

The Orang Asli and the Laws of Malaysia: With Special Reference to Land

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ABSTRAK

Dengan berlakunya perubahan yang pesat dalam sektor ekonomi dan pertanian di bawah Rancangan-rancangan Malaysia, kedudukan dan status Orang Asli di negara ini perlu dikaji semula. Kajian semula ini perlu mengkhusus kepada Undang-undang Tanah yang melibatkan Orang Asli. Polisi kerajaan terhadap Orang Asli adalah berbentuk pengkalan-pemeliharaan dan paternalistik seperti termaktub dalam Ordinan Orang Asli 1954, Kertas Polisi 1963 dan Akta Orang Asli 1986. Hampir tiada perbezaan yang besar antara polisi 1986 dengan polisi tahun-tahun 1950an. Kesemua Undang-undang ini meletakkan Orang Asli di bawah tanggung-jawab Jabatan Orang Asli. Polisi JOA sentiasa dipengaruhi oleh dua pertimbangan utama, iaitu keadaan keselamatan negara, dan juga integrasi nasional. JOA mengajukan polisi 'perubahan secara beransur-ansur' dan 'pembaharuan terancang'. Terdapat banyak percanggahan da-lam undang-undang yang melibatkan Orang Asli, dan juga dalam perkara-perkara yang berkaitan dengan jaminan hak milik ke atas tanah bagi berbagai kumpulan Orang Asli. Akta 1984 sudah usang dan ketinggalan zaman dan oleh itu tidak lagi sesuai untuk Malaysia moden. Akta-akta perlu digubal agar status Orang Asli sebagai bumiputra dapat ditetapkan dengan jelasnya, dan kemasukan atau tidaknya mereka ke dalam agama Islam mestilah tidak mempengaruhi status mereka sebagai bumiputra. Suatu rancangan yang menyerupai Tanah Simpanan Melayu, dan pembangunan terancang seperti FELDA amat berfaedah bagi Orang Asli.

ABSTRACT

With remarkable changes in Malaysian economic and agricultural sectors under the various Malaysian Plans, the status and position of the Orang Asli should be reviewed, especially as regard the land laws affecting them. Government policy on the Orang Asli is one of preservation and paternalism, as could be seen in the Aboriginal Peoples Ordinance 1954, Policy Paper 1963 and Aboriginal Peoples Act. There is little difference between the policy of 1986 and 1950's. The Orang Asli is administered by the Jabatan Orang Asli who are being guided by factors affecting the

security situation in the country as well as national integration. It followed a policy of gradual change and planned development. However, there are inconsistencies in the laws affecting the Orang Asli, in matters pertaining to the security of tenure of land for the various Orang Asli groups. The Aboriginal Peoples Act is outdated and no longer appropriate for modern Malaysia. Acts should be enacted so that the status of Orang Asli as bumiputra be clearly established and their conversion to Islam or otherwise must not influence their status as bumiputra. A similiar land reserve scheme like the Malay Reservation land, and programmed development like that of FELDA would be beneficial for the Orang Asli.

INTRODUCTION

The intention of this article is to (a) describe the present laws of Malaysia bearing on the Orang Asli and (b) to suggest changes which might be made, particularly in respect to issues of land occupation, utilization, and ownership. This last is especially important given the remarkable changes in Malaysia's economic and agricultural systems under the Fourth and Fifth Malaysia Plans which continue under the New Economic Policy. Added to this, the status of the Orang Asli has also changed, with them now being classified as Bumiputra. The present laws, however, have not kept pace with these changed circumstances nor with developments within the Orang Asli communities themselves.

Connected with these factors is the nature of Orang Asli society. The usual division, Negrito, Senoi, Melayu-Asli (Proto-Malay) and the subdivisions within each group¹ tend to mask a rather more complex social and economic reality. Within a total population of about 70,000 there are marked differences in social organization, economic activity, habitat and degree of acculturation with the wider Malaysian society. To assume, as the law does, that there is something identifiable as an 'Orang Asli' is not only wrong in fact but impossible to operate in terms of a sensible state policy toward these people.² The point I wish to stress is that regulation by law, insofar as it remains necessary, must (a) take account of the nature of Orang Asli societies, (b) match these characteristics to the facts of modern economic and social life in Malaysia, and (c) provide mechanisms for future changes which will undoubtedly occur.

