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ALICE M. NAH

# **Recognizing indigenous identity in postcolonial Malaysian law**

## **Rights and realities for the Orang Asli (aborigines) of Peninsular Malaysia**

### *Introduction*

In Southeast Asia, the birth of postcolonial states in the aftermath of the Second World War marked a watershed in political relations between ethnic groups residing within emerging geo-political borders.<sup>1</sup> Plurality and difference were defining characteristics of the social landscape in these nascent states. Colonial laws and policies that divided groups and territories for efficient control influenced the relations between linguistically and culturally distinct groups. The transfer of power to 'natives' during decolonization often resulted in indigenous minorities being sidelined politically and legally. Indigenous minorities in Southeast Asia continue to negotiate for more equitable inclusion in contemporary postcolonial states. In some cases, such as in Myanmar, Thailand, Indonesia and the Philippines, these have escalated into separatist movements. Other indigenous minorities however, struggle for the recognition of their identity and rights through – rather than apart from – existing state mechanisms of power, for example by lobbying for changes in existing laws and bringing cases to court.

The struggle for recognition of the legal rights of indigenous minorities began, however, before the process of decolonization; colonial powers contended with politically dominant indigenous majorities as they tried to exert influence over territories, and this had impacts on indigenous minorities. The British method of colonization, in particular, which sought to attain 'indirect rule' without using military conquest, required the identification and recognition of native structures of power. British administrators exerted influence through the 'invitation' of local rulers, which meant that domestic laws

<sup>1</sup> This paper is based on a chapter submitted for a master's thesis to the National University of Singapore in 2004. I am grateful for the comments of two anonymous reviewers and Martin D. Jones, which were incorporated when revising this manuscript.

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and administrative policies were developed as a result of negotiation rather than through direct imposition of English laws and policies. As a result, the legal structures put in place during decolonization meant that some recognition of indigenous customary practices was already incorporated, albeit for certain indigenous groups and not for others.

In order to recognize and protect the 'special rights' of indigenous persons, it became vital to define the legal identity of individuals. It was necessary for British administrators to determine which groups were 'indigenous', what specific criteria were required for demonstrating membership of these groups, and when disputes occurred, to determine which individuals possessed a legitimate claim of belonging. They also had to decide if the rights and privileges were accorded on a group or individual basis. These decisions are neither ahistorical nor apolitical.

In this paper, I examine the contemporary case of the Orang Asli, the minority indigenous peoples of the Malay Peninsula. I begin by providing an outline of political developments that have resulted in the legal recognition of three groups of people as having indigenous status. I also review the evolution of the Malaysian legal system in order to provide a context for subsequent discussion. I then look at how Orang Asli are recognized in the Federal Constitution and in statutes, with reference to case law, as the meaning and weight of these written laws were elaborated in court judgements. I then look at three court cases, reviewing the right to engage in commercial activities in aboriginal places as decided in the *Koperasi Kijang Mas Bhd & Ors v. Kerajaan Negeri Perak & Ors* (1991), hereafter referred to as the *Koperasi Kijang Mas* case; the recognition of native title and usufructuary rights as recognized in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (1997), hereafter referred to as the *Adong Kuwau* case, a judgement upheld in the Court of Appeal (*Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* (1998) and the Federal Court;<sup>2</sup> as well as proprietary rights in and to the land which were recognized in the *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* (2002) ruling, hereafter referred to as the *Sagong Tasi* case, upheld in the Court of Appeal (see *Kerajaan Negeri Selangor & Ors v. Sagong Bin Tasi & Ors* (2005) but currently under appeal in the Federal Court. These cases demonstrate how Orang Asli have drawn on international legal frameworks to claim special privileges in ways not possible for other Malaysians, on the basis of their identity.

<sup>2</sup> This judgement was not written.

*Indigenous identity in postcolonial Malaysia*

Modern conceptions of identity in present-day Malaysia are rooted in British colonial conceptions of 'natives' prior to the Independence of Malaya in 1957 (Nah 2003, 2004; Hirschman 1986, 1987). Social understandings of who were 'indigenous' and 'immigrant' have implicated not only the way in which power operated under colonial administration but how sovereignty was negotiated and legal systems reconstructed during the transition from colonial to postcolonial rule. The exertion of British power and control over the Peninsula in the eighteenth and nineteenth centuries occurred through negotiations with existing Malay-Muslim polities. These agreements allowed the British to control economic resources on the condition that the sovereignty of 'Malay' rulers was acknowledged and that they retained authority in matters concerning 'Malay' customs and religion (Harper 1999).

The recognition of the Malay rulers as legitimate authorities for political negotiations shaped the body-politic of the Federation of Malaya in 1948, Independent Malaya in 1957, and the Federation of Malaysia in 1965. Most notably, Malays were given constitutional guarantees of 'special privileges' on the basis of their indigeneity; Islam, the religion of the Malays, was declared the religion of the Federation; and the Malay language was given primacy, becoming the national 'emblems of nation-ness' (Anderson 1991:133). In an effort to protect the customary lands of the Malays from being sold, British lawmakers instituted the Malay Reservations Act of 1930, based on the Malay Reservations Enactment of 1913, a unique statutory provision that restricted the transfer of land titles (see discussions by Means 1971 and Voon 1976).

In contemporary Malaysia, three groups are socially, politically and legally recognized as being 'indigenous' to the land, and all of them are considered '*bumiputra*' (literally translated 'sons of the soil'): the politically powerful majority 'Malays' (all of whom, by constitutional legal definition are Muslims), the natives of Sabah and Sarawak, and the Orang Asli.<sup>3</sup> Orang Asli is a 'pan-ethnic identity' (Cornell 2000) that refers to a number of linguistically and culturally distinct groups. In 2003, there were an estimated 147,412 Orang Asli divided into 18 ethnic sub-groups,<sup>4</sup> comprising about 0.5% of the

<sup>3</sup> There are still debates about whether or not the Orang Asli are *bumiputra*. I argue in Nah (2004) that a distinction must be made between '*bumiputra* status' – which the Orang Asli are accorded in government policies (despite the fact they are not given special privileges in Article 153 of the Federal Constitution, the way the Malays and natives of Sabah and Sarawak are) – and the 'enjoyment of *bumiputra* benefits', such as discounts on housing schemes, special quotas for university admission, and scholarships for further education, which are reserved for *bumiputra* groups on the basis of their 'special position'. The Orang Asli as a whole do not have the same level of access to *bumiputra* benefits as their Malay counterparts in the Peninsula.

