

AFFIRMATIVE ACTION AND THE LEGAL RECOGNITION OF CUSTOMARY LAND RIGHTS IN PENINSULAR MALAYSIA: THE ORANG ASLI EXPERIENCE

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I Introduction

In Malaysia, constitutional protection for its Indigenous minority, Orang Asli (in the English version of the *Federal Constitution* (Malaysia), 'Aborigines')¹ principally takes the form of affirmative action provisions for their 'protection, well-being or advancement'. However, this constitutional protection has not resulted in the effective legislative or executive recognition and protection of Orang Asli customary land rights. This state of affairs persists, notwithstanding the common law recognition of Orang Asli customary land rights by the Malaysian courts and Malaysia's unequivocal votes for the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'). Instead, the federal and state governments use their extensive legal powers over Orang Asli peoples and Orang Asli lands to determine state priorities for land and resource ownership, management and use. The exercise of these powers adversely affects Orang Asli land rights.

In August 2013, the Human Rights Commission of Malaysia ('SUHAKAM') released a report on its 18 month National Inquiry into the Land Rights of Indigenous Peoples ('the *SUHAKAM Report*').² The *SUHAKAM Report* contains 18 recommendations for the recognition and protection of Indigenous (including Orang Asli) land rights as well as policy and administrative reform. In response, the federal government formed a task force whose terms of reference include an assessment of the findings and recommendations of the *SUHAKAM Report* with a view to implement the recommendations contained in the *Report*.³

While a comprehensive law and policy document on the practicability of the *SUHAKAM Report* recommendations within the confines of this article may be too ambitious,

this recent development provides an opportunity to examine the main constitutional, legal, political, policy and administrative challenges in any law or policy reform initiative towards the recognition and protection of Orang Asli customary land rights.

This article begins with an introduction to Orang Asli vis-à-vis Malaysian society, before the laws governing Orang Asli customary land rights and the practical problems faced by Orang Asli in securing the protection of their customary land rights are examined. The main political, policy and administrative challenges in securing effective recognition and protection of Orang Asli land rights are then analysed before the article concludes with guarded optimism on government initiatives toward the possible recognition of Orang Asli customary land rights.

II Orang Asli within the Malaysian Context

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.

In April 2012, the population of Malaysia stood at 28.72 million,⁴ divided into ethnic Malays (50.1 per cent), Chinese (22.5 per cent), other Indigenous groups (11.7 per cent), Indians (6.7 per cent) and other races (8.9 per cent).⁵ Malays, explicitly defined in the *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. Orang Asli, the Indigenous minority

in Peninsular Malaysia are said to be the 'first peoples' of Peninsular Malaysia.⁷ In 2010, Orang Asli, numbered approximately 178,197, around 0.6 per cent of the population of Malaysia.⁸

The term 'Orang Asli' collectively refers to the 18 official and distinct ethnic Aboriginal sub-groups in Peninsular Malaysia, classified into three broad categories of *Negrito*, *Senoi* and *Aboriginal Malay*.⁹ Literally translated, the term means 'natural people' and is now also taken to mean 'original' or 'first' people.¹⁰ Similar to other Indigenous communities worldwide, many Orang Asli struggle to maintain their culture and identity which are inextricably linked with their close physical, economic, social, cultural, territorial and spiritual relationship with the environment.¹¹

The two 'other' Indigenous minority groups mentioned in the *Malaysian Constitution* are natives of Sabah and Sarawak, who are Indigenous to the Borneo Territories.¹² They do not form the subject of this article for this reason and due to the different constitutional and legal status ascribed to them under Malaysian law compared to the Orang Asli.¹³

Key socio-economic indicators reveal that the Orang Asli are 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.¹⁴ Orang Asli, who mostly reside in rural areas, have a much higher poverty rate than the national rural poverty rate of 11.9 per cent.¹⁵ The drop-out rate of Orang Asli students from school has also been relatively high.¹⁶ In 2008, 47.8 per cent of Orang Asli students who registered for secondary school in 2004 failed to complete their secondary education.¹⁷ As for the tertiary level, government figures reveal that the percentage (0.067 per cent) of Orang Asli qualifying from Malaysian public institutions of higher learning in 2008 was disproportionate to the percentage of the total population of Orang Asli peoples (around 0.6 per cent).¹⁸ In 2010, water and electricity supplies only covered 67.4 per cent and 76.1 per cent of Orang Asli villages respectively.¹⁹ These percentages pale in comparison to the corresponding national rural averages of 97 per cent and 98 per cent.²⁰

III Orang Asli: Constitutional and Legal Provisions

In order to contextualise the challenges that the Orang Asli face in securing the recognition and protection of their

customary land rights, this section provides the necessary backdrop to the pertinent constitutional and legal provisions affecting the status of Orang Asli before examining these provisions.

A Constitutional Provisions

During colonial expansion in Peninsular Malaysia in the late 19th and early 20th century, the British colonial administration did not engage with Orang Asli peoples on issues of sovereignty, territoriality and ownership over their customary territories. Instead, the British engaged with the numerically superior and dominant Malay kingdoms whose familiar hierarchical social organisation and prevailing preconceptions about Orang Asli society suited: (i) British plans to increase their power and influence over the resource-rich Malay states; and (ii) their ethnocentric views of an organised society.²¹ On the other hand, the decentralised power structures of the Orang Asli, their relatively remote locations and the skewed British and Malay perceptions of Orang Asli social organisation and territoriality justified the omission of Orang Asli from any negotiation during the colonization process.

As the newly formed Federation of Malaya pushed for independence in the mid-1950s, drafting a Constitution necessitated reaching a complex compromise between the interests of the major ethnic groups in Malaya. This included the numerically stronger Malays, whose earlier settlement and kingdoms in the Malay Peninsula had been recognised by the Colonial government, and the immigrant ethnic Chinese, Indians and other groups, many of whom were vying for entrenched citizenship rights in an independent Malaya. The relatively superior bargaining position of the Malays ensured that two important aspects of the compromise were: (i) Malay demands for the maintenance and protection of their culture, religion and lands; and (ii) their prevailing socio-economic disadvantages if compared to Chinese and Indians.²² Accordingly, the 1957 *Malayan Constitution* provided such express safeguards for the Malay community and citizenship rights for other ethnic groups who had legally resided in Malaysia. The natives of Sabah and Sarawak were generally ascribed similar privileges as the Malays, when these two states, the Federation of Malaya and Singapore, formed the Federation of Malaysia in 1963. Singapore left the Federation in 1965.

In contrast, the Orang Asli community did not participate in

public consultations held prior to the drafting of the *Malaysian Constitution*. Such was the political ‘invisibility’ of Orang Asli that the main text of the first draft Constitution, prepared by the Reid Commission,²³ did not even refer to Orang Asli, let alone grant them the special privileges afforded to Malays. Several factors contributed to the omission of distinct constitutional privileges for Orang Asli. They included: (i) the weak political and demographic position of Orang Asli; (ii) the perceived social and cultural inferiority of Orang Asli compared to their Malay counterparts; (iii) the need to reinforce Malay privileges that were partly justified by them being ‘native’ to the Malay peninsula; and (iv) earlier administrative classifications of ‘Aborigines’ as a sub-category of Malays.²⁴ These potentially discriminatory factors prevailed in spite of two realities at the time, firstly, that material cultural, religious and linguistic differences existing between Malays and ‘Aborigines’ had been acknowledged by the British colonial administration and indeed, the Malay elites; and second, that Orang Asli were not as yet ascribed the stronger legal protection afforded to the Malays under pre-Independence laws. In Part IVA of this article, it is suggested that these factors contribute to identity challenges that Orang Asli face as a distinct community today. In the end, Orang Asli were included as a distinct group in the *Federal Constitution* (rather ironically, following appeals from the Malay community)²⁵ albeit with lesser constitutional privileges if compared to ethnic Malays and subsequently, the natives of Sabah and Sarawak.

Constitutionally, Orang Asli,²⁶ ethnic Malays,²⁷ natives of Sabah²⁸ and natives of Sarawak²⁹ are afforded varying degrees of rights and privileges by virtue of their ethnicity. Article 153 of the *Malaysian Constitution* obliges the *Yang Dipertuan Agong*³⁰ to safeguard the ‘special position of the Malays and natives of any of the States of Sabah and Sarawak’ while article 161A extends to the natives of Sabah and Sarawak the same ‘special privileges’ as the Malays.³¹ 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.³² 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.³³ In respect of land, Malay reservations created immediately before Independence Day (31 August 1957) shall continue 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.³⁴

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 Constitution* specifically empowers the federal government to legislate for the welfare of Orang Asli.³⁵ Article 8(1) is the equal protection clause of the *Malaysian Constitution* and states that ‘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 article 8(1). Therefore, affirmative legislative action enacted for the welfare of Orang Asli that comes within the ambit of article 8(5)(c) would be valid. Despite enabling positive discrimination laws in favour of Orang Asli, these constitutional provisions do not *expressly* oblige the federal government to safeguard the position of the Orang Asli.³⁶ 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. Malays and natives of Sabah and Sarawak have constitutional protection against laws that touch upon their respective customs.³⁷ Islam, the religion of all Malays (as defined in the *Malaysian Constitution*),³⁸ is the official religion of Malaysia³⁹ and is constitutionally protected.⁴⁰ The Malay language is the national language.⁴¹ Orang Asli have no equivalent protection with respect to their languages, laws, traditions, customs and institutions. Notwithstanding arguments that Malaysia has the constitutional potential to legislate for the effective recognition of Orang Asli customary land rights,⁴² the Malaysian government has yet to do so. This is arguably attributable to the lack of an express constitutional obligation to recognise Orang Asli lands.