There is one final point on the laws. This is that all the laws which affect the Orang Asli either directly or by implication must be taken together. Change in one part or section only without the corresponding alterations in the other, will merely create confusion. Obviously the nature of revision will be affected by policy and it is this to which we now turn.

POLICY AND ADMINISTRATION

POLICY

Insofar as any policy on the Orang Asli can be discerned, it can best be described as one of preservation and paternalism. The earliest statement is a short (18 pages) outline published in 1961³ some seven years after the Aboriginal Peoples Ordinance of 1954 (see below). Its tone clearly reflect the provisions of the Ordinance and, even more clearly, reflect the security situation in the Federation of Malaya. The "Emergency", a war with the Communist Party Malaya, was still being fought in the jungles of Malaya and the Orang Asli were by virtue of their liabitat, of crucial importance to both sides. On the other hand, the Report also attempt to provide guidance for government in education, health, agricultural, and forest policy while at the same time recognizing the "different" stages of development" reached amongst the various Orang Asli groups and insisting on a flexibility of government aims and operations. The ultimate stated aim is "Integration".

The Policy Paper then establishes the following broad principles:

(i) Insofar as Orang Asli social, economic, and cultural condition prevent them from enjoying the benefits of the laws of the country, special measures should be adopted for the protection of their institutions, mode of life, property, and labour.

However, the measures for protection should not be used as a means of segregation.

(ii) Orang Asli development has as its objective "natural integration" not an artificial assimilation". Recourse to coercion is excluded and there will be a positive effort to preserve religious and cultural values and existing forms of social control.

(iii) Laws and land: these are crucial provisions and they are cited here in full:⁴

"The aborigines shall be allowed to retain their own customs, political system, laws and institutions when they are not incompatible with the national legal system. In this respect the methods of, social control of the deep jungle groups shall be used as far as' possible for dealing with crimes or offences committed by aborigines.

The special position of aborigines in respect of land usage and land rights shall be recognised [sic]. That is, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically into line with other communities in this country. Aborigines will not be moved from their traditional areas without their full consent".

(iv) Priority is to be given to educational opportunity, on the same footing as that available to the other sections of the population. This include the preservation of Orang Asli languages and provision should be made for the teaching of these languages.

(v) Special training facilities should be provided for "occupation for which they have traditionally shown aptitude". These are not defined in the Paper, though there is a later reference to "handicrafts and rural industries" which express cultural and Flartistic values".

(vi) Adequate health services are to be provided.

(vii) Finally, in all matters concerning the welfare and development of the Orang Asli, government will seek the collaboration of the communities concerned or their representatives.

Having stated these principles, the Paper then, move on to more specific provisions for the division of administrative responsibility with respect to education, health, agricultural and forestry matters and (national) security, From our point of view here, the most important is agricultural and forestry policy. So far as forestry policy is concerned, the Paper suggests that the "hunting and collecting economy [of the Negrito]" be found a place provided that this activity is not detrimental to accepted forest policy. It is notable that this suggestion is quite vague and refers to hunting and gathering activity only. The issue of swidden cultivation is, however, specifically dealt with (pages 14-15) and the recommendation is that it be replaced by some form of permanent cultivation (gardens, rubber). No reason is given for this recommendation although it is clearly implied that it is inevitable in some way. The Paper goes on to suggest the establishment of sites for permanent occupation, the provision of training and the involvement of the Ministry of Agriculture in planning. Thus, no encouragement should be given to the perpetuation of [Orang Asli] present nomadic way of life."(p. 16)

To summarize: the Paper proposes a policy of gradual change in respect of those, the majority of the Orang Asli, who are jungle or jungle fringe dwellers. It has nothing specific to say about the coastal peoples or those, like the Orang Asli, who already have some permanent settlements. The stated emphasis is on "natural integration, an emphasis which appears to have continued into the recent past."⁵ Thus, "The Government policy is the ultimate integration and assimilation of the Orang Asli population with the main national community."⁶ The reference here is to the Malay community and would thus imply conversion to Islam. There are already a number of Orang Asli Muslims, most notably the Orang Kuala⁷ but it appears that despite religion, an assimilation as such has not occurred. However, the religious factor is important because of its legal consequences which are, shortly, the application of Islamic

law in matters of personal status and property. This necessarily involves conflict with the existing legislation on Orang Asli affairs.