<sup>4</sup> Statistics obtained from the website of the Centre for Orang Asli Concerns, accessed 14-2-2008, (<http://www.coac.org.my/>). Debates ensue about the actual number of Orang Asli sub-ethnic

total population of Malaysia. Prior to the introduction of the term 'Orang Asli' in the 1960s (Carey 1976), they were referred to by the British as the 'aborigines', a term which is still applied in the current legal system.<sup>5</sup>

### *The evolution of the Malaysian legal system*

The present structures of the Malaysian legal system are the culmination of changes, amendments and developments since British colonial administrators introduced principles of English law in the 1800s. Under colonial administration, the religions, manners, and customs of local inhabitants were considered in the development of laws; legal recognition was given to selected customary practices (Hooker 1976). The colonial government recognized the plurality of the peoples under its jurisdiction, and allowed, indeed required, their identities to be established before the relevance and role of 'customs' could be evaluated. As Hooker explains, several types of identities became relevant to the legal system: those constructed on 'racial' grounds (such as 'Chinese' or 'Malay'), religious grounds (for example 'Muslim'), or a combination of both (for example, a 'Hindu').

Selective recognition of the customary practices of distinct groups continues in the current postcolonial legal system; the principle of lawful discrimination is applicable for certain legally defined categories of people.<sup>6</sup> For the Orang Asli, I suggest that three types of identity definitions have implications for their legal position: their ethnic/racial difference, their religious ascription, and, because of recent court cases, their status as minority indigenous people according to international legal definitions.

Officially, a strict hierarchical ordering of texts exists in the Malaysian legal system, with the Federal Constitution – specifically, the Malay version – seen as the supreme authority (Federal Constitution, Article 160B). It is to this that all political and legal developments, in principle if not always in practice, are required to adhere. This has important implications for the interpretation of statutes and for judicial decisions; all statutes written prior to the independence of Malaya in 1957, as well as after, have to be interpreted – and modified if necessary – to bring them in line with the Constitution; any inconsistencies are

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groups. Lye (2001) suggests that between 17 to 25 indigenous ethnic minorities may be considered Orang Asli. Benjamin (2002) notes that some smaller groups are subsumed under other ethnic categories.

<sup>5</sup> The subject of Orang Asli in the law has also been discussed by, among others, Bunnell and Nah 2004; Boon Kheng Cheah 2002; Nicholas 2000; Hooker 1996, 2001; Hood 1990; Liow 1981; Means 1986; Nair 2001; Rachagan 1990; Sullivan 1998; and Williams-Hunt 1995.

<sup>6</sup> For further discussion, see *Datuk Haji Harun bin Haji Idris v. Public Prosecutor* (1977), which establishes the principle that 'lawful discrimination' is permitted under clause (5) of Article 8 and Article 153 of the Constitution.

made void.<sup>7</sup> The Constitution sets out the roles of federal and state governments, divides powers of the executive, legislative and judiciary,<sup>8</sup> and outlines the fundamental freedoms of the peoples of the Malaysian nation-state. Because of the separation of powers, space is constructed for judicial courts to arbitrate between citizens, organizations, and members of the executive.<sup>9</sup>

Nevertheless, there are limits on the supremacy of the Constitution. Firstly, there are provisions that allow for it to be amended. This is accomplished through a two-thirds majority vote in Parliament and the assent of the constitutional monarch (the Yang Di-Pertuan Agong). Indeed, since its initial form in 1957, numerous changes have been made (Hoong Phun Lee 1995). Secondly, the Constitution is a text requiring application and interpretation. Judges therefore play a significant role, particularly when these interpretations are contested in the courts.<sup>10</sup>

Laws are legislated by Parliament at the federal level, and by state legislative assemblies at the state level. The former have the power to enact laws on issues identified in List I of the Ninth Schedule of the Federal Constitution, while the latter can enact laws as listed in List II of the Ninth Schedule, which pertain mostly to Islam, land, agriculture, forestry and local government. At the federal level, bills have to be passed by the Senate and the House of Representatives, and given assent by the constitutional monarch.

The precise definition and meaning of rights are established through court cases, which require direct application of written laws. The Malaysian legal system operates on the principle of *stare decisis*, that is, the hierarchical system of binding judicial precedent.<sup>11</sup> In Malaysian law, as in English common law, the decisions of higher courts are binding upon lower courts, such that the Federal Court is the ultimate authority, followed by the Court of Appeal, and the High Courts of Peninsular Malaysia and of Sabah and Sarawak.<sup>12</sup> Specific contests over land are judged by the High Court in the first instance, and

<sup>7</sup> Federal Constitution, Article 4(1); Article 162(6). This was affirmed in relation to the Aboriginal Peoples Act of 1954 in the Sagong Tasi Court of Appeal judgement discussed below.

<sup>8</sup> This allows for the judiciary to decide upon cases where the executive – for example, the federal government and all state governments – are plaintiffs, appellants or defendants.

<sup>9</sup> However, the independence of the judiciary has come under severe criticism from the 1980s up to the present (see Harding 1990; Case 1991).

<sup>10</sup> Tun Mohamed Suffian 1976. As Gopal Sri Ram JCA eloquently articulated, in *Repco Holdings Berhad v. Public Prosecutor* ([1997] 3 MLJ 681), 'Our Federal Constitution is a living document written for all time. Its language compresses within it ideas that are manifold and concepts that are multifaceted. The task of the judicial interpreter of such a document is not to place it in a coffin and nail the lid but to breathe life into it and to give effect to the full breadth and width of its great language.'

<sup>11</sup> See *Public Prosecutor v. Datuk Tan Cheng Swee & Anor* ([1980] 1 LNS 58).

<sup>12</sup> These are followed by the Subordinate Courts, which, in the case of Peninsular Malaysia, are the Sessions Courts, Magistrates' Courts, Small Claims Courts, and Penghulu Courts. In addition, Syariah courts are subordinate to the Superior Courts (Mei Pheng Lee 2001).

may be brought for appeal to the Court of Appeal and thence to the Federal Court. At the High Court, these cases are decided on a balance of probabilities by a judge acting as trier of fact. In Sabah and Sarawak, Native Courts have jurisdiction over matters concerning 'native customs', where the parties are natives; there is no parallel system in Peninsular Malaysia. Across the whole of Malaysia, however, there are Syariah courts, which have jurisdiction over Islamic law.

