

## The future of Orang Asal

**Time has come to give greater recognition to their role as they too are equally as Malaysian as the most of us.**

by Jason Loh

As it is, the Orang Asal (otherwise also known popularly or colloquially as the Orang Asli) are the aboriginal peoples of Malaysia – whose native pedigree stretches back thousands of years – and by default bestowed with the special position as enshrined in Article 153 of our Federal Constitution.

However, like their counterparts in many parts of the world, they remain marginalised and left behind in national development.

Article 8 of the Federal Constitution on equality before the law further provides under sub-article 5 that this doesn't invalidate or prohibit (c) "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 ..."

The Orang Asal should not have to choose between legacy (ie, their traditional and customary way of life) and development. They should be entitled, constitutionally and politically, to retain both their habitat and ecosystem and at the same time enjoy the fruits of progress.

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For far too long, the Orang Asal have been forced and cajoled to eke out an existence and a living on the margins and fringes of society or worse still in complete isolation in the heart of the jungle.

The question is, why can't the Orang Asal enjoy the features of modern and sophisticated civilisation within their own so-called "natural" setting? In fact, based on anecdotal and empirical evidence, that's what the Orang Asal want and aspire to.

It's not only right and realistic too that modern and even state of the art infrastructure and facilities can co-exist within a forest and jungle environment. And this doesn't in any way at all entail some form of deforestation. And the last thing that the Orang Asal need are logging and land clearance activities for oil palm plantations that devastate the ecosystem of the Orang Asal and doesn't bring any financial or socio-economic benefits whatsoever to them.

After all, the geographically and topographically displaced Orang Asal are not then re-absorbed into the surrounding economic activities but pushed further and deeper into the jungle (that's yet to be "ravaged by exploitative capitalism").

Not only that, they are deprived of compensation when their land designated as *tanah pusaka* (literally, ancestral land) or *tanah adat* (literally, customary land) at common law (where it's ungazetted as such under the Aboriginal Peoples' Act, 1954 as amended in 1974) – are encroached.

And if the land is gazetted, it can only be revoked "through clear and unambiguous words of the legislature with payment of compensation. This is *sui generis* (ie, unique) right, forming a kind by itself, exempt from the National Land Code" (see *Orang Asal Customary Land Rights* by Alliff Benjamin Suhaimi of law firm Thomas Philip, May 2, 2019).

In the landmark case of *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002], the High Court held that the Orang Asal were legally entitled at common law to be recognised as

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enjoying proprietary rights over the specific settlement they have occupied for (uninterrupted) generations. No statute law is capable of extinguishing the common law rights of the Orang Asal – in terms of their continuous use, access and enjoyment of the land – without due and proper process. Therefore, any purported eviction is deemed unlawful (null and void).

Hence, the claim of trespass was accordingly granted. And compensation had to be paid to them as per the Land Acquisition Act 1960, ie, in terms of proprietary (ownership) rights subject to Article 13, specifically (2) of the Federal Constitution, namely that, “[n]o law shall provide for the compulsory acquisition or use of property without adequate compensation”. The decision was upheld by the Court of Appeal.

Thus, Orang Asal land can only be lawfully taken away by their express consent as (beneficial) owners (including and extended to the deprivation of possession or use) which is normally tied to the – appropriate sum which could be higher than the market value as determined by the courts for the – compensation.

Only last month, the Orang Asal of Gua Musang (Kelantan) filed a summons in court for encroachment for the purpose of mining, logging, and agriculture. In addition to the private players concerned, the state authorities in the form of the Land and Mines Office, Forestry Department, the state government itself as well as the Department of Orang Asal Development (Jakoa) were also sued by the Orang Asal plaintiffs.

As reported on March 11, 2021, in their statement of claim, the plaintiffs “alleged that all the [fourteen] defendants had encroached on their ancestral land for mining, logging as well as oil palm and rubber tree plantations, which affected the daily livelihood of villagers living in the areas... these activities have severely damaged the crops... [and] also caused river pollution, resulting in the loss of the main water supply for villagers in the affected areas”.

Such incidents are common and happen because there’s no policy framework to guide the authorities when it comes to developing Orang Asal land.

What needs to be implemented, moving forward, is for a national development policy or strategy for the Orang Asal that aims to:

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1. integrate the development policies, programmes and projects into the ecosystem of the Orang Asal living in rural and remote areas; and conversely
2. increase and better integrate the urban Orang Asal participation in mainstream life whilst preserving their identity and customs.

An action plan would probably firstly require the establishment of a Royal Commission that reports directly to the Yang di-Pertuan Agong and the Conference/Council of the Malay Rulers.

The findings of the report will be followed by the formulation of a policy framework as alluded above that seeks to promote the welfare of the Orang Asal from the legal (eg, a Special Court for Orang Asal Affairs), political (eg, parliamentary representation), economic (eg, agriculture and eco-tourism), socio-economic (eg, education and access to facilities) and environmental aspects (eg, tree replanting efforts). A White Paper could thereafter be presented in Parliament by a minister (which would entail Jakoa upgraded into a ministry).

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### Orang Asli communities in Peninsular Malaysia

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