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Danielle T. Sato
Lehigh University

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INDIGENOUS LAND RIGHTS AND THE MARGINALIZATION OF THE ORANG ASLI IN MALAYSIA

Danielle T. Sato



Although the Orang Asli are the original, indigenous peoples of Peninsular Malaysia, they have been largely excluded from the country's economic growth of recent decades. Rather than protect this marginalized community, state officials and private agencies regularly exploit the Orang Asli and their ancestral lands. Given that many of the Orang Asli's prevailing challenges stem from their lack of customary land ownership, systemic change must come from the legislative level.

Introduction

Although indigenous peoples across the world represent a highly diverse set of social practices, biophysical environments, and cultural values, they often share experiences of oppression, exploitation, and marginalization at the hands of the states that exert authority over them (Aiken and Leigh, "In the way..."; "United Nations..."). In industrializing nations, not only are indigenous communities typically excluded from economic prosperity but also this prosperity often comes at their own expense (Winzeler). Unfortunately, the indigenous peoples of Malaysia have not been immune to the deeply systemic patterns of harm observed in other economically developing countries ("United Nations..."; SUHAKAM, "Report...").

Since independence in 1957, Malaysia has facilitated large-scale initiatives for industrial development, increasing the quality of life for substantial portions of its population. However, Orang Asli communities, the

indigenous peoples of Peninsular Malaysia, still face a multitude of fundamental inequalities. The widespread prevalence of poverty, contaminated water, infectious disease, and early school dropouts points toward a systemic cause of the Orang Asli's plight. Ultimately, many problems stem from the severe lack of Orang Asli customary land rights.¹ With Pakatan Harapan (PH) taking federal leadership in 2018, incoming officials have made big promises regarding this issue. Although the intention to increase protections of Orang Asli land is supported by the official PH manifesto, the developmental goals of the country—goals that only prioritize economic gain—seem to repeatedly trump indigenous human rights concerns. If PH genuinely desires to protect, support, and uplift the country's indigenous

¹Terms, such as customary land rights, customary title, native title, ancestral land rights, and indigenous land rights, are used relatively interchangeably when referring to the Orang Asli's native customs on usage and ownership of their ancestral lands.

peoples, systematic intentional change must come from the highest governmental levels.

Background

The Orang Asli are the indigenous minority peoples of Peninsular Malaysia. Although referred to generally as Orang Asli, they should not be treated as a homogenous group (Nicholas, 2000). Orang Asli communities include three classifications based on language and customs: Senoi, Proto-Malay, and Negrito. These classifications are further broken down into 18 ethnic subgroups, each with unique cultural practices, linguistic styles, occupational distributions, and settlement locations (JAKOA).

Although there is no universal consensus on the definition of “indigenous” groups, institutions that work with indigenous communities, such as the United Nations, have accepted a working definition based on characteristics such as uniqueness from the dominant society, cultural history prior to colonial states, deep relationships with the land, and utilization of native customs and laws (Martínez Cobo). Based on Malaysian legislation, the dominant Malay majority, Orang Asli, and natives of Sabah and Sarawak are included in the conceptualization of indigenous peoples and therefore afforded bumiputera status (Aiken and Leigh, “In the Way...”). In practice, though, the Orang Asli are not afforded bumiputera benefits, such as housing discounts and university admission quotas, that their Malay counterparts enjoy (Nah, “Recognizing...”). Instead, Orang Asli communities are legally regarded as “aborigines” by the Aboriginal Peoples Act (APA) and lack the same autonomy regarding their legal standing and political rights (Nah, “Recognizing...”; Nordin and Witbrodt). As such, the term “indigenous” as used in this article follows the United Nations definition and not necessarily that of Malaysian legislation.

