

Orang Asli languages are also not actively promoted or given significant resources to be developed as mainstream languages. The plan to have Pupils Own Languages (POL) classes for Orang Asli children in Orang Asli-majority schools, especially for the Semai language, has languished due to inadequate financial and other resources allocated for this project.

And while a few Orang Asli languages (viz. Jakun, Semai, Temiar) are used in the special Orang Asli radio programme, Asyik FM, the messages tend to bend towards government information bordering on propaganda and programmes meant to change the Orang Asli mindset and spiritualities. Thus far, we are told, there has been no specific

programme that has focused on informing the listeners of the existence of UNDRIP, let alone creating awareness about its principles.

FPIC disregarded

One of the key concepts promulgated in the UNDRIP is that of obtaining Free, Prior and Informed Consent (FPIC) in all matters dealing with indigenous peoples, especially with regard to the use or acquisition of their customary lands.⁵

From experience, we know that it has clearly not been the practice to obtain such FPIC from the Orang Asli in developments affecting their lands, livelihoods or even their identity. The number of cases of land encroachments that have been taken to court, and the many more that are pending, attest to the fact that the free, prior and informed consent of the Orang Asli was never first obtained when these land infringements occurred. Many Orang Asli also frequently relate that they find out that their lands are under threat only when the surveyors are on their land, or when the bulldozers come in.

Even in the case of gazetted Orang Asli reserves, there is no FPIC practised when these reserves are degazetted. As discussed earlier in Chapter 5, a total of 8,760.28 hectares of Orang Asli reserves and areas approved for gazetting as Orang Asli reserves have been lost to the Orang Asli—invariably without their prior information, let alone consent.

This situation could not have only come about if the agency responsible for Orang Asli welfare and progress, the JHEOA, has been acting on behalf of the Orang Asli in negotiations about their land. Orang Asli representatives are generally not called to meetings with government agencies when such land matters are discussed. In their place officers from the JHEOA attend the meetings and in the several cases reported to us, with official minutes supplied in some cases, they often represent the interests of the government rather than the Orang Asli at these meetings. Certainly, the Orang Asli's FPIC were not sought or obtained.⁶

Failing in Fiduciary Duty

The JHEOA was established to assist the government in realizing its lawful responsibility, as decreed by Article 8(5)(c) of the Constitution,



Figure 18. Criticizing the lack of FPIC. Orang Asli protesting the budget allocations that expose the intention of the government to enforce its land policy for the Orang Asli. Most of the Orang Asli object to it and have articulated their reasons in various ways including a mass protest, memoranda, dialogues and through the media. (Bar Council, Kuala Lumpur. CN-2010)

to enforce “positive discrimination in favour of the aborigines for the protection, wellbeing or advancement of the aboriginal peoples”. Towards this end, the 1961 Policy Statement did to some extent provide the basis by which the government, through the JHEOA, was to effect this.

Sadly, the JHEOA has failed miserably to protect the rights and interests of the Orang Asli. The Orang Asli continue to complain of this, to the extent of calling for the closure of the department, and even the judges in the *Sagong Tasi* case have chastised the JHEOA for failing in their fiduciary duty to protect the interests (and lands) of the Orang Asli. Also, in all cases that have gone to court over land matters, the JHEOA had always sided with the government and with those who were accused of being the encroachers on Orang Asli lands.

In the current debate over the proposed amendments to the Aboriginal Peoples Act, where the Orang Asli are strongly opposing the changes that would cause them to lose much of their customary lands as well as lose control over their lives and whatever lands that are ‘given’ to them, the JHEOA had been a key player in getting the policy changes accepted by the National Land Council in December 2009.



Figure 19. Spreading the word. Jah Hut and Temuan activists share the UNDRIP and the current situation with Temiars from the surrounding villages. These JOAS-sponsored road-shows have been effective in letting many Orang Asli know about the UNDRIP. (Pos Pasik, Gua Musang, Kelantan. CN-2010)

Only because of strong, unprecedented protests from the Orang Asli community has the JHEOA engaged in dialogue on this issue, but it has not been a good-faith dialogue. The lack of good faith has been revealed by the announcement of the 2011 Budget on 15 October 2010 which states that the JHEOA-sanctioned proposals are to go ahead in any case.

Perhaps of a more significant implication, the amendments to the Aboriginal Peoples Act being proposed and endorsed by the JHEOA, actually are designed to further whittle away the rights of the Orang Asli.⁷ Such amendments in fact actually go against the grain of what the UNDRIP prescribes for the protection and recognition of the rights of indigenous peoples.

Keeping quiet

The most compelling evidence that the Government of Malaysia is choosing to ignore the application of the UNDRIP to protect and advance Orang Asli rights, is the fact that there has been no announcement or promotion of news that informs both the general public and the Orang Asli in particular that it has endorsed the UNDRIP at the

international level. Even officers in the JHEOA seem to be unaware of its existence.

On the contrary, whenever alert Orang Asli confront the JHEOA and other government officers on the lack of application of the UNDRIP in Malaysia, the officers question the legality and authority of the UNDRIP in Malaysia. One Orang Asli activist was even threatened with legal action when he was distributing UNDRIP information pamphlets published by the Indigenous Peoples Network of Malaysia, JOAS.⁸

To the credit of the Orang Asli, they have embarked on several programmes, supported by JOAS, to inform and create greater awareness about the UNDRIP in various Orang Asli communities during their regular ‘roadshows’. And they have done a commendable job thus far, compared to the negligible activity concerning the Declaration in government circles.

Endnotes

1. It was thought by some that Malaysia’s triple endorsement of the declaration was largely because it considered the Malays as indigenous peoples as well. This view can be discounted, for in all the deliberations of the UN Working Group on Indigenous Peoples and other related for a, it was clear that the indigenous peoples the government encountered and regarded as such were invariably the Orang Asli (Asal?)—the Orang Asli of Peninsular Malaysia and the Natives of Sabah and Sarawak. Furthermore, as we discussed in the second chapter, the Malays have not exercised their right of self-identification as indigenous peoples. Neither do they meet the internationally-accepted criteria and principles for the definition of indigenous peoples. This is very different from the definition and meaning of ‘bumiputera’, which does include Malays.
2. This section states that: Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.
3. The lawyers in the Sagong Tasi Federal Court appeal countered as follows: By common law the Court of Appeal must be referring to the English common law as applicable to Sarawak by virtue of s 3 (1) (c), Civil Law Act 1956. In this regard it should be emphasized that the common law is not a mere precedence for the purposes of making a judicial decision. It is a substantive law which has the same force and effect as written law. It comes within the term of “existing law” under Article 162 of the Federal Constitution. [Article 162 (6) any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day

under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provision of this Constitution. (7) In this Article “modification” includes amendment, adaptation and repeal.] This is exactly what Justice Gopal Sri ram did in his *Sagong Tasi* decision, as discussed earlier.

