

ETHNICITY, INDIGENEITY AND INDIGENOUS RIGHTS: THE 'ORANG ASLI' EXPERIENCE

YOGESWARAN SUBRAMANIAM*

Orang Asli, the heterogeneous Indigenous minority peoples of Peninsular Malaysia, continue to face formidable challenges in realising their rights as distinct Indigenous peoples despite being ascribed a measure of constitutional and statutory protection and recognition. With reference to the 2007 United Nations Declaration on the Rights of Indigenous People and international definitions of 'Indigenous peoples', this paper examines the influence of the externally constructed ethnic term 'Orang Asli' and its concomitant legal implications on the Orang Asli quest for indigeneity and the recognition of their rights as distinct Indigenous Peoples.

I INTRODUCTION

Orang Asli, the heterogeneous Indigenous minority of Peninsular Malaysia, continue to face formidable challenges in realising their rights as distinct Indigenous peoples despite being ascribed a measure of constitutional and statutory protection. These issues persist despite there being positive developments concerning Orang Asli rights, including: (1) the Malaysian courts' recognition of the Orang Asli and their customary land rights and the fiduciary obligations owed by the federal and state governments to Orang Asli;¹ and (2) the Malaysian government's support for the 2007 *United Nations Declaration on the Rights of Indigenous People ('UNDRIP')*.² Challenges to the full realisation of 'Indigenous' rights for the politically, numerically and economically inferior Orang Asli involve a complex web of factors, including, historical prejudices and power imbalances, disparate affirmative action laws and policies, differentiated and contested constructions of Orang Asli indigeneity vis-a-vis Malays, 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 towards achieving economic progress.³

This articles examines the impact of the term 'Orang Asli' on the Orang Asli struggle for the recognition of their rights as Indigenous peoples. The article begins with the origins of the term

* LLB (London), MBA (University of Southern Queensland), LLM (Malaya), PhD (University of New South Wales). Advocate and Solicitor of the High Court of Malaya and the Chairperson of the Malaysian Bar Council Committee on Orang Asli Rights, Associate member of the Centre for Malaysian Indigenous Studies, University of Malaya. The views expressed in this article are the author's personal views and do not necessarily reflect the institutions to which the author is affiliated.

¹ For an examination of the recognition of Orang Asli rights at common law see, eg, Yogeswaran Subramaniam, *Orang Asli Land Rights by UNDRIP Standards in Peninsular Malaysia: An Evaluation and Possible Reform* (PhD Thesis, University of New South Wales, 2012) ch 6, 7.

² *United Nations Declaration on the Rights of Indigenous People ('UNDRIP')* GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2007).

³ See Yogeswaran Subramaniam, 'Affirmative Action and Legal Recognition of Customary Land Rights in Peninsular Malaysia: The Orang Asli Experience' (2013) 17(1) *Australian Indigenous Law Review* 103, 111-6.

‘Orang Asli’ and the manner in which this exonym has gained acceptance by the persons categorised as such. Domestic legal definitions of the term ‘Orang Asli’ and their interplay with the implications that accompany the term are then analysed with a view to appraise the term’s potential resilience as a common name to describe a distinct group of Indigenous peoples fighting to maintain and develop its identity, ethnicity and well-being on its own terms. The article concludes with observations on the need to clarify the term ‘Orang Asli’ in a manner that sustains and respects the Orang Asli community as distinct Indigenous peoples.

II ORANG ASLI AS AN ‘INDIGENOUS’ GROUP

As a preliminary point, ‘Indigenous rights’ for the purposes of this article refer to international standards for Indigenous rights with a particular emphasis on international definitions of ‘Indigenous peoples’ and rights as encapsulated in the *UNDRIP*. In this article, the definitions of ‘Indigenous peoples’ in international fora are not treated as legally binding on Malaysia. As for *UNDRIP* ‘rights’, Malaysia has supported the *UNDRIP* both at the Human Rights Council and General Assembly levels of the United Nations. While the legal enforceability of the *UNDRIP* in Malaysia is debatable, the *UNDRIP* creates a genuine expectation and moral obligation on the state to work towards achieving the aspirations of the *UNDRIP* in the ‘spirit of partnership and mutual respect’.⁴ Accordingly, both international standards relating to the definitions of ‘Indigenous peoples’ and relevant *UNDRIP* provisions are utilised in this article as comparative guides rather than legally binding documents.

The Federation of Malaysia comprises of the peninsular land that separates the Straits of Malacca from the South China Sea and most of the northern quarter of the island of Borneo. Peninsular Malaysia consists of 11 states and two federal territories. The Borneo territories are made up of the states of Sabah and Sarawak and a federal territory. A distinction should be drawn between ethnic Malays, the natives of Sabah, the natives of Sarawak and the Orang Asli because these four ethnic groups are ascribed different definitions and treatment under Malaysian law compared to the Orang Asli.⁵ The natives of Sabah and Sarawak, who are indigenous to the Borneo Territories do not form the focus of this article.

A *Orang Asli and Malays Differentiated: An Overview*

Malays, explicitly defined in the *Federal Constitution (Malaysia)* (*‘Malaysian Constitution’*),⁶ are the numerically and politically dominant ethnic group in Peninsular Malaysia whose ancestors had formed kingdoms within the Malay Peninsula at the time of the first recorded European contact.⁷ On the other hand, the pan-tribal group known as Orang Asli are said to be the ‘first peoples’ of Peninsular Malaysia who have for the most part, maintained aspects of their respective languages, social organisations and spiritual values, culture and customs distinct from that of the Malays and

⁴ *UNDRIP* (2007) Preamble para 24.

⁵ These differences are elaborated in Part III(A) below.

⁶ See, eg, definition of ‘Malay’ (*Federal Constitution* (Malaysia), art 160(2)). For definition, see below n 36.

⁷ For an account of the history of these early Malay kingdoms, see Barbara Watson Andaya and Leonard Y Andaya, *A History of Malaysia* (Palgrave MacMillan, 2nd ed, 2001) chs 1–2.

mainstream society.⁸ Malays account for slightly more than 50 per cent of the Malaysian population while Orang Asli account for close to 0.7 per cent. The remainder of the population is mainly accounted for by ethnic Chinese (24 per cent) and Indians (7 per cent) and the natives of Sabah and Sarawak (11 per cent). The Orang Asli are also arguably the most impoverished and marginalised community in Malaysia. In 2009, 50 per cent of Orang Asli lived below the poverty level compared to the national average of 3.8 per cent.⁹ Orang Asli, who largely reside in rural areas, have a much higher poverty rate than the national rural poverty rate of 11.9 per cent.¹⁰ The distinction between Malays and Orang Asli and the concomitant implications for Orang Asli assertions of indigeneity are important aspects of this analysis which will be re-examined from various perspectives throughout this article.

B *The Term ‘Orang Asli’ and its Adoption*

In reality, ‘Orang Asli’ is a term used to collectively describe the 18 official and distinct ethnic aboriginal sub-groups in Peninsular Malaysia, classified into three broad categories of Negrito, Senoi and Aboriginal Malay.¹¹ Literally translated, the term means ‘natural people’ and is now also taken to mean ‘original’ or ‘first’ people.¹² Similar to other Indigenous communities worldwide, many Orang Asli struggle to maintain their distinctive culture and identity which are inextricably linked with their close physical, economic, social, cultural, territorial and spiritual relationship with the environment.¹³

The Malaysian label ‘Orang Asli’ was intended as an etymologically responsible translation for the existing term ‘aborigine’ during the Malayan communist insurgency (known locally as the Malayan Emergency) in the 1950s¹⁴ when members falling within this category of people, particularly those residing in the inland forests of Peninsular Malaysia, were seen as communist sympathisers. For the longest time, the then prevailing official term ‘aborigine’ (still present in the English version of the *Malaysian Constitution* and written laws) and other Malay terms such as ‘Sakai’ used to describe this heterogeneous population had been viewed as derogatory.¹⁵ Such

⁸ Robert Knox Dentan et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, 1997) 10–12.

⁹ Economic Planning Unit, Prime Minister’s Department, *Tenth Malaysia Plan 2011–2015* (Malaysia, 2010) 149, 151, 162.

¹⁰ Economic Planning Unit, Prime Minister’s Department, *Ninth Malaysia Plan 2006–2010* (Malaysia, 2006) 358.

¹¹ For a summary of these sub-groups, their respective languages, location and traditional activities, see eg, Subramaniam, above n 1, 20–3.