In the mid-1970s the Malaysian National Development Planning Committee, under the direction of the National Security Council ordered the re-location of a number of Orang Asli groups. The motive was the same as in 1952/53, i.e. to deny terrorists the possibility of Orang Asli help. The Jabatan Orang Asli (the Department of Aboriginal Affairs) was of course involved, in this "regroupment" and, according to the present Director, Encik Jimin bin Idris⁸ has taken this opportunity to define and implement "development".

Development is defined as "growth plus change" which consists of (a) economic improvement through land development and commercial schemes and (b) the provision of social services to the same standard as that available nationally. However, the following constraints are also indicated. First, the Orang Asli do not comprise a homogenous group from the economic point of view because they include "semi-nomads", swidden cultivators, settled agriculturalists and coast and island dwellers. Second,

All the facilities and services which are to be extended to the community are alien concepts. Commercial agriculture, formalised form of education, modern medicine, for example are new" to the Orang Asli culture.

However, even with these difficulties the JOA policy is to proceed with what is called "planned development". This appear to mean (a) the provision of minimum essential services (health, education) for remote Orang Asli groups and (b) a "comprehensive approach" for groups living in more accessible areas and include the provision of land schemes and model settlement.⁹ For the intermediate range of swidden cultivators, the policy is to modify rather than reject the system by introducing food, cash and tree crops together with improving the techniques of cultivation. The emphasis is on long term commercial development involving a considerable financial outlay. For example, a total of thirty seven regroupment schemes costing RM245 millions and involving 24,500 Orang Asli have been planned¹⁰ and some are in operation.¹¹ The schemes in the three states of Pahang, Perak and Kelantan provide for ten acres of cash crops plus two acres of house land for each family together with supporting school, medical and administrative services. The JOA has overall administrative responsibility but in each case state (e.g. planning) and federal authorities (e.g. FELDA, FELCRA, see below) are also involved. The scheme appears to be patterned on the existing land development schemes for the Malays though with much lower expectations.

In short, it appears that the dominant principle of policy remains that of security. Insofar as "development" is seen to be practical, it remains subject to close administrative control by the JOA. The difference in policy between 1986 and the 1950s is one of degree rather than of kind.

ADMINISTRATION

The Jabatan Orang Asli (JOA) is a department within the Ministry of Home Affairs (formerly Ministry of Interior). The original department was established in 1954 and its powers and functions were legislated for in the Aboriginal Peoples Ordinance of 1954 (see below) together with the policy guide of 1961 (above). It has grown in size and complexity over the succeeding thirty years and now comprising a total staff of over 1,700 and an annual budget in excess of RM35 million¹² of which half is an operating allocation, the other half being for administration.

One can summarize the main characteristic of the JOA administration by an examination of the main divisions into which the department is organized. Leaving aside the Administrative and Finance division, which is concerned purely with internal support management, we have the following: Education; the functions of this division is to make "national education" available to all Orang Asli children through the provision of primary and secondary schools. The programme has not been a success, with poor school attendance, lack of materials and substandard teaching¹³ Medical and Health; this was the first division to be established and it is today the largest. It relies heavily on paramedical staff, themselves Orang Asli, and the division operates over fifty posts in the jungle areas. It also staffs and runs a 450 bed hospital at Gombak on the outskirts of Kuala Lumpur where fully professional treatment is available. There are also medical and health clinics and a mobile health clinic. Provision is also made for emergency evacuation by air. Communication and Operations; as its title suggests this is a support division responsible for wireless communication and all transport matters. Training; the responsibility of this division is to train its own staff for effective work. Apart from training in technical subjects (health, communication etc) a strong emphasis is placed on basic sociology and language.

These divisions are basic to the functions of the department and obviously take a great deal of finance and staff. From the point of view of this article, however, they are of less importance than the three which remain, that is the Research and Planning Divisions the Regroupment Division and the Economic and Construction Division. These are the core divisions so far as "development" and "change" are concerned.

To take the Research and Planning division first: its title is something of a misnomer. Its function, in the JOA's word¹⁴ is to be "the eyes and ears of government", particularly in sensitive areas which "pertain to the security of the Malaysian nation as a whole". Even more striking is the following passage:¹⁵

Another section within this Division deals with the propagation of Islam. (Please note that Islam is the National Religion of Malaysia and the propagation of Islam among the Orang Asli population is part of the terms of reference given to the Department). As in all aspects of Departmental functions, no force or coercion is ever used. All persuasion towards getting the Orang Asli to accept Islam centres on two issues, viz:

The international brotherhood that is Islam.

b) The acceptance of the fact that the indigenous and majority population are Muslims and that religion would be the binding bond in the integration process.