Despite the *Malaysian Constitution* containing explicit provisions that contemplate the ‘welfare’ of Orang Asli, Orang Asli are largely reliant on the goodwill of the state for their welfare as there are no mandatory constitutional provisions for their protection. Accordingly, their status under the *Malaysian Constitution* must be distinguished from that of Malays and the natives of Sabah and Sarawak. At the birth of the nation, the Orang Asli were seen as an ethnic group incapable of managing their own affairs and in need of state intervention for their protection, well-being and advancement. In contrast, Malays were ascribed special privileges and rights under the Constitution with due respect to their respective laws, customs and religious beliefs.

B Statutory Rights of Orang Asli

This section examines the main statutory provisions governing Orang Asli and their lands, contending that the individual State possesses ultimate statutory authority over Orang Asli lands. Other statutory laws affecting Orang Asli lands do not even envisage Orang Asli as a distinct Indigenous group.

(i) *The Aboriginal Peoples Act 1954 (Malaysia) ('APA')*

The *APA* is the main statute governing the administration and rights of Orang Asli. In many ways, the *APA* is a double-edged sword, functioning not only to protect Orang Asli but to secure and perpetuate control over Orang Asli and their lands and resources.

The preamble describes the *APA* as an Act for the protection, welfare and well-being of Orang Asli. True to its criticism as an Act of 'patronising benevolence' by the British,⁴³ passed during the 'Malayan Emergency' where many Orang Asli were seen as communist sympathisers, the *APA* confers extensive powers on the federal executive including powers to: (i) determine whether a person is an Orang Asli;⁴⁴ (ii) determine the appointment and removal of Orang Asli headmen;⁴⁵ (iii) exclude undesirable persons from any Orang Asli inhabited areas;⁴⁶ and (iv) restrict any written, printed, or photographic matter deemed harmful by the state.⁴⁷

In relation to land, the provisions of the *APA* relating to all three statutory categories of Orang Asli land, namely, Aboriginal reserves, Aboriginal areas and Aboriginal inhabited places, may be regarded as a limited form of state-controlled occupancy and use of Orang Asli lands and resources.

a. *Aboriginal Reserves*

Section 7 is the main provision concerning Aboriginal reserves. Despite offering a measure of protection to Orang Asli lands, an individual state authority possesses the power to declare an area as an Aboriginal reserve by gazette notification⁴⁸ and revoke wholly or in part or vary any such declaration by similar notification.⁴⁹ Within an Aboriginal reserve:

- No land shall be declared as a Malay reservation, wildlife sanctuary or reserve or a forest reserve pursuant to any written law pertaining to these matters.⁵⁰

- No land shall be alienated, granted, leased or disposed of except to Orang Asli normally resident within the reserve,⁵¹ but such dealings are subject to the consent of the Commissioner for Orang Asli Affairs.⁵²
- No temporary occupation of any land shall be permitted under any written law relating to land.⁵³

Statutory Orang Asli reserves therefore provide relatively limited security of tenure as the existence of these limited rights are wholly dependent on the state executive fiat.⁵⁴

Section 8 creates a 'special form of tenure'⁵⁵ for Orang Asli but again vests power to grant such tenure in the relevant state authority. Under section 8, the state authority may grant rights of occupancy within Aboriginal reserves to any individual Orang Asli or members of any Orang Asli family or community, but such interests 'shall be deemed *not* to confer any better title than that of a tenant at will'.⁵⁶ A tenant at will in this context means that any rights of occupancy granted to Orang Asli can simply be terminated by a notification from the state authority.⁵⁷

With respect to compensation for loss of lands, the state authority *may* grant compensation to any Orang Asli or Orang Asli community where any Aboriginal reserve is excised or land within an Aboriginal area is alienated, granted, leased or otherwise disposed of or if any right or privilege in any Aboriginal reserve is revoked wholly or in part.⁵⁸ Compensation for loss of lands within an Aboriginal reserve or area appears to be discretionary. The Court of Appeal has interpreted the word 'may' in section 12 of the *APA* to mean 'shall' and introduced the word 'adequate' before the word 'compensation' in the same provision. The purposive approach taken by the Court in interpreting section 12 was to bring the provision in line with article 13(2) of the *Malaysian Constitution*.⁵⁹ Article 13(2) states that '[n]o law shall provide for compulsory acquisition or use of property without adequate compensation'. Despite these developments, there has been no formal legislative or executive step to give effect to the Court's observations on section 12.

b. *Aboriginal Areas*

Section 6 of the *APA* is the main provision relating to Aboriginal areas. Aboriginal areas cover a broader scope than Aboriginal reserves as they can extend to cover areas: (1) 'predominantly' (as opposed to exclusively) inhabited by

Orang Asli; and (2) with more than one Aboriginal ethnic group, subject to divisions into cantons.⁶⁰

Similar to Aboriginal reserves, the powers to declare, vary and revoke an Aboriginal area,⁶¹ grant rights of occupancy⁶² and award compensation for loss of land within an Aboriginal area,⁶³ are vested in the state authority. Within an Aboriginal area, no land shall be declared as a Malay reservation or wildlife sanctuary or reserve pursuant to any written law pertaining to these matters.⁶⁴

In other respects, the protection against the creation of interests within Aboriginal areas is weaker if compared to Aboriginal reserves. Unlike section 7(2)(iii) of the *APA* in relation to Aboriginal reserves, there is no like prohibition for the creation of forest reserves or the granting of temporary occupational licences within Aboriginal areas under section 6(2) of the Act. Further, section 6(2)(iv) also allows licences for the collection of forest produce to be granted to non-Aborigines or commercial undertakings, provided the Commissioner for Orang Asli Affairs is consulted.

c. *An Aboriginal Inhabited Place*

The third category of Orang Asli land under the *APA* is the 'Aboriginal inhabited place'. Section 2 defines an 'Aboriginal inhabited place' to cover all residual places inhabited by Orang Asli communities that are neither Aboriginal reserves nor Aboriginal areas.

Orang Asli communities in Aboriginal inhabited places have minimal statutory protection. Section 10(1) of the *APA* allows an Orang Asli community resident in an area declared to be a Malay Reservation, forest reserve or game reserve under any written law to continue residing on such areas. However, the state authority may order any Aboriginal community out of such lands and further make consequential provisions, including the payment of compensation in accordance with the general compensation provision contained in section 12.⁶⁵ Again, payment of compensation under section 10(3) and 10(4) is at the discretion of the state authority and only applies to Orang Asli communities residing within Malay Reservations, forest or game reserves. In reality, Orang Asli in Aboriginal inhabited places also occupy other categories of land including state land,⁶⁶ land reserved for other state purposes, mining land, protected parks and private land.⁶⁷ In respect of Orang Asli inhabiting these lands, Orang Asli communities do not possess express statutory rights of

occupancy. Orang Asli occupying *state land* are, nevertheless, entitled to just compensation for the loss of their fruit and rubber trees.⁶⁸

Three conclusions can be drawn from the examination of Orang Asli lands under the *APA*. First, legal control over the ultimate occupancy and use of such lands under the *APA* lies with the individual state authority. Orang Asli have no express participatory rights over decisions affecting their lands. Secondly, all these rights are terminable by the state authority without explicit statutory protection for Orang Asli. Thirdly, the state authority possesses the power, except in the case of Orang Asli fruit and rubber trees growing on state land under section 11, to determine if compensation is payable for the loss of Orang Asli lands. As will be observed in Part IIIB.V of this article, such extensive powers can function to wrest control of Orang Asli lands with little or no redress available to the Orang Asli community.

(ii) Resource Based Legislation

The *National Forestry Act 1984* (Malaysia) ('*NFA*') that governs the administration, management and conservation of forests and forestry development in Peninsular Malaysia confers limited privileges to Orang Asli, who are dependent on the individual state for such privileges.

Section 40(3) of the *NFA* provides that the state authority may exempt forest produce⁶⁹ removed from alienated land by Orang Asli for any of the purposes specified under section 62(2)(b). An exemption under section 62(2)(b) negates the requirement for a licence to remove forest produce under the *NFA*.⁷⁰ Subject to any contrary direction by the state authority, section 62(2)(b) provides that the State Director of Forestry⁷¹ may also reduce, commute or waive any royalty in respect of, or exempt from royalty, any forest produce taken from any state or alienated land by any Orang Asli for temporary huts lawfully occupied for Orang Asli, domestic purposes or 'work for the common benefit' of Orang Asli.

However, the exemption from licensing requirements under section 40(3) and the royalty privileges under section 62(2)(b) are subject to limitations. First, the exemption under section 40(3) is not automatic and requires the State Authority to exercise its discretion to exempt in favour of the Orang Asli concerned. Secondly, the exemption under section 40(3) only applies to alienated land but not to state or reserved land. However, any forest produce taken by Orang Asli from state

land may be granted a *waiver* in respect of any payment of royalty subject to the limited confines of section 62(2)(b) of the *NFA*. Thirdly, an exemption under section 40(3) can only be granted for the limited purposes and restricted meaning of section 62(2)(b).⁷² Royalty privileges under section 62(2)(b) also requires a positive act by the relevant state body and are limited to state or alienated land. As such, reserved lands including those lands gazetted pursuant to the *APA*, are not covered by section 62(2)(b) of the *NFA*.

In 2010, the *Protection of Wildlife Act 1972* (Malaysia) was repealed and replaced by the *Wildlife Conservation Act 2010* (Malaysia) ('*WCA*'). Section 51(1) of the *WCA* reduced the number of species that *Orang Asli* can hunt for subsistence purposes from hundreds to only 10,⁷³ suggesting a possible government move to push *Orang Asli* away from their hunting, trapping and other traditional activities. There also does not appear to have been any effective consultation process with the *Orang Asli* prior to the 2010 enactment.

Despite the federal government's constitutional power to legislate for their 'protection, well-being and advancement', there are no other provisions in other land and resource-based legislation that protects the *Orang Asli* and their special relationship with their customary lands. Under these laws, the *Orang Asli* in occupation of their lands are treated no differently from other citizens, so much so that they, for the most part, appear legally 'invisible' as rightful stakeholders in matters affecting their customary lands and resources.