4. JHEOA (1998), *Garis-Panduan Prosedur Perlantikan Penghulu dan Batin Orang Asli*. (Guidelines for the procedure to appoint Orang Asli village heads.)
5. See Articles 10, 11(2), 19, 28, and 29(2) of the UNDRIP.
6. To see an example of how the JHEOA represents the Orang Asli without the Orang Asli’s knowledge, let alone consent, you can view the video “The involuntary resettlement of the Chewong and Temuans for the proposed Kelau Dam in Pahang”, available on YouTube and on the coac website at http://www.coac.org.my/codenavia/portals/coacv2/code/main/main_art.php?parentID=11735950880949&artID=11735948473572
7. The concerns of the Orang Asli to such whittling away of rights are contain in their *Memorandum Bantahan dasar pemberilikan tanah Orang Asli* (2010).
8. A copy of the pamphlet can be viewed at http://www.coac.org.my/codenavia/portals/coacv2/code/main/main_art.php?parentID=11400226426398&artID=1239780981302

9



THE ISSUE OF
NON-RECOGNITION AS
INDIGENOUS PEOPLES



9 THE ISSUE OF NON-RECOGNITION AS INDIGENOUS PEOPLES

Introducing and maintaining the concept of a ‘mainstream society’ to which the Orang Asli are expected to conform, has been politically important insofar as the nation state can assert its claim of a single nationality. With this claim, the state completely denies recognition of the Orang Asli as a separate *people* who are entitled to enjoy their rights as sanctioned by various UN and other international instruments, including the UNDRIP.

By introducing the concept of a mainstream society, the state makes the presumption that the Orang Asli are to be considered as backward communities in need of government largesse and direction. Hence the expressed objective of the JHEOA (and it follows, that of the government) is ‘integrating the Orang Asli with the mainstream society’.

When there is such a policy for a people, especially when it is followed up with programmes to change their way of life, their religion and their mindset to match those of the dominant political power of a society, it cannot be claimed that the Orang Asli are recognised as indigenous peoples in Malaysia.

Another indicator that is frequently used to demonstrate that the Orang Asli are not recognised as indigenous people in Malaysia is their glaring absence from the list of ethnic groups who are accorded ‘special position’ in Article 153(1) of the Federal Constitution. The three ethnic groups mentioned therein—the Malays and the Natives of

Sabah and Sarawak—are accorded indigenous recognition without any reservation. It would seem that the only other Bumiputera group left out in this section—the Orang Asli—would need to argue their way to get such recognition.

The question, we feel, is not to see how the Orang Asli can be legally recognised by the Federal Constitution as indigenous peoples with special position status (and therefore with special ‘rights’ accorded to this status). Rather, it is for the government to recognise them as indigenous peoples by making the appropriate amendments in the Constitution such that there will not be a mistaken interpretation or argument over their indigenous status.

Thus, while the Orang Asli fulfil the internationally-accepted criteria and principles for the ‘definition’ of indigenous peoples, the rights and entitlements that come with such recognition, as spelt out in the UNDRIP, are not reflected on the ground. In contrast, ironically, the Malay community enjoys the rights and protections envisaged in the UNDRIP much more than the Orang Asli do, even though Malays do not self-identify as indigenous peoples.

Non-recognition leads to discrimination

The non-recognition and disregard for Orang Asli rights as enshrined in the UNDRIP is a direct result of the non-recognition of the Orang Asli as indigenous peoples. However, in a country where racial discrimination is tolerated and even institutionalized. One is not likely to raise an eyebrow even when such discriminations are blatantly evident.

The discrimination extends to programmes and policies designed for the Orang Asli, invariably largely by people who are not Orang Asli. For example, with the expressed objective to convert all Orang Asli to Islam (JHEOA 1983), and the absence of credible state-sponsored actions to protect and promote Orang Asli traditions, territories, and languages, the state cannot justify the claim that all bumiputeras are treated equally. On the contrary, for the Malay Bumiputera, state support for these cultural markers are not only institutionalised and heavily sponsored but also regarded as a given right, and frequently fervently defended.

The disparity in protections also extends to more material aspects of Orang Asli concerns, especially in the security of tenure of their



Figure 20. The Orang Asli seek recognition. Because they are not recognized as indigenous peoples, with all the attendant rights enumerated in the UNDRIP, their continuity as a people is threatened. (Kampung Temir, Pahang, CN-2005)

traditional lands. Orang Asli reserves, for example, do not enjoy the same legal tenurial security as does Malay reservation lands. It appears to be a simple matter of making a decision at the state EXCO level if any Orang Asli land needs to be de-gazetted or acquired. The need to inform, let alone get the consent of the Orang Asli involved, is not regarded as a precondition. Try de-gazetting Malay reservation land without the inhabitants' consent and see what happens?

The fact that the Orang Asli count themselves among the most marginalised of Malaysians today—experiencing the highest poverty rates, suffering disproportionately poor health situations, putting up with lack of basic infrastructure and amenities, and having little access to political power—are also indicative of their lack of special status as the indigenous peoples of this country. This is despite the 'positive obligation' that the Constitution provides for the Orang Asli, and despite Malaysia adopting the UNDRIP.

The discrimination is further aggravated when the agency that is supposed to work for the betterment of the Orang Asli, the JHEOA, at times exercises its jurisdiction over the Orang Asli to their detriment. For example, while all single-parents or deserving elderly need only apply to the relevant department to claim benefits from the welfare aid programmes, those of Orang Asli origin need to go through the

JHEOA who have been known to arbitrarily withhold the delivery of such assistance.

What do the Orang Asli want?

In a nutshell, the Orang Asli want to be accorded the recognition that is due to them as contained in the UNDRIP. In particular,

- They seek recognition of their history, of their inherent rights, of their problems, and of their perspectives.
- They seek recognition that their ancestral lands are essential for their economic, social and spiritual development; and they also want these lands secured.
- They seek recognition that they have been marginalized and discriminated against by the colonial and national governments; and they want redress.
- They seek recognition that they possess complex, flexible and appropriate social institutions; and they want the right to practise them.
- They seek recognition of their right to develop their own cultures, languages and customs; and they want to be able to transmit them freely to future generations.
- They seek recognition that they are the indigenous peoples of the territory they call their traditional or adat lands.