The term “Orang Asli” refers only to the indigenous inhabitants of Peninsular Malaysia. The indigenous peoples of Sabah and Sarawak are commonly and legally regarded as “natives of Sabah and Sarawak” (Federal Constitution). This distinction denotes clear historical, demographic, and legislative differences

between these two groups. Sabah and Sarawak natives compose a much larger portion of their respective states’ populations and hence can more fully represent themselves in governmental settings (Winzeler). The natives of Sabah and Sarawak are protected under the Federal Constitution regarding their traditions, language, religion, and laws, while the Orang Asli possess few comparable protections (Subramaniam, “Ethnicity...”). Additionally, the state judicial systems of Sabah and Sarawak have Native Courts with explicit jurisdiction over “native customs,” unlike the states of Peninsular Malaysia (Nah, “Recognizing...”). Although Sabah and Sarawak natives have not entirely evaded the negative consequences commonly faced by indigenous groups, they are not the primary focus of this article.

Prevailing Challenges of Orang Asli Communities

Prejudicial legislative distinctions continually deny the Orang Asli their rights; thus, they are among Malaysia’s most disadvantaged and marginalized peoples (SUHAKAM, “Report...”). This pervasive marginalization is entrenched in Malaysian society, as reflected in the high poverty rates, educational issues, and land encroachments that contribute to and result from the Orang Asli’s disenfranchisement.

Poverty

In 2014, the national incidence of poverty for Malaysians was 0.6%, based on an average monthly poverty line income of RM930 at the time (EPU, “The Malaysian...”; EPU, “Eleventh...”). This number dropped substantially from an incidence of 49.3% in 1970, as the result of widespread programs to raise household income, create job opportunities, raise educational attainment, increase access to clean water and health care, and generally improve living standards for all citizens (Hatta and Ali). The Eleventh Malaysia Plan additionally claims that hardcore poverty, as defined by half the poverty line income, has been fully eradicated. Unfortunately, though, rates of poverty among the Orang Asli are much higher than in the greater Malaysian

population (Abdullah, Muhammad Fuad, et al.; Khor and Shariff). Although issues in data collection hinder up-to-date poverty statistics, estimates in 2009 show 33.5% and 15.5% of Orang Asli households living in poverty and hardcore poverty, respectively (JAKOA). This same year, the greater Malaysian population experienced drastically lower poverty and hardcore poverty rates of 3.6% and 0.7%, respectively (EPU, "The Malaysian...").

Author, activist, and Center for Orang Asli Concerns coordinator Colin Nicholas (2010) cites lack of permanent proprietary rights as a major contributing factor to these disproportionate poverty levels. Although the Orang Asli are spiritually and economically connected to the land, they lack land rights that are insusceptible to state-allocated development projects and are regularly displaced from areas they have relied on for generations. Financial compensation is sometimes given to displaced individuals, but these amounts do not typically satisfy the profound relationship that indigenous communities have with the land in question. Hence, culturally ignorant regulations translate to widespread impoverishment and underdevelopment for Orang Asli communities.

Education

Education attainment rates for indigenous communities have increased since Malaysian independence (Khor and Shariff), but Orang Asli children still face disproportionately high dropout rates compared with the rest of the population (Kamaruddin and Jusoh). At every education level, from preschool to postsecondary, Orang Asli children are more likely to discontinue schooling, further contributing to heightened rates of poverty and lower quality of life (Nicholas, 2010). Additionally, Orang Asli students encounter rampant discrimination, bullying, and ridicule from both teachers and peers in school (SUHAKAM, "SUHAKAM Calls for..."). In one extreme case, a teacher forced an Orang Asli primary school student to eat glass as a punishment for accidentally breaking a school window pane (Tan; SUHAKAM, "Allegation..."). Orang Asli children are also neglected in school settings, which can have serious consequences.

In a case formally presented to the Human Rights Commission of Malaysia (SUHAKAM), seven Orang Asli school children went missing in 2015 as a result of negligent primary school teachers (Alhadjri; SUHAKAM, "SUHAKAM Calls on...").