¹² See Leonard Y Andaya, ‘Orang Asli and the Melayu in the History of the Malay Peninsula’ (2002) 75(1) *Journal of the Malaysian Branch of the Royal Asiatic Society* 23, 25; Iskandar Carey, *Orang Asli: The Aboriginal Tribes of Peninsular Malaysia* (Oxford University Press, 1976) 5.

¹³ Anthony Williams-Hunt, ‘Land Conflicts: Orang Asli Ancestral Laws and State Policies’ in Razha Rashid (ed), *Indigenous Minorities of Peninsular Malaysia: Selected Issues and Ethnographies* (Intersocietal and Scientific [INAS], 1995) 35–6.

¹⁴ Geoffrey Benjamin, ‘On Being Tribal in the Malay World’ in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Institute of Southeast Asian Studies, 2002) 17.

¹⁵ See, eg, Alberto Gomes, ‘Ethnicisation of the Orang Asli: A Case Study of the Semai’ in Lim Teck Ghee, Alberto Gomes and Azly Rahman (eds), *Multiethnic Malaysia: Past, Present and Future* (SIRD and MiDAS, 2009) 298–9, 310–12; Marie-Andree Couillard, ‘The Malays and the “Sakai”: Some Comments on Their Social Relations in the Malay Peninsula’ (1984) 2(1) *Kajian Malaysia* 81.

terminology would certainly have not aided efforts to win over the hearts and minds of the aboriginal community in counter insurgency efforts. After all, the immediate competition, namely the Malayan Communist Party had already started to utilise the sensitised term ‘*Orang Asal*’ (a better Malay translation for ‘original people’) when referring to the aboriginal community.¹⁶ The federal government’s adoption of the unused albeit less accurate variant ‘Orang Asli’ instead of ‘*Orang Asal*’ was nonetheless perceived as a genuine initiative to acknowledge the existence of ‘first people’ in the newly-formed Federation of Malaya. However, the use of a politically correct term to officially describe the Orang Asli did not negate the fact that Orang Asli homogeneity was more ‘a creation of non-Orang Asli perceptions and ideological impositions’¹⁷ rather than self-determined, suggesting an inherent patronising attitude towards the Orang Asli, the implications of which will be revisited in Part IV(B) below.

Notwithstanding its external origin, ‘Orang Asli’ has since gained acceptance as an autonym by the aboriginal community as a result of official and popular use of the term. Internally, Orang Asli acknowledgment and claims as an ethnic grouping were brought about by: (1) a combination of increased incidences of social stress and greater intra-community communication;¹⁸ and (2) shared experiences.¹⁹ Difficulties faced by the Orang Asli in their resistance to ethnic assimilation, fight for customary land rights, general lack of economic resources and minimal political clout have necessitated Orang Asli leaders having to speak about themselves through singular voices while being aware of their own plurality, internal fractures and unresolved differences.²⁰

The resultant need for Orang Asli to distinguish themselves as a group, which coincided with the domestic environment in Malaysia where race or ethnicity plays a significant role in politics and indeed everyday life,²¹ created an inherently political concept of Orang Asli identity aimed at intra-national and more recently,²² international relations. Improvements and access to digital technology have enabled Orang Asli activists to articulate and share ideas and collaborate with the natives of Sabah and Sarawak to form common rights-advocacy platforms, such as the *Jaringan Orang Asal SeMalaysia*.²³ Digital technology accessibility also aids Orang Asli activists to enlist in transnational networks and more broadly, the global Indigenous rights movement. In sum, the

¹⁶ Gomes, above n 15, 299; Tan Chee-Beng, ‘Ethnic Groups, Ethnogenesis and Ethnic Identities’ (Paper presented at ‘Meeting Point of Cultures’ International Symposium, Macau, 3-7 November 1993) 14.

¹⁷ Colin Nicholas, ‘Organizing Orang Asli Identity’ in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Institute of Southeast Asian Studies, 2002) 119.

¹⁸ Ibid 126.

¹⁹ Carey, above n 12, 6.

²⁰ Alice M Nah, ‘(Re)Mapping Indigenous “Race”/Place in Post-Colonial Peninsular Malaysia’ (2006) 88 Series B (3) *Geografiska Annaler* 285, 287.

²¹ Gomes, above n 15, 315–16; Alice M Nah, *Negotiating Orang Asli Identity in Postcolonial Malaysia* (Master’s Thesis, National University of Singapore, 2004) 43.

²² Nicholas, above n 17, 126.

²³ See Karen Heikkila and Anthony Williams-Hunt, ‘Spaces of Self-Determination: Divining Contemporary Expressions of Indigeneity from Orang Asli Blogs’ in Kirk Endicott (ed), *Malaysia’s ‘Original People’: Past, Present and Future of the Orang Asli* (NUS, 2015) (forthcoming); Subramaniam, above n 1, 70.

official use of the term ‘Orang Asli’ provides a recognisable face to this heterogeneous aboriginal community in their external communications.²⁴

To their credit, the Orang Asli have enjoyed relative success in using the label foisted upon them to assert and advocate their rights as Indigenous peoples. Some of the more obvious accomplishments include the following:

- (1) The Malaysian courts’ acknowledgment of the distinct ethnic identity of Orang Asli (or in English versions of Malaysian written law, ‘aborigines’) vis-a-vis other ethnic groups;²⁵
- (2) The Malaysian courts’ recognition of Orang Asli customary land rights and title at common law;²⁶
- (3) The Human Rights Commission of Malaysia (‘SUHAKAM’)’s consistent position that Orang Asli are Indigenous peoples;²⁷
- (4) The Malaysian Government’s recent acknowledgment that Orang Asli are Indigenous peoples during its United Nations Universal Periodic Review (‘UPR’).²⁸

C *Orang Asli as ‘Indigenous Peoples’*

‘Indigeneity’ for the purposes of this article is defined with reference to the common characteristics of ‘Indigenous peoples’ described in international fora.²⁹ Although some of these definitions may

²⁴ Adopting such flexible strategies in adapting to the changing environment is not a new phenomenon for Orang Asli. The historical resilience of Orang Asli in adopting to the changing environment in Malaysia has been observed by other commentators. See, eg, Kirk Endicott, ‘The Batek of Malaysia’ in Leslie E Sponsel (ed), *Endangered Peoples of Southeast and East Asia: Struggles to Survive and Thrive* (Greenwood Press, 2000) 114–18; Wazir Jahan Karim, ‘Transformations in Ma“Betise” Economics and Ideology: Recurrent Themes of Nomadism’ in Razha Rashid (ed), *Indigenous Minorities of Peninsular Malaysia: Selected Issues and Ethnographies* (INAS, 1995) 109; Alberto G Gomes, ‘The Semai: The Making of an Ethnic Group in South East Asia’ in A Terry Rambo, Kathleen Gillogly and Karl L Hutterer (eds), *Ethnic Diversity and the Control of Natural Resources in Southeast Asia* (Center for South and Southeast Asian Studies, University of Michigan, 1988) 99.

²⁵ See *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591 (High Court of Malaya).

²⁶ For an analysis of the doctrine of Orang Asli customary land rights at common law, see, eg, Subramaniam, above n 1, chs 6, 7. See also Human Rights Commission of Malaysia (SUHAKAM), *Report of the National Inquiry into the Land Rights of Indigenous Peoples* (2013) 76–80.

²⁷ See SUHAKAM, above n 26, ch 2.

²⁸ See below n 32 and accompanying text.

²⁹ For international definitions of ‘Indigenous peoples’ see, eg, Jose R Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7/Add.4 (1986) paras 378–82; Commission on Human Rights Working Group on Indigenous Peoples, *Working Paper by the Chairperson-Rapporteur, Mrs Erica-Irene A Daes, on the Concept of ‘Indigenous People’* UN Doc E/CN.4/Sub.2/AC.4/1996/2 (1996) 22; World Bank, *Operation Manual OP 4.10* (July 2005) para 4; *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* ILO C 169 (Adopted 27 June 1989, entered into force 5 September 1991) art 1. It must be acknowledged that Benjamin views the use of the concept of ‘Indigeneity’ or ‘Indigenesness’ in Asia as inherently political and consequently susceptible to state manipulation and sociological inaccuracies. However, Benjamin acknowledges that the concept of ‘Indigeneity’ as applied in international fora is commonly

be said to over-emphasise ‘criterial’ properties for indigeneity (meaning classifications that focus on inherent criteria, or conditions, that enable identification of the ‘Indigenous’ as a global ‘kind’), these definitions equally display ‘relational’ tendencies that ground indigeneity in relations between the ‘indigenous’ and their ‘others including the state’.³⁰

Domestic literature reveals that there is little doubt that Orang Asli fulfil all the common characteristics for ‘Indigenous peoples’ in various international fora including the following:

- historical continuity since before pre-colonial societies;
- marginalisation;
- self-identification and distinctiveness from the dominant society;
- use of languages distinct from the national language;
- determination to preserve rights and identity;
- intricate relationship with lands, territories and region; and
- the presence of customary, social and political institutions.³¹

In 2013, the Malaysian government’s UPR National Report to the United Nations explicitly identified the ‘relatively small number of Indigenous peoples’ in Peninsular Malaysia as Orang Asli.³²

Notwithstanding the fact that Orang Asli may well fulfill international definitions for ‘Indigenous peoples’, ‘Indigeneity’ as constructed domestically has its own contextualised meaning. Uncertainties still loom in domestic legislation and discourse as to whether Orang Asli claiming Indigenous rights as developed in the international fora are deserving of these rights. For instance, the federal and state governments contest Orang Asli customary land rights by alleging, amongst other things, that the Orang Asli claimants no longer lead an ‘aboriginal way of life’.³³ Two ex-Prime Ministers of Malaysia have also justified Malays as being ‘Indigenous’ and the ‘definitive people’ of Peninsular Malaysia over the ‘primitive’ Orang Asli because the latter did not form

regarded as most deserving of attention and support internationally. See for example, Geoffrey Benjamin, ‘Who Gets to Be Called “Indigenous”, And Why?’ (Keynote address (10 April 2015) at International Conference on Access to Justice for Indigenous Peoples Centre for Malaysian Indigenous Studies (CMIS) and Faculty of Law, University of Malaya, 9-11 April 2015) 3-4.

³⁰ For further analysis of the ‘criterial’ and ‘relational’ emphasis of international definitions for ‘Indigeneity’, see Francesca Merlan, ‘Indigeneity: Global and Local’ (2009) 50(3) *Current Anthropology* 303, 305–6.

³¹ See SUHAKAM, above n 26, 10–11; Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: From Rhetoric to Recognition* (Center for Orang Asli Concerns, 2010). For other work acknowledging Orang Asli as Indigenous people under international law see, eg, Subramaniam, above n 1, 42–4; Ruhaida Nordin et al, ‘Hak Penentuan Nasib Sendiri Orang Asal: Kajian Kes Orang Asli di Kampung Sungai Bumbun, Pulau Carey [Self-Determination of Indigenous Peoples: A Case Study of the Orang Asli at Kampung Sungai Bumbun, Carey Island] (2013) 25(1) *Kanun* 43 (author’s trans).

³² Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 the Annex to Human Rights Council Resolution 16/21 (Malaysia)*, UNGA Doc A/HRC/WG.6/17/MYS (6 August 2013) para 67.

³³ See, eg, *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591, 603–10 (High Court of Malaya).

‘effective governments’.³⁴ The combined impact of the vulnerability of the current legal definition of ‘Orang Asli’ and these definitional issues are examined in Parts III and IV below.

III THE LEGAL DEFINITION OF ‘ORANG ASLI’

This Part analyses the constitutional and statutory provisions that are relevant to the domestic identification of Orang Asli as a distinct ethnic group.

A *Constitutional Provisions*

This section compares specific constitutional provisions concerning the recognition and protection of Orang Asli rights and the constitutional provisions relating to Malay and Sabah and Sarawak native rights respectively. The comparison does not suggest that Malays and the heterogeneous native groups of Sabah and Sarawak are not marginalised in their own particular way but contends that Orang Asli have relatively less explicit constitutional ‘rights’ if compared to Malays natives of Sabah and Sarawak.

The word ‘Indigenous’ is not contained in the *Malaysian Constitution*. Constitutionally, Orang Asli (‘aborigines’ in the English version of the *Malaysian Constitution*),³⁵ ethnic Malays,³⁶ natives of Sabah,³⁷ and natives of Sarawak³⁸ are afforded varying degrees of rights and privileges by virtue of their ethnicity. ‘Ethnicity’ here is defined by the differing socio-religious practices, cultural practices, racial and ancestral criteria used to identify these four groups as set out in the written laws of Malaysia. While reconciling the traditional distinction between ‘ethnicity’ (culturally-focused) and ‘race’ (biologically-focused) in these criteria may be problematic, it must be accepted that conflating race and ethnicity is not an uncommon practice in Malaysia.³⁹ Whether or not this conflation is theoretically correct, race and ethnicity should not be regarded as separate

³⁴ See Rusalina Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia* (PhD Thesis, Harvard University, 2008) 160–2; Dentan et al, above n 8, 19–22.

³⁵ The definition of an Orang Asli is examined at the end of this part and in Part III(B).

³⁶ A ‘Malay’ means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and: (a) was before *Merdeka* Day (31 August 1957) born in Malaya or Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of that person. See art 160(2) *Malaysian Constitution*.

³⁷ Article 161A(6)(b) of the *Malaysian Constitution* provides that a native in relation to Sabah is a person who is a citizen, is the child or grandchild of a person of a race Indigenous to Sabah, and was born (whether on or after Malaysia Day [16 September 1963] or not) either in Sabah or to a father domiciled in Sabah at the time of birth.

³⁸ Article 161A(6)(a) of the *Malaysian Constitution* provides that a native in relation to Sarawak is a person who is a citizen, is the grandchild of a person of the Bukitan, Bisayah, Dusun, Sea Dayak, Land Dayak, Kadayan, Kalabit, Kayan, Kenyah [including Subup and Sipeng], Kajang [including Sekapan, Kejaman, Lahanan, Punan, Tanjong and Kanowit], Lugat, Lisum, Malay, Melano, Murut, Penan, Sian, Tagal, Tabun and Ubit race or is of mixed blood deriving exclusively from these races.

³⁹ Judith Nagata, ‘What is a Malay? Situational Selection of Ethnic Identity in a Plural Society’ (1974) 1(2) *American Ethnologist* 331, 347.

autonomous categories,⁴⁰ more so in the current analysis given that the legal definitions of natives of Sabah and Sarawak and Orang Asli include ‘race’ criteria.⁴¹

The distinct special rights and privileges granted to these four ethnic groups were a result of the constitutional arrangements for the protection of those considered to be ‘indigenous’ or ‘native’ during the decolonisation process and the formation of the Federation of Malaya in 1957 and subsequently, the Federation of Malaysia (with Sabah and Sarawak) in 1963. In Peninsular Malaysia, Malay ‘ethnicity’ and ‘indigeneity’ was not innate but rather learned or constructed as a result of intersecting historical, cultural and social factors.⁴² The construction of Malays as ‘Indigenous’ to Peninsular Malaysia and its impact on Orang Asli indigeneity is further explored in Part IV below.

Article 153 of the *Malaysian Constitution* obliges the *Yang Dipertuan Agong* to safeguard the ‘special position of the Malays and natives of any of the States of Sabah and Sarawak’⁴³ while article 161A extends to the natives of Sabah and Sarawak the same ‘special privileges’ as the Malays.⁴⁴ Any amendment to article 153 can only take place with a two-thirds majority of both houses of Parliament and the consent of the Conference of Rulers of the Malay States.⁴⁵ This special position includes reservations of positions in the public service, scholarships and other educational and training privileges and licences for the operation of any trade or business required by federal law.⁴⁶ Regarding land, Malay reservations created immediately before Independence Day (31 August 1957) continue to be in force unless a state enactment is passed to the contrary by a two-thirds majority in the relevant state legislative assembly and both houses of Parliament.⁴⁷

The Orang Asli do not enjoy equivalent constitutional rights but instead, are dependent on the federal government for their welfare. Item 16 of the ninth schedule of list I of the *Malaysian*

⁴⁰ Ramon Grosfoguel, ‘Race and Ethnicity or Racialized Ethnicities? Identities with a Global Coloniality’ (2004) *Ethnicities* 315, 315.

⁴¹ For definitions of natives of Sabah and natives of Sarawak, see above n 37 and 38 respectively. For the definition of ‘Orang Asli’, see Part III(B) below.

⁴² See, eg, A B Shamsul, ‘A History of an Identity, an Identity of a History: The Idea and Practice of “Malayness” in Malaysia Reconsidered’ (2001) 32(3) *Journal of Southeast Asian Studies* 355; Nah, above n 20.

⁴³ This is the domestic equivalent of the ‘King’ in Malaysia who is appointed on a rotational basis every five years by and from the Council of Rulers of the States in Peninsular Malaysia that have monarchs as a head of state, namely, Perlis, Kedah, Kelantan, Perak, Terengganu, Pahang, Selangor, Negeri Sembilan and Johor. See *Federal Constitution (Malaysia)* arts 33–8 schs 3, 5.