This passage contains several surprising propositions. The first is that, while it is true that the Malaysian Constitution¹⁶ describes Islam as the national religion, this does not imply anything further. Constitutional lawyers actually find it difficult to give any precise meaning to Art. 3.¹⁷ The implication seems to be that the Orang Asli are without religion. The right to propagate a religion is a matter for state law (Art. 11(4)) and is not directly a matter for the Federal Government, or by extension, its agencies. Islam (except in the Federal Territory) is a state matter.¹⁸

Second, the propagation of Islam is described as being within the "terms of reference given to the Department". The question is, from whence did these terms come and on what basis? Religion is a state matter and the conversion of non-Muslims to Islam is regulated in state Islamic law enactments. It is important to know the answer to this question; unauthorized conversion is punishable by state laws. Does propagation mean "propagation short of conversion". Further, conversion has direct and immediate consequences for personal status and for the distribution of property on death or divorce.

Third, paragraph (a) of the passage cited refers to the "international brotherhood that is Islam". If this means anything at all, it perhaps refers to the question of identity, the view that marginal peoples, as the Orang Asli are clearly regarded, obtain a wider and more significant identity by becoming Muslim.

Finally, in paragraph (b) we have a reference to Islam as a "binding bond in the integration process". This appears to support the comments just made about identity and even goes further. Islamization is equated with integration, but of course this actually amounts to assimilation

within the wider Muslim community. We return to the issue of conversion below.

Turning now to the Regroupment Programme Division, its function is to plan and control the newly established Orang Asli Settlement. As indicated earlier the schemes are constructed on the FELDA model though they are much less extensive in finance and objectives.

Finally, we turn to the Economic and Construction division, the function of which is to plan and control agricultural development and co-operative development. The agricultural schemes are small scale and localized in the areas where Orang Asli are already sedentarized, thus being confined primarily to Senoi and Orang Melayu Asli. The emphasis is on providing cash crops. Where capital works are required, it is JOA policy to use Orang Asli labour. Co-operative development means the introduction of group finance schemes for the sale and purchase of consumer goods. The schemes are managed by JOA field officers.

To summarize: this outline of policy and administration has thrown up a number of interesting features. Perhaps the main overall conclusion is that the combined policy and administration is internally inconsistent. The overall determinant is still the security factor before which all else must give way. This requires certainty, that is the maintenance of close supervision over Orang Asli particularly the 60% or so who remain in the jungle area. The policy of the 1950s, which combined restriction with tolerance for Orang Asli culture is the most satisfactory way of achieving control. At the same time, however, the exploitation of natural resources (timber, water for hydroelectricity, land development schemes) make the preservation of stasis increasingly difficult to maintain.

This brings us to regroupment. Such schemes are responses to changing circumstances whether of security or the exploitation of natural resources. The problem here is that so far as "development" is concerned, the tendency is for it to be seen in regroupment terms. But there are or may be other alternatives which can provide for betterment without the loss of Orang Asli cultures. Some recent anthropological data have suggested alternatives²¹ and these seem to me to be quite practical given the will to make them work. They will involve change in policy, administration and they ultimately depend on a solution to the land issue (see below). But it is a mistake to confine "development" just to regroupment.

Finally, the question of integration. It is difficult to escape the impression that integration is increasingly coming to be thought of as assimilation, specifically assimilation to Malay-Muslim values. If this is so, it is difficult to see how the view that the Orang Asli represent a valuable and unique part of Malaysian culture worthy of encouragement and respect can be maintained within the present policy and administrative system.

These three factors, security, development-regroupment and assimilation-integration, are inconsistent within themselves and with each other. The implications of these inconsistencies are clearly apparent in the laws which apply to or in some way affect the Orang Asli to which we now turn.

THE LAWS AFFECTING ORANG ASLI

Fortunately these are few in number but this is unfortunately compensated for by (a) the age of the legislation and (b) its internal inconsistency which has become even more marked in recent years.