Many school teachers and government officials claim that indigenous children are more likely to drop out because of parents' negative attitudes about formal school and a disconnect between mainstream Malaysian and traditional Orang Asli values, but this reasoning is unsupported (Abdullah, Ramle bin, et al.; Kamaruddin and Jusoh). Blaming disproportionate dropout rates on cultural differences ignores the systemic barriers to school attendance and only encourages inaccurate stereotypes of the Orang Asli. Formal education requires resources like school fees, modes of transportation, and meal allowances that those living in poverty cannot afford (Kamaruddin and Jusoh). Moreover, when these expenses occur at the start of the school year in January, agricultural incomes are at their lowest. Another inaccurate attribution of high Orang Asli dropout rates is to student disinterest, laziness, or boredom. In actuality, Orang Asli children report positive attitudes and outlooks on school (Abdullah, Ramle bin, et al.). Such misconceptions similarly perpetuate false stereotypes, failing to acknowledge that teachers can and should create classrooms welcoming for all students.

Land Encroachment

Orang Asli community leaders have identified to the Malaysian government areas that should be designated under customary proprietary ownership guidelines. Nonetheless, land encroachment occurs often without prior notification. Governmental leaders and business executives justify recurrent cases of land encroachment by prioritizing resource extraction, plantation conversion, and infrastructural developments over the livelihood of indigenous communities (Aiken and Leigh, "In the Way..."). Accounts from affected communities, academic researchers, and NGOs all emphasize how land encroachment and heedless attempts at resettlement are linked to struggles like poor

health, extensive poverty, and cultural identity loss (SAM and JKOASM).

In response to land rights violations, Orang Asli groups have taken to protests, blockades, and public demonstration of their grievances. Although paternalistic governmental practices kept the Orang Asli powerless to their past circumstances, indigenous communities, Malaysian citizens, and international advocates are speaking out now (Nordin et al.). The barricading of customary lands by local tribes is a direct reaction to decades of silencing, ignoring, and violating indigenous rights.

In response to almost all problems that affect Orang Asli communities, governmental agencies blame the Orang Asli rather than address the systemic causes at play (Nicholas, 2010). Inaccurate stereotypes lead to deeply harmful misconceptions, such as blaming dropout rates on attitudinal issues and poor health outcomes on unhygienic habits (Khor and Shariff). However, the source of such fundamental issues lies much deeper. The legislative framework undergirding land encroachment is intrinsically flawed, hindering the advancement of Orang Asli communities before it begins.

Legal Framework of Orang Asli Land Rights

In reviewing the jurisprudence regarding indigenous land rights in Malaysia, a number of underlying discrepancies emerge. Although recent landmark judicial decisions affirm the Orang Asli's rights to own and cultivate their customary land, governmental agencies and business leaders use problematic legislative statutes to infringe on those same rights. Additionally, the federal government's intentions regularly contradict states' actions when handling the concerns of Orang Asli communities.

International Law on Indigenous Peoples' Rights

The Orang Asli's customary rights are stipulated in multiple international documents on the land, territory, and resource rights of indigenous peoples in a global context. Two

key sources are the International Labour Organisation (ILO) Indigenous and Tribal Peoples Convention 169, 1989 (ILO C169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The ILO C169 highlights many overarching principles regarding the rights of indigenous peoples, framing its 44 articles as "new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards." Notably, governments are advised to consult with and have active participation from the indigenous peoples affected by governmental matters. The document goes on to address the immense importance customary land rights hold in relation to the well-being of indigenous communities. As such, comprehensive rights for land, territories, and resources should be granted to the indigenous peoples concerned (ILO).

In September 2007, the United Nations General Assembly finalized its draft of the UNDRIP. This 46-article declaration centers on both individual and collective rights of indigenous peoples, recognizing that "indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources." The declaration identifies an "urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources." Several articles explicitly address customary land rights. Article 26(1) proclaims the right to the land and resources indigenous peoples have traditionally owned, occupied, used, or acquired. Article 26(2) rearticulates this traditional ownership to "the right to own, use, develop, and control" these lands. Articles 26(3) and 27 require that the respective states "give legal recognition and protection to these lands" and enact "a fair, independent, impartial, open and transparent process...to recognize and adjudicate the rights of peoples pertaining to their lands." Article 28 addresses how indigenous peoples are entitled to restitution

or compensation with respect to “confiscated, taken, occupied, used, or damaged” customary land. Additionally, Article 10 explicitly bans the forced removal of indigenous populations from their land, recognizing that relocation can only occur with free, prior, and informed consent and equitable compensation (“United Nations...”).