### *Orang Asli in the Federal Constitution*

In the current version of the Constitution, the 'aborigine' (in the Malay text, *orang asli*) is recognized as a separate legal entity from the 'Malay' (Orang Melayu) and the 'natives' (*bumiputra*) of Sabah and Sarawak (see Figure 1). As such, 'aborigines' may not claim legal rights given to 'Malays' and vice versa.<sup>13</sup> The 'aborigine' is defined in Article 160(2) of the Constitution as 'an aborigine of the Malay Peninsula', highlighting its minority location within a geographically imagined 'Malay' broader territory. There are two important implications of this brief and tautological definition. Firstly, it places greater emphasis on the Aboriginal People's Act (Act 134) definition of 'aborigine', as evident in the Koperasi Kijang Mas and Sagong Tasi cases. For the latter case in particular, the Temuan Orang Asli who brought their case to court had their identity, within the meaning of Act 134, challenged.<sup>14</sup> Secondly, as it is the definition in Act 134 that gives meaning to the legal term 'aborigine', a change in legal definition of this class of persons may be effected without the safeguards and procedures given to the legal definition of 'Malay' and 'native' of Sabah and Sarawak, which are both defined in the Constitution (Rachagan 1990).

When comparing the definitions of various indigenous groups in the Constitution (as supported by relevant statutes), therefore, it becomes apparent that they are based on different criteria. As stated, the definition of 'aborigine' relies on the Act 134 definition, which places importance on aboriginal practices (language, customs, beliefs and 'way of life'), inclusion in an aboriginal community, and to some extent on ancestry.<sup>15</sup> A 'native' of Sabah and Sarawak,

<sup>13</sup> This was a matter emphasized in the Sagong Tasi case.

<sup>14</sup> Specifically, they were recognized as aboriginal Temuan people, but were challenged as to whether they still practised 'Temuan culture', as evidenced by their speaking an aboriginal language, following 'an aboriginal way of life', and adhering to 'aboriginal customs and beliefs', which are requirements stipulated in the Act 134 definition. Qualifying for the Act 134 definition thus established the plaintiffs' rights under statutory law. It is interesting to note that in the Koperasi Kijang Mas, Adong Kuwau and Sagong Tasi cases, administrative recognition of the plaintiffs by the Jabatan Hal-Ehwal Orang Asli (JHEOA) (evidenced by its prior dealings with them) was part of how their identity as Orang Asli was 'proven'.

<sup>15</sup> It also allows for individuals 'of any race' adopted by aborigines to be considered aborigine if they still practice an 'aboriginal way of life' and are accepted into an aboriginal community.



Figure 1. Definitions of identity in the Malaysian legal system

Category	Authority	Definition
Aborigine ( <i>orang asli</i> )	Federal Constitution, Article 160 (2) Aboriginal Peoples Act (1954, revised 1974), Section 3	<p>‘an aborigine of the Malay Peninsula’</p> <p>(1)+ In this Act an aborigine is –</p> <p>any person whose male parent is or was a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;</p> <p>any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or 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.</p> <p>(2) Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising that religion.</p> <p>(3) Any question whether any person is or is not an aborigine shall be decided by the Minister.</p>
Malay (Orang Melayu)	Federal Constitution, Article 160	<p>‘Malay’ means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs and –</p> <p>a) was born before Merdeka Day in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or</p> <p>b) is the issue of such a person;</p>



Natives ( <i>bumiputra</i> ) of Sabah and Sarawak	<p>Federal Constitution, (6) In this Article 'native' means –</p> <p>Article 161A (6) and (7)</p> <p>a) In relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races, and</p> <p>b) In relation to Sabah, 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 or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.</p> <p>(7) The races to be treated for the purposes of the definition of 'native' in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.</p>
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Sources: Federal Constitution (as of 10 September 2002), Aboriginal Peoples Act (1954, revised 1974)

on the other hand, is defined by ancestry or 'race', while the definition of 'Malay' is based purely on socio-religious practice, and not ancestry or race (see also Mohd Salleh 1986). This has implications for the citizens of Malaysia in general and the Orang Asli in particular. It is possible that individuals can be legally reclassified as 'Malay' when they fulfil the three-pronged criteria of converting to Islam, taking on 'Malay customs', and demonstrating proficiency in the Malay language, a matter that already occurs on a social and political basis.<sup>16</sup> As Tun Mohamed Suffian (1976:291) explains, 'to be a Malay for the purposes of the Constitution you need not be of Malay ethnic origin. An Indian is Malay if he professes the Muslim religion, habitually speaks Malay and conforms to Malay custom'; the same applies for Chinese and other ethnic groups in Malaysia. In 'becoming Malay', these different ethnic groups 'become' indigenous, and are legally qualified to receive *bumiputra* privileges and 'special rights' as Malays. For Orang Asli, whose legal definition as 'aborigine' is derived primarily from a demonstration that they still practise an aboriginal 'way of life', they stand to lose their legal identity as aborigines if they convert to Islam, speak Malay, and replace the practice of aboriginal customs with the practice of Malay customs. In contrast, no one can 'become'

<sup>16</sup> Nicholas 1996; Dentan et al. 1997; Dentan 1997.

an 'aborigine' or 'become' a 'native' of Sabah and Sarawak by changing their socio-religious practices alone.<sup>17</sup>

The 'aborigines' are mentioned three times in the Constitution (See Figure 2). Firstly, the 'welfare of the aborigines' is outlined as a 'federal' subject, and therefore a matter over which the federal government, rather than state governments, has responsibility.<sup>18</sup> This means that the role of law making in relation to the Orang Asli lies in the hands of Parliament rather than the legislature of any state. Secondly, the constitutional monarch can appoint members to the Senate who 'are capable of representing the interests of aborigines'.<sup>19</sup> It is under this provision that the role of the Orang Asli Senator was created; significantly, it is an appointed rather than elected role.<sup>20</sup>

Thirdly, the Constitution allows for special provisions applicable to all Orang Asli. According to common-law interpretations of Article 8(5)(c), these special provisions do not jeopardize the principle of equality before the law. This Article was discussed in two different significant court cases. In the Adong Kuwau High Court judgement, the presiding judge Mokhtar Sidin JCA interpreted Article 8(5)(c) to mean that 'the aboriginal people of Malaysia [enjoy] a special position'. In the High Court ruling for Sagong Tasi ([2002] 2 CLJ 543, pp. 555, 575), Judge Mohd Noor Ahmad J. noted that this Article, along with other constitutional and statutory provisions, supported the claim that both state and federal governments owe fiduciary duties to the Orang Asli, for which losses in consequence of the breach 'must be made good'.<sup>21</sup>

<sup>17</sup> The social, political and legal permeability of Malay ethnicity creates unease among the Orang Asli, who are wary that ascription to Islam (with concomitant changes in lifestyle) potentially results in a change of identity from 'Orang Asli' to 'Malay', a matter that is recognized and allowed for in the legal framework (see Nah 2004 for further discussion). It must be noted, however, that it is not as easy to 'exit' Malayness.