1. The Aboriginal Peoples Act²²
2. In this Act unless the context otherwise requires "aboriginal area" means an aboriginal area declared to be such under this Act;

"aboriginal community" means the members of one aboriginal ethnic group living together in one place;

"aboriginal ethnic group" means a distinct tribal division of aborigines as characterised by culture, language or social organisation and includes any group which the State Authority may, by order, declare to be an aboriginal ethnic group;

"aboriginal inhabited place" means any place inhabited by an aboriginal community but which has not been declared to be an aboriginal area or aboriginal reserve;

"aboriginal language" includes any language and such dialectal modifications or archaic forms of the language as any aborigines habitually use;

"aboriginal racial group" means one of the three main aboriginal groups in West Malaysia divided racially into Negrito, Senoi and Proto-Malay;

"aboriginal reserve" means an aboriginal reserve declared to be such under this Act;

"aboriginal way of life" includes living in settled communities in kampungs either inland or along the coast;

“alienated” in relation to land has the meaning assigned to it in the written law relating to land in force in West Malaysia;

... (omitted)

... (omitted).”

There are four points which arise from the definition section, some of which recur in later provisions. First, “ethnic group”; the language used here (eg “tribal division”) is distinctly old fashioned. More important, the power to declare or identify any people as a group “is vested in the state authority. The reference here is not clear. “State Authority” is undefined but, if we return to the original ordinance of 1954 we find that the reference is to the Ruler in Council in a State or the High Commissioner in nominated Council in a Settlement. These are pre-Merdeka references, so the contemporary reference to State Authority” must refer to the Ruler of the present states in Malaysia. In short, the fundamental class – “ethnic group” – is determined by the State as opposed to the Federal authority.

Second, the reference to “racial group”; the three fold division is Negrito, Senoi and Proto-Malay (now called Melayu Asli). The question is whether this is accurate. From the administrative and policy point of view the division is obviously convenient but does it accurately represent the complexity of Orang Asli culture? This is not just a historical question because if future policy is to be “development” then such a policy can only succeed on an accurate knowledge of “group” culture. There is evidence²³ to suggest that the present division, while comfortably certain, is not in fact sophisticated as to make forward and planning certain enough to justify itself either in human or financial terms.

Third, the reference to “way of life”; if this is a reference to hunter – gather peoples it is understandable. But it cannot sensibly apply to swidden cultivators, settled agriculturalists, or coastal dwellers. The line here, between those classed as Orang Asli on the one hand and Malay on the other is typically very fine on economic grounds. A distinction can be down on the basis of religion (Islam) and perhaps identity (Malay) but this makes little sense in economic or ecological terms. On the sociological side there are data²⁴ which suggest rather more similarity in “way of life” than the reverse. To accept such a blanket description in 1980 is not consonant with the reality of contemporary Malaysia though of course in 1954 it must have seemed sensible.

Finally, we come to “alienated” in respect of land. The reference is to the laws of Malaysia as they now stand and this is a reference to the National Land Code.²⁵ Specifically to sections 42, 57-61 and 76-92.²⁶ It should be noted here that section 9 of the Aboriginal Peoples Act

prohibits dealings in land by Orang Asli without the Commissioner's permission. We shall look at the National Land Code in detail later when we come on to the topic of land proper. It is enough at the moment to note that the provisions on alienation effectively define title to land in terms which bear no relation to Orang Asli conceptions of occupation and utilization. Indeed, the technical rules for alienation are pretty well beyond the grasp of all except those professionally concerned.²⁷

It is interesting to compare these comments on section 2 with the various policy statements described earlier. While section 2 effectively dates from 1954, the current policy, i.e. 1986, on definition seems not to have changed at all. This is not all that surprising given the overriding importance of the security factor for the planning of which the broad outline is always preferable to the messiness of detail. At the same time it ignores the constitutional rights of the Orang Asli and will almost certainly lead to inaccurate choices in the future. Terms such as "group", "racial group", "way of life" and "alienated" have now to be re-drawn or, better, incorporated within a more practical scheme for Orang Asli advancement.

3. (1) In this Act an aborigine is –
 - (a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;
 - (b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or
 - (c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks and aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.
- (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.

- (3) Any question whether any person is or is not an aborigine shall be decided by the Minister.