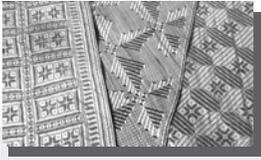
In a broad sense, therefore, Orang Asal today are re-asserting their right to be able to develop and progress as individuals—and as a *people*—based on a social order that they themselves determine. That is to say, they want to reclaim their right to self-determination.

The non-recognition of the Orang Asli as indigenous peoples is the root cause of all the negative things that are happening to them and their territories—including no participation in decision-making, the selection and determination of their leaders by others, declining cultural integrity, prejudice against them, and increasing degradation of their environments.

10



GAPS IN THE APPLICATION OF UNDRIP



10 GAPS IN THE APPLICATION OF THE UNDRIP

Appendices 3 to 5 gives an analysis of the gaps, or compliance, of the provisions in the Federal Constitution, the Aboriginal Peoples Act, and various other laws that affect the Orang Asli in as far as they comply or nullify the tenets of the UNDRIP.

Many of these gaps and divergences have been discussed earlier while others are obvious from the tables. To illustrate the problem the Orang Asli face with the application of the UNDRIP in their country, two issues will be discussed more fully here. These are the status of Orang Asli decision-making and the application of the principle of free, prior and informed consent (FPIC).

Orang Asli Decision-making

Decision-making for the Orang Asli is very much dictated by provisions provided for in the Aboriginal Peoples Act (APA) and the JHEOA's Guidelines for the Appointment of Orang Asli Village Heads (*Garis panduan*).¹

Two persons feature highly in the hierarchy of Orang Asli decision-making: the Minister in charge of Orang Asli Affairs and the Director-General of the JHEOA. The Minister responsible for Orang Asli affairs is usually the one in charge of the ministry under which the JHEOA is located. Currently, it is the Ministry of Rural and Regional Development.

The Director-General of the JHEOA is appointed not by a Minister but by the Yang DiPertuan Agung under Section 5(1) of the Aboriginal

Peoples Act. The Orang Asli have no say in who the Director-General shall be.

Section 4 of the APA states that, “the Director General shall be responsible for the general administration, welfare and advancement of Orang Asli.” However the same section says that “nothing in this section shall be deemed to preclude any aboriginal headman from exercising his authority in matters of aboriginal custom and belief in any aboriginal community or any aboriginal ethnic group.”

The Powers of the Minister over the Orang Asli

In the Aboriginal Peoples Act, the Minister is accorded several powers to act on behalf of the Orang Asli, or make decisions about them . These include, for example, the appointment and removal of Orang Asli headmen, as follows:

19. (1) The Minister may make regulations for carrying into effect the purposes of this Act and in particular for the following purposes:
 - (c) providing for the appointment of, and prescribing the qualifications of and the method of appointing, any headman;
- (2) The Minister may remove any headman from his office.

Section 19 of the APA in fact gives overwhelming powers of the Minister, superseding any authority the Orang Asli once had in such matters. For example, the Minister has the authority to make regulations for the creation, nature and regulation of aboriginal settlements within aboriginal areas and aboriginal reserves [s 19(a)].

He can also prohibit either absolutely or conditionally, and control, the entry into aboriginal reserves, aboriginal areas, aboriginal inhabited places and aboriginal settlements of any person or any class of persons [s 19(b)].

He can prohibit the planting of any specified product on lands over which rights of occupancy have been granted [s 19(f)]; and even permit and regulate the felling of jungle within aboriginal areas and aboriginal



Figure 21. Defying the guidelines. After the death of Batin Tukas, the headman in the Sagong Tasi case, the community decided to ignore the JHEOA's guidelines for the appointment of headmen, and instead selected and installed their new village-head according to Temuan CUSTOM. (Kampung Bukit Tampoi, Selangor. CN-2010)

reserves [s 19(g)] or decide on what forest produce may be taken by the Orang Asli in aboriginal areas [s 19(h)] as well as regulating their taking of wild birds and animals [s 19(i)].

Section 19(l) also gives authority to the Minister to prohibit either absolutely or conditionally the entry into, or the circulation within any aboriginal area, aboriginal reserve or aboriginal inhabited places of any written or printed matter, any cinematograph film and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner capable of suggesting words or ideas and every copy and reproduction or substantial reproduction thereof;

Not only can the Minister decide to allow or prevent any type of communication of messages or ideas into a village, he can also prohibit, as stated above, any person or class of person from entering or remaining in an aboriginal area, reserve or place [14. (1)], irrespective of whether the community allows such a visitor entry.

If all these restrictions were not enough, the APA also gives authority to the Minister to actually decide the terminology by which Orang Asli, aboriginal communities and aboriginal ethnic group are to be called [s 19(n)]. And in the event of a dispute as to whether any person is or is

not an aborigine, it is not the community that decides, but the Minister [s 3(3)].

The Selection of Orang Asli Headmen

Although section 16 (1) of the APA says that the headman of the aboriginal community can be selected by the community in accordance with custom, the appointment is still subject to confirmation by the Minister.

And such confirmation is now only given if the Guidelines for the Appointment of Orang Asli Village Heads (*Garispanduan*), developed by the JHEOA, had been adhered to. The *Garispanduan* lists several conditions that need to be met if any person is to be recognized as a village head. In effect, the guidelines remove whatever authority and autonomy the Orang Asli had in the appointment and selection of their own leaders and have relegated these to the government.

The *Garispanduan* in fact is rather detailed in what it expects a village head to be. For one, he has to be male (Section 4.1). This section seems to be aimed at reinforcing the male chauvinistic tendencies of the mainstream society and in complete repudiation of the fact that in the past there *were* Orang Asli village heads who were women.²

The headman must also be able to speak, read and write the Malay well (s. 4.5). The emphasis is thus on literacy rather than on the competence of the candidate in the community's customs and traditions. This regulation excludes the older leaders who, despite being knowledgeable in the customs of the community—a once-important criterion for traditional leaders—are frequently illiterate.

The headman's community must also not have fewer than 100 members (s. 5.1). This excludes several hamlet-sized groups of Negrito-Orang Asli who are still semi-nomadic, such as the Batek and Jahai.

Also, the *Garispanduan* dictates that the candidate for village head must have passed the background test on his character conducted by the district JHEOA office (s. 4.7). This is another bureaucratic snare to control the community and occurs despite the fact that the community would have already approved of his candidature.

More importantly, in an apparent move to ensure allegiance to the JHEOA rather than to his community, the *Garispanduan* demands that the headman follows the directives and orders of the JHEOA in

relation to his duties and responsibilities. If the headman is found to act otherwise, he can be dismissed by the JHEOA.

Clearly, the application of the APA and the *Garispanduan* in the matter of the selection and appointment of Orang Asli village heads has reduced such positions to that of mere employees or servants of the JHEOA.³ The UNDRIP would have nothing to do with these sort of guidelines.