⁴⁴ This article was introduced when Sabah, Sarawak, the Federation of Malaya and Singapore formed Malaysia in 1963.

⁴⁵ See *Federal Constitution (Malaysia)* arts 159(3), 159(5) respectively.

⁴⁶ *Ibid* art 153(2).

⁴⁷ *Ibid* art 89(1). Unlike Indigenous traditional land from a common law native title perspective, ‘Malay reservations’ are not limited to prior and continuous occupation of or the maintenance of a traditional connection with a specific tract of land by an Indigenous community. Malay reservations were created pursuant to colonial state legislation passed towards preventing the overall loss of lands within such states to non-Malays (which currently include Orang Asli) and could also be founded upon executive declarations over lands not necessarily occupied, used or enjoyed by Malays. It is pertinent to note that the British-mooted Malay reservation system and its implementation has been criticised for being outmoded and failing to sufficiently address Malay interests and the evolving economic needs of Malay society, see, eg, Bashiran Begum Mobarak Ali, ‘The Federal Constitution — A Shield for the Protection of Malay Reservation Policy’ (2008) *The Law Review* 53.

Constitution specifically empowers the federal government to legislate for the welfare of Orang Asli.⁴⁸ Article 8(1) is the equal protection clause of the *Malaysian Constitution* and states ‘all persons are equal before the law and entitled to equal protection of the law’. Article 8(5)(c) of the *Malaysian Constitution* permits laws ‘for the protection, well-being or advancement’ of Orang Asli ‘including, the reservation of land’ or the ‘reservation to Orang Asli of a reasonable proportion of suitable positions in the public service’ without offending art 8(1). Despite enabling positive discrimination laws in favour of Orang Asli, these constitutional provisions do not *expressly* oblige the federal government⁴⁹ to safeguard the position of the Orang Asli. In contrast, the state is *obliged* to safeguard the privileged status of the Malays and natives of Sabah and Sarawak on a potentially wider scope of protections.⁵⁰ Further, Malays and natives of Sabah and Sarawak have constitutional protection against laws that touch upon their respective customs.⁵¹ Islam, the religion of all Malays (as defined in the *Malaysian Constitution*),⁵² is the official religion of Malaysia and is constitutionally protected.⁵³ The Malay language is the national language.⁵⁴ Orang Asli have no equivalent protection with respect to their languages, laws, traditions, customs and institutions.

Accordingly, the status of Orang Asli under the *Malaysian Constitution* must be distinguished from that of Malays and the natives of Sabah and Sarawak as there are no mandatory constitutional provisions for their protection. Rather, the constitutional provisions permitting affirmative action in favour of Orang Asli suggest that Orang Asli are an ethnic group incapable of managing their own affairs and in need of state intervention for their protection, well-being and advancement.⁵⁵ In respect of who is an Orang Asli under the *Malaysian Constitution*, art 160(2) of the *Malaysian Constitution* merely states an aborigine to mean an ‘aborigine of the Malay Peninsula’. It is therefore pertinent to examine the definition of an Orang Asli or ‘aborigine’ under the relevant legislation, namely, the *Aboriginal Peoples Act 1954* (‘APA’).

B The APA

The *APA* is the principal statute governing the administration and rights of Orang Asli. The preamble describes the *APA* as an act for the protection, well-being and advancement of the Orang Asli. However, the *APA* also serves to secure and perpetuate control over Orang Asli and their lands and resources. As will be observed, the *APA*’s paternalistic orientation denies Orang Asli

⁴⁸ Article 74(1) of the *Malaysian Constitution* empowers the federal government to legislate for matters enumerated in the Federal List (sch 9 list I) and Concurrent List (sch 9 list III).

⁴⁹ However, the Malaysian courts have held that the federal and state governments owe Orang Asli a fiduciary duty to protect the welfare of the Orang Asli, including their lands. The findings were supported by constitutional and statutory provisions and other sources. See *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591, 618–19 (High Court of Malaya). For an overview of the fiduciary duty owed to the Orang Asli, see Subramaniam, above n 3, 109.

⁵⁰ See above n 43–7, and accompanying text.

⁵¹ *Federal Constitution (Malaysia)* arts 76(2), 150(6A). There are also constitutional rights for the resolution of such disputes by the Syariah courts (see *Federal Constitution (Malaysia)* art 121(1A)). In respect of native courts for the natives of Sabah and Sarawak, see *Federal Constitution (Malaysia)* art 95B(1)(a) and sch 9 list IIA item 13.

⁵² For a definition of ‘Malay’ under art 160(2) of the *Federal Constitution (Malaysia)*, see above n 36.

⁵³ *Federal Constitution (Malaysia)* arts 3(1), 76(2).

⁵⁴ *Ibid* art 152.

⁵⁵ These matters are revisited in Section IV below.

self-determination over their identity, institutions, lands and lives, all important aspects of the *UNDRIP*.⁵⁶

Promulgated when: (1) Indigenous or tribal communities were generally viewed as populations in need of protection pending their advancement and integration into mainstream society, and (2) during the Malayan Emergency where many Orang Asli were seen as communist sympathisers, the *APA* confers extensive powers on the federal and state executive arms of government. Some of the more questionable powers include the powers to:

- (i) determine whether a person is an Orang Asli;⁵⁷
- (ii) determine the appointment and removal of Orang Asli headmen known as *Batin*;⁵⁸
- (iii) exclude undesirable persons from any Orang Asli inhabited areas;⁵⁹ and
- (iv) restrict any written, printed, or photographic matter deemed harmful by the state.⁶⁰

In relation to land, the provisions of the *APA* grant to Orang Asli a limited form of state-controlled occupancy and use of Orang Asli lands and resources.⁶¹

The extensive power that the federal executive possesses over the appointment and removal of Orang Asli headmen or *Batin* under s 16 pays is arguably incompatible with the right of Indigenous peoples ‘to maintain and develop their own indigenous decision-making institutions’.⁶² These powers pay scant regard to many other forms of traditional and communal Orang Asli decision-making institutions and processes. The *Batin* or headman concept imposed in the *APA* is not common to all Orang Asli ethnic groups. Examples of traditional institutions include the *Mairaknak* (Elders consultation council) in the case of the *West Semai* sub-group, *Lemaga Adat* (Customary Council) in the case of *Jah Hut* and *Lembaga Adat* (Customary Council) in the case

⁵⁶ Article 3 of the *UNDRIP* provides that ‘Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’. Article 33.1 states that ‘Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions’. In respect of Indigenous institutions, art 5 states ‘Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions’. As for lands, art 32.1 provides for the right of Indigenous peoples to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

⁵⁷ *Aboriginal Peoples Act 1954* (Malaysia) (*APA*) s 3(3).

⁵⁸ *APA* s 16.

⁵⁹ *APA* ss 14, 15.

⁶⁰ *APA* s 19. For commentary on the potential legal impact of these powers on the Orang Asli see, eg, Yogeswaran Subramaniam, ‘Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia’ (2011) 19(2) *Waikato Law Review* 44, 45–7, 49–50, 54–6.

⁶¹ For further analysis on these rights and the Orang Asli land rights problem, see Subramaniam, above n 1, 155–60, 166–170; SUHAKAM, above n 26, 32–3, 61–3, 130–53. The common law recognition of Orang Asli customary land rights is yet to prompt any legislative or executive action to recognise Orang Asli customary land rights. See Subramaniam, above n 1 and accompanying text.

⁶² See *UNDRIP* art 18.

of the *Temuan*. The inordinate power that the state has over the headman may also compromise Orang Asli interests.⁶³

Unsurprisingly, the scope of who falls within the definition of ‘Orang Asli’ under the *APA* also manifests such paternalistic and discriminatory tendencies. Section 3(1) of *APA* defines an aborigine (Orang Asli) to mean:

- (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, 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.

Section 3(3) empowers the Minister having charge of aboriginal affairs to determine whether any person is an Orang Asli. Under s 2, an ‘Aboriginal ethnic group’ means a distinct tribal division of aborigines as characterised by culture, language or social organisation and includes any group that the State Authority may, by order, declare to be an aboriginal ethnic group.⁶⁴

The main issue with the definition of an ‘aborigine’ or an ‘aboriginal ethnic group’ is that it is inconsistent with the right of Indigenous peoples to determine their own identity or membership.⁶⁵ Rather than the Orang Asli community itself, the federal minister having charge of Orang Asli Affairs, namely the Minister for Rural and Regional Development, possesses the power to determine if a person fulfils the criteria for being an Orang Asli laid down in s 3(1). The Minister has never been an Orang Asli. Such extensive ministerial power does not apply to Malays or natives of Sabah and Sarawak. The power to ‘create’ an aboriginal ethnic group is vested in the State Authority instead of the Orang Asli. Compounding matters, legislative action by way of a simple majority of both houses of Parliament can change who constitutes an ‘aborigine’ or an ‘Aboriginal ethnic group’.⁶⁶ Orang Asli are particularly vulnerable to such amendments given that they constitute less than 1 per cent of the Malaysian population. Perhaps understandable during the communist insurgency when there were concerns over the infiltration of communist insurgents and ideologies into remote Orang Asli communities,⁶⁷ it is doubtful if the federal and state

⁶³ For a critique on the selection and removal of Orang Asli headmen see, eg, Nicholas, Engi and Teh, above n 31, 114–5.