The Federal Constitution and Aboriginal Peoples Act

In addition to international law, various articles within the Federal Constitution of Malaysia outline the basis for both recognition of indigenous land rights and protection of Orang Asli communities. However, the language used to articulate these rights contrasts with that used in international law. The ILO C169 and UNDRIP focus on the collective ownership of land and resources for indigenous peoples. The Malaysian Constitution prioritizes individual, not collective, land ownership, thereby contradicting the traditional philosophies of the Orang Asli.

Still, the protection of fundamental liberties and proprietary rights is recorded in the Malaysian Federal Constitution, which ensures equal protection under the law for all persons, specifically prohibiting discrimination on the grounds of “religion, race, descent, place of birth or gender...in the administration of any law relating to the acquisition, holding or disposition of property.” In addition, the right to property is clearly stated as a fundamental liberty: “No person shall be deprived of property save in accordance with law” and “No law shall provide for the compulsory acquisition or use of property without adequate compensation.” Finally, despite land ownership commonly cited as a state matter in public discourse, the federal government is empowered to make laws affecting lands to ensure uniformity of such laws across Peninsular Malaysia (Federal Constitution).

Another piece of legislation that informs Orang Asli land rights is the APA, which is intended to “provide for the protection, well-being, and advancement” of the indigenous peoples of Peninsular Malaysia. However, the current status of the Orang Asli in relation to land rights is essentially as tenants-at-

will, so eviction by state entities can come at any time and without notice (Aiken and Leigh, “Seeking...”). Although the Constitution requires compensation for land possession, the APA fails to delineate regulation of such compensation for either past or future acquisition. Moreover, the APA was drafted when the Malaysian government was attempting to protect indigenous peoples from the communist party, reflecting the still prevalent perception of the Orang Asli as wards of the state (Nah, “Negotiating...”).

As the official law of the land, the Federal Constitution operates as the guiding document for legal decision making at both federal and state levels. The APA, although its preamble states otherwise, regards the Orang Asli as no more than tenants-at-will on their ancestral land. Despite multiple provisions in the Constitution and the APA outlining customary indigenous land rights, substantial injustices continue to affect Orang Asli communities. Further, the Malaysian Constitution is steeped in notions of individual rights and individualistic perspectives, contradicting traditional approaches to indigenous land ownership and thereby setting a precedent for the divide between governmental interests and indigenous peoples’ well-being.

Landmark Judicial Decisions

Over the last three decades, judicial decisions have offered hope for governmental recognition of indigenous lands. Three landmark cases in particular have been commonly cited in the fight for customary land rights.

In the case of *Koperasi Kijang Mas & Ors [Others] v. Kerajaan Negeri Perak & Ors* in 1991, the State Government of Perak was accused of allowing a private company to log areas of Orang Asli land, thus violating the APA. The state officials argued that, because the specified lands had not yet been gazetted,² they were not at fault. However, the High Court ruled that gazettment was not a requirement for the

²Although not required to do so, state governments can officially designate an area of land as aboriginal reserve, aboriginal area, or aboriginal inhabited place, as dictated by the APA. When an area is documented with this formal designation, it is said to be gazetted.

Orang Asli to own the forest area's products and resources. In ordering logging operations to cease, this judgment set a precedent for the rights of Orang Asli communities to claim land ownership without the precondition of gazettement (Aiken and Leigh, "Seeking...").