<sup>18</sup> See Article 74 and 77, Item 16; List I – Federal List, Ninth Schedule. Significantly, it is important to note that the 'welfare of the aborigines' under the aegis of the federal government does not extend to matters concerning land, over which state governments continue to hold authority. This creates legal difficulties for the Orang Asli in relation to land, a matter covered in greater depth below.

<sup>19</sup> Article 45(2). In addition, he can appoint other representatives of racial minorities to the Senate, as well as individuals seen to have performed distinguished public, professional or social services.

<sup>20</sup> See Nah (2004) and Nicholas (2000) for further discussion.

<sup>21</sup> At the time of writing, this is being contested at the Federal Court.

Figure 2. 'Aborigines' ('orang asli') in the Federal Constitution

Article 8	<p>(1) All persons are equal before the law and entitled to the equal protection of the law.</p> <p>(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.</p> <p>[....]</p> <p>(5) This Article does not invalidate or prohibit –</p> <p>[....]</p> <p>a) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service [...].</p>
Article 45(2)	<p>The members to be appointed by the Yang di-Pertuan Agong shall be persons who in his opinion have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service or are representatives of racial minorities or are capable of representing the interests of aborigines.</p>
<p>Article 74 and 77, Item 16, List I – Federal List, Ninth Schedule.</p>	<p>[Article 74(1)] Parliament may make laws with respect to any of the matters enumerated in the Federal List [List I][...]</p> <p>[List I, at Item 16 reads] 'Welfare of the Aborigines'</p> <p><i>Note: Article 77 states that the Legislature of a State does not have the power to make laws on matters enumerated in the Ninth Schedule over which Parliament has the power to make laws.</i></p>

Source: Federal Constitution as of 10 September 2002

### *Absences in the Constitution*

Of great import are the ways in which 'the aborigines' are not mentioned, when 'Malays' and the natives of Sabah and Sarawak are. For example, there are restrictions on Parliament as to the making of laws that touch upon Islamic law and Malay customs, as well as to native customs or laws in Sabah and Sarawak (Article 76, Article 150 (6A)), but not with regard to aboriginal customs. For the natives of Sabah and Sarawak specifically, the legislatures

of the state governments of Sabah and Sarawak are allowed to make laws with respect to native law and custom as well as to native procedure of native courts (see Article 74(20) and the Ninth Schedule, List IIA, Item 13), while the legislatures of states in the Peninsula, where all the Orang Asli are found, are not. This has allowed the natives of Sabah and Sarawak some recognition of rights to their customary lands that the Orang Asli did/do not enjoy.<sup>22</sup>

As detailed in Article 89(6), both 'Malays' and 'natives' are also given special privileges with regard to Malay Reservations Land that the 'aborigines' are excluded from.<sup>23</sup> Malay Reservations Land, unlike 'aboriginal reserves', 'aboriginal areas', or 'aboriginal inhabited places' as legally recognized in Act 134, are specially protected in the Constitution. Specifically, Malay Reservations Land can only be degazetted by state enactments passed by a two-thirds majority vote in state legislative assemblies and a two-thirds majority vote approval by resolution of Parliament (Article 89(1)), which offers these lands stronger protection.<sup>24</sup>

Symbolically, perhaps the most significant absence of the 'aborigines' in the Constitution, when compared to Malays and the natives of Sabah and Sarawak, is Article 153 of the Federal Constitution, which reads:

It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the states of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.

The aborigines are noticeably missing in this provision, an absence repeated in state-level constitutions which hold parallel articles. This is significant, for it is this constitutional provision that is the basis for justifying positive discrimination for the *bumiputra*, the most notable implementation being the New Economic Policy (NEP). This absence has created some ambiguity and debate over whether the Orang Asli are, in fact, *bumiputra*.<sup>25</sup>

<sup>22</sup> This does not mean that they enjoy security over their native lands (see King 1995).

<sup>23</sup> This was confirmed in Sagong Tasi case (Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors ([2002] 2 CLJ 543, p. 576)), in which the judge specifically ruled that: 'Article 89 when read as a whole does not include the aboriginal people of the Malay Peninsula because the word 'natives' appearing in sub-Article (6) is defined in Article 161A(6) to mean the natives of Sabah and Sarawak. If it is meant to be otherwise the word 'aborigines' would have been used in the sub-art.'

<sup>24</sup> Not only are 'aboriginal reserves', 'aboriginal areas', or 'aboriginal inhabited places' not given constitutional recognition, Act 134 also stipulates that they may be gazetted and that the gazettelement can be revoked by state authorities (without the involvement of Parliament).

<sup>25</sup> Further discussed in Nah 2004; Dentan et al. 1997; see also note 3.

*Other constitutional provisions: religion and property*

Freedom of religion is guaranteed in Article 3(1) and Article 11 of the Constitution for all non-Muslims, as is freedom of peaceful assembly in Article 10(1) (b) and the right of individuals not to receive instruction or take part in any ceremony or act of worship other than his/her own (Article 12(3)).<sup>26</sup> Orang Asli who have converted to Islam become subject to Islamic law, over which the legislatures of state governments have jurisdiction (Federal Constitution, Ninth Schedule, List II, Item 1), which is vested in Syariah courts.<sup>27</sup> In addition to this, the Constitution allows for state and federal laws to be passed that control or restrict the propagation of non-Muslim religious doctrines among Muslims (Article 11(4)). Furthermore, each state has laws that empower state Islamic departments to regulate the activities of Muslims, a significant one being the observation of the fasting month, Ramadan.<sup>28</sup>

Last but not least, proprietary rights are protected under Article 13, of which sub-Article 1 reads: 'No person shall be deprived of property save in accordance with law' and sub-Article 2 reads: 'No law shall provide for the compulsory acquisition or use of property without adequate compensation'. These have been interpreted in the Adong Kuwau and Sagong Tasi rulings to encompass the protection of native title (further discussed below).

*Statutory rights: the Aboriginal Peoples Act (1954, revised 1974)*

Aborigines are human beings with human reactions, and the idea of this [1953 Aboriginal Peoples] Bill is to provide for their protection as human beings and not as museum pieces or exhibits. (Dato' Onn bin Ja'afar, speech to the Legislative Council of the Federation of Malaya, 25 November 1953 (*Report select committee* 1954)).