⁶⁴ ‘State Authority’, means the Ruler or Governor of the individual state in Peninsular Malaysia, see *National Land Code 1965* (NLC) s 5, or as delegated by law.

⁶⁵ For example, art 33.1 of the *UNDRIP* states ‘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’.

⁶⁶ See *Federal Constitution (Malaysia)* art 62(3).

⁶⁷ The communist insurgency ended in 1989 with the signing of a peace accord between the Communist Party of Malaysia and the Malaysian Government.

governments still need such extensive legal control over the composition of the Orang Asli community.

Gomes suggests that s 3(1) is fraught with ambiguities and false assumptions because:

- (1) the terms ‘aboriginal’ and ‘aborigines’ make an *a priori* assumption of the existence of people deemed to be aboriginal without clarifying the criteria for such aboriginal status;
- (2) there is a presumption of patrilineal affiliation which is clearly an aspect of Islamic Malay culture but not common to many of the Orang Asli communities;
- (3) the terms ‘way of life’ and ‘race’ are problematic as the former is too open-ended while the latter has been rejected in conventional social science as a valid way of defining humans.⁶⁸

Although there have been judicial pronouncements which have: (1) demonstrated a liberal approach in determining whether Orang Asli customary land rights claimants fulfilled the definitions of an ‘aborigine’ and ‘aboriginal ethnic group’ as contained in ss 3(1) and 2 respectively;⁶⁹ and (2) advocated a liberal approach in interpreting the provisions of the *APA*,⁷⁰ there is no guarantee that the federal executive or for that matter, the courts will interpret this provision liberally in the future. Terms such as ‘aboriginal’, ‘way of life’ and ‘social organisation’, if interpreted narrowly or in a manner intolerant of changes in aboriginal customs, traditions, society and culture,⁷¹ may result in a person or community losing legal status as an Orang Asli. It is remarkable that the legal definition of ‘Orang Asli’ remains pliable despite executive and judicial recognition of Orang Asli as a distinct ethnic group,⁷² suggesting that the issues that Orang Asli face in realising their rights as Indigenous peoples go well beyond legal considerations.

IV IMPLICATIONS FOR THE ADVOCACY OF INDIGENOUS RIGHTS

The legal term ‘Orang Asli’, which effectively places Orang Asli identity, community leadership and ethnicity under the control of the state, potentially functions to reinforce existing challenges

⁶⁸ Gomes, ‘Ethnicisation of the Orang Asli’ above n 15, 313–14.

⁶⁹ See, eg, *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591, 606–7 (High Court of Malaya). For commentary, see Subramaniam, above n 1, 246–7, 264–72.

⁷⁰ In *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289, 304; the Court of Appeal held that the *APA* was an Act ‘to protect and uplift the First Peoples of this country’. The Court further held that the *APA* was ‘fundamentally a human rights statute ... giving it pre-eminence over ordinary legislation’. Accordingly, the *APA* must ‘receive a broad and liberal interpretation’.

⁷¹ For example, the level of change, adaptation and interruption of Aboriginal laws and customs allowable has worked to defeat native title claims in Australia. For commentary see, eg, Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008); Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 74–81; Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 348–51.

⁷² See eg, above n 14–16 and 28 and accompanying text; See, eg, *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591, 621 (High Court of Malaya); *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289, 304 (Court of Appeal).

that Orang Asli face in finding their rightful place as distinct ‘Indigenous peoples’ in a Malay-dominated multicultural society in pursuit of economic wealth. These challenges are examined under the following broad and related categories, namely:

- Contested perspectives of indigeneity in Peninsular Malaysia;
- Historical discrimination against Orang Asli; and
- Indigenous rights as a hindrance to economic prosperity.

A *Contested Perspectives of Indigeneity in Peninsular Malaysia*

Although written law has regarded the Orang Asli and Malays as legally distinct ethnic groups throughout the Malay Peninsula from at least 1948,⁷³ Orang Asli indigeneity vis-a-vis Malays is a much more complex proposition domestically.

Malay claims to constitutional privileges were founded upon their ‘indigeneness’,⁷⁴ meaning: (1) the British colonial administration’s prior acknowledgment of the Malay sultanates’ institutions and sovereignty in and over the Malay Peninsula; and (2) the administration’s construction and perpetuation of ‘Malay’ ethnic identity.⁷⁵ The recognition of Malay ethnic identity ‘was a

⁷³ See Part III(A) above. During the formation of the Federation of Malaya prior to its independence from British indirect rule, individual state constitutions promulgated or supplemented in 1948 expressly distinguished between a ‘Malay’ and a person belonging ‘to an aboriginal tribe’ when defining whether a person was a ‘subject of the Ruler’ of an individual state within the Federation. See, eg, *The Laws of the Constitution of Kedah 1948* (Kedah, Malaysia) art IV(1); *The Laws of the Constitution of Kelantan 1948* (Kelantan, Malaysia) art IV(1); *The Laws of the Constitution of Perak 1948* (Perak, Malaysia) art IV(1); *The Laws of the Constitution of Negri Sembilan 1948* (Negeri Sembilan, Malaysia) art IV(1); *The Laws of the Constitution of Pahang 1948* (Pahang, Malaysia) art IV(1); *The Laws of the Constitution of Selangor 1948* (Selangor, Malaysia); *Supplement to the Laws of the Constitution of 1911* (Terengganu, Malaysia) art II(1); *Supplement to the Constitution of the State of Johore 1948* (Johor, Malaysia) art II(1). Subsequent pre-independence state nationality laws also expressly distinguished between a ‘Malay’ and a person belonging ‘to any aboriginal tribes of Malaya’ when defining whether a person was a ‘subject of the Ruler’ of an individual state within the Federation of Malaya. See, eg, *Kedah Nationality Enactment, 1371 (1952)* (Kedah, Malaysia) ss 4(a) and (b); *Kelantan Nationality Enactment, 1952* (Kelantan, Malaysia) ss 4(a) and (b); *Perak Nationality Enactment, 1952* (Perak, Malaysia) ss 4(a) and (b); *Negeri Sembilan Nationality Enactment, 1952* (Negeri Sembilan, Malaysia) ss 4(a) and (b); *Pahang Nationality Enactment, 1952* (Pahang, Malaysia) ss 4(a) and (b); *Selangor Nationality Enactment, 1952* (Selangor, Malaysia) s 4(a) and (b); *Trengganu Nationality Enactment, 1952* (Terengganu, Malaysia) ss 4(a) and (b); *Johore Nationality Enactment, 1952* (Johor, Malaysia) ss 4(a) and (b).

⁷⁴ ‘Indigeneness’ is the root of the special position of the Malays today. See Susan McLellan ‘Orang Asli: An Analysis of State Penetration and Development Plans on Aboriginal Peoples of West Malaysia’ (1985) 19(2) *Review of Indonesian And Malaysian Affairs* 80, 83. See also Subramaniam, above n 3, 111–12.