(iii) Common Law *Orang Asli* Customary Land Rights

In addition to constitutional and statutory law, the Malaysian superior courts have recognised the pre-existing rights of *Orang Asli* to their ancestral and customary lands at common law.⁷⁴ Under articles 160(2) and 162 of the *Malaysian Constitution*, the Malaysian common law forms part of 'existing law' in Malaysia and is therefore legally binding.⁷⁵ Despite Sabah and Sarawak having their own respective land regimes which explicitly recognise native customary rights (and are not applicable to *Orang Asli*), it must be noted that common law principles are also applicable there, making common law cases from Sabah and Sarawak equally applicable in Peninsular Malaysia.⁷⁶

In order to appreciate the extent of the federal and state legislatures and executives' reluctance to recognise *Orang*

Asli customary land rights, the extensive scope of these common law rights must be understood. The salient features of the common law doctrine are as follows:

1. The common law recognises and protects the pre-existing rights of *Orang Asli* in respect of their lands and resources.⁷⁷
2. The radical title of the state is subject to any pre-existing rights held by *Orang Asli*.⁷⁸
3. Common law customary land rights in Malaysia do not owe their existence to any statute or executive declaration.⁷⁹ In Peninsular Malaysia, statutory rights under the *APA* and common law rights of *Orang Asli* are complementary in that they can exist in tandem.⁸⁰
4. Proof of these rights is by way of continuous occupation,⁸¹ and oral histories of the claimants relating to their customs, traditions and relationship with their lands, subject to the confines of the *Evidence Act 1950* (Malaysia).⁸² 'Occupation' of land does not require physical presence but evidence of continued exercise of control over the land.⁸³
5. These rights have their source in traditional laws and customs.⁸⁴ The precise nature of these rights is determined by the customs, practices and usages of each individual community where a communal customary title may be held to exist.⁸⁵
6. Customary rights under the common law and any derivative title are inalienable except in accordance with the particular laws and customs of the rights holders.⁸⁶
7. These rights can either be held communally or individually.⁸⁷
8. Extinguishment of these rights may be by way of clear and unambiguous words in legislation,⁸⁸ or an executive act authorised by such legislation.⁸⁹ A reservation or trust of land for a public purpose may not necessarily extinguish these rights, unless it is inconsistent with the continued enjoyment of these rights.⁹⁰
9. If these rights are extinguished, adequate compensation is payable in accordance with article 13 of the *Malaysian Constitution*.⁹¹ However, 'foraging lands' and 'settlement lands' have been treated differently in terms of assessing 'adequate compensation'. In *Adong bin Kuwau v Kerajaan Negeri Johor* ('*Adong HC*'), the Court assessed compensation for loss of foraging lands having regard to deprivations of: (1) heritage land; (2) freedom of habitation or movement; (3) produce of the forest; and (4) future living of himself, immediate

family and descendants but below the market value of the land.⁹² In respect of settlement lands, the Court in *Sagong HC* awarded 'market value' compensation.⁹³

10. The Malaysian courts have also limited the proprietary interest in customary lands 'to the area that forms their settlement, but not to the jungles at large where they used to roam and forage for their livelihood in accordance with their tradition'.⁹⁴ The Court of Appeal has held this view because 'otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had foraged in search for food'.⁹⁵ This limitation, seemingly driven by pragmatism, would appear arbitrary given that the nature of any customary title is to be determined in accordance with the practices of each individual community.⁹⁶

Unlike some other jurisdictions, such as Australia where common law developments culminated in the legislative recognition of native title through the passage of the *Native Title Act 1993* (Cth), there has been neither legislative nor executive recognition of Orang Asli customary land rights in Malaysia. In addition, Orang Asli face significant challenges in instituting and maintaining common law claims due to a number of factors including the lack of financial means, an acute shortage of legal aid and assistance, internal conflict, the risk of state and external interference, strenuous opposition from the government, evidentiary challenges, the relative risk and uncertainty of litigation and in general, the legalistic, adversarial and the non-participative nature of the court process.⁹⁷ The impact of these challenges is discussed in Part IIIB. V below.

(iv) Fiduciary Duty and the *UNDRIP*

In Malaysia, the courts have held that the federal and state governments owe Orang Asli a fiduciary duty by virtue of: (1) constitutional provisions for the protection, well-being and advancement of Orang Asli as per article 8(5)(c) and item 16 of the ninth schedule of the *Malaysian Constitution*, as well as the *APA*, which is legislation for the protection, well-being and advancement of the Orang Asli; (2) the establishment of the Department of Orang Asli Affairs ('JHOEA') for the welfare of Orang Asli; and (3) a 1961 Orang Asli Policy. Specifically, paragraph (d) of this policy states that: (1) the special position of Aborigines in respect of land usage and land rights shall be recognised and (2) Aborigines will not

be moved from their traditional areas without their full consent.⁹⁸ The relatively vulnerable position of the Orang Asli under the *Malaysian Constitution* is clearly evident and has had a strong influence in the determination that Orang Asli are owed a fiduciary duty by the state, particularly in respect of their customary lands.

The content of the fiduciary duty consists of the duty to protect Orang Asli welfare including their land rights and not to act in a manner inconsistent with these rights, and further to provide remedies where an infringement occurs.⁹⁹ The Federal Court, the apex court in Malaysia, has affirmed the fiduciary duty owed by the state to Orang Asli and natives of Sabah and Sarawak.¹⁰⁰ The Malaysian courts have held that the federal and/or state governments breached their fiduciary duty by:

1. depriving Orang Asli of their lands without paying adequate compensation;¹⁰¹
2. not providing adequate notice before evicting Orang Asli;¹⁰²
3. failing or neglecting to gazette Orang Asli inhabited land;¹⁰³ and
4. delaying the gazettal of Orang Asli inhabited land.¹⁰⁴

Malaysia has also voted in favour of the *UNDRIP*.¹⁰⁵ The *UNDRIP* contains extensive provisions for the recognition of land, territories and resources.¹⁰⁶ While the legal enforceability of the *UNDRIP* in Malaysia is debatable, there is little doubt that the *UNDRIP* creates, at the very least, 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'.¹⁰⁷

Once again, neither of these developments has resulted in any legislation or executive action towards improving the recognition of Orang Asli customary land rights.

(v) The Customary Land Rights Problem

Government stewardship over Orang Asli customary lands and subsequent legal and international developments recognising the special position of Orang Asli and their lands have done little to alleviate Orang Asli land woes. This section examines state practice with regards to Orang Asli customary land rights with a view to highlight the state's extensive statutory power over Orang Asli lands.

Under the current statutory reservation scheme, the statutory power to safeguard Orang Asli lands and resources is vested in the state, specifically, the federal government, through its functionary. The Department of Orang Asli Development ('JAKOA') and the individual state authority. This underscores the importance of the state's performance in protecting these interests.

'Protection' within the context of the domestic statutory scheme would necessarily translate to the 'gazetted' of Orang Asli lands as reservations. Non-protection of Orang Asli lands would leave such lands and resources open to alternative utilisation. The following are the most recent publicly-available statistics on officially acknowledged Orang Asli lands.

Table : Orang Asli Land Status as at December 2010

	Land Status	Area (hectares)
1	Gazetted Orang lands	20,670.83
2	Approved for gazetting but not gazetted yet	26,288.47
3	Applications for gazettal	85,987.34
4	Total	132,946.64

Source: JAKOA (2010)¹⁰⁸

'Officially acknowledged' Orang Asli lands do not cover the full extent of Orang Asli customary lands as the status and area of officially acknowledged lands are not necessarily determined in accordance with Orang Asli laws and customs.¹⁰⁹ Instead, these figures are determined by: (1) JAKOA, when it classifies Orang Asli-occupied lands or applies for reservation of Orang Asli lands; and (2) the individual State Authority, when it approves and gazettes these lands. These determinations often result in the 'under-gazetted' of Orang Asli lands as reservations. SUHAKAM estimates that official figures only represent 17 per cent of the total lands claimed by Orang Asli.¹¹⁰

Notwithstanding these qualifications, these figures still demonstrate that the state's performance in gazetting officially-acknowledged Orang Asli lands has been dismal.¹¹¹ Only 15.55 per cent of officially-acknowledged Orang Asli customary lands are gazetted and even then, are subject to revocation, variation or in local parlance 'de-gazetted'.¹¹²

Lands approved by the state authority but not gazetted account for 19.77 per cent of officially-acknowledged Orang

Asli lands. Following *Koperasi Kijang Mas v Kerajaan Negeri Perak*, this category of lands would enjoy the protection of Aboriginal reserves and areas under the APA without the need for a gazette notification.¹¹³ However, the enforcement of rights on approved Orang Asli lands that have not been gazetted would be done by way of the courts because these lands are not officially demarcated in the land registry and surveyed maps. The remaining lands (64.68 per cent) occupied by Orang Asli would fall under the category of 'Aboriginal inhabited places' which merely confer statutory rights of permissive occupancy over prescribed forms of reserved lands that are, in any event, terminable at the State's will.¹¹⁴ The invisibility of Orang Asli lands on the land register compounds these problems, through the State's maintenance and creation of land interests which overlap with Orang Asli-occupied land, including title grants, forest and wildlife reserves, licenses and protected areas, which include national and state parks. In such instances, the individual state authority sees itself as having the necessary statutory authority to deal with Orang Asli occupied lands as deemed fit.

In order to gazette Orang Asli lands, individual states have also resorted to the general 'public purpose' land reservation provision contained in the *National Land Code 1965* (Malaysia) ('NLC'). This legislation is the principle statute that regulates titles and dealings in interests in land in Peninsular Malaysia. However, section 62 reservations provide less security of tenure than reservations under the APA as the former can also be revoked and perhaps more importantly, do not contain the express statutory protection conferred upon Aboriginal reserves and areas under the APA. Neither the recognition of Orang Asli customary land rights at common law nor the imposition of a fiduciary duty for the federal and state governments to protect Orang Asli lands has seen any effective response to the seemingly perennial problem of 'under-gazetted', 'non-gazetted' and 'degazetted' of Orang Asli lands.