Also known as Act 134, the Aboriginal Peoples Act came into force in 1954, when British administrators were waging war against Communism in the Peninsula.<sup>29</sup> The historical milieu within which this Act was created is of great significance to its content and to its contemporary impact on the Orang Asli. During the Emergency Period from 1948 to 1960, communist insurgents ad-

<sup>26</sup> In relation to Article 12(3), parental/guardian consent must be obtained for those under 18 years of age, as stated in Article 12(4).

<sup>27</sup> Islamic law, when implemented judicially, is largely confined to matters of family law and land practices. However, there are socio-legal effects of Islamization that are often not considered by Orang Asli when they embrace Islam (see Endicott and Dentan 2004).

<sup>28</sup> Because Orang Asli are often mistaken as Malays due to their similarities in physical appearance, there have been many occasions where they were (almost) found in breach of the law by state Islamic departments for not fasting during Ramadan (Nah 2004).

<sup>29</sup> Act 134 was later revised in 1967 and 1974. It is based on the Aboriginal Peoples Bill of 1953.

opted guerrilla warfare tactics and established their bases in jungle areas in order to avoid detection. As the jungle was the province of the aborigines, the insurgents relied on aborigines in order to survive, and thus the loyalty of the aborigines was deemed crucial to the outcome of this confrontation. Measures were taken by British administrators to extend 'protection' to aboriginal groups while keeping them away from communist influence.<sup>30</sup> When initial drafts of this Act (then known as the Aboriginal Peoples Ordinance) were first reviewed by the Select Committee of the Legislative Council on 27 January 1954,<sup>31</sup> its main principle and aims were outlined as follows:

to ensure that the aborigines were protected from unscrupulous exploitation, to safeguard their tribal organization and way of life from the too rapid advance of civilization and to remove any obstacles which might hinder their gradual advancement along the lines best suited to them in accordance with their changing environment.<sup>32</sup>

The introduction of the Ordinance in 1954 was a significant milestone in the administration of the Orang Asli, for this was the first time that the federal government officially declared its responsibility towards them (Jimin et al. 1983).

In addition to giving meaning to the precise definition of 'aborigine' (see Figure 1), this Act gives extensive powers to the Department of Orang Asli Affairs (Jabatan Hal-Ehwal Orang Asli, JHEOA), a federal body established during the fight against Communism, that is currently responsible for the welfare of the Orang Asli. For example, the JHEOA has ultimate authority to decide whether a specific individual is deemed an 'aborigine' (Section 3(3)); it must approve all dealings in land by aborigines (Section 9); it can prevent any person or class of persons from entering aboriginal areas and reserves (Section 14); it may detain individuals in such areas which are deemed to be conducting activities detrimental to the welfare of aborigine(s) (Section 15); and it appoints hereditary headmen of aboriginal communities to office (Section 16). The JHEOA is also given powers to impose regulations on a number of practices. These powers are related to land use, the entry of individuals as well as the circulation of information (in a variety of media) into aboriginal spaces, the appointment of headmen, the registration of aborigines, the activities of aborigines within jungle areas, their education and employment, buying and selling of liquor, as well as the terminology by which aborigines are referred to (Section 19).

<sup>30</sup> Carey 1976; Holman 1958; Jimin et al. 1983; Leary 1989; Noone and Holman 1972; Miller 1972.

<sup>31</sup> The content of the law was based on the Perak Aboriginal Enactment of 1939, largely crafted by anthropologist H.D. Noone, which was extended under British administration of the Federated Malay States to Selangor, Negeri Sembilan and Pahang.

<sup>32</sup> *Proceedings legislative council* 1954:1. The Select Committee comprised Onn bin Ja'afar, Bukit Gantang, H. Zainal, Tengku Muhammad, Shamsudin B. Nain, A.H.P. Humphreys, Ismail Rahman, and H.M. Eusoff. Invited to the meeting was (then) Adviser on Aborigines, R.O.D. Noone, and the Assistant Legal Draftsman, A.M. Webb.

Act 134 also reaffirms the role of state authorities in matters relating to land, giving them supreme powers to gazette and to revoke land as 'aboriginal reserve' (Section 7), 'aboriginal area' (Section 6), or 'aboriginal inhabited place', which is in stark contrast to the multiple constitutional protections in place for Malay Reservations Land.<sup>33</sup> State authorities may also order any aboriginal community to leave Malay Reservations Land (Section 10), and have powers to excise, alienate, grant, lease and otherwise dispose of land which aboriginal communities have used – with compensation being limited to fruit and rubber trees (Section 11).<sup>34</sup> Section 12 further adds that state authorities may grant compensation for losses if land is excised from aboriginal areas or reserves and may pay this to the Director General of the JHEOA to be held in a common fund.<sup>35</sup>

Nevertheless, certain protections and 'special rights' are offered to Orang Asli under this Act. For example, they have the right to be present in lands gazetted as 'aboriginal areas' and 'aboriginal reserves', the right not to be excluded from schools, the right not to be obliged to attend any religious instruction without prior parental/guardian consent (Section 17), and the right not to be adopted by non-aboriginal parents except with the consent of the JHEOA (Section 18). Furthermore, the identification of the JHEOA (represented by the Commissioner) as being 'responsible for the general administration, welfare and advancement of aborigines' (Section 4), has been turned around to argue that the federal government owes a fiduciary duty to all Orang Asli. As argued in the Sagong Tasi case, this has become a matter enforceable through the judiciary.

The interpretation of Act 134 in relation to the rights of Orang Asli has been an important consideration in court cases concerning Orang Asli land rights. Prior to these decisions, the application of Act 134 was bittersweet, for it was read and applied in ways that imposed many restrictions upon contemporary Orang Asli even while it codified some statutory rights for them. Certain sections of Act 134 eroded the autonomy of the Orang Asli and it was therefore rightly criticized as being irrelevant, paternalistic and restrictive. Civil society actors repeatedly called for its review if not its outright repeal. However, the application and significance of Act 134 has been re-evaluated and redefined through judicial decisions.

<sup>33</sup> However, Section 7(2i) also states that once land has been declared an 'aboriginal reserve', no land within it can be declared Malay reservations land.

<sup>34</sup> In *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* ([1997] 1 MLJ 418, p. 431), the presiding High Court judge interpreted that: 'By virtue of [section] 10 [of Act 134], the rights of the aboriginal peoples to occupy and/or collect forest produce overrides Malay reserve land, forest reserve or game reserve. Section 10 reflects the legislature's intention to allow the aboriginal people to lead the type of life they have always led, which has been nomadic and always looking for greener pastures'.

