The Orang Asli – Malaysia’s neglected Indigenes?

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(Paper presented at the Malaysia Institute, Australian National University, Canberra, 10 April 2019)
Who are the Orang Asli?

• Adopted exonym (in English, ‘aborigines’ or ‘aboriginal people’, literally translated ‘original people’) to describe first known inhabitants of Peninsular Malaysia - contrast ethnic Malays of Peninsular Malaysia and natives of Sabah and Sarawak
• Officially divided into 18 sub-ethnic groups consisting 3 larger groups
• Depending on sub-group or local community, traditional livelihood is diverse ranging from mobile foraging (lands and waters) to shifting/fixed cultivation
• Customary territories inextricably linked with Orang Asli well-being, identity and culture
• Population around 217,000 (0.6 per cent of Malaysian population)
• Religion - 20 per cent Muslim, 10 per cent Christian, 3.5 per cent Baha’i, close to 50 per cent traditional religions (JHOEA 2008)
Source: (Benjamin 2012)
Historical, constitutional and legal position (1)

• Prior to British intervention in the Malay states in the 19th century, many Orang Asli communities lived independently of the Malay sultanates (Carey 1976) despite some degree of interaction between some communities and the Malay sultanates (eg. tributary, trade, occasional, “slave raids” (Dentan et al 1998))

• The increase of British control over the Malay states and the subsequent forging of the Malay nation-state as dictated by the British saw the Orang Asli as dependents of Sultan notwithstanding relatively little access to or no formal assertion of sovereignty over the Orang Asli particularly those in the interior (Sullivan 1998)

• Orang Asli social organisation was perceived as ‘non-state oriented’ and too low on the scale to be considered as having sovereign/property rights (Sullivan 1998)

• Initial European ethnography placed Orang Asli at an early stage of ethnic Malay development in a ‘slow march towards a settled’ and ‘civilised existence’ through ‘absorption’ into the larger Malay community (Harper 1997)

• Nonetheless, the British colonial administrators adopted policies and laws for the protection and welfare of the Orang Asli in selected areas in response to subsequent concerns over the well-being of the Aborigines (Dentan et al 1998)
The relatively low number of Orang Asli, their weak economic position and their perceived backwardness and submissiveness contributed to colonial and local prejudices and preconceptions of their political, social and cultural inferiority.

Malayan emergency (1948-60) – threat of communist ideology among the Orang Asli.

Resultant protectionist and paternalistic pre-and post-independence legislation (Aboriginal Peoples Ordinance 1954 (now the Aboriginal Peoples Act 1954)) conferring extensive power and control over the Orang Asli, their traditional lands and lives.

Consequent “welfare” constitutional provisions including empowering government affirmative action for the “protection, well-being or advancement” or appointment of senators “capable of representing the interests of the aborigines in the Malayan and subsequently Malaysian Constitution (art 8(5)(c), art 45(2) item 16 of the Federal list).

Lower level of constitutional special privileges compared to ethnic Malays and natives of Sabah and Sarawak (Subramaniam 2013) (not covered by art 153 (reservation of quotas), no constitutional protection or jurisdiction over religion (art 4) and customs (eg. art 76(2), Ninth sch List IIA, art 150(6A), art 161(5)), land reservations (arts 89, 90, 161A(5)).
The APA – Governmental control (1)

• ‘Protection, advancement and well-being’ preamble

• Implementing federal agency (Department of Orang Asli Development (JAKOA)) headed by the Director-General of Orang Asli affairs (s 4)

• Protection against discrimination from entry into schools (s 17), forced adoption (s 18), loss of identity by religious conversion (s 3(3))

• Ultimate ministerial control over who is or is not Orang Asli (s 3(3)) and the appointment and removal of headman (s 16)

• The State Authority’s power to declare, vary and revoke aboriginal reservations (ss 6 and 7) and to relocate Orang Asli inhabiting other reserved areas (s 10)
The APA – Governmental control (2)

• Just compensation for loss of reservation land is discretionary (s 12) except for loss of fruit and rubber trees (s 11)
• Director General’s power in respect of Orang Asli land transactions (s 6(2)(iv) and 9)
• Government’s power to exclude entry or undesirable persons from aboriginal inhabited areas (ss 14 and 15) and to control information or activities through regulations (s 17)
• Enabler for control, denial of self-determination to chart destiny, platform for integrationist policies and potential abandonment of traditional culture, governmental control over lands and resources
Key socio-economic, land and other indicators