Orang Asli peoples facing dispossession due to the failure of the state to protect their lands would have to resort to the courts for recognition of their common law customary land rights or to sue the state for possible breach of fiduciary duty.¹¹⁵ Such claims are usually strenuously contested by the federal and state governments and met with constant attempts to roll back the common law recognition of Orang Asli customary land rights and reduce the scope of the fiduciary duty owed to the Orang Asli.¹¹⁶

JAKOA (before 2011, the Department of Orang Asli Affairs ('JHOEA')) often attributes the poor performance and delay in protecting Orang Asli land to the fact that land matters fall under the constitutional jurisdiction of the individual state.¹¹⁷ The statutory power to gazette and degazette lands as either Aboriginal reserves or areas under the *APA* or reserved lands under the *NLC* is vested in the individual state authority. As a federal government agency, JAKOA has no jurisdiction over the individual state when it comes to land matters. While this excuse may be acceptable to a degree, there is equally little doubt that the overall poor performance in protecting Orang Asli lands suggests a lack of priority and concerted will from both federal and state governments to protect Orang Asli customary lands under the statutory scheme.¹¹⁸

Currently, an individual state government is at liberty to generate state and private revenue from large tracts of 'unprotected' Orang Asli occupied lands expeditiously. The prevailing statutory framework also facilitates broader resource exploitation activities, an important aspect of Malaysia's overall strategy towards progress, further explored in Part IVB of this article. Consequently, any attempt to wrest the extensive statutory power of the state over lands and to negotiate competing interests over Orang Asli land equitably, which form part of the *SUHAKAM Report* recommendations relating to the effective recognition of Indigenous customary land and resource rights¹¹⁹ would be likely to encounter resistance from the state governments and other affected stakeholders.

IV Challenges to the Recognition of Orang Asli Customary Land Rights: Perceived or Actual?

This section examines the principal political, policy and administrative challenges that may potentially contribute to resistance against effectively recognising Orang Asli customary land rights.

A The Politics of 'Indigeneity' in Peninsular Malaysia

Nicholas, Engi and Teh contend that Orang Asli meet the criteria for international definitions of Indigenous peoples, namely, self-identification, non-dominant status within a wider society, history of particular subjugation, marginalisation, dispossession, exclusion and discrimination, land rights prior to colonisation or occupation by other groups, and a land-based culture and a willingness to

preserve it.¹²⁰ On the other hand, Malays are said not to meet international definitions of 'Indigenous peoples' due to the religious criteria to qualify as a 'Malay' and their lack of a special attachment to a particular ecological niche as well as their non-self-identification as being 'Indigenous' at international fora.¹²¹ In fact, recent communications from the Malaysian government to the United Nations have explicitly identified the 'relatively small number of Indigenous peoples' in Peninsular Malaysia as Orang Asli,¹²² and not Malay.

However, indigeneity carries a whole different meaning domestically. It was earlier observed the forging of the Malaysian nation-state as dictated by the British colonial administration and the local power bases culminated in disparate constitutional privileges afforded to the Malays and Orang Asli.¹²³ The Malaysian courts have subsequently confirmed that Orang Asli are distinct from the Malays in Peninsular Malaysia when historically analysing the relationship between Malay and Orang Asli¹²⁴ and when adjudicating Orang Asli rights to Malay reservation lands.¹²⁵

However, Orang Asli indigeneity vis-à-vis Malays involves complex historical, political and national issues.¹²⁶ Historically, Orang Asli have been regarded by administrators as a community destined for eventual integration with the Malay section of society although recent developments suggest an increased assertion of a separate identity by Orang Asli.¹²⁷ Beyond earlier Malay and colonial misconceptions and prejudices in the treatment of the 'Aborigines', these issues have now become inextricably linked to Malay sovereignty and the rationalisation and defence of Malay special privileges. The 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'.¹²⁸

Whether exclusive definitions of 'indigeneity' are indeed necessary, given the constitutional entrenchment of Malay sovereignty and the general social acceptance of Orang Asli as 'first peoples', is another question altogether. The fact remains that political and popular debates have used the prior dominance and political acceptance of Malay kingdoms in the Malay peninsula to justify Malay sovereignty and special privileges under current constitutional arrangements. Reminiscent of the discriminatory social evolutionary practices of British colonials, two ex-Prime Ministers of Malaysia have justified Malays as being 'Indigenous' and the 'definitive people' of Peninsular Malaysia over the 'primitive'

Orang Asli because the latter did not form 'effective governments'.¹²⁹ Where do these discourses leave Orang Asli? Ibrahim argues that the support by the 'political shell' of the state for Malay claims to Indigenous status as well as the consequent special privileges as *Bumiputera* (princes or sons of the soil) means that the 'Indigenous' position of the Orang Asli is perpetually relegated.¹³⁰

Further, the extensive power that the Federal Executive possesses over Orang Asli identity¹³¹ poses potential challenges to the continued vibrancy of their distinct identity. The inclusion of the Orang Asli under the category of 'Malay', enabled by the relatively flexible cultural construct of the category under the *Malaysian Constitution*,¹³² may be utilised to morally reinforce the special position of Malays under the *Malaysian Constitution* and contested Malay-dominant affirmative action policies.

Recognising Orang Asli identity and customary land as central to their identity as recommended in the *SUHAKAM Report*¹³³ may therefore be misconstrued as a threat to the special position of Malays. From a legal perspective, this apprehension appears unfounded. The legal recognition of the Orang Asli as a distinct group of persons possessing customary land rights 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.

B Development Priorities and Orang Asli Customary Lands

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 New Economic Model ('NEM'), launched by the federal government in 2010 also contains reform initiatives to propel Malaysia toward the goals set forth in Vision 2020.¹³⁴ The existing national agenda for progress 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 customary lands. Externally, broader land development and concomitant resource exploitation in realising Malaysia's vision for material wealth adversely affect Orang Asli customary lands, which as observed,

largely remain with little or no security of tenure. 'Locking-in' available lands and resources by legally recognising and protecting large tracts of Orang Asli customary lands may be seen as an obstacle to Malaysia's charge towards the attainment of Vision 2020. Internally, Orang Asli land policies, aligned with the overall national vision, place little emphasis on the recognition of Orang Asli customary lands. Current development programs are yet to envisage, let alone integrate the recognition of Orang Asli customary land.

This seemingly cohesive vision for national development may not necessarily be consistent with the *SUHAKAM Report* recommendations to address current land development imbalances that exist between the state and Indigenous peoples due to the poor recognition and protection of Indigenous rights.¹³⁵

(i) National Development Policies

Despite the introduction of the NEM, 'development' from the Malaysian government's perspective still largely corresponds with post-World War II 'modernisation' theories.¹³⁶ Rostow's 1960 'stages of economic growth model'¹³⁷ is used to argue that the end 'developed' state in this genre of 'modernisation' theories is an industrialised society like those of the capitalist West. Thus, development requires imposing capitalist economic practices, markets, divisions of labour, bureaucratic rationality, modern state structures and 'modern' technology. Land and its natural resources are potentially invaluable resources for wealth creation and ultimate economic progress. In Peninsular Malaysia, commercial land development has predominantly involved the clearing of large tracts of tropical rainforests for agricultural, commercial, residential and infrastructure use.¹³⁸ Land use policies are more oriented to land development for commercial agricultural production, or the extraction of revenue from the forests rather than environmental or forest protection.¹³⁹ In addition to private revenue, commercial logging and licensing, which falls within the prerogative of the individual state, provides revenue to the state.¹⁴⁰ The system of federal-state relations where lands and forests are matters within the constitutional purview of the individual state also hampers major federal government reforms relating to forestry and agriculture. While the federal government's NEM suggests 'maximising the quality and income' from the environment 'without damaging the environment', there is nothing in the document which effectively addresses the federal-state power divide or integrates the crucial role

played by Indigenous communities in sustainable forest and environmental management.

Orang Asli, who typically reside at the frontiers of land development, bear the brunt of land development activities partly due to government agency perceptions that the Orang Asli possess limited land rights outside their officially reserved lands. These lands can therefore be excised or utilised with relative ease, and with mandatory statutory compensation only for the loss of fruit and rubber trees and as observed earlier, seeking justice in the courts poses its own challenges for Orang Asli peoples.

The national development paradigm, which focuses on the cash economy by converting forest land into agricultural plantations or development projects, has deprived Orang Asli of their resources, including food and clean water.¹⁴¹ The current national development paradigm leaves little room for 'traditional practices and social forms', the basis of Orang Asli customary land rights and in some ways, rationalises the appropriation of Orang Asli customary lands for more 'productive' use by Orang Asli and more so, others.

(ii) Orang Asli Land Policies: Mainstreaming Orang Asli and Their Lands?

This section examines special measures taken by the government for Orang Asli in respect of lands and the extent to which customary land rights are integrated into such policy measures.

In 1996, Hooker observed that 'development' in relation to Orang Asli policies was defined as 'growth plus change' which consists of economic improvement through land development and commercial schemes and provision of services to the same standard as available nationally.¹⁴² To a large extent, these 'mainstreaming' development policies still apply to government policies for Orang Asli. As part of the implementation process for the achievement of the NEM, the Ministry of Rural and Regional Development (the Ministry having charge of Orang Asli affairs) unveiled the Rural Development Masterplan in October 2010.¹⁴³ The Masterplan provides for the transformation of 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 resettlement and development of Orang Asli lands mainly through cash crop agriculture.¹⁴⁴

The 2011 *JAKOA Strategic Development Plan* ('*JAKOA Plan*'), part of the rural development initiative, focuses on six core areas:

- Human capital development;
- Initiation of integrated economic activities and competitive, sustainable and progressive industries;
- Expanding infrastructure access;
- Raising the quality of life of the Orang Asli community;
- Research, collection, preservation and promotion of Orang Asli traditional knowledge and heritage; and
- Strengthening services and management.¹⁴⁵

In respect of Orang Asli land, one of the main challenges identified by JAKOA is to encourage individual ownership among Orang Asli, to be achieved through discussions, planned economic activities and orderly resettlement.¹⁴⁶ Individual ownership of lands is also reflected in the 2009 proposed Orang Asli land titles policy.¹⁴⁷ 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. 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.¹⁴⁸

In a policy environment where optimising the use and exploitation of available lands and resources is of paramount importance, the argument for 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. On the other hand, 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.