In the 1997 case of *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor*, Orang Asli families claimed their customary lands were unlawfully acquired without adequate compensation by the State of Johor for a dam development project. Although the initial compensation amount was recommended by the Department of Orang Asli Affairs,³ it only covered lost produce, not the greater loss of livelihood (Nah, "Recognizing..."). In citing previous common law, Article 13 of the Constitution, and legal precedents from other countries, the High Court notably introduced the concept of native title for the Orang Asli (Hooker). The affected families were awarded RM26.5 million to comprehensively cover the land loss. Although this ruling benefited the Orang Asli, an important caveat remained. The Orang Asli families had proprietary rights to produce *on* the land and sustain their livelihood, yet they lacked the inalienable right *in* the land. As such, compensation covered the area's economic value but not the cultural or spiritual loss of this dispossession (Aiken and Leigh, "Seeking...").

In *Sagong Bin Tasi & Ors v. Kerajaan Negeri Selangor & Ors* in 2002, Orang Asli from the Temuan tribe argued unlawful eviction from their gazetted land. To continue the construction of a highway to the Kuala Lumpur International Airport, Selangor state authorities justified this eviction claiming that the Orang Asli were only tenants occupying land owned by the state. The state also argued that the Orang Asli could not claim ancestral land ownership because their current way of living was too modernized, referring to their cultivation of non-traditional crops, decreased reliance on foraging, adoption of other religions, and marriage with outsiders (Aiken and Leigh, "Seeking..."). Importantly, the courts disagreed. In this monumental judicial decision, the Orang Asli community

was granted customary land rights both *on* and *in* the land, in contrast to the previous case decision (Subramaniam, "Rights..."). This ruling further demonstrated that factors like intermarriage, religious conversion, and modernization do not negate indigenous heritage. Not only is this notion a culturally sound reflection of the Orang Asli identity, but also it is legally validated within the APA and international law on indigenous rights.

These court cases represent only a few of the litigations brought by Orang Asli communities against public and private agencies, but they provide the strongest framework for how governmental authorities can utilize the current legislation to support the Orang Asli, rather than back destructive industrialization projects. They exemplify the way that the Malaysian government can reverse unjust laws from an era of colonization and exploitation. More practically, these cases set precedents for numerous recent judiciary disputes involving the Orang Asli. They outline the fiduciary duty of the government to appropriately gazette ancestral regions, provide adequate compensation for land loss, and uphold customary land rights as native title (SUHAKAM, "Report...").

Still, these judicial decisions were contingent on Orang Asli communities reacting to injustices already being committed by either state agencies or private parties. Placing the responsibility to speak up on the very communities that are already marginalized only perpetuates the hegemonic and oppressive structures currently in place. Instead, the full rectification of past wrongs requires local, state, and federal governments to be the instigators of significant, systematic change.

Recommendations from Key Contributors

Findings of academic articles, NGO publications, and some governmental documents agree—the lack of customary land rights in Malaysian legislation explains many of the Orang Asli's prevailing challenges. Still, the complex array of issues that Orang Asli communities endure cannot be tackled with only one solution in mind. Key players in the

³Now known as the Department of Orang Asli Development (JAKOA).

fight for indigenous rights in Malaysia have proposed a variety of recommendations.

In his book, *Orang Asli: Rights, Problems & Solutions*, Nicholas recommends several key solutions to the prevailing issues of Orang Asli communities. First, he calls for the fundamental recognition of the Orang Asli as the indigenous, original peoples of Peninsular Malaysia, rather than wards of the state. Nicholas also recommends a shift in the mindset of JAKOA and Malaysian politicians more generally. Rather than primarily serve economic interests, political leaders and governmental agencies must actively advocate for Orang Asli communities, remove prejudicial practices, and re-educate the public on Orang Asli issues. An important step toward achieving these goals is a greater involvement of Orang Asli community members in JAKOA and other committees, boards, and councils. Finally, Nicholas calls for greater involvement of Orang Asli women in otherwise largely patriarchal communities. He advises that including female leaders in decision making more likely prioritizes community-oriented goals over individual self-interest (Nicholas, 2010).