The provisions of this section repeat exactly the provisions of the 1954 Ordinances. Sub-section (1) (a-c) defines an aboriginal person as one such by way of descent or adoption, the criteria being language and way of life. This made sense in 1954 and, perhaps, still does but it also ignores the fact that individuals may wish to retain their own culture (and be proud of it) while at the same time objecting to ministerial fiat (s. 3(2)) as to personal status. The section assumes that nothing has or will change. Again, as with section 2, this is impractical and quite unrealistic given the advance of educational and jobs held among some Orang Asli. If government policy is for development and integration and if success, however relative, is claimed then section 3 cannot really stand. But this is not the end of the matter.

Sub-section (2) is crucial to definition and will appear further below. It says that conversion as such cannot take away one's status as an Orang Asli provided that the person continues to speak an Orang Asli language and continues his or her way of life. The problem here is that conversion to Islam immediately places the individual under another law- the Islamic Law Enactments of each state – by which jurisdiction is vested in the respective Syariah Court. The rule in section 3(2) is in flat contradiction to state law on Islam.

4. the Commissioner shall be responsible for the general administration, welfare, and advancement of aborigines:

Provided that nothing in this section shall be deemed to preclude any aboriginal headman from exercising his authority in matters of aboriginal custom and belief in any aboriginal community or any aboriginal ethnic group.

We come now to the question of Orang Asli "headmen". It appears to be assumed in this and in section 16 that there is such a person as a headman in all Orang Asli groups. This is just not true though again we can see why the 1954 Ordinance included the provision. At the time there was a need for the security forces to know that a designated individual was "in charge", someone to whom orders could be given and from whom information was to be forthcoming. The reality of life, however, is rather different. My own research into the nature of jural personality among the Senoi of South Perak (Ulu Slim) in 1967 led me to believe that the idea of "headman" was a figment of the imagination. Nothing I have seen on Senoi or Negrito ethnography has led me to believe otherwise²⁸

So far as the Orang Melayu Asli are concerned, the "Batin" system found in Negeri Sembilan and Johor appears to be at least as "Malay" as "Orang Asli". In the case of Negeri Sembilan the Batin system can be traced to a late justification of Minangkabau immigration,²⁹ and in Johor to a tribute post³⁰ of which has anything to do with "headman" as such - the idea is suspect on both historical and ethnographic grounds. So far as contemporary life is concerned, it makes no sense.

On the other hand, an Orang Asli representative or representatives in the Malaysian Parliament may well be a better alternative. Laws are made in Parliament and there is no doubt but that an Orang Asli voice should be heard. Such a suggestion may be attacked as "communalism", but then Malaysian politics are communal.³¹

5. (1) The Yang di-Pertuan Agong may appoint a Commissioner for Aboriginal Affairs, and as many Deputy Commissioners for Aboriginal Affairs and other officers as he may consider necessary for the purposes of this Act.
- (2) It shall be lawful for the Commissioner to do all acts reasonably necessary and incidental to or connected with the performance of his functions under this Act including the conducting of research into any aspects of aboriginal life.
- (3) all the powers of the Commissioner under this Act shall be exercisable by the deputy Commissioners.
- (4) Every person appointed under this section shall be deemed to be a public servant within the meaning of the Penal Code.

The interest in section 5 is not in its terms so much as in the original (1954) section 5(2). This provided that the state, i.e. one of the states of the Federation, might appoint a Protector/Commissioner for aboriginal affairs. This provision was removed in the amendment of 1967. In other words, commissioned appointments are, as the present section 5 says, a Federal matter. This is important because it recognizes that the Orang Asli are a national resource as well as a national responsibility. This is a reaffirmation of the constitutional changes made at the same time.

We come now to section 6 and 7, respectively on Orang Asli "areas" and Orang Asli "resources", both of course dealing with land. There are subtle but important differences between the two. Taking section 6 first:

6. (1) The State Authority may, by notification in the Gazette, declare any area predominantly or exclusively inhabited by aborigines, which has not been declared an aboriginal

reserve under section 7, to be an aboriginal area and may declare the area to be divided into one or more aboriginal cantons:

Provided that where there is more than one aboriginal ethnic group there shall be as many cantons as there are aboriginal ethnic groups.

- (2) Within an aboriginal area
 - (i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservation;
 - (ii) no land shall be declared sanctuary or reserve under any written law relating to the protection of wild animals and birds;
 - (iii) no land shall be alienated, granted, leased or otherwise disposed of to persons not being aborigines normally residents in that aboriginal area or to any commercial undertaking without consulting the Commissioners; and
 - (iv) 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 original 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.