The dilemma faced by Orang Asli is illustrated by two State-driven land initiatives. They are state 'Regroupment' programs, namely, *Rancangan Pengumpulan Semula* ('*RPS*'),¹⁴⁹ and the Orang Asli land titles policy.

a. *Regroupment programs*

The general aim of *RPS* is an orderly resettlement of traditional Orang Asli villages that transforms participants into settled, self-sufficient farmers. While *RPS* do not necessarily involve the 'resettlement' or the 'regroupment' of Orang Asli communities, they have done so in the past which have resulted in the reduction in the size and Indigenous control of Orang Asli lands and resources.¹⁵⁰

In *RPS*, the JHOEA would supply and provide common infrastructure facilities, farming equipment, seedlings and fertilisers. Orang Asli participants would provide the labour for planting and tending to the crops and are not required to pay back the cost for developing the land. However, the Orang Asli are not issued documents of title for lands allocated under *RPS*.¹⁵¹ In Pahang, where individual land titles are issued to Orang Asli households subject to *RPS*, the exercise of Orang Asli customary rights over the remainder of their customary lands is at the will of the state.¹⁵² As the consent to exercise these rights can be revoked at any time by the state, the state deems itself fit to deal with these lands in any way thought appropriate.

There is little doubt that *RPS* have been successful in integrating some Orang Asli into mainstream society by exposing them to the market economy and shifting their mentality towards self-development.¹⁵³ However, the net effects of *RPS* are questionable. Price fluctuations, especially in palm oil and rubber prices and unscrupulous middle-men, common phenomenon in the market economy, have left many Orang Asli in *RPS* with an unsecure source of income.¹⁵⁴ Opportunities of moving to other businesses seem limited for those who do not possess a range of alternative skills. The breakdown of traditional social organisations stemming from this form of resettlement is partly responsible for social ills like alcohol abuse and prostitution.¹⁵⁵ The rubber or palm oil smallholder lifestyle advocated by these schemes carries adverse socio-cultural effects on the Orang Asli.¹⁵⁶

From a land rights perspective, *RPS* has also resulted in the loss of Orang Asli customary lands and without the payment of adequate compensation. When Orang Asli villages are regrouped, their customary lands are substantially diminished in size, and have been said to average between one and two per cent of their land before resettlement.¹⁵⁷ No longer possessing customary lands, Orang Asli participants face erosion of their traditional knowledge, and a severance

of the strong cultural affiliation that they have with their lands.¹⁵⁸ In the meantime, lands no longer occupied by the Orang Asli are available for the creation of other interests by the state.

b. *The Individual Land Titles Solution*

In late 2009, the National Land Council passed the Orang Asli land titles policy ('the *Proposed Policy*'). Under the *Proposed Policy*, every Orang Asli head of household is to be granted between two and six acres of plantation lands and up to half an acre for housing, depending on land availability as determined by the individual State.¹⁵⁹ According to JAKOA, the granting of individual titles under privatised cash crop development schemes would increase economic activity and income.¹⁶⁰ However, these titles come at the ultimate price to Orang Asli customary lands. The *Proposed Policy* prohibits Orang Asli who receive benefits under the policy from making any further legal claim in relation to their customary land rights.¹⁶¹ Additionally, the *Proposed Policy* would only apply to about 50,000 hectares, close to aggregate area of gazetted Orang Asli lands and approved but ungazetted Orang Asli lands.¹⁶² An estimated 85,987.34 hectares,¹⁶³ or about 64.68 per cent of officially-acknowledged Orang Asli land, not including land claimed by Orang Asli to be their customary lands, therefore stands to be lost. State-appointed external contractors for land development, and limitations in the use of Orang Asli land to residential plots and plantations, diminishes Orang Asli autonomy over their customary lands.

On 17 March 2010, more than 2,500 Orang Asli marched in Putrajaya, the administrative capital of Malaysia, to hand a memorandum to the Prime Minister protesting against the *Proposed Policy*. Unfortunately, subsequent discussions for the refinement of the *Proposed Policy* have mainly involved JAKOA, other government agencies and members of the state executive, with very few Orang Asli participants. Despite opposition from Orang Asli, a few states have already started to implement their own refined versions of the *Proposed Policy* without effective engagement with the Orang Asli.¹⁶⁴ The *Proposed Policy* shares a common but unfortunate theme with earlier government land policies towards the Orang Asli. In addition to being devised without satisfactory engagement with Orang Asli people, the *Proposed Policy* fails to recognise Orang Asli customary land and disregards the development of Orang Asli culture, economy, lands and identity on Orang Asli terms.

(iii) The New Economic Policy: Whither Orang Asli?

While programs associated with affirmative action in Malaysia have their roots in the *Malaysian Constitution* and were implemented soon after the independence of Malaya in 1957, they were only actively pursued after the 1969 race riots when the Malaysian government promulgated the New Economic Policy ('NEP') in 1970.¹⁶⁵ The main purpose of the NEP was to eradicate poverty and inter-ethnic wealth and income disparities, particularly those suffered by Malays and other Indigenous groups if compared to other ethnic groups. The NEP popularised the use of the term *Bumiputera* (literally translated from the Malay language, princes of the soil) to describe these privileged groups, but left the Orang Asli out of the NEP, at least when it came to their customary land.

Effectively, the NEP was a 20 year affirmative action program covering a broad spectrum of areas, including poverty eradication, higher education, public and private employment, corporate ownership and landlessness. The NEP was facilitated by policies that enabled greater state intervention in public resource allocation as well as public sector ownership and control of business enterprise.¹⁶⁶ Despite the official end of the NEP in 1990, the tenets of affirmative action have continued after 1990 through broad-based programs such as the National Development Policy (1991-2000), the National Vision Policy (2001-2010) and the New Economic Policy. It has also featured in the latest edition of the Malaysian five year economic development plans, namely, the 10th Malaysia Plan (2011-2015).¹⁶⁷

The main thrust of the rural development strategy during the NEP was to raise the productivity and income of the largely ethnic Malay rural poor through an integrated and comprehensive program of agricultural, socioeconomic and institutional development by government agencies such as the Federal Land Development Authority ('FELDA').¹⁶⁸ The development package would include basic physical and economic structures and social amenities and the provision of institutional and agricultural research, training, credit and input subsidies.¹⁶⁹ In order to overcome the problem of landlessness, the government agencies developed large tracts of 'new' land for settlers who would ultimately end up as a self-sustaining oil or palm oil smallholders. However, the political criteria for the selection of settlers meant that over 95 per cent of the settlers were Malay.¹⁷⁰ But as aptly observed by Nicholas, 'unlike other ordinary FELDA

settlers, they [the Orang Asli] are not landless peasants, but [were] once an autonomous and landed people'.¹⁷¹ In short, Orang Asli did not fit into the program.

In her analysis on the failure of the NEP to address Orang Asli poverty, Idrus faults its policy design.¹⁷² The focus of the NEP on increasing the productivity of the Malay peasantry who were rice farmers, rubber smallholders, coconut smallholders and fisherman meant that those groups who did not fall within this category would be left out. Compounding matters, these large scale agriculture projects and the subsequent focus of the NEP on the *Bumiputera*-owned commercial enterprises resulted in further encroachment and loss of Orang Asli customary territory.¹⁷³

In terms of customary land rights, Orang Asli have not only been neglected by the NEP but, much to their detriment, have had to make way for the implementation of land-based affirmative action policies for the benefit of others. This begs the question whether continued Malay-centric affirmative action will be a consideration in any policy move towards setting aside customary lands and resources exclusively for Orang Asli.

C Administrative Challenges: JAKOA

The Federal Government maintains a specific department dedicated to Orang Asli, namely JAKOA (formerly, JHOEA). As stated by the Malaysian government in its 2009 *Universal Periodic Review Report* to the United Nations:

Malaysia has also enacted the Aboriginal People Act 1954 concerning the protection, well-being and advancement of the Aboriginal people of West Malaysia. The Department of *Orang Asli* Affairs headed by a Director General is responsible to protect the welfare and manage the development of the *Orang Asli*.¹⁷⁴

Under section 4 of the APA, the responsibility for implementing laws and policies on Orang Asli affairs is assigned to the Commissioner for Orang Asli Affairs, a position now held by the Director-General of JAKOA. JAKOA is a federal government department which essentially operates as a single multi-functional agency, devising strategies and programs towards implementing policies on Orang Asli. Other government agencies also play roles in collaboration with JAKOA when delivery of services to Orang Asli comes within their respective portfolios.