In a sweeping National Inquiry, SUHAKAM (“Report...”) makes 18 recommendations to uphold the customary land rights of the Orang Asli. Primarily, the federal and state governments must recognize that land rights are essential to upholding the Orang Asli’s human rights more generally. This recognition entails granting Orang Asli communities with land tenure security, studying and clarifying customary tenure of traditional land, and returning or providing full compensation for stolen indigenous land. To remedy past abuses regarding land loss, SUHAKAM calls for the installation of redress mechanisms, re-evaluation of problematic policies and programs, and review of protocols for land and resource compensation. In pointing out the “desecration of graves; destruction of agricultural land, crops, catchment areas and important cultural sacred sites; [and] water, air and noise pollution” that have come from irresponsible economic development of the past, development projects of the future must be reconceptualized to protect and uplift Orang Asli communities.

In addition to addressing previous wrongs, SUHAKAM outlines how to prevent future losses: settling customary land claims before projects begin, recognizing Orang Asli land even within conservation areas, and engaging Orang Asli leaders in decisions about forest management. SUHAKAM also calls for a review and restructuring of governmental and administrative players in Orang Asli rights, namely JAKOA and the Department of Land and Mines. Finally, SUHAKAM notes that realization of the Orang Asli’s fundamental human rights is contingent on the recognition of land as central to indigenous peoples’ identity. Establishing an independent National Commission on Indigenous Peoples to oversee governmental action relevant to the Orang Asli would be an integral part of this recognition (SUHAKAM, “Report...”).

Governmental Promises

Although the current legal framework of land ownership has not successfully allowed the Orang Asli to exercise the customary land rights to which they are entitled, a radical restructuring of proprietary rights and governmental administration could spur meaningful change. The induction of PH in 2018 has sparked excitement in the fight for Orang Asli land rights.

In contrast to government organizations and private corporations that historically prioritized monetary goals over indigenous communities, PH explicitly supports the Orang Asli (Pakatan Harapan). Their campaign manifesto assures improved distribution of Malaysia’s economic development, noting that wealth will be “shared more equitably by the Bumiputera and every citizen regardless of race and religion, including especially the Indians and the Orang Asal.”⁴ The manifesto further commits to “advancing the interests of Orang Asal in Peninsular Malaysia,” acknowledging the myriad problems that Orang Asli communities face (Pakatan Harapan). The prevailing hope among Orang Asli communities is that the current government will uphold these campaign promises.

⁴As used by SUHAKAM, the term “Orang Asal” collectively refers to the Orang Asli of Peninsular Malaysia as well as the natives of Sabah and Sarawak.

Conclusion

Despite the international recognition of indigenous peoples' oppression in both the past and the present, communities like the Orang Asli continually face injustices and maltreatment by the states that are meant to protect and support them. Although the Malaysian government cannot reverse events of the past, the harm from past abuses can be alleviated by substantial legislative shifts in the present. PH has openly expressed its commitment to advancing the well-being of Orang Asli communities. Implementing and enforcing customary land rights with a collective ownership framework would be crucial in lessening the issues still facing the Orang Asli. Such rights would allow indigenous communities to advance in Malaysian society on their own terms, rather than by the agency of government officials. However, past judicial decisions and legislative interpretation, as well as the documented inconsistencies in federal intentions and state actions, make it difficult to assume that campaign promises will automatically hold true.

Indigenous peoples are recognized for a uniquely intimate and profound relationship with their lands. To pervert this relationship to one simply rooted in economic value has incredibly negative consequences, especially when constructing and interpreting legislation on proprietary rights. The outdated, prejudicial notion that a connection to and respect for the land equates “backwardness”—a notion that is regularly attributed to Orang Asli communities—must end. While economic prosperity and development are legitimate goals for Malaysian citizens, governmental leaders must not infringe upon the fundamental rights of indigenous peoples to attain these goals. If PH is to substantiate its claims regarding the equitability of economic development, major legislative action must clarify, regulate, and enforce Orang Asli customary land rights. To do so not only would work to rectify the unethical treatment of indigenous communities in the past but also hopefully keep such injustices from occurring in the future.

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