<sup>35</sup> Section 12 was later reinterpreted to bring it in line with protections offered by the Federal Constitution in the Sagong Tasi Court of Appeal judgement, discussed below.



In the Adong Kuwau High Court ruling, the judge emphasized that Act 134 does not revoke the rights of the Orang Asli at common law, a matter reinforced by the Court of Appeal and then followed in the Sagong Tasi case. The Court of Appeal judgement for Sagong Tasi further expanded on the application of Act 134, emphasizing that it be read in a purposive manner. The judgement affirmed that the interpretation of Act 134 should not 'curtail or restrict aboriginal land rights', which would 'run counter to the purpose of [this Act]'.<sup>36</sup> Gopal Sri Ram, writing the judgement, expressed:

the purpose of the 1954 Act [the Aboriginal Peoples Act] was to protect and uplift the First Peoples of this country. It is therefore fundamentally a human rights statute. It acquires a quasi constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation [...] There is therefore no doubt in my mind that the 1954 Act calls for a construction liberally in favour of the aborigines as enhancing their rights rather than curtailing them [...].<sup>37</sup>

The 'aborigines' are also mentioned in other statutes, which give them special rights and privileges. The Law Reform (Marriage and Divorce) Act of 1976 (also known as Act 164), for example, allows for the marriage and divorce of 'aborigines' to be governed by native customary law or aboriginal customs, if that is their choice. Furthermore, in the Protection of Wildlife Act of 1972, an aborigine is allowed to shoot, kill, or take protected wild animals and birds 'for the purpose of providing food for himself or his family', when other Malaysians are not given such freedoms (Section 52). Thirdly, as stated in the National Forestry Act 1984 (Act 313), aborigines can all be exempted from holding licenses for the removal of forest produce from certain classes of land (Section 40(3)). Lastly, a certain type of aborigine ('nomadic aborigines') is mentioned in the Employee Provident Fund Act of 1991, which stipulates that they are, by default, not considered 'employees', unless the Director-General of the JHEOA recommends otherwise.

#### *Common law developments: native title, usufructuary rights and proprietary rights*

As has been stated, several important cases have come through the courts in the past two decades, which have established land rights for Orang Asli through common law (see also Hooker 2001; Nicholas 2003). These developments have created exceptions to current systems of administering land, which is governed by the National Land Code of 1965, based on the Australian Torrens system of registration. According to the Code, all un-alienated land is considered 'Sultanate Land' under the management of state authori-

<sup>36</sup> Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543, p. 24.

<sup>37</sup> Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543, pp. 19-20.

ties. Furthermore, the Land Acquisition Act of 1960 allows state authorities wide freedom to acquire lands already alienated, but specifies that compensation must be given for the value of the lands acquired. In this section of the paper, I discuss the protection of Orang Asli customary land rights through case law developments, looking at the Adong Kuwau and Sagong Tasi cases in greater detail after brief consideration of the Koperasi Kijang Mas case.

*Exclusive rights to commercial activities in aboriginal places: Koperasi Kijang Mas Bhd & Ors v. Kerajaan Negeri Perak & Ors (1991)*

The plaintiffs sought declaration that the land in question, Kuala Betis, was an 'aboriginal area' and not just 'state land'. Therefore, they claimed, only 'aborigines' had rights over forest produce from that area. They argued that the actions of one of the defendants, the Director of Forestry (a federal agency), to offer the land to a private limited company (another defendant) was unlawful because the latter had no connection with the aborigines. The plaintiffs argued that this company had therefore no right to conduct logging activities in the area.

The presiding judge, Abdul Malek Ahmad H, made these declarations and ruled that only aborigines, as specified under Act 134, had rights to harvest forest produce from these areas. He agreed that 'logging conducted by any body, organization, foundation or representative and their agents that are not owned by aborigines are in violation of s. 6(2iv) of the Aboriginal People's Act 1954' (p. 651).<sup>38</sup> In this court case, Orang Asli were able to claim special rights and privileges by virtue of their legal identity.

*Introducing native title: the Adong Kuwau case*

In this case, 52 plaintiffs of the Jakun tribe living in Linggiu Valley were displaced from their traditional and ancestral land upon which they foraged. This occurred when the land was alienated by the Johor state government and the Johor Director of Land and Mines for the building of a dam in agreement with the government of Singapore. The plaintiffs claimed that the compensation they received as recommended by the JHEOA (in accordance with Sections 11 and 12 of Act 134) was inadequate. New judicial concepts were introduced in this landmark case, in particular, that of native title.

The judge laid down his understanding of native title, drawing upon prece-

<sup>38</sup> Article 6(2iv) states that 'no licences for the collection of forest produce under any written law relating to forests shall be issued to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Commissioner and in granting any such licence it may be ordered that a specified proportion of aboriginal labour be employed'.

dents in the United States, Canada and Australia, stating that 'it is the right of the native to continue to live on their land as their forefathers had done', a right 'acquired in law' and not based on any document or title.<sup>39</sup> This also meant that 'future generations of the aboriginal people would be entitled to this right of their forefathers'.<sup>40</sup> Specifically, he defined this 'right over the land' to include:

the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial.<sup>41</sup>

He ruled that compensation had to be given not just for rubber and fruit trees, as required in Act 134,<sup>42</sup> but 'for what is above the land over which the plaintiffs have a right', that is compensation 'for the loss of livelihood and hunting ground'.<sup>43</sup> These, he established, were protected under Article 13 of the Federal Constitution (concerned with proprietary rights to land), and could not be excluded by Act 134. Compensation was thus given for five types of deprivation: of heritage land, of freedom of inhabitation or movement, of produce of the forest, of future living for the plaintiffs and their immediate families, and of future living for their living descendants. Compensation was valued at RM 26.5 million for 53,273 acres of land. When this was reviewed in the Court of Appeal, the presiding judges upheld the decision, and reaffirmed that 'deprivation of livelihood may amount to deprivation of life itself and that state action which produced such a consequence may be impugned on well-established grounds'.<sup>44</sup> This judgement was affirmed by the Federal Court.

### *Proprietary rights in and to the land: the Sagong Tasi case*

Eight months before the Adong Kuwau High Court judgement, a portion of land upon which several Temuan families lived was acquired for construction of a portion of a highway that joined the Kuala Lumpur International Airport to the North-South Highway. These families were evicted, with only minimal compensation given for their loss of fruit trees, crops and homes – not for the value of the land upon which they resided. They brought the Selangor state government, the federal government, the highway authority, and the private

<sup>39</sup> Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, p. 428.