Despite its purview, JAKOA and its predecessors, by-products of colonial action during the Malayan communist insurgency, have failed to safeguard Orang Asli interests through paternalistic and assimilationist policies.¹⁷⁵

A majority of JAKOA employees, especially those in positions of authority, are non-Orang Asli.¹⁷⁶ JAKOA or its predecessors have also never been headed by an Orang Asli. Salleh has argued that a pro-Malay bias manifested itself in JHOEA's previous dealings with Orang Asli.¹⁷⁷ He contends that Malay officials have developed a paternalistic attitude towards Orang Asli and feel it is within their rights to show Orang Asli 'the proper way to live in the modern world'.¹⁷⁸ Religious differences between Malay (Muslim) officers and Orang Asli have also been said to cause dissatisfaction and discomfort in their interaction with Orang Asli.¹⁷⁹ More recently, 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.¹⁸⁰

Nicholas contends that JAKOA's predecessor, JHOEA has frequently appeared to be in a position of conflict of interest, especially where the state wishes to appropriate Orang Asli customary lands. On the one hand, they represent Orang Asli interests and on the other hand, their status as a government agency may necessarily involve advancing state interests.¹⁸¹ These competing tensions have placed JHOEA in a difficult position whenever it may need to question government action in carrying out its assumed function of representing Orang Asli interests. There is little to suggest that the position is too much different under the department's new name, JAKOA. Administratively, JAKOA's poor performance in applying for the gazettal of Orang Asli lands is also hampered by insufficient capacity and resources and the relatively low budget for the survey of Orang Asli lands, again suggesting the lack of priority for the protection of Orang Asli customary lands.¹⁸² Compounding matters, JAKOA does not provide any legal or financial assistance for customary land rights litigation,¹⁸³ and has never been involved in pursuing any litigation involving the violation of Orang Asli land rights. Much to the contrary, JAKOA strenuously contests Orang Asli customary land rights claims where they are included as a party.¹⁸⁴

In January 2011, JHOEA changed its name to JAKOA, presumably to reflect its position as the agency responsible

for the development of Orang Asli and their lands pursuant to the Rural Development Masterplan and the JAKOA Plan.¹⁸⁵ Rather than ensuring the protection, well-being and advancement of the Orang Asli community in a manner respectful to Orang Asli lands and their culture, the JAKOA seems to function as an agency for the implementation of state-imposed land development policies for Orang Asli and the defense of federal government interests. It is therefore not surprising that the *SUHAKAM Report* has called for a comprehensive review of JAKOA.¹⁸⁶ Whether such a review comes to fruition would largely depend on whether the federal government is willing to renegotiate the extensive control it has over Orang Asli and their development priorities.

V Conclusion

Express constitutional and legal protection of Orang Asli customary land rights that places extensive power over Orang Asli and their lands in the state has not translated to the effective recognition and protection of Orang Asli rights ,or for that matter, equality for Orang Asli. As suggested in this article, a combination of factors have additionally contributed to the lack of relative priority for the Orang Asli, their culture and attendant customary lands. These factors consist of a complex web of historical and cultural prejudices against the numerically inferior Orang Asli, hierarchical, differentiated and contested definitions of indigeneity in Malaysia as well as Malaysia's subsequent push for economic progress which is linked to ethnic Malay-centric affirmative action. The resultant deprioritisation and concomitant failure to fully appreciate the plight of Orang Asli in their struggle for recognition as a distinct Indigenous group partly explains the absence of any policy move to address this regrettable scenario. At present, Orang Asli appear to be left with whatever land ownership, use and development priorities foisted upon them by the state for their own good or the good of others, but not necessarily in that order of priority.

While the formation of a National Task Force to consider the implementation of the *SUHAKAM Report* recommendations suggests that there may be hope for legislative and executive recognition of Orang Asli customary land rights, there is equally little to suggest that the legal, political, policy and administrative challenges identified in this article will be satisfactorily addressed. Addressing these challenges would require substantial recalibration and reprioritisation of how Orang Asli and their lands are viewed by not only

the government but by the Malaysian populace, a seemingly arduous task at this juncture. Even if the federal government has formed the political will to legally recognise Orang Asli customary land rights, there is every possibility that such recognition will likely be a product of legal, political, economic and pragmatic compromise that is negotiated with state governments and other stakeholders, the extent of which may again serve to shortchange the Orang Asli. Only the passage of time will provide answers to these issues.

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- 1 See, eg, definition of 'Aborigine' at art 160(2). For an examination of the constitutional position of Orang Asli vis-a-vis other Indigenous groups, see Part III.A.
- 2 SUHAKAM, *Report of the National Inquiry into the Land Rights of Indigenous Peoples* (SUHAKAM, 2013) ('SUHAKAM Report').
- 3 See K Pragalath, 'Task Force Will Not Mar SUHAKAM Report', *Free Malaysia Today* (online), 28 August 2013 <www.freemalaysiatoday.com/category/nation/2013/08/28/task-force-denies-undermining-suhakam-report>.
- 4 Department of Statistics Malaysia, *Official Website* (22 June 2013) <<http://www.statistics.gov.my/portal/>>.
- 5 Department of Statistics Malaysia, 'Populations Malaysia 2010-2040' (Report, Department of Statistics, 2012) 6.
- 6 For the definition of 'Malay' see, eg, *Federal Constitution* (Malaysia) art 160(2).
- 7 Robert Knox Dentan, Kirk Endicott, Alberto Gomes and M. B. Hooker, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, 1997) 10-12.
- 8 Department of Orang Asli Development ('JAKOA'), 'Pelan Strategik Jabatan Kemajuan Orang Asli 2011-2015' [Department of Orang Asli Development Strategic Plan 2011-2015] (Report, Department of Orang Asli Development, 2011) 20 [author's trans].
- 9 For a summary of these sub-groups, their respective languages,

- location and traditional activities, see 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) 20-23.
- 10 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) 6.
- 11 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, 1995) 35-6.
- 12 For constitutional definitions of these four groups, see below nn 26-9.
- 13 For an overview of these differences, see Part III.A.
- 14 Economic Planning Unit, 'Tenth Malaysia Plan 2011-2015' (Report, Prime Minister's Department, Malaysia, 2010) 149, 151, 162.
- 15 Economic Planning Unit, 'Ninth Malaysia Plan 2006-2010' (Report, Prime Minister's Department, Malaysia, 2006) 358.
- 16 SUHAKAM, *Rights of Orang Asli* (SUHAKAM, 2003) 15.
- 17 JAKOA, above n 8, 48.
- 18 These percentages are calculated from two sources. See: Ministry of Higher Learning, 'Kemeneterian Pengajian Tinggi' [Higher Learning Statistics 2008] (Report, Ministry of Higher Learning, 22 June 2012) 10 <[hyperlink](#)> [author's trans]; Department of Orang Asli Affairs ('JHOEA'), 'Data Makumat Asas' [Basic Information Data] (Report, Ministry of Higher Learning, 22 June 2012) 39 [author's trans].
- 19 JAKOA, above n 8, 34-5.
- 20 Mustaffa Omar, 'Penilaian Impak Sosial Rancangan Pengumpulan Semula (RPS) Orang Asli' [An Evaluation of the Social Impact of Orang Asli RPS] (Paper presented at National Conference: Orang Asli After 50 Years of Independence of Malaysia: Contribution and Achievement of the Orang Asli in National Development, Muzium Seni, 18-19 November 2008) 15 [author's trans].
- 21 Subramaniam, above n 9, 30-2.
- 22 Joseph Fernando, 'The Making of the Malayan Constitution' (Monograph No 31, Malaysian Branch of the Royal British Asiatic Society, 2002).
- 23 The Reid Commission, headed by Lord Reid, was appointed by the Council of Rulers of the Malay States and Her Majesty the Queen to make recommendations for the Constitution of the newly formed independent Federation of Malaya. See Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (HMSO, 1957).
- 24 Subramaniam, above n 9, 44-6, 381-3, 385.
- 25 Orang Asli were included at the behest of Malay representatives.

- See Alice M Nah, *Negotiating Orang Asli Identity in Postcolonial Malaysia* (Master of Social Science Thesis, National University of Singapore, 2004) 26-7, 33.
- 26 The definition of an Orang Asli under art 160(2) of the *Federal Constitution* (Malaysia) merely states an Aborigine to mean an 'aborigine of the Malay Peninsula'. See also s 3 of the *Aboriginal People Act 1954* (Malaysia) ('APA') provides for the definition of an *Orang Asli*. It defines an aborigine 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 descendent 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 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 *Orang Asli* affairs to determine any question whether a person is an *Orang Asli*. The issue of a member of the Executive having unilateral power over who is an *Orang Asli* is revisited in Part IV.A.
- 27 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: *Federal Constitution* (Malaysia) art 160(2).
- 28 Article 161A(6)(b) of the *Federal Constitution* (Malaysia) 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.
- 29 Article 161A(6)(a) of the *Federal Constitution* (Malaysia) 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.
- 30 This is the equivalent of the King of Malaysia who is appointed on a rotational basis every five years by the Council of Rulers of the States in Peninsular Malaysia that have Sultans as a head of state, namely, Perlis, Kedah, Kelantan, Perak, Terengganu, Pahang, Selangor, Negeri Sembilan and Johor. See *Federal Constitution* (Malaysia) arts 33-8, sch 3, 5.
- 31 This article was introduced when Sabah, Sarawak, the Federation of Malaya and Singapore formed Malaysia in 1963.
- 32 See *Federal Constitution* (Malaysia) arts 159(3), 159(5) respectively.
- 33 *Federal Constitution* (Malaysia) art 153(2).
- 34 *Federal Constitution* (Malaysia) art 89(1).
- 35 Article 74(1) of the *Federal Constitution* (Malaysia) empowers the federal government to legislate for matters enumerated in the federal list (Ninth sch List I) and Concurrent List (Ninth sch List III).
- 36 In this context, the fiduciary duty owed by the state to Orang Asli discussed in Part III.B(iii) may not be a *constitutional* fiduciary duty but a *common law* fiduciary duty supported by constitutional and legislative provisions and other sources.
- 37 *Federal Constitution* (Malaysia) arts 76(2), 150(6A). There are constitutional rights for the resolution of such disputes by the Syariah courts. See *Federal Constitution* (Malaysia) art 121(1A) in respect of Malays and native courts. In respect of natives of Sabah and Sarawak, see *Federal Constitution* (Malaysia) art 72(20) and Ninth sch, List IIA, Item 13.
- 38 For a definition of 'Malay' under art 160(2) of the *Federal Constitution* (Malaysia), see above n 27.
- 39 *Federal Constitution* (Malaysia) art 3(1).
- 40 *Federal Constitution* (Malaysia) art 76(2).
- 41 *Federal Constitution* (Malaysia) art 152.
- 42 See Subramaniam, above n 9, ch 4.
- 43 Carey, above n 10, 289.
- 44 *Aboriginal Peoples Act 1954* (Malaysia) ('APA') s 3(3).
- 45 *APA*, s 16.
- 46 *APA*, ss 14, 15.
- 47 *APA*, s 19. For commentary on the potential legal impact of these powers on 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.
- 48 *APA*, s 7(1).
- 49 *APA*, s 7(3).
- 50 *APA*, ss 7(2)(i)-7(2)(iii).
- 51 *APA*, s 7(2)(iv).
- 52 *APA*, s 9.
- 53 *APA*, s 7(2)(iv).
- 54 See *Kerajaan Negeri Selangor v Sagong bin Tasi* ('Sagong CA') [2005] 6 MLJ 289, 312-4 where the Court of Appeal held that the federal and state governments were under a duty to gazette Orang Asli lands by virtue of its fiduciary duty owed to the Orang Asli claimants in the case.