The Issue of Free, Prior and Informed Consent (FPIC)

FPIC is a specific right for indigenous peoples as recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). FPIC is also enshrined in the 1961 Policy Statement (para 1(d)).

The issue of (non-compliance with) FPIC has been discussed earlier by way of various illustrations. To a large extent, FPIC is not normally used when dealing with Orang Asli issues, especially when it is thought the Orang Asli would not put up much opposition to the project or activity proposed. Even if consent is obtained, it is not usually done on a community basis or an involved-party basis.

The consent of Orang Asli village heads or of select members (e.g. the JKKK chairmen) is sometimes sought to comply with FPIC conditions of donor agencies or the stringent requirements of some procurement policies. However, it is evident that the consent of one or a few individuals closely subservient or indebted to the project proponent or planner in no way equates with FPIC.

In fact, complying with FPIC requirements is usually regarded as something officials would want to do away with, if they could. And in most cases, they can. Five decades of domination of Orang Asli lives and livelihoods has resulted in JHEOA becoming the 'ruler' of the Orang Asli and with that status, the routinely unchallenged decision maker for all matters concerning the Orang Asli.

The current plans to amend the Aboriginal Peoples Act to allow the JHEOA to exercise further control over the Orang Asli, and to further deprive the Orang Asli of their rights to land and resources, started off on the basis that the FPIC of the community was not necessary as long as a few token individuals can be seen to be participating in the policy discussions.

And even when there was unprecedented challenge to these amendments, the JHEOA went into damage control to try and get the semblance of participation and consent by conducting dialogues and road-shows on the issue. Many observers have called this a farce, especially when announcements of 2011 budget allocations by the Prime Minister seem to clearly indicate that the amendments are going ahead irrespective of whether FPIC, or even just simple consent, is obtained or not.

If ever a specific case is need to demonstrate how little FPIC is understood an applied in the context of the Orang Asli, the case of the Orang Asli ‘participation’ in Kelau Dam deliberations is a good example.

The Kelau Dam Project

The Kelau dam project involved transferring raw water from the state of Pahang to the state of Selangor via a 44-kilometre tunnel dug through the central mountain range. Initially two dams were planned, but one was later dropped for cost reasons. The purpose of the dam was to ensure that the state of Selangor, and that of the capital city Kuala Lumpur, would not suffer a water-shortage that was foreseen to occur at the beginning of the year 2002.⁴

Japan is very much involved in this project, and not just from the position as a lender of a 82 billion yen (RM2.8 billion) soft loan through the Japanese Bank for International Cooperation or JBIC (now under JICA). Japan also provided the engineering brainwaves for the trans-state, trans-mountain water transfer project.

From the day the project was announced in 1999, there has been a stream of distortion, mis-information, and even outright non-truths, that were put forward by various people, all acting for the project proponent, and all supporting the need for the dam project. This included some of the consultants and the government officers responsible for Orang Asli affairs. The project in fact was approved by the Pahang Menteri Besar even before the EIA’s Terms of Reference was put together!

Only because the JBIC guidelines required that there be consultations with the various stakeholders were NGOs able to get access to some of the decision-making processes of the dam project and to some of the hard data involved. As a result, the NGOs were able to gather much evidence against the need for the dam.

One argument concerned the water demand data used by the project proponents to justify the need for the dam. According to their flawed analysis, the state of Selangor would face a water shortage by 2002, the date by which the original two dams were supposed to be ready. It is now 2010, and the dams have not been built. And yet there is still no water shortage in Selangor. The water demand projections, as such, were clearly flawed. Had the projections been done professionally, the planners would have seen that there was no need for the water-transfer project at all.

Second, even if the water was really needed to stem a looming shortage in Selangor, there were other cheaper alternatives to get the needed water to the state. This included getting it from the water-rich state of Perak in the north. There was no need for a tunnel to be drilled through any mountain, as the pipeline could easily follow the existing railway track.

Third, it was clear that the motivation for the project was financial benefit for some. It is not surprising that the original project cost should have increased from the RM980 million in 1999 to almost RM10 billion in 2010.

And there was also a Japanese connection in the tender for the contracts. A forensic accounting study of the project done by some accounting graduate students showed how a prominent Japanese businessman who had close business links with the top leaders in the country was involved in all the 3 bids made. Local businessmen linked to the main political party, UMNO, and even Malay royalty were also identified. In the end, a Japanese company did get the project.

Participation and Consent

The project plan required that two Orang Asli communities be resettled to make way for the dam – even though it was officially acknowledged that their lands would not be inundated by the dam.

One was the Chewong community that lived high on Bukit Cenal, which is about 203m asl. This is more than 100 metres above the original height of the dam wall (i.e. 90 m asl, but later reduced to 84m asl). So it is hard to understand, on this basis, why the planners sought to resettle the 30-odd Chewong at all.

Yet the department in charge of Orang Asli affairs, the JHEOA,

insisted that they had asked the Chewong concerned and that they had agreed to be resettled as it was a good opportunity to get development. This was a lie. In reality, no JHEOA or any other government officer had ever been to the Orang Asli settlement on the hillock and told them about the dam project, let alone asked them for their consent to be resettled. When we asked them if they were willing to be resettled if asked to do so, the Chewong unanimously replied in the negative. Only 9 years after the project-cum-resettlement was mooted, and perhaps as a concession to show that the project proponents were listening to the public, did they agree to leave the Chewong alone.

The other group of Orang Asli who were also asked to resettle are the Temuans of Kampung Temir. In all stakeholders meetings, the batin (headman) was regarded as the rightful representative of the whole Temuan community. No other Temuan community leaders were brought to these meetings.

But even so, the batin has been consistent in his stand on the project. He was against the resettlement of his community since the beginning. And he has stated that he was consistently being forced, “*paksa*”, to agree to the resettlement.

In fact at a major stakeholder meeting hosted by the Economic Planning Unit of the Prime Minister’s Department, he reiterated his objection to the resettlement. Here he was the sole Orang Asli attending the meeting, and was surrounded by government officers, including the Director-General of the JHEOA, in the company of consultants, project proponents, lenders, and people of authority of all sorts. At this meeting, the chairperson had stated to all present, including the JBIC senior officers from Tokyo, that,

“The Orang Asli are very agreeable to the resettlement.”