• Economically marginalisation (Poverty rate of 31.16 per cent (JAKOA 2016) compared to national poverty rate of 0.4 per cent (JPM 2016)
• Education – Inordinate primary school dropout rate of 30 per cent (JAKOA 2016) compared to less than 1 per cent nationally (The Sun 2017)
• Infrastructure – 20 per cent of officially recognised villages without clean water supply; 19 per cent without electricity supply (Bernama 2018)
• Land – no security of tenure and dismal performance in protection (only 32,779.37 of 134,440.99 hectares of officially recognised Orang Asli inhabited lands legally reserved under written law (Bernama 2018); estimation that figure only accounts 17 per cent of Orang Asli claimed lands (SUHAKAM 2013); lands can be degazetted without mandatory just compensation under written law)
• 60 years of poor stewardship in terms of achieving substantive equality for the Orang Asli despite possessing and extensive legal powers for their well-being
Orang Asli rights: Significant positive developments

- Over the past two decades, the Malaysian courts’ repeated recognition of the pre-existing rights of Orang Asli customary rights at common law as constitutional ‘property rights’ independent of statute (Adong bin Kuwau (1998) 2 MLJ 154; Sagong bin Tasi (2005) 6 MLJ 289; Mohamad bin Nohing (2015) 6 MLJ 527)

- The Malaysian courts’ recognition of the federal and state governments’ fiduciary duty to protect Orang Asli land rights and not to act inconsistently with such rights (Sagong bin Tasi (2005) 6 MLJ 289))

- Common law as applied by the Malaysian courts forms part of the law in Malaysia (art 160 Malaysian Constitution)

- Although not legally binding, Malaysia’s support of the United Nations Declaration on the Rights of Indigenous Peoples 2007 and recognition of Orang Asli as distinct peoples in UN documents

- Human Rights Commission of Malaysia (SUHAKAM)’s 2013 18 recommendations in respect of Orang Asli land rights – 17 approved by Malaysian cabinet in 2015 without any outcome yet
Government non-recognition of Orang Asli rights: A complex web of factors

• While Orang Asli issues (federal jurisdiction) inevitably concern land (individual state jurisdiction), there are sufficient constitutional powers and mechanisms for the federal government to intervene in land matters in respect of Orang Asli (see Malaysian Constitution arts 83, 91 and 76(4); Lim 1998; Subramaniam 2012)

• Challenges to achieving substantial equality for the Orang Asli go well beyond the law involve a complex web of factors (Subramaniam 2013; Subramaniam 2015), including:
  - Political, numerical and economical weakness of Orang Asli
  - Differentiated and contested constructions of Orang Asli indigeneity vis-a-vis Malays
  - Historical discrimination against Orang Asli
  - The extensive legal power possessed by the federal and state executives over Orang Asli and Orang Asli lands, and
  - The nation’s priorities for the utilisation of lands and resources
Possible optimism for the OA post-GE14 2018?

• The ruling Pakatan Harapan coalition’s pre-2018 election manifesto that expressly pledges to ‘preserve’ and ‘fight for’ Orang Asli lands

• Federal government court action against Kelantan state government for breach of fiduciary duty in respect of land (January 2019)

• First Orang Asli Member of Parliament elected in January 2019 Cameron Highlands by-election (candidate fielded by opposition)

• First Orang Asli appointed to National Economic Action Council (February 2019)

• Two Orang Asli senators in the Senate (March 2019)
A new beginning for the Orang Asli? (1)

- Increased visibility and airtime in public conversations and media space
- Increased political significance
- Significantly less conflation with ethnic Malays by government
- Observations from 2019 Cameron Highland by-election (21% Orang Asli voters) (reduction in traditional support for Barisan Nasional, loss for ruling Pakatan Harapan government, victory for Asli candidate – a more discerning Asli voter?) (Edwards 2019)
- Channels for governmental dialogue better
- No concrete action yet despite promises of institutional reform (including Department of Orang Asli Development (JAKOA) – particularly in respect of crucial Orang Asli customary land issue
- A real new beginning would go beyond institutional reform into a recalibration of broader economic priorities and socio-political mindsets and narratives
A new beginning for the Orang Asli? (2)

- The incorporation of sustainable models for the recognition of Orang Asli land and resource rights into land and resource utilisation laws, policies and practice rather than to view such recognition as a hindrance to economic prosperity

- Releasing the legal stranglehold over Orang Asli to enable Orang Asli self-determination

- Discard pitting the Orang Asli against ethnic Malays as more deserving of constitutional privileges (legally, their positions are mutually exclusive, cannot underestimate popular sensitivities, counter productive to Orang Asli cause)

- Undoing the historical prejudice and racism against Orang Asli who are viewed as backward and in need to live like the rest of mainstream Malaysia (paternalism v self-determination, benevolence v remedying injustice, marginalised peoples v peoples who have been marginalised)
A new beginning for the Orang Asli? (3)

• The ‘lack of political will’ challenge – Orang Asli are and will probably remain politically and numerically weak for the foreseeable future

• Favourable conditions that may ignite a ‘new beginning’ in terms of Orang Asli rights to substantive equality:
  - An Orang Asli community united in terms of desired rights
  - Political and public perception that Orang Asli votes and consequently rights matter
  - Public perception that Orang Asli issues are closely linked to national (possibly environmental/conservation) issues and require immediate action
  - A good and stable economic setting