⁷⁵ In respect of ‘construction’ in the context of Malay ethnic identity, see above n 42, and accompanying text. It must further be acknowledged that the term ‘Malay’ contained in the *Malaysian Constitution* (see above n 36) is synonymous with professing the religion Islam and defined by a socio-religious practice rather than blood ties and ancestry. Consequently, the popular Malay phrase ‘*masuk Melayu*’ (translated, ‘becoming Malay’) is a possibility for non-Malays who fulfil the criteria of a ‘Malay’ under art 160(2) of the *Malaysian Constitution*. This concept is by no means a recent phenomenon. After the arrival of Islam and prior to any written law definitions of the term ‘Malay’, the Malay civilisation in the Malay peninsula was regarded as an ‘expansive’ ethnicity as it tended to absorb many different ethnic migrant groups, including Achenese, Bugis, Javanese, Batak, Thai, Indians, Persians and Arabs into its fold. During this period, Islam was regarded as the only hurdle for those wishing to become Malay. See Leonard Y Andaya, ‘Orang Asli and the Melayu in the History of the Malay Peninsula’ (2002) 75(1) *Journal of the Malaysian Branch of the Royal Asiatic Society* 23, 39–41.

compelling argument used by Malay elites when they negotiated special rights and privileges for themselves, a position that other “immigrant” elites — Chinese and Indian political representatives — accepted’.⁷⁶

This historical foundation has become invariably become linked to Malay sovereignty and the rationalisation and defence of Malay special privileges and affirmative action policies vis-a-vis not only the Orang Asli, but broader Malaysian society. As contended by Alice M Nah, the political, social, legal and economic position and power of the Malays ‘has been determined through articulations of indigeneity, which continue to be reinforced and legitimized’.⁷⁷ Where then does this leave Orang Asli indigeneity? The popular but perhaps misguided domestic Malay-Orang Asli debate ‘accepts that Orang Asli are different in culture and origins, but denies that they are a sovereign people like the Malays, with equal and separate rights’.⁷⁸ Consequently, Orang Asli are positioned as a marginalised community with limited rights while the Malays are constructed as indigenous peoples with special privileges.⁷⁹

Despite the government’s official recognition of term ‘Orang Asli’, which in itself may suggest Orang Asli indigeneity and its acknowledgment of Orang Asli as Indigenous peoples of Peninsular Malaysia at the United Nations,⁸⁰ the existence of Orang Asli identity and their claims to Indigenous rights disrupts the ‘tidy stability of Malay indigeneity in Peninsula’.⁸¹ Saroja Dorairajoo contends that the creation of two separate but equal Indigenous groups in Peninsular Malaysia would threaten Malay ‘indigeneity’ and concomitant *Bumiputera* (literally translated, princes of the soil) privileges and reservations to which Orang Asli do not hold an equal share.⁸² Politically fuelled statements asserting Malay ‘indigeneity’⁸³ and previous periods of time where census data included the Orang Asli as part of the larger Malay ethnic group have served broader political purposes but from an Orang Asli perspective, have also functioned to obfuscate their struggle for recognition of distinct Indigenous rights, particularly among the Malay populace.⁸⁴ As argued previously:

The legal recognition of the Orang Asli as a distinct group of persons... cannot possibly translate to the loss of Malay sovereignty and rights expressly embedded in the *Malaysian Constitution*. However, political and popular sensitivities against such recognition should not be understated in a nation where racial profiling dictates rights and dominates local politics.⁸⁵

⁷⁶ See, eg, Nah, above n 20, 286.

⁷⁷ Ibid 295.

⁷⁸ Patrick Sullivan, ‘Orang Asli and the Malays: Equity and Native Title in Malaysia’ in Catherine J Iorns Magallanes and Malcolm Hollick (eds), *Land Conflicts in Southeast Asia: Indigenous Peoples, Environment and International Law* (White Lotus Co, 1998) 57.

⁷⁹ Idrus, above n 34, 173.

⁸⁰ See above n 28 and accompanying text.

⁸¹ Nah, above n 20, 295.

⁸² Saroja Dorairajoo, *The Orang Asli of Peninsular Malaysia: Aborigine but yet not Bumiputera* (Master’s dissertation, Cornell University, 1996) 71; See also Nah, above n 20, 291, 295.

⁸³ See Idrus above n 34 and accompanying text.

⁸⁴ See Dorairajoo, above n 82, 22–4.

⁸⁵ Subramaniam, above n 3, 112.

Notwithstanding some official recognition that Orang Asli are ‘Indigenous Peoples’, there remains some ambivalence and possibly, confusion about the position of the Orang Asli vis-a-vis the Malays, the latter of which have been afforded constitutional special privileges based on their historically constructed ‘Indigenoussness’. Accordingly, the vulnerability of the legal term ‘Orang Asli’ to adverse interpretation and more importantly, state manipulation against the politically, socially, economically and numerically weak Orang Asli community poses a serious risk to the recognition of Orang Asli a distinct Indigenous ethnic group within Malaysian society.

B *Historical Discrimination Against the Orang Asli*

Although the Orang Asli may have traditionally seen themselves as free people, Nicholas Dodge contends that the Malays have historically regarded the Orang Asli as subordinate and inferior people.⁸⁶ There is also evidence in Malay socio-history to suggest that Malays used the word *Sakai*, previously used as an official term to describe many Orang Asli, to refer to a group of people who were: (1) in a relation of personal dependence vis-a-vis a sovereign dependent chief known as a *Batin* (the current name assigned by the state to an Orang Asli headman); and (2) subjected to corvee labour.⁸⁷ Further, Geoffrey Benjamin suggests that in the traditional Malay world, those Malays who remade themselves culturally including those claiming exogenous origin were seen as culturally superior compared to those people who were ‘fully indigenous’.⁸⁸ He argues that the former group were considered fit to rule over the latter group, who were born to be ruled and effectively need not be consulted in respect of any decisions affecting them.⁸⁹ As observed throughout this article, these prejudices continue to manifest themselves in the context of the Orang Asli albeit in varied and restricted forms.

Malay worldviews aside, the reality of historical Orang Asli-Malay relations differs substantially. Notwithstanding spatial, political and ethnic interaction and to an extent, economic symbiosis between certain sections of Malay and Orang Asli society, there were many Orang Asli communities who remained relatively independent of the Malay kingdoms.⁹⁰

British intervention into the Malay states in the 19th century exacerbated Malay preconceptions towards the Orang Asli. Prevailing Eurocentric prejudice against societies possessing social structures regarded as unfamiliar or primitive compared to European standards worked against Orang Asli interests.⁹¹ Such prejudice found its way into the manner in which Malay and Orang Asli societies were constructed by colonial historians. Richard Winstedt, for example, described the ‘hunter-gatherer’ *Negrito* as having ‘no tribal organisation’ while Malays were regarded as

⁸⁶ Nicholas Dodge, ‘The Malay-Aborigine Nexus under Malay Rule’ (1981) 137(1) *Bijdragen Tot de Taal-, Land und Volkenkunde* 1.

⁸⁷ Couillard, above n 15, 85–91. ‘Corvee labour’ in this context refers to Malay socio-historical perceptions that Orang Asli could be subjected to unpaid labour at the demand of a Malay sovereign.

⁸⁸ Benjamin, above n 14, 20.

⁸⁹ *Ibid.*

⁹⁰ Subramaniam, above n 1, 23–9.

⁹¹ See, eg, the Privy Council appeal case of *Re Southern Rhodesia* [1919] AC 211, where it was held that local communities would have to meet the Eurocentric ‘scale of social organisation test’ before being recognised as a society ‘civilised’ enough to possess customary land rights.

‘civilised’.⁹² The dominant, numerically superior and geographically accessible Malay society who lived a ‘settled’ way of life and possessed ‘familiar’ social structures and hierarchies suited British colonial ambitions. Consequently, the British dealt with the Malay sultans when facilitating their colonial expansion, ‘assuming that the Malay rulers were Indigenous and that the Orang Asli were their dependants’.⁹³ As observed in Part IV(A) above, these colonial constructions have militated against Orang Asli assertions of indigeneity.

For the most part, initial European ethnography placed Orang Asli at an early stage of Malay development in a ‘slow march towards a settled’ and ‘civilised existence’ through ‘absorption’ into the larger Malay community.⁹⁴ The coincidence of thinking between the Malay intelligentsia and the British colonisers on Orang Asli culture and the Malay ‘agency’ element in accessing Orang Asli mutually reinforced their respective ethnocentric views of Orang Asli.⁹⁵ At times, the federal government still positions Orang Asli as ‘poorer cousins’ of the Malays who need to follow the Malay development path in order to be successful.⁹⁶ In this environment, it would not be difficult for some to envision achieving ‘Malayness’ as an accomplishment for Orang Asli which can be attained through the acceptance of Islam and an acceptance of an established social hierarchy.⁹⁷ In contrast, Orang Asli, who are said to see the world through Malay culture,⁹⁸ prefer modernisation without ‘Malayisation’, even when they convert to Islam.⁹⁹

Unfortunately, ethnocentric views of the Orang Asli have found their way into policies affecting Orang Asli and their implementation. The 1961 *Statement of Policy Regarding the Long Term Administration of the Aborigine Peoples in the Federation of Malaya*¹⁰⁰ (‘the 1961 Policy’) carries the ultimate objective of integrating Orang Asli with the Malay section of society, or at least wider society.¹⁰¹ Further evidence of the integrationist trend within the document are:

- the prescriptive wording of paragraph (b) that calls for the promotion of natural integration of the aboriginal community, thereby neglecting Orang Asli self-determination;
- paragraph (f) that mentions replacement of special training with ‘the advance of the process of integration’; and

⁹² R O Winstedt, *The Malays — A Cultural History (revised in 1981 by Tham Seong Chee)* (Graham Brash, 1981) 45.