However, when asked by COAC if that was so, the batin told the meeting, in Malay, that

“It is true that I say I support the project. Because we Orang Asli have been weakened. Others weaken us. They say resettle, we have to resettle. Officers come in and say, “Tok batin, resettle.” And we have to resettle. They pressure us until we cannot think



Figure 22. Participation does not mean consensus. The arrow shows the lone batin (headman) invited to the meeting of stakeholders and government officials for the purpose of showing participation and consensus. Even so, the batin spoke up courageously against the resettlement. His opposing remarks were intentionally distorted to appear to be very agreeable to the resettlement. (Economic Planning Unit, Putrajaya. CN-2002)

anymore. If we have a choice, we want to stay where we are. The land is our ancestors' land. We have been there for a long time. But what can we do. The government wants to give water to Selangor.”

Even after having said this in front of a large crowd of stakeholders (NGOS, civil servants, private sector, academics, JBIC officers from Kuala Lumpur and Tokyo, Japanese Embassy officers, etc.), the chairperson interpreted the headman's remarks for the benefit of the JBIC officers present, as:

“The Orang Asli *are* very anxious to move to the site.”!

In reality, the Orang Asli need not have to be resettled at all. In a letter to COAC in 2005, the Chief Representative of JBIC in Kuala Lumpur, stated that,

“According to the Government of Malaysia, the Orang Asli houses of Sungai Temir will not be inundated and the people can choose either to stay or

to move from the current village to a new settlement in Sungai Bilut.”

So why resettle the Orang Asli? Especially when they have said NO all this while?

Not taking ‘No’ for an answer

For some reason, JBIC and the project proponents were intent of listening only to a positive answer from the Orang Asli. They were also intent of making it seem that such a positive answer was obtained according to the standards to prior informed consent (PIC), if not on the basis of free, prior and informed consent (FPIC).

In fact, even when 27 Orang Asli took up a case to ask the court to stop the dam project on account of the environmental laws of the country not being adhered to, JBIC (now JICA) and the project proponents, further pursued the Orang Asli and tried to persuade them to resettle.⁵

In an effort to satisfy JICA’s requirement of ‘consent from the Orang Asli stakeholders’, a final big push was executed by the government and the project proponents in August this year. Although it was termed a ‘working visit’ by the Minister of Energy, Green Technology and Water, it was actually a 3-day event to pressure the Orang Asli into agreeing to the resettlement deal.

The village was crawling with police personnel, staff from the various government departments and those from other agencies – in what was seen as a standard hard-and-soft approach to ‘turn’ a people around. Goodies were given out in the form of rice and other rations.

The batin was swarmed by all this. He was still against the resettlement, although not against the dam. But the pressure to concede was tremendous, unlike how it was in the past.

Besides, the authorities now saw fit to regard other young men in the community as the batin! The real batin’s son (who turned pro-project and pro-government after getting all the recent positive attention from the government and the project proponent) and two others were elevated to the level of ‘batin’, with stickers on their shirts saying such on the big working visit-cum-signing ceremony day. They actually hold no such position in the community. The real batin, on the other hand, had no such ‘name tag’ on him to say that he was the headman.



Figure 23. Guidelines for the appointment of batins were not followed. Perhaps to strengthen credence in the quality of apparent consent for the dam project given by the villagers, three young men, all from the same village, were ludicrously given the status of 'Tok Batin', as the sticker on their shirts read. The real batin did not have such a sticker. (Kampung Sungai Temir, Kelau, Pahang. CN-2009)

Nevertheless, the majority of the Orang Asli signed the consent forms that day. Those who rejected the offer were derided by the minister in his speech, although it was clearly stated to them that the choice was theirs whether to resettle or not. It was a battle lost. The Orang Asli are to be resettled by the end of 2010. And the Japanese officers from JICA, MOFA and the embassy in KL joined the Menteri Besar of Pahang and the project proponents in celebrating this victory (with the latter singing and dancing the joget on band stage).

Some of the Orang Asli who signed the consent form, are now saying they were cheated or tricked into doing so, and want to pull out of the resettlement programme. In fact, when met recently, the batin still insists that he was told that even after they were resettled, he and the others can come back to their rubber trees and *dusuns* to tap and harvest them.

In summary, we need to ask: Was the Orang Asli's participation sought only because the JBIC guidelines called for it? Or was public participation also required by Malaysian standards? And, if so, what was the purpose of the participation? To endorse the project or to make a decision on it?

The proponents of the Kelau Dam project are touting the Kelau Dam case as a model of Orang Asli and other stakeholders participation

in project implementation. If the consent obtained in this case can be regarded as having met the standards of FPIC as envisaged in the UNDRIP, it is worrisome to imagine what happened in the many other cases where such consent was not considered necessary and therefore not sought. After all, this was a unique case when Orang Asli consent, never mind if it was not FPIC, was only sought because it was a pre-condition for the release of the loan.

The preceding discussion shows that the two important principles of the UNDRIP—self-determination and free, prior and informed consent—are not being applied in dealings with the Orang Asli.

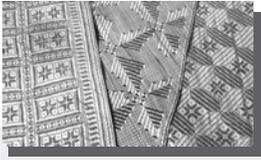
Endnotes

1. JHEOA (1998), *Garis Panduan Prosedur Perlantikan Penghulu dan Batin Orang Asli*. (Guidelines for the appointment of oa village heads.
2. See for example, Endicott and Endicott (2008), *The Headman was a Woman*.
3. In like fashion, the selection and appointment of the Orang Asli Senator has been the prerogative of the Minister, on advice from the JHEOA. No Orang Asli senator had ever been one chosen by the Orang Asli themselves.
4. This case study was presented at a conference on Improving Public Participation in Policy & Project Planning. See Nicholas (2010a)
5. *Pendor bin Anger & 26 Ors v Department of Environment & 3 Ors*. (2007). In October 2007, 27 Orang Asli sought judicial review of the approval of the Detailed Environmental Impact Assessment (DEIA). Among others things, they challenged a claim in the report that the Orang Asli had agreed to the project and were willing to be resettled. However, by the time the judgment was made two years later on 27 August 2009, the events described later in this chapter had taken place and the Orang Asli were said to have agreed to resettle. This was one of the grounds the judge gave to throw out the case. The other grounds were that the project was of national importance and that the government had already spent a large sum on it, plus the fact that the proponents had several briefing sessions with the Orang Asli (where obviously ‘consultation’ was confused for ‘consent’). The judge appears to have taken the submissions of the senior federal counsel as his own (oral) judgement without applying his legal mind to the actual matter before him: whether the EIA was legally and competently conducted at the material time and whether the Orang Asli gave their free, prior and informed consent. Anything that happened after that are to be treated as after-thoughts or attempts at damage control on the part of the defendants.

11



SO WHAT NOW?



11 SO WHAT NOW?

The United Nations Special Rapporteur on Indigenous Peoples, James Anaya, has cautioned that, “The implementation of the Declaration on the Rights of Indigenous Peoples should not be obscured by a discussion about whether or not it is a legally binding document but should be regarded as a ‘political, moral and legal imperative’ without qualification.”