- 55 Select Committee Appointed to Consider Aboriginal Peoples Bill, Legislative Council, *Report No 2 of the Select Committee Appointed to Consider Aboriginal Peoples Bill* (1954) 2.
- 56 APA, s 8.
- 57 The concept of a tenancy at will at common law has been applied by the Malaysian courts. See, eg, *Tan Khien Toong v Hoong Bee & Co* [1987] 1 MLJ 387, 391 (Supreme Court); *Lee Ah Low v Cheong Lep Keen* [1970] 1 MLJ 8, 10 (Federal Court); *Cheah Leong Keah v Mydin bin Tamby Bappoo* (1932) 1 MLJ 98, 99.
- 58 APA, s 12.
- 59 *Sagong CA* [2005] 6 MLJ 289, 309–10.
- 60 APA, s 6.
- 61 See APA, ss 6(1), 6(3).
- 62 See APA, s 8.
- 63 See APA s 12.
- 64 APA, ss 6(2)(i)-6(2)(ii).
- 65 See APA ss 10(3), 10(4). Such provision for compensation has been held to violate art 13 of the *Federal Constitution* (Malaysia).
- 66 ‘State land’ means all land in the individual state (including so much of the bed of any river, and of the foreshore and bed of the sea, as is within the territories of the State or the limits of the territorial waters) other than (a) alienated land; (b) reserved land; (c) mining land; (d) any land which under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest: see *National Land Code* (Malaysia) (‘NLC’) s 5.
- 67 See *SUHAKAM Report*, above n 2, ch 8.
- 68 APA, s 11(1).
- 69 ‘Forest produce’ is defined in s 2 of the *National Forestry Act 1984* (Malaysia) (‘NFA’) to include ‘(a) the following when found in or brought from a permanent reserved forest: guano, peat, rock, sea-sand, sea-shells and the surface soil; (b) the following when found in or brought from a permanent reserved forest or State land: (i) trees and parts or produce not hereinafter mentioned of trees; (ii) plants including climbers, creepers and grasses, and all parts or produce of such plants; (iii) silk, cocoons, honey and wax and edible bird’s nests; (c) the following whether found in or brought from a permanent reserved forest, State land, mining land, reserved land or alienated land: timber, fuelwood, charcoal, *getah* [rubber], *getah taban* leaves, wood oil, bark, extracts of bark, *damar* and *atap*.
- 70 Section 40 provides for the requirement of a licence for the removal of forest products.
- 71 This Act applies throughout Peninsular Malaysia through its adoption by the individual states. Despite the uniformity of the Act throughout Peninsular Malaysia, forestry matters nevertheless fall under the State legislative list. See *Federal Constitution* (Malaysia) Sch 9 List II- State List, Item 3.
- 72 For further elaboration of these limitations, see Subramaniam, above n 9, 162.
- 73 See *Wildlife Conservation Act 2010* (Malaysia) sch 6.
- 74 See *Adong HC* [1997] 1 MLJ 418; *Kerajaan Negeri Johor v Adong bin Kuwau* (‘*Adong CA*’) [1998] 2 MLJ 158 (Court of Appeal); *Sagong bin Tasi v Kerajaan Negeri Selangor* (‘*Sagong HC*’) [2002] 2 MLJ 591; *Sagong CA* [2005] 6 MLJ 289.
- 75 *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh* (suing as Administrator of the Estate of the Deceased, *Salleh bin Kilong*) (‘*Madeli*’) [2008] 2 MLJ 677, 690-1 (Federal Court). Analyses of this doctrine in an *Orang Asli* context have been conducted elsewhere. See, eg, *SUHAKAM Report*, above n 2, 76–80; Subramaniam, above n 9, chs 6 and 7.
- 76 See Subramaniam, above n 9, 212-3.
- 77 See *Adong HC* [1997] 1 MLJ 418, 430; *Adong CA* [1998] 2 MLJ 158, 162–3; *Madeli* [2008] 2 MLJ 677, 692 (Federal Court).
- 78 See *Sagong CA* [2005] 6 MLJ 289, 301-302; *Madeli* [2008] 2 MLJ 677, 692 (Federal Court).
- 79 *Sagong HC* [2002] 2 MLJ 591, 612; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai* (‘*Nor Nyawai*’) [2006] 1 MLJ 256, 270.
- 80 *Adong HC* [1997] 1 MLJ 418, 431; affd *Adong CA* [1998] 2 MLJ 158, 163; *Sagong HC* [2002] 2 MLJ 591, 615.
- 81 See *Nor Nyawai* [2006] 1 MLJ 256, 269.
- 82 See *Sagong HC* [2002] 2 MLJ 591, 610, 621- 4.
- 83 *Madeli* [2008] 2 MLJ 677, 694-695 (Federal Court).
- 84 *Madeli bin Salleh* (Suing as Administrator of the Estate of the Deceased, *Salleh bin Kilong v Superintendent of Land & Surveys Miri Division* [2005] 5 MLJ 305, 330 (Court of Appeal).
- 85 *Sagong CA* [2005] 6 MLJ 289, 301–2.
- 86 *Adong HC* [1997] 1 MLJ 418, 430; affd *Adong CA* [1998] 2 MLJ 158, 162.
- 87 *Sagong HC* [2002] 2 MLJ 591, 613-4; *Madeli* [2008] 2 MLJ 677, 693 (Federal Court).
- 88 *Sagong HC* [2002] 2 MLJ 591, 612; *Madeli* [2008] 2 MLJ 677, 690, 696–7 (Federal Court).
- 89 *Sagong HC* [2002] 2 MLJ 591, 612; *Sagong CA* [2005] 6 MLJ 289, 307–8; *Madeli* [2008] 2 MLJ 677, 689, 698 (Federal Court).
- 90 *Madeli*, [2008] 2 MLJ 677, 697-8 (Federal Court).
- 91 *Adong CA* [1998] 2 MLJ 158, 163-4; *Sagong HC* [2002] 2 MLJ 591, 617; affd *Sagong CA* [2005] 6 MLJ 289, 309-10; *Madeli* [2008] 2 MLJ 677, 691-2 (Federal Court).
- 92 [1997] 1 MLJ 418, 436; affd *Adong CA* [1998] 2 MLJ 158.
- 93 *Sagong HC* [2002] 2 MLJ 591, 621; affd *Sagong CA* [2005] 6 MLJ 289, 309–11.
- 94 See *Sagong HC* [2002] 2 MLJ 591, 615; *Nor Nyawai* [2006] 1 MLJ 256, 269.