- (3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal area made under sub-section (1).

This section provide for temporary occupation in contract to a “reserve” which envisages permanent occupation (below s.7). Section 6 is not new, it reprints the s. 6 of the Ordinance of 1954. The effect of designating an “area” is to exclude Malay Reservation, reserve or wild life sanctuary, licences for the collection of forest produce and alienation from being declared. However, overriding power remains in the respective State governments to reserve or vary any area declaration (s.6(3)). Section 6, therefore, leaves the initiative solely with the State governments. There are no provisions (a) for , Orang Asli initiative or (b) Orang Asli appeal.³²

7. (1) The State Authority may, by notification in the Gazette, declare an area exclusively inhabited by aborigines to be an aboriginal reserve:

Provided

- (i) when it appears unlikely that the aborigines will remain permanently in that place it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and
 - (ii) an aboriginal reserve may be constituted within an aboriginal area.
- (2) Within an aboriginal reserve
- (i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;
 - (ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;
 - (iii) no land shall be declared a reserved forest under any written law relating to forests;
 - (iv) no land shall be alienated, granted, leased or otherwise disposed of except to aborigines of the aboriginal communities normally resident within the reserve; and
 - (v) no temporary occupation of any land shall be permitted under any written law relating to land.
- (3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal reserve made under sub-section (1).

This section envisages permanent as opposed to temporary occupation. The same exclusion revisions apply once a reserve has been given (s.7(2)) as in aboriginal areas (s.6(2)) but there is one important difference. Section 7(2(v)) prohibits any "temporary occupation... under any written law" whereas section 6 does not have this proviso. The implication is clear, "area land" may be occupied, by whom is not specified, while reserve land may not be occupied. The reference is to the Temporary Occupation licence system which is part of the land laws of Malaysia.³³ The point, so far as the Orang Asli are concerned, is that not only is tenure insecure but that the Aboriginal Peoples Act itself carries no guarantee even of occupation. This is confirmed when we look at section 8.

8. (1) The State Authority may grant rights of occupancy of any land not being alienated land or land leased for any purpose within any aboriginal area or aboriginal reserve.

- (2) Rights of occupancy may be granted
- (a) to
 - (i) any individual aborigine;
 - (ii) member of any family of aborigines; or
 - (iii) members of any aboriginal community;
 - (b) free of rent or subject to such rents as may be imposed in the grant; and
 - (c) subject to such conditions as may be imposed by the grant,

and shall be deemed not to confer on any person any *better title than that of a tenant at will* .

- (3) Nothing in this section shall preclude the alienation or grant or lease of any land to any aborigine.

The key to this section is in the italicized words "... tenant at will". What do they mean? To answer this we have to turn to the National Land Code of 1965. The term "tenancy" is not defined in the Code, its ground weaning is a lease for a term not exceeding three years and is thus a tenancy "exempt from registration" (section 213, National Land Code, 1965). However, the tenancy may be endorsed on the title to the land but if it is not then the tenant has no protection against a bona fide purchaser for value to whom the owner (in this case, the State) sells. Protection depends on endorsements (sections 213, 316-317 National Land Code). In short, any Orang Asli tenant has no protection, except possibly one in equity (below). The intention of the Aboriginal People Act clearly is to deny the Orang Asli a title registerable and enforceable under the National Land Code, though with the saving para 3 of section 8 allowing alienation. To my knowledge, and this is open to correction, no such titles have been issued.

9. No aborigine shall transfer, lease, charge, sell, convey, assign, mortgage or otherwise dispose of any land except with the consent of the Commissioner and any such transaction effected without the Commissioner's consent shall be void and of no effect.

This section is unremarkable except that it indicates the possibility (probability?) of unauthorised land dealings in Malaysia, i.e. dealings outside the state's land registers. The contemporary squatter problem is an obvious reference.

10. (1) An aboriginal community resident in any area declared to be a Malay Reservation, a reserved forest or a game reserve under any written law may, notwithstanding anything to the contrary contained in that written law, continue to reside therein upon such conditions as the State Authority may by rules prescribe.
- (2) Any rules made under this section may expressly provide that all or any of the provisions of such written law shall not have effect in respect of such aboriginal community or that any such provisions of the written law shall be modified in their application to such aboriginal community in such manner as shall be specified.
- (3) The State Authority may by order require any aboriginal community to leave and remain out of any such area and may in the order make such consequential provisions, including the payment of compensation, as may be necessary.
- (4) Any compensation payable under subsection (3) may be paid in accordance with section 12.