He added that a great deal remains to be done to see the rights and objectives of the Declaration become a reality in the lives of indigenous peoples throughout the world. Since the UNDRIP is basically a rights-based declaration it follows that a rights-based approach should be the proper framework to analyze and assess the Orang Asli position.

A Rights-Based Approach

Essentially, a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development. The norms and standards are those contained in the wealth of international treaties and declarations.

A rights-based approach to development would therefore include the following elements:

- express linkage to rights;
- accountability,
- empowerment,

- participation, and
- non-discrimination and attention to vulnerable groups.

According to the United Nations Working Group on the Right to Development (UNWGRD), rights become a *responsibility* in relation to any marginalized community that is deprived of those rights.

It becomes the task of the responsible authority to see to the maintenance and enjoyment of those rights. Thus, with a rights-based approach for the Orang Asli, the authorities are required to demonstrate that Orang Asli rights as enshrined in international documents such as the UNDRIP are adhered to.

A major right of indigenous peoples protected in this declaration is the need to obtain the free, prior and informed consent (FPIC) of the Orang Asli public before any project that affects them, or their territories and resources, is planned or implemented.

In the same light, the Orang Asli are not to be moved from their traditional territories without their free, prior and informed consent (Articles 10, 11, 19, 28, 29 of the UNDRIP and Section 1(d) of the 1961 Statement of Policy for the Administration of the Orang Asli).

Restoring Recognition and Rights

It has been asserted that the non-recognition of the Orang Asli as indigenous peoples is the root cause of their bleak situation today. An important first step therefore towards remedying this situation would be for them to get back that recognition if they are to enjoy the rights as enshrined in the UNDRIP.

The effect of Orang Asli non-recognition manifests itself in almost every aspect of their lives. But it is the effect on the security of their customary lands, more than anything else, that they feel most deeply about. And not surprisingly, the united call of the Orang Asli, as is universally the case for indigenous peoples elsewhere, has been for their customary lands to be recognised as theirs, permanently.

Thus, the first objective of any positive action towards this end is to secure all Orang Asli lands so that their further expropriation or degradation will be halted. There are several options as to how this can be done, but they all require a sense of justice and political will:

- Exercise authority at the state level to secure existing Orang Asli lands from imminent or potential threat. States can resort to using Section 62 of the National Land Code to do this. This will enable states to register or gazette Orang Asli lands under its own legislation rather than have such lands transferred to the federal government as is normally the case (since Orang Asli issues are a federal matter);
- Recognise and treat undocumented, but established, native title rights as equivalent to registered titles. The fact that these lands are undocumented or non-registered should not allow the Torrens system to override this right of the Orang Asli;
- Place a moratorium on all dealings involving Orang Asli areas, lands and reserves, whether gazetted, titled, or merely occupied, unless and until the full FPIC have been obtained from all the members of the community concerned;
- Accept maps of community lands drawn competently by the community and encourage and support capacity building in community mapping initiatives.
- Notices and hearings of de-gazetting of Orang Asli land should be in accordance with the law and their full free, prior and informed consent always obtained before any decision is made.
- Introduce new legislation that criminalises and revokes any transfer of land if it can be shown that there was fraud in the original transfer. The onus is thus on the subsequent buyers of the land to assure themselves that there was no fraudulent intent in the original transfer.
- Harmonize existing laws with the UNDRIP, especially the Aboriginal Peoples Act, the National Land Code and the Land Acquisition Act.
- Have the UNDRIP principles enshrined in the

constitution, or adopted as a separate legislation, and so making inconsistent laws *ultra vires* the Federal Constitution.

- Identify and recognise Orang Asli as indigenous peoples clearly in the Federal Constitution.

The application of the UNDRIP at the local and national level will go a long way in ensuring that the Orang Asli will get their due recognition as indigenous peoples. But first, the UNDRIP and what it stands for must be internalized into the mindsets and attitudes of those in a position either to aid progress for the Orang Asli or to cause their further marginalization. These include government officers, politicians, the JHEOA, consultants and all those who have dealings with the Orang Asli.

Such internalization can be done through training, workshops and seminars, regular publications or net-news, exposure to Orang Asli communities and other programmes that promote interaction with all strata of Orang Asli. The aim is to sensitise people so that they will be able to understand and accept the UNDRIP and its principles and so act accordingly.

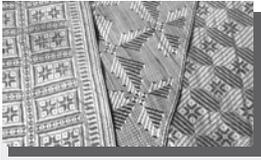
All Orang Asli want a reasonable standard of living. They also want to remain as indigenous peoples.

And to be able to continue being indigenous peoples, they must be able to transmit their identity to future generations. The UNDRIP principles allow them to do this. Hence it is vital why the UNDRIP must be internalized into the psyche of more Malaysians.

12



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12 REFERENCES

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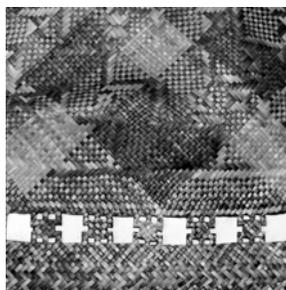
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APPENDICES

APPENDIX 1

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Adopted by the General Assembly 13 September 2007

The General Assembly

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustice as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interest,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structure and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over development affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures, and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relation among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and constructive arrangements, and the relationship they represent, are the basis for strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the rights of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are

indispensable for their existence, well-being and integral development as peoples,

Recognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect,

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economics, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. State shall provide effective mechanism for prevention of, and redress for:
 - (a). Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b). Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c). Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d). Any form of forced assimilation or integration;
 - (e). Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without

prejudice to ensuring full freedom of expression, should encourage privately-owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development,

and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, *inter alia*, in the areas of education, employment, vocational training and retaining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their rights to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals

also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the rights to determine and develop priorities and strategies for the development or use of their land or territories and other resources.

2. State shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. State shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have their right to determine the structure and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across border.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangement.

2. Nothing in this Declaration may be interpreted as to diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous people have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to have access to and prompt decision through just and fair procedure for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States, shall promote respect and full application of the provision of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this declaration shall be subject only to such limitations as are determined by law, in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedom of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on Thursday September 13, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

Since its adoption, Australia and New Zealand have reversed their positions and now endorse the Declaration. Colombia and Samoa have also reversed their positions and indicated their support for the Declaration. In March 2010, the Government of Canada announced it would take

steps to endorse the UN Declaration and, in April 2010, the United States indicated that it will also review its position regarding the Declaration.