<sup>40</sup> Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, p. 430.

<sup>41</sup> Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, p. 430.

<sup>42</sup> The JHEOA recommended a compensation of RM 560,535 (Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, p. 425).

<sup>43</sup> Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, p. 431.

<sup>44</sup> Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665, p. 158.

construction company to court, and argued for the recognition of native title with attendant full compensation. Part of the land in question had already been gazetted as aboriginal land under the Aborigines Peoples Act of 1954 while another part of it remained ungazetted.

The presiding judge, Mohd Noor Ahmad J, affirmed that the plaintiffs held native title to the gazetted land as was recognized in the Adong Kuwau High Court judgement, which included usufructuary rights (that is, the right to the possession and enjoyment of the land), as well as interest in and to the land. These rights, he decided, were proprietary rights under common law which were protected in Article 13 of the Federal Constitution.<sup>45</sup> Specifically, the Judge ruled:

Apart from the Orang Asli and the native people of the Borneo states, there are no other classes of people in Malaysia who occupy the said lands on the basis of customary right except the lands occupied under the tribal adapt in Negeri Sembilan and Malacca [...] Thus, the Act speaks of aboriginal reserve land and aboriginal occupied land. The latter refers to hereditary land or customary land.<sup>46</sup>

Therefore, he ruled that when native title – a title held at common law – was revoked, it warranted the same compensation awarded to other title holders under the Torrens system, as specified by the Land Acquisition Act of 1960.

This judgement was subsequently upheld and extended by the Court of Appeal. Several important points were made in this written judgement. Firstly, as discussed earlier, the judges ruled that the Aboriginal Peoples Act be read in a purposive manner, as a human rights statute. Secondly, the judgement dealt with the interpretation of Section 12 of the Aboriginal Peoples Act, modifying it in order to bring it in accord with the Federal Constitution. Specifically, the judges added two words, rephrasing it to say, ‘the State Authority “shall” grant “adequate” compensation therefore’.<sup>47</sup> In doing so, they confirmed that Section 12 does not merely confer discretion on the state authority to decide whether compensation should be paid, it becomes the duty of the state authority to ensure that compensation is made.

Thirdly, and significantly, the Orang Asli were also deemed to be in possession of customary community title for the lands that had not yet been gazetted.<sup>48</sup> The judges ruled that the failure or neglect of the Selangor state government, the first defendant, to gazette the area they inhabited was a breach of fiduciary duty, for the state had not fulfilled its commitment to

<sup>45</sup> He further noted, following *Mabo v. Queensland* ([1991-1992] 175 CRL1), that although native title was a community title, ‘individuals within the community could by its laws and customs possess proprietary individual rights over the respective parcels of land’ (*Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543, p. 568).

<sup>46</sup> *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, p. 573.

<sup>47</sup> *Aboriginal Peoples Act of 1954*, p. 31.

<sup>48</sup> At the time of writing, this is being challenged at the Federal Court.

protect the rights of Orang Asli in relation to their lands. Applied properly, this has resounding implications for the current status of Orang Asli customary lands, many of which have not yet been gazetted despite numerous and repeated appeals by Orang Asli communities for this to be done (Williams-Hunt 1995). This judgement reinforces that state authorities are held responsible for protecting the land rights of the Orang Asli.

While these developments in case law bode well for the Orang Asli, the wide powers of the Land Acquisition Act of 1960 still permit government authorities to acquire Orang Asli customary land. As Anthony Williams-Hunt, an Orang Asli spokesperson, commented about the judgement in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* ([2002] 2 CLJ 543), 'We cannot stop people from taking the land. We may get some compensation, but as long as the government says that it is for development, you have no say. There must be some protection for this.'<sup>49</sup> As Wui Ling Cheah (2004) also notes, this landmark decision does not take into account the spiritual, religious, cultural and communal dimensions of Orang Asli customary lands; it merely treats the land as a possession or commodity to be compensated at monetary value.

### *Going to court: everyday realities*

In discussing this case with me, the leading lawyer for the plaintiffs in the Adong Kuwau case, S. Kanawagi, said that they faced many challenges. As the aboriginal communities for which they advocated were not able to bear the costs of such litigation, expenses for the first case, which took more than six years to fight, were borne by the lawyers.<sup>50</sup> As the case was proceeding, the plaintiffs were pressured to drop their claims in various ways outside of court, although the 'messengers' of such 'suggestions' often came incognito.

The lawyers for the plaintiffs did not desire that this case receive great publicity. When the judgement was first released, it was without much media attention. Furthermore, as the legal system was based on colonial conceptions of land, property, and ownership, arguments for native title required a rethinking of fundamental principles of justice. In this case it wasn't just that 'the Orang Asli are totally innocent, they don't know their rights', as Kanawagi said, but that the judges who presided in the cases, too, had to reassess the fundamental structures and premises of the postcolonial legal system in order to decide the rights of the Orang Asli.<sup>51</sup>

<sup>49</sup> Interview with 'Bah Toni', Anthony Williams-Hunt, ex-president of the Peninsular Malaysia Orang Asli Association, Ipoh, 3-12-2002.

<sup>50</sup> Interview with S. Kanawagi, lawyer for plaintiffs in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* ([1997] 1 MLJ 418), Kuala Lumpur, 29-12-2002.

<sup>51</sup> In July 2004, the Orang Asli involved in this case made it known that the compensation they had been awarded had not been disbursed appropriately, and lodged a police report against their lawyer, S. Kanawagi. Investigations are ongoing.

For the plaintiffs in the Sagong Tasi case, the process of going to court was, as Ilam Senin noted, frightening and stressful for the Bukit Tampoi Temuans. As he said, 'We encouraged them to be brave, to stand up for their rights as indigenous people. That gave them courage.'<sup>52</sup> One of the lawyers for the plaintiffs, Rashid Ismail, noted that the legal process was quite unfamiliar to the Temuan people involved. He commented, '[The plaintiffs] were exceptionally afraid of going to court; the environment was totally alien to them, they had not been exposed to that before.'<sup>53</sup> This, along with language difficulties, made it difficult for them to extract 'evidence' from their own witnesses, which the lawyers needed to build their case. 'What we considered relevant, they did not think was relevant [...] [They were also] not comfortable with Bahasa [Malay language],'<sup>54</sup> they had limited vocabulary, which impeded them from fully expressing themselves.' Commenting on this matter, Sharmila Sekaran, also a lawyer for the plaintiffs, noted,<sup>55</sup>

When we asked them 'What are your customs?', they replied, 'Yes, we have our customs.' In law, we are not supposed to lead our witnesses. But they could not see the intent of what the lawyers were trying to do [...] They don't know what is relevant and what is not.'