⁹³ Sullivan, above n 78, 61.

⁹⁴ Timothy Norman Harper, ‘The Politics of the Forest in Colonial Malaya’ (1997) 31(1) *Modern Asian Studies* 1, 5. For criticism on this ‘layer cake’ approach to ethnology, see Benjamin, above n 14, 18–20.

⁹⁵ Sandra Khor Manickam, ‘Common Ground: Race and the Colonial Universe in Malaya’ (2009) 40(3) *Journal of South East Asian Studies* 593, 606–8.

⁹⁶ Idrus, above n 34, 165–7, 171–2.

⁹⁷ Benjamin, above n 14, 50–1.

⁹⁸ Hood Salleh, ‘The Orang Asli of Malaysia: An Overview of Recent Development Policy and Its Impact’ in Lim Teck Ghee and Alberto G Gomes (eds), *Tribal Peoples and Development in South East Asia* (Department of Anthropology and Sociology, University of Malaya, 1990) 144.

⁹⁹ Benjamin, above n 14, 55.

¹⁰⁰ Ministry of the Interior, Federation of Malaya (20 November 1961).

¹⁰¹ See the Introduction and preamble of the 1961 Policy.

- paragraph (iii)(b) of the notes of explanation to the *1961 Policy* that encourages the ultimate replacement of shifting cultivation practised by certain Orang Asli groups with permanent agriculture.

These paragraphs suggest that the *1961 Policy*'s ultimate 'integration' objective can equally serve as an escape clause for policy makers when confronted with allegations of contravention of the *1961 Policy*, particularly those paragraphs relating to the protection Orang Asli culture and lands.

The *1961 Policy*, often regarded as the most progressive in respect of the 'protection' of Orang Asli rights, pales in comparison to current international standards on Indigenous rights as contained in the *UNDRIP*.¹⁰² Noticeably missing are Indigenous rights to free, prior and informed consent,¹⁰³ effective consultation,¹⁰⁴ and the right to determine their own development priorities.¹⁰⁵ Recent initiatives, such as the *2011 Department of Orang Asli Development ('JAKOA') Strategic Development Plan ('the JAKOA Plan')*¹⁰⁶, suggest paternalistic overtones and little focus on empowering Orang Asli through effective consultation and self-determination. The JAKOA Plan also neither prioritises nor integrates the effective recognition of Orang Asli customary lands, territories and resources, an important aspect of the *UNDRIP*.¹⁰⁷

JAKOA or its predecessors including the Department of Orang Asli Affairs, a multi-functional federal agency which devises strategies and programs towards implementing Orang Asli policies, has always been headed by a non-Orang Asli and staffed by a majority of non-Orang Asli employees.¹⁰⁸ SUHAKAM has observed that many JAKOA officers are still not well-versed with Orang Asli customs, culture and issues and are dependent on the advice of long-serving JAKOA staff, who still take an assimilationist stance rather than understanding the evolving needs of Orang Asli.¹⁰⁹

In the 1980s, the integrationist approach was arguably pushed to that of assimilation through the introduction of the *dakwah* (Islamic missionary activity) or the process of islamising Orang Asli. While not necessarily objectionable, it must be appreciated that conversion to Islam theoretically facilitates Orang Asli 'becoming' Malays as defined under the art 160(2) of the *Malaysian Constitution*.¹¹⁰ The broad constitutional definition of a 'Malay', namely, a person who (1) is domiciled in Malaysia on 31 August 1957; (2) professes the religion of Islam; (3) habitually speaks Malay and observes Malay customs; or (4) is the issue of such person,¹¹¹ may facilitate the

¹⁰² For a comparative analysis, see Subramaniam, above n 1, 177–80.

¹⁰³ *UNDRIP* arts 10, 28, 29, 32.

¹⁰⁴ *UNDRIP* arts 18, 27, 30(2), 38.

¹⁰⁵ *UNDRIP* arts 3, 23, 32.

¹⁰⁶ *Pelan Strategik Jabatan Kemajuan Orang Asli 2011–2015* [*Department of Orang Asli Development Strategic Plan 2011-2015*] (Planning and Research Section, Department of Orang Asli Development, 2011) (author's trans).

¹⁰⁷ See, eg, *UNDRIP* arts 10, 26, 27, 32 para 2.

¹⁰⁸ Jabatan Hal Ehwal Orang Asli [Department of Orang Asli Affairs], *Data Maklumat Asas* [*Basic Information Data*] (Planning and Research Section, Department of Orang Asli Affairs, 2008) (translated from the Malay language by the author), 2.

¹⁰⁹ *SUHAKAM Report*, above n 26, 152–3.

¹¹⁰ 'Becoming' Malay is legally possible under the *Malaysian Constitution* due to the definition's emphasis on socio-religious practices rather than ancestry or blood ties. For further elaboration, see above n 75.

¹¹¹ For the definition of a 'Malay' under art 160(2) of the *Federal Constitution (Malaysia)*, see above n 36.

absorption of an Orang Asli into the Malay race. An Orang Asli may well ‘become’ Malay if an Orang Asli were to convert to Islam and is deemed by the government authorities to observe Malay customs and ‘habitually’ speaks Malay. Theoretically, a Muslim Orang Asli need only habitually speak Malay and practice ‘Malay customs’ to fulfil this definition. As a sweetener, the *dakwah* programme involves the implementation of a ‘positive discrimination’ policy towards Orang Asli who convert to Islam, with material benefits given both individually and via development projects.¹¹² Despite not being overtly pursued, the abundance of literature on the islamisation of the Orang Asli suggests that it is an open secret.¹¹³

Historical prejudices against Orang Asli as an inferior and subordinate group of people who are unable to manage their own affairs and develop independently continue to surface in current Orang Asli administration. In this regard, extensive state control over the scope of an ‘aborigine’ and an ‘aboriginal ethnic group’ can potentially serve to fulfil the prophecy that Orang Asli are on ‘a slow march towards a settled and civilised existence through absorption into the larger Malay community’¹¹⁴ rather than developing their own identity as distinct Indigenous peoples.

C *Indigenous Rights as a Hindrance to Economic Prosperity*

The Malaysian government’s long term goal is to make Malaysia a fully industrialised country with the standard of living of a developed country by the year 2020. This goal is known as *Wawasan 2020* (translated, Vision 2020). The current national agenda for progress contained in the New Economic Model launched in 2010 carries both external and internal implications for Orang Asli and their customary lands, either of which do not sit well with the recognition of Orang Asli rights as Indigenous peoples.¹¹⁵ Externally, broader land development and concomitant resource exploitation in realising Malaysia’s vision for material wealth adversely affect Orang Asli customary lands, an integral aspect of Orang Asli identity, culture and well-being. Setting aside large tracts of lands and resources for a relatively small number of Orang Asli may be seen as a hindrance to Malaysia’s charge towards the attainment of Vision 2020. Internally, Orang Asli land policies which are aligned with the overall national vision, place little emphasis on the recognition of Orang Asli customary lands.¹¹⁶ Current development programs are yet to envisage, let alone integrate the recognition of Orang Asli customary lands.

¹¹² See, eg, Kirk Endicott and Robert Knox Dentan, ‘Into the Mainstream or Into the Backwater: Malaysian Assimilation of Orang Asli’ in Christopher R Duncan (ed), *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities* (NUS Press, 2008) 34; Colin Nicholas, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia* (IWGIA, Center for Orang Asli Concerns, 2000) 98–102. Nicholas refers, amongst others, to a 1983 DOA Strategy paper in support of this argument, *ibid* 98.

¹¹³ See, eg, Nobuta Toshihiro, *Living in the Periphery: Development and Islamisation Among the Orang Asli in Malaysia* (Center for Orang Asli Concerns, 2009); Benjamin, above n 14, 54; Nicholas, above n 112, 98–103; Endicott and Dentan, above n 112, 29–30, 44–7; Dentan et al, above n 8, 79–83; 142–150.

¹¹⁴ See Harper above n 94 and accompanying text.

¹¹⁵ For a recent analysis of the clash between the national development agenda and the recognition of Orang Asli customary land rights see, eg, Subramaniam, above n 3, 109–11, 112–5.

¹¹⁶ For an example of such policies, see below n 122–7 and accompanying text.