During the Durban Review Conference in April 2009, 182 States from all regions of the world reached consensus on an outcome document in which they “ *Welcome[d]* the adoption of the UN Declaration on the rights of indigenous peoples which has a positive impact on the protection of victims and, in this context, urge[d] States to take all necessary measures to implement the rights of indigenous peoples in accordance with international human rights instruments without discrimination...” (UN Office of the High Commissioner for Human Rights, *Outcome document of the Durban Review Conference* , 24 April 2009, para. 73).

APPENDIX 2



Memorandum to

**HRH DYMM Seri Paduka Baginda Yang Dipertuan Agong
Al-Wathiqu Billah Tuanku Mizan Zainal Abidin Ibni Al-Marhum
Sultan Mahmud Al-Muktafi Billah Shah**

from the

Indigenous Peoples Network of Malaysia (JOAS)

Preface

1. The Indigenous Peoples Network of Malaysia (or Jaringan Orang Asal SeMalaysia, JOAS) is the umbrella network for 21 organisations throughout Malaysia that represents different indigenous peoples' organisations and communities. As the focal point for indigenous rights and advocacy in Malaysia, JOAS provides the indigenous communities with representation nationally, regionally and internationally.
2. The Orang Asal or indigenous peoples of Malaysia consist of more than 80 ethno-linguistic groups, each with its own culture, language and territory. Together we number about 4 million, or about 15 per cent of the national population. Collectively, also, our peoples count as among the poorest in Malaysia, a manifestation of our marginalisation and disenfranchisement from the mainstream society on account of the non-recognition of our rights as contained in both national and international customary law.

3. Our presence and history goes back before the recorded history of Malaysia. Our adat, traditions and institutions have been developed and practised before any written law. And we have practised this on our ecological niche which we call our *tanah adat*.
4. Part 2, Article 5 to 13 of the Federal Constitution assures the fundamental liberties of all Malaysians including the Orang Asal. Article 153 also provides powers and responsibilities to the Yang Dipertuan Agung to safeguard the rights and special privileges of the Orang Asal. It is the government's duty to assure and protect the rights of the Orang Asal.
5. The UNDRIP is the United Nations Declaration on the Rights of the Indigenous Peoples. It is a set of provisions which safeguards the rights of Indigenous Peoples worldwide and it also provides for the protection of the Indigenous Peoples' cultures, land and way of life. The UN General Assembly on the 13th of September 2007 voted and adopted the UNDRIP. Malaysia is one of the countries that have voted to adopt it.
6. This memorandum is a result of a comprehensive research on policies and laws of Malaysia affecting the Orang Asal. The process included a series of consultations, workshops and discussions with Orang Asal representatives throughout Malaysia culminating in a national workshop that was held in the Annexe Gallery, Central Market, Kuala Lumpur from the 9th to the 12th of September 2008.
7. The following are our positions which has been agreed upon to be presented to Yang Kebawah Duli Tuanku.

Right to self-determination

8. The UNDRIP acknowledges that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development. Article 3 in particular of the UNDRIP state that indigenous peoples have the right to self-determination and by virtue of that right,

they freely determine their political status and freely pursue their economic, social and cultural development.

9. In the context of Malaysia, however, no law or policy was found that mentions the right to self-determination for the Orang Asal, let alone accord us that right.
10. On the contrary, various laws, actions and programmes of the government directly oppose the principle of self-determination and violates the human rights of our people. These violations include the non-recognition of our customary lands, forced resettlement, non-recognition of cultural rights, policies of assimilation and integration, and even outright disregard for judicial decisions.

Non-recognition of customary lands

11. Article 26 of the UNDRIP states that indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and that States shall give legal recognition and protection to these.
12. Malaysian courts have in fact endorsed this in several judgments that essentially accord native title to our traditional lands, territories and resources. These include the judgments in the cases of Adong Kuwau, Nor Nyawai, Sagong Tasi, Rambilin Ambit, and Madeli Salleh.
13. These judgments attest that native title arises out of native customs and that these customs, which define the content of native title, are part of the law of Malaysia and are protected under the Federal Constitution. The implementation of customs is also consistent with common law, which directs our courts to define native title with reference to native customs.
14. However, despite these decisions of the local courts, the Malaysian government and its agencies choose not to accept these judgments as legal precedents and instead require indigenous communities to treat each native title claim as a fresh legal argument.
15. The former State Attorney-General of Sarawak had even stated in a public forum that judgments by the apex court in Malaysia, such as that of Madeli Salleh cited above, which recognizes and uphold native title, do not determine how his state treats the rights

of indigenous peoples to their traditional lands and should not be treated as precedents.

16. In the current Federal Court appeal submission in the Sagong Tasi case cited above, the Malaysian government has rejected the notion of native title. Further the government, citing sections 3 and 6 of the Civil Law Act, is also asserting that if a local, appropriate law is available, there is no necessity for it to be subjected to the articles of the Federal Constitution or to any international customary law or instrument.
17. Clearly, as such, the Malaysian government rejects the right of indigenous peoples to our traditional lands, territories and resources.

No Free, Prior and Informed Consent (FPIC)

18. With such non-recognition of native customary title, the Federal and state governments have acted maliciously against the indigenous Orang Asal by forcibly appropriating, acquiring and taking Orang Asal lands, territories and resources without our free, prior and informed consent.
19. In the state of Selangor alone, about 7,000 hectares of indigenous Orang Asli reserves have been degazetted as such without the Orang Asli knowing when, where and how these areas were lost to them. In Sabah and Sarawak, an increasing number of communities are now finding out the hard way that their native customary lands have been given to oil palm and industrial tree plantation companies or leased to logging companies – again without their prior consent, let alone their free and informed consent, and frequently without adequate compensation as required by Article 28 of the UNDRIP and the Land Acquisition Act.
20. Many of these cases involve the forced and violent eviction of indigenous Orang Asal from their native customary lands.
21. And plans are afoot in Sarawak to build 12 more dams on the lands and territories of our peoples – again without our knowledge and consent and in violation of Article 32 of UNDRIP.
22. The establishment of so-called Growth Corridors that are designed to spur the economic growth of the country will also severely affect our land rights position.

Forced resettlement

23. In line with the government's non-recognition of native title and the disregard for obtaining free, prior and informed consent, the indigenous Orang Asal have also been subjected to forced or involuntary resettlement.
24. A case in point is the forced resettlement of the Chewong-Orang Asli community in the Kelau dam project in Pahang where the Orang Asli were intentionally misrepresented by agents of the government in order to carry out the forced resettlement of the Orang Asli. To make matters worse, the indigenous community concerned do not need to be resettled as their village would not be affected by the project at all.
25. This is in direct violation of Article 10 of the UNDRIP which states that indigenous peoples shall not be forcibly removed from their lands or territories and that no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned.