This, she suggested, was not unrelated to the very specific format of discourse required in the courts, which was very different from what the Temuan witnesses were accustomed to. 'For the Orang Asli, their understanding is that you discuss problems. But in court, you need 'yes [or] no' answers. They don't know what to say [to our questions], what is relevant.'

She continued to elaborate on the everyday difficulties of bringing the case to court:

First, we had to have their trust; this made it easier to deal with them. Because they have a lack of understanding about the legal system, they didn't trust the system. [If they don't trust us] they can withhold information or evidence that is crucial to the case. Second, we have trouble with language. Most important information was from the older people, who don't speak Bahasa. During the question and answer sessions, the translator sometimes just gave a summary, or the translation is not in full. Thirdly, we needed help with logistics [...] [the plaintiffs] had to attend every day of the trial. Some of them go to work in towns because they can't work on the land [any longer], and they couldn't get leave.<sup>56</sup>

<sup>52</sup> Interview with Ilam Senin, Orang Asli involved in the Sagong Tasi case, Gombak, 15-12-2002.

<sup>53</sup> Interview with Rashid Ismail, lawyer for plaintiffs in the Sagong Tasi case, Kuala Lumpur, 16-8-2002.

<sup>54</sup> Malay language is the official language used in courts.

<sup>55</sup> Interview with Sharmila Sekaran, lawyer for plaintiffs in the Sagong Tasi case, Petaling Jaya, 14-9-2002.

<sup>56</sup> Similar observations were held by another lawyer who has provided legal advice to Orang Asli individuals on various issues, including land compensation. As he stated, 'The Orang Asli



The judge's role in addressing some of these communication issues was important, as Ms Sekaran explained. In this particular case, the judge insisted that the interpreters explain the proceedings to the plaintiffs, and ensured that they knew what was going on. 'This shows a consideration of them as people, upholding their dignity,' she said, which gave the plaintiffs greater confidence during the whole procedure. Going to court was also a legal process not divorced from social and political realities. As Colin Nicholas, who was involved throughout the court case (and who observed the reactions and responses of witnesses at the trial), noted, certain individuals were hesitant in providing evidence for the plaintiffs, as they were government servants and felt that they couldn't say anything 'against' the government, who were among the defendants in the proceedings.<sup>57</sup>

Bringing such a case to court was a learning experience for the lawyers involved, most of whom did not have much prior contact with Orang Asli groups. It was also a new experience for the Orang Asli plaintiffs. The court proceedings introduced new means by which defence against dispossession can be articulated and have given Orang Asli greater confidence in the rights that they can enjoy in the Malaysian nation-state. Following the Sagong Tasi High Court judgement, two communities in Sabah and Sarawak brought two companies to court for encroaching on their customary land (International Work Group for Indigenous Affairs 2003).

### *Conclusion*

The Malaysian legal system does allow some room for the practice of what Levy (2000) terms 'indigenous law', albeit in different ways for different categories of citizens. Customary inclusions were given to Malays and to the natives of Sabah and Sarawak under the Constitution. For Malays, the legal system recognizes and allows for certain Islamic customs and laws to be incorporated and independently decided upon in Syariah courts. State legislative assemblies are also able to rule on matters involving Islam. In Sabah and

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are sometimes not able to take up the legal advice [I offer them]. They are fearful; fearful of challenging the authorities; fearful because they are not familiar with the legal system. I have advised them that it is not 'anti-government' [to file a case] but it is asserting their rights. The people who take cases to court are the ones who are more articulate, confident, aware, and have better networking. They are familiar with the systems of the outside world. [Most Orang Asli] are fearful that they won't have the financial resources; fearful that they have to pay the costs for the other side [if they lose the case]. They have no confidence that they will win.' Speaking in particular about compensation for land taken by the government, he says, 'They think "it is better to have a bird in hand than two in a bush", and they are happy with compensation for fruit trees. Most people are not happy, but they will accept rather than fight for their rights. Education is needed to overcome this' (Interview with a lawyer, Klang Valley, 10-10-2002).

<sup>57</sup> Seminar presented at the National University of Singapore, October 2002.



Sarawak, native customs and laws are recognized and allowed judicial recognition in native courts. The Orang Asli, however, have no such decentralized systems. With the exception of land matters, which are legislated (with some restriction) by state legislative assemblies, all laws in relation to them are made by Parliament and all legal cases concerning their customary practices come through the regular subordinate and superior courts. The only ways in which they have enjoyed any recognition of their customary practices have been through common law developments.

Most Orang Asli are neither aware of their rights in the written text of the law, nor are they familiar with the process of seeking justice through judicial systems. As such, they rely on interpreters of the law – JHEOA officials, civil society actors, lawyers, and judges – to help them with the everyday struggles they face. Most do not possess the confidence, money, time, specialized knowledge, and linguistic skills to bring to the cases to court. They are vulnerable to cheating and poor advice. The juridical field is structured in a way that is strange to the Orang Asli plaintiffs (as it is to many other citizens of Malaysia); it is a formal terrain in which they feel uncomfortable and in which they require the help of authorities who possess the types of capital needed to argue for their rights (Bourdieu 1987).

For every successful case for land rights won through the courts, there have been many more incidents of Orang Asli communities whose rights to land have not been given recognition through case law. Despite the existence of legal and administrative provisions to gazette Orang Asli lands in order to protect them, these are under-utilized. Lands approved for gazetting as Orang Asli reserves as far back as the 1960s have not actually been gazetted (Nicholas 2007). Drawing on official data provided by the JHEOA, Nicholas points out that in 2003, only 15.1% of the total land area recognized as Orang Asli inhabited places, areas, or reserves were actually gazetted. Of greater concern, he notes, is the fact that the area of gazetted reserves has actually been decreasing over the years. Between 1990 and 2003, 1,444 hectares were de-gazetted while approval for gazetting 7,315 hectares was revoked without the land ever being given this formal status.

The expansion of plantations, extraction of timber, and appropriation of land for factories, highways, and development projects still results in encroachment on Orang Asli customary lands. By virtue of their identity as minority indigenous people, they have been able to argue for recognition of native title and to appropriate compensation at market rates. However, the legal concept of native title has only just been established – up to now it has limited bearing on the actual lives of Orang Asli, who continue to be displaced and dispossessed.

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