Not unlike many other emerging economies, the popular ideology in Malaysia is that private land is a finite and valuable resource that should be put to productive economic use. As Nicholas summarises:

the ideology that is imposed on the Orang Asli assumes that it is the duty of the people to maximize exploitation of resources bestowed upon them by nature. Failure to do this necessarily implies ‘backwardness’. It is argued that a people ill-disposed to exploiting nature’s resources have no right to stand in the way of other (external) peoples representing ‘higher levels’ of civilization.¹¹⁷

By Malay conception, ‘modernity’, which entails ‘keeping pace with the rest of the world’,¹¹⁸ has been said to lead to ‘many negative judgments about attitudes derived from the past’.¹¹⁹ As Benjamin observes, *Melayu* (including Malay) cultural rhetoric which takes pride in what has been historically discarded in the quest for cultural self-improvement also contributes to a fear of reassimilation into ‘tribality’ common within the Malay community.¹²⁰ Such perspectives, if indeed prevalent in Malaysian society, leave little room for ‘traditional practices and social forms’, the basis of Orang Asli customary lands. Following this scenario, ‘development’ can also rationalise the appropriation of Orang Asli customary lands for economically productive use by others.

While deprioritising the recognition of Orang Asli customary lands in favour of the interests of the broader society (including Orang Asli) may well find popular appeal, many Orang Asli peoples view these policies as a violation of their rights to determine their own priorities for development as citizens and Indigenous peoples.¹²¹ Article 3 of the *UNDRIP* states that by virtue of their right to self-determination, Indigenous people can freely pursue their economic, social and cultural development. Article 23 of the *UNDRIP* provides for the right of Indigenous peoples to determine and develop priorities and strategies for exercising their right to development while art 32.1 states that Indigenous peoples have the right to determine and develop priorities and strategies for the development and use of their lands or territories.

Partly in response to Orang Asli poverty and marginalisation but focusing more on broader rural development, the Ministry of Rural and Regional Development unveiled the Rural Development Masterplan in October 2010.¹²² The Masterplan provides for the transformation of all rural areas, focusing on poverty eradication through economic and industrial activity, improvement of basic infrastructure, education and rural management. The transformation initiative includes Orang Asli

¹¹⁷ Nicholas, above n 17, 124.

¹¹⁸ Lye Tuck-Po, ‘Forest People, Conservation Boundaries and the Problem of “Modernity” in Malaysia’ in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Institute of Southeast Asian Studies, 2002), 178.

¹¹⁹ See, eg, Robert M McKinley, ‘Zaman dan Masa, Eras and Periods: Religious Evolution and the Permanence of Epistemological Ages in Malay Culture’ in A L Becker and Aram A Yengoyan (eds), *The Imagination of Reality: Essays in Southeast Asian Coherence Systems* (Ablex, 1979), 303, 314.

¹²⁰ Benjamin, above n 14, 38.

¹²¹ For an example of Orang Asli dissatisfaction with land use policies, see below n 127 and accompanying text.

¹²² See Kementerian Kemajuan Luar Bandar dan Wilayah [Ministry of Rural and Regional Development], *Pelan Induk Pembangunan Luarbandar [Rural Development Masterplan]* (Ministry of Rural and Regional Development, 2010) (author’s trans).

resettlement and development of Orang Asli lands mainly through cash crop agriculture.¹²³ The JAKOA Plan identifies one of its main challenges as the encouragement of individual property ownership among Orang Asli, which is to be achieved through discussions, planned economic activities and orderly resettlement.¹²⁴ In line with the national agenda for development, customary lands and community-based systems characteristic of many Orang Asli villages, do not appear to be a priority. The standards employed in engaging with Orang Asli on the introduction and implementation of such policies are also notably absent from the JAKOA Plan.

Geared towards propelling Orang Asli into enjoying the benefits of the mainstream market economy, the 2009 proposed Orang Asli land titles policy ('the Proposed Policy') advocates individual property ownership to the Orang Asli.¹²⁵ While not necessarily abhorrent in principle, SUHAKAM estimates that Orang Asli stand to lose more than 80 per cent of lands claimed by Orang Asli as customary lands if the Proposed Policy is fully implemented.¹²⁶ In 2010, the Orang Asli protested against the Proposed Policy arguing that it would destroy the communal lifestyle practised by Orang Asli, was in violation of the *UNDRIP* and the fundamental liberties of Orang Asli under the *Malaysian Constitution*, and was formulated and passed without prior consultation with the Orang Asli community.¹²⁷ If insensitive to Orang Asli needs, these policies for orderly resettlement and planned economic activities, in addition to being inconsistent with Orang Asli rights to determine their own priorities for development and to the recognition of lands, territories and resources occupied, used or acquired,¹²⁸ will function to sever the inextricable material and spiritual link that Orang Asli have with their lands, which form the basis of their identity, culture and well-being.

It is evident that the rights contained in the *UNDRIP* have not been sufficiently incorporated into the law and policies affecting Orang Asli and their lands and resources. Priorities for national development, particularly those affecting Orang Asli, continue to be introduced and implemented without effective cooperation and consultation with the Orang Asli in an effort to push Orang Asli into the mainstream economy. The lack of nuanced and equitable economic development programs

¹²³ See, eg, *ibid* 70, 94.

¹²⁴ JAKOA, above n 106, 68–9.

¹²⁵ *Ibid* 57–9.

¹²⁶ SUHAKAM, above n 26, 133.

¹²⁷ *POASM and Gabungan NGO-NGO Orang Asli Semenanjung Malaysia* [Peninsular Malaysia Orang Asli NGO Network], *Memorandum Bantahan Dasar Pemberilikan Tanah Orang Asli yang diluluskan oleh Majlis Tanah Negara yang Dipengerusikan oleh YAB Timbalan Perdana Menteri Malaysia pada 4hb Disember 2009* [*Protest Memorandum Against Orang Asli Land Title Grant Policy approved by National Land Council in a Meeting Chaired by the Right Honourable Deputy Prime Minister of Malaysia on 4 December 2009*] (17 March 2010) (author's trans), 5.

¹²⁸ Article 23 of the *UNDRIP* states: 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development'. See also art 32.1 in terms of Indigenous rights to determine priorities for land development and use; Article 26 of the *UNDRIP* states: '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.'

adversely affect the indigeneity and identity of rural-based Indigenous minority communities like the Orang Asli. As observed by Tan:

The nature of economic development, especially laissez-faire capitalist development, has serious consequences for economic weaker groups especially rural-based minorities. More and more, they have to align and realign themselves into larger groups and link their minority status to mobilization for a fairer share of the nation's economy.¹²⁹

Economic development and 'mainstreaming' Orang Asli should not come at the price of jeopardising of the Orang Asli 'way of life' as determined by them. However, the legal and executive stranglehold that the state holds over Orang Asli ethnicity, identity and customary lands potentially facilitates state-imposed 'realignment' of the Orang Asli community towards economic integration but in a manner that is devastating to their lands, culture, identity, and overall well-being.

V CONCLUSION

Although the Orang Asli have utilised their externally imposed ethnicity and identity to advocate their rights as Indigenous peoples with some success, the extensive and protectionist statutory powers possessed by the federal and individual state executives to determine the composition and criteria of the Orang Asli community is incompatible with international norms on Indigenous rights and can further function as a tool to deny Orang Asli their attendant rights as Indigenous peoples. Admittedly, it would be tenuous and arguably embarrassing for the state to refute Orang Asli indigeneity at this point given the recognition it has given to the Orang Asli community both domestically and internationally. However, substantial challenges remain in metamorphosing this ambivalent recognition of Orang Asli indigeneity into Indigenous rights as envisioned by the Orang Asli. The vulnerable legal construction of Orang Asli ethnicity serves to fortify these challenges.

A possible starting point for the reconciliation of these matters may be for the government to clarify the legal status of Orang Asli as distinct Indigenous peoples who possess contextualised rights which do not affect the special privileges already possessed by Malays under the *Malaysian Constitution*. The corresponding criteria to determine who falls within the scope of the term 'Orang Asli' should be framed in consultation with the Orang Asli community and should incorporate principles of self-identification but with necessary safeguards. Beyond legal definitions and criteria, it is equally important that these initiatives are accompanied with a comprehensive program that disseminates information on Orang Asli indigeneity in a manner that is neither divisive nor threatening to other sections of Malaysian society. These suggestions may not be the panacea to all Orang Asli rights issues but would go some way towards increasing confidence in government efforts to treat the Orang Asli people with the respect they deserve as the 'first people' of Peninsular Malaysia and more generally, to portray Malaysia as a moderate and tolerant multicultural society.

¹²⁹ Tan, above n 16, 29.