- 95 *Nor Nyawai* [2006] 1 MLJ 256, 269.
- 96 *Sagong CA* [2005] 6 MLJ 289, 301–2. For a criticism of this limitation, see Subramaniam, above n 9, 242–44.
- 97 For elaboration of these issues, see Subramaniam, above n 47, 61–2.
- 98 *Sagong HC* [2002] 2 MLJ 591, 619–20, *Sagong CA* [2005] 6 MLJ 289, 311–4.
- 99 *Sagong HC* [2002] 2 MLJ 591, 618–9; *affd Sagong CA* [2005] 6 MLJ 289, 311–2.
- 100 *Bato Bagi v Kerajaan Negeri Sarawak* [2011] 6 MLJ 297, 326.
- 101 *Sagong CA* [2005] 6 MLJ 289, 313–14, 319.
- 102 *Sagong HC* [2002] 2 MLJ 591, 620.
- 103 *Sagong CA* [2005] 6 MLJ 289, 314.
- 104 *Pengarah Tanah dan Galian Johor v Khalip bin Bachik* [2013] 1 MLJ 799, 812–13.
- 105 See *Working Group of the Commission of Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, UN HRC Res 2/2006, 1st sess, 21st mtg, UN Doc A/HRC/1/L.3 (2006); Department of Public Information, News and Media Division, United Nations General Assembly, ‘General Assembly Adopts Declaration on Rights of indigenous Peoples: Major Step Towards Human Rights for All, Says President’ (Media Release, 13 September 2013) <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> (General Assembly).
- 106 For commentary on the *UNDRIP* see, eg, Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009); Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011).
- 107 Quotation from *UNDRIP* preambular [24].
- 108 See *SUHAKAM Report*, above n 2, 132.
- 109 See Bah Tony Williams-Hunt, ‘FPIC and Orang Asli Lands in Peninsular Malaysia’ (Paper presented at a Conference on Customary Lands, Territories and Resources: Bridging the Implementation Gap, Kuala Lumpur, 25–26 January 2011).
- 110 *SUHAKAM Report*, above n 2, 133.
- 111 For historical figures on the status of Orang Asli lands, see 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) 32–40.
- 112 See *APA* ss 6(3), 7(3).
- 113 *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] 1 CLJ 486, 487.
- 114 *APA* s 10.
- 115 For the challenges faced by Orang Asli in succeeding in such claims, see Subramaniam, above n 9, 263–88.
- 116 For current examples of JAKOA’s stand in this regard, see, eg, *Sangka bin Chuka v Pentadbir Tanah Daerah Mersing, Johor* (Johor Bahru High Court Application for Judicial Review No 25-27-02/2012); *Yebet binti Saman v Foong Kwai Long* (Kuantan High Court Originating Summons No 24 NCV-321-12/2012).
- 117 See, eg, JAKOA, above n 8, 56–7.
- 118 For example, the Federal-State power divide was not an impediment to the passing of the proposed Orang Asli land titles policy by the National Land Council in 2009. See Part IV.B(ii)(b) of this article.
- 119 The *SUHAKAM Report* recommendations include, amongst other things, addressing Indigenous land security of tenure, clarification of the concept of customary tenure, restitution for non-recognition of Indigenous lands, the review of compensation, the recognition of Indigenous lands in protected areas and active involvement of Indigenous peoples in forest management. See *SUHAKAM Report*, above n 2, 165–71.
- 120 See Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: From Rhetoric to Recognition* (Center for Orang Asli Concerns, 2010) 11–24.
- 121 *Ibid* 16–17.
- 122 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 (2013) [67].
- 123 Sullivan argues that it was not uncommon for colonisers to systematically disinherit ‘non-state-oriented societies such as hunter gatherers and shifting horticulturalists’ while forging ‘something approximating their idea of a nation-state out of those they ruled’ during the decolonisation process, and that this was indeed the case in Peninsular Malaysia. See 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.
- 124 See *Adong HC* [1997] 1 MLJ 418, 429.
- 125 See *Sagong HC* [2002] 2 MLJ 591, 621.
- 126 For more recent work on these issues see, eg, Rusaslina Idrus, *The Politics of Inclusion: Law, History and Indigenous Rights in Malaysia* (PhD Thesis, Harvard University, 2008); Nah, above n 25.
- 127 See, eg, Nah, above n 25, 25–6, 55, 71, 138–41.
- 128 Sullivan, above n 123.
- 129 See Idrus, above n 126, 160–2; Dentan et al, above n 7, 19–22; Nicholas, above n 111, 90.
- 130 Zawawi Ibrahim, ‘The New Economic Policy and the Identity Question of the Indigenous Peoples of Sabah and Sarawak’ in Edmund Terence Gomez and Johan Saravanamuttu (eds), *The New Economic Policy in Malaysia: Affirmative Action, Ethnic*

- Inequalities and Social Injustice* (NUS Press, 2013) 296.
- 131 See, eg, *APA*, s 3(3) which empowers the Minister having charge of Orang Asli to determine whether a person is an Orang Asli.
- 132 For the constitutional definition of Malay, see above n 27.
- 133 *SUHAKAM Report*, above n 2, 173-4.
- 134 National Economic Advisory Council, *New Economic Model for Malaysia: Part 1 Strategic Policy Directions* (National Economic Advisory Council, 2010) 3.
- 135 *SUHAKAM Report*, above n 2, 168-70.
- 136 Jimin bin Idris et al, *Planning and Administration of Development Programmes for Tribal Negrito Groups and Semi-Nomadic Peoples* (CIRDAP, 1983).
- 137 See W W Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press, 1960).
- 138 For recent examples of such activities and their impact on Orang Asli, see *SUHAKAM Report*, above n 2, 130-53.
- 139 Jomo K S, Chang Y T and Khoo K J, *Deforesting Malaysia: The Political Economy and Social Ecology of Agricultural Expansion and Commercial Logging* (Zed Books, 2004) 223-4.
- 140 Ibid 224-5.
- 141 Rusaslina Idrus, 'Left Behind: The Orang Asli under the New Economic Policy' in Edmund Terence Gomez and Johan Saravanamuttu (eds), *The New Economic Policy in Malaysia: Affirmative Action, Ethnic Inequalities and Social Injustice* (NUS Press, 2013) 272-3.
- 142 M B Hooker, 'The Orang Asli and the Laws of Malaysia: With Special Reference to Land' (1996) 48 *Akademika* 21, 25ff.
- 143 Ministry of Rural and Regional Development, 'Pelan Induk Pembangunan Luarbandar' [Rural Development Masterplan] (Report, Ministry of Rural and Regional Development, 2010) [author's trans].
- 144 See, eg, *ibid* 70, 94.
- 145 JAKOA, above n 8, 73-133.
- 146 *Ibid* 68-9.
- 147 *Ibid* 57-9. The Proposed Policy is examined below at Section IVB(ii)(b).
- 148 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) 124.
- 149 See JAKOA, above n 8, 24-36. For a critique of Orang Asli policies, see, eg, Nicholas, above n 111, 80-2, ch 5, 113-26.
- 150 See Nicholas, above n 111, 95-6, 113-17.
- 151 Dentan et al, above n 7, 119-20.
- 152 Director of Lands and Minerals, Pahang, 'Kajian Semula Dasar dan Kaedah Pemilikan Tanah Orang Asli di Negeri Pahang' [Revision of Policy and Procedure for Orang Asli Land Ownership in Pahang] (Administration Direction No 4, State of Pahang Darul Makmur, 2006) [2.3] [author's trans].
- 153 Juli Edo et al, 'Pemetaan Impak Rancangan Penempatan Semula Berdasarkan Aplikasi GIS dan Persepsi' [Mapping the Impact of Regroupment Programmes based on the Application of GIS and Perceptions] (Centre for Malaysian Indigenous Studies, 2010) 157 [author's trans].; Ramle bin Abdullah, 'Pembangunan dan Transformasi Sosio-Ekonomi Orang Asli: Kes Masyarakat Orang Asli Di Negeri Terengganu' [Socio-economic Development and Transformation of Orang Asli: The Case of the Orang Asli Community in the State of Terengganu] (Paper presented at National Conference 'Orang Asli After 50 years of Independence of Malaysia: Contribution and Achievement of the Orang Asli in National Development', Muzium Seni Malaysia, Universiti Malaya, 18-19 November 2008) (translated from the Malay language by the author).
- 154 Ramle bin Abdullah, 'Pembangunan dan Transformasi Sosio-Ekonomi Orang Asli: Kes Masyarakat Orang Asli Di Negeri Terengganu' [Socio-economic Development and Transformation of Orang Asli: The Case of the Orang Asli Community in the State of Terengganu] (Paper presented at National Conference: Orang Asli After 50 Years of Independence of Malaysia: Contribution and Achievement of the Orang Asli in National Development, Muzium Seni, 18-19 November 2008) [author's trans].
- 155 *Ibid* 140-1.
- 156 Edo, above n 153, 137.
- 157 Robert Knox Dentan, 'The Semai of Malaysia' in Leslie E Sponsel (ed), *Endangered Peoples of Southeast and East Asia: Struggles to Survive and Thrive* (Greenwood Press, 2000) 212.
- 158 *Ibid* 157.
- 159 JAKOA, above n 8, 57-8.
- 160 *Ibid*. The land would be cleared and cultivated by a third party contractor. Orang Asli who are granted the titles would have to repay all costs associated with the issuance of such titles once the plantations become productive.
- 161 Peninsular Malaysia Orang Asli NGO Network, 'Memorandum Bantahan Dasar Pemberimilikan 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] (Protest Memorandum, National Land Council, 17 March 2010) Enc 1 [author's trans].
- 162 *SUHAKAM Report*, above n 2, 138.
- 163 JAKOA, above n 8, 55-6.
- 164 *SUHAKAM Report*, above n 2, 138.
- 165 For an overview of the NEP and the circumstances surrounding its introduction, see Jomo K S and Chang Yii Tan, 'The Political

- Economy of Post-Colonial Transformation' in Jomo K S and Wong Sau Ngan (eds), *Law, Institutions and Malaysian Economic Development* (NUS Press, 2008) 26–30.
- 166 See Jomo and Chang, above n 165, 28.
- 167 Edmund Terence Gomez, Johan Saravanamuttu and Maznah Mohamad, 'Malaysia's New Economic Policy: Resolving Horizontal Inequalities, Creating Inequities?' in Edmund Terence Gomez and Johan Saravanamuttu (eds), *The New Economic Policy in Malaysia: Affirmative Action, Ethnic Inequalities and Social Injustice* (NUS Press, 2013) 21.
- 168 See Ragayah Haji Mat Zin, 'The New Economic Policy and Poverty Eradication in Malaysia' in Edmund Terence Gomez and Johan Saravanamuttu (eds), *The New Economic Policy in Malaysia: Affirmative Action, Ethnic Inequalities and Social Injustice* (NUS Press, 2013) 40–2.
- 169 Ibid 40–2.
- 170 Ibid 44–5.
- 171 Nicholas, above n 111, 121.
- 172 Idrus, above n 141, 281.
- 173 Ibid.
- 174 Human Rights Council, *National Report Submitted In Accordance With Paragraph 15 (A) Of The Annex To Human Rights Council Resolution 5/1 (Malaysia)*, UNGA Doc A /HRC/WG.6/4/MYS/1/ Rev.1 19 November 2008 (2008) [98].
- 175 Amy Dennison, 'Evolving Conceptions of Native Title in Malaysia and Australia - A Cross Nation Comparison' (2007) 11(1) *Australian Indigenous Law Review* 79, 80.
- 176 JHOEA, above n 18, 2.
- 177 Mohd Tap bin Salleh, *An Examination of Development Planning Among the Rural Orang Asli of West Malaysia* (PhD Thesis, University of Bath, 1990) 461.
- 178 Ibid.
- 179 Ibid 34.
- 180 *SUHAKAM Report*, above n 2, 152–3.
- 181 Nicholas, above n 111, 110.
- 182 *SUHAKAM Report*, above n 2, 130.
- 183 Subramaniam, above n 47, 61-2.
- 184 For current examples of such contestation, see above n 116.
- 185 See JAKOA, above n 8.
- 186 Ibid 171–2.