Violation of right to self-governance

26. Article 20 of the UNDRIP gives indigenous peoples the right to maintain and develop their political, economic and social systems or institutions. However, the government has increasingly interfered in our traditional systems, especially in the selection and appointment of our customary leaders.
27. For example, the *Guidelines on the Procedure for the Appointment of Orang Asli Headmen* dictates that the government has the final say in who becomes the community head and has the right to prescribe the procedure for his election.

Pressured assimilation & Right to freedom of religion

28. The Orang Asal have our own unique cultures, spiritualities and institutions which we want to continue and pass on to our future generations. However, some of the Orang Asal face extreme pressure to convert to the state religion, especially when missionary-proselytizing programmes are conducted with state largesse and infrastructure. This is clearly in violation of Article 12 of the UNDRIP.

29. This coupled with the stated objective, especially for the Orang Asli of Peninsular Malaysia, of integrating us into the ‘mainstream society’ has overtones of a policy of pressured assimilation.
30. Furthermore, some of the Orang Asal who chose to adopt a mainstream religion other than the official state religion, have found our religious structures demolished by local authorities on the weak and untenable argument that these religious structures were constructed on state land.
31. The Orang Asal should be free to choose any religion we wish to profess as enshrined in Article 11 of the Federal Constitution.

The consequence of Non-Documentation

32. A disproportionate number of Orang Asal are not documented (i.e. having proper identification papers). This is mainly due to our lack of access to the government infrastructure and machinery responsible for documenting citizens and the process is not friendly to the Orang Asal.
33. However, the onus should be on the agency that is entrusted by law to carry out its function rather than blame the marginalized and impoverished indigenous individuals for their failure to be documented.
34. An undocumented citizen cannot enjoy several rights that are accorded to citizens, including social and economic benefits and the right to citizenship.

Conclusion and Recommendation

35. Because Malaysia endorsed the UN Declaration on the Rights of Indigenous Peoples, the government should be held to its good intention by ensuring that the Declaration is fully implemented and enforced.
36. Article 38 of the UNDRIP in fact requires that “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of the Declaration.”
37. This is further reinforced by Article 42 that calls on States to

“promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

38. Many of the human rights violations facing the Orang Asal of Malaysia can be resolved if the UNDRIP is fully applied and if the court decisions and the principles of our Federal Constitution are upheld.
39. This is especially so in the case of native customary land rights – which is now a well-established right in Malaysian jurisprudence, provided by explicit provisions in the law and elaborated on by court judgments. From these, it is clear that undocumented native customary rights are equally valid as registered titles. The State must recognise this.
40. Doing so would also be consistent with upholding the Federal Constitution – as the abolition of native customary rights is to be regarded as violating the right to livelihood of an indigenous group. And this right is protected under Article 5(1) of the Federal Constitution which states that “no person shall be deprived of his life or personal liberty save in accordance with law.”
41. Thus, in merely being consistent with the provisions of the Federal Constitution and in applying the articles of the UNDRIP in full, we can be assured that our rights will be recognised and upheld.
42. In this regard we call upon the Government of Malaysia to follow our national laws with regard to upholding indigenous rights and at the same time honour the rights we are entitled to under international customary law.

We the indigenous peoples of Malaysia hereby demand:

43. That the government must immediately halt the legal process to gazette land which indiscriminately acquire indigenous customary lands. Customary land which has been appropriated or gazetted for all kinds of purposes should be returned and the appropriate legal process should be in place for restitution of the land taken.
44. That if the government wishes to acquire customary land for the purpose of development, conservation and any other purposes, it has to adhere to the principles of FPIC and pay appropriate compensation

which includes land, crops, settlements and all the resources therein, according to its real value. The process of demarcating indigenous customary lands, including their communal forests should include the full participation of the Orang Asal community involved.

45. That the courts should prioritise the hearing of cases involving customary land disputes and decide promptly. The government should provide legal assistance for Orang Asal cases.
46. That the administration and governance of the affairs of the Orang Asal should be reinstated. This can be achieved through the abolition of the Department of Orang Asli Affairs (JHEOA) and replacing it by an Orang Asli Council whose members are selected by the Orang Asli from the Orang Asli community. This also needs to be extended to the appointment of a special representative of Orang Asal in the state legislative assembly and parliament who are also to be chosen by the Orang Asal.
47. That the establishment of an Orang Asli Native Court in Peninsular Malaysia to look into the legal matters pertaining to the Orang Asli customary laws. In this respect marriages solemnised by the Tok Batin/Penghulu or their adat council should be legally recognised in Malaysia.
48. That, since the Orang Asal have suffered from injustices by previous regimes and governments and have suffered prejudices since the formation of the government of Malaysia, the government must apologise for all these injustices and prejudices that has happened throughout the history of Malaysia.
49. The institutionalisation of a legislative mechanism that can end the discrimination against Orang Asal. The quality of education and health should be improved. The media should also change its perception and the negative image of the Orang Asal.
50. The simplification of the process for the application of identification documents and for Orang Asal to provide their details according to their wishes.
51. The establishment of the Royal Commission to investigate the fraudulent issuance of identification documents and citizenship to foreigners and the usage of the term “Bumiputera lain-lain” (“other Bumiputera”).

52. The repeal or amendment of all laws that violate, disrespect, or does not protect Orang Asal rights and which are in contradiction with the UNDRIP – such as the Orang Asli Act 134, and amendments to the Sarawak Land Code and the Sabah Land Acquisition Ordinance (Cap. 69).
53. The Federal Government should enact laws which give recognition and guarantees to the rights of the Orang Asal as provided for in the UNDRIP,

Signed by:

Adrian Lasimbang,
Chairman, JOAS

Indigenous Representative from Peninsular Malaysia

Indigenous Representative from Sabah

Indigenous Representative from Sarawak

13 Septembr 2008
Kuala Lumpur

THE ORANG ASLI AND THE UNDRIP

From Rhetoric to Recognition



This book looks at the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on the First Peoples of Peninsular Malaysia.

The UNDRIP ascribes many rights to the Orang Asli as an indigenous people. However, despite Malaysia adopting this declaration, there is an enormous gap between what the UNDRIP aspires for indigenous peoples and what the reality is for the Orang Asli.

This book traces the fate of the Orang Asli in history and explains how they came to be in their present situation. The topics include:

- The Orang Asli as a people
- Orang Asli rights in the Constitution and the courts
- The Government of Malaysia and the UNDRIP
- The issue of non-recognition as indigenous peoples
- Gaps in the application of the UNDRIP



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