The effect of this section is to require the Orang Asli to leave Malay reserved land at the direction of the State but with compensation. There are two points here. First, in section 10(2) the provisions of the laws on Malay reservations may be modified in this application to an Orang Asli community or that the Orang Asli may continue to reside on conditions set by the state. Second, the state may order any Orang Asli community out of the area. Section 10(1) refers to "rules" to be prescribed by the states in implementing its provisions. These, if they exist, are not published³³ but even if they are, then account must be taken of the new "Bumiputra" state of the Orang Asli.

11. (1) Where an aboriginal community establishes a claim to fruit or rubber trees on any State land which is alienated, granted, leased for any purpose, occupied temporarily under licence or otherwise disposed of, then such compensation shall be paid to that aboriginal community as shall appear to the State Authority to be just.
- (2) Any compensation payable under subsection (1) may be paid in accordance with section 12.

12. If any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefor and may pay such compensation to the persons entitled in his opinion there to or may, if he thinks fit, pay the same to the Commissioner to be held by him as a common fund for such persons or for such aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the Minister.

Sections 11 and 12 are concerned with compensation. The first with reference to fruit and rubber trees and section 12 with area and reserve land. There are a number of issues arising here. The first is the opening phase of section 11. "... establishing a claim to fruit or rubber trees..." This can only mean a claim established by prescription but there is no indication of how its validity can be tested. The land is of course State land, as section 11 makes clear, and prescriptive rights cannot be acquired by methods other than those set out in the National Land Code itself. On the other hand, section 11 appears to recognize the right to take something from State land at the will of the State.

As for compensation itself, section 12 leaves the whole question of amount of method of payment on administration of compensation in State hands, either the Commissioner or the (federal) Minister. Data are lacking on current practice but it is probably true that in some circumstances an Orang Asli involvement shall now become practice.

13. When any immovable property, not being State land, is needed to be acquired in order to declare the same to be an aboriginal area or an aboriginal reserve, the property may be acquired in accordance with the written law relating to the acquisition of land and any declaration that the property is needed shall have effect as if it were a declaration that the property is needed for a public purpose in accordance with that written law.

The written law referred to here is the Land Acquisition Act (No. 34/1960) as amended. The act gives government power to acquire land for any purpose deemed to be a "public purpose", *ie.* for the general interest of the wider (national) community. The ultimate method is compulsory acquisition and on vesting, the land becomes State land free of encumbrance. In other words, government has power to compulsorily

acquire privately reserved land and declare it Orang Asli reserve or area land. However, where a State authority refuses a Federal Department/Agency's request for acquisition the Federal Government may invoke Art. 83(5) of the Constitution though this has never yet happened.

14. (1) The Minister may, if he is satisfied that having regard to the proper administration of the welfare of the aborigines in any aboriginal area or aboriginal reserve or aboriginal inhabited place it is desirable that any person or class of person should be prohibited from entering or remaining in the area, reserve or place, make an order that effect in the form prescribed in the Schedule.
15. (1) The Commissioner and any police officer may detain any person found in any aboriginal area, aboriginal reserve or aboriginal inhabited place whose activities he has reason to believe are detrimental to the welfare of any aborigine or any aboriginal community and shall remove any such person from the area, reserve or place within seven days from the date of detaining him.

Sections 14 and 15, given here only in their respective opening provisions, are self explanatory. They are in fact part of the general "protective" nature of the Act, a characteristic to which we return below.

16. (1) The hereditary headman of an aboriginal community shall be the headman thereof or, in the case of an aboriginal community in which the office of the headman is not hereditary, a person selected to be headman by the members of the community shall be headman, thereof, subject in each case to confirmation by the Minister.

- (2) The Minister may remove any headman from his office.

This provision dated from the 1954 Ordinance and, rather than reflecting Orang Asli social structure, is more likely to be an attempt by government to establish a local authority or chain of command through which government policy may be channelled as and when required. It also presupposes a hierarchic social structure for each Orang Asli group as well as a static society overall. The former is certainly historically unsound and the latter whatever the position in the past might have been, is dangerously inaccurate.

17. (1) No aboriginal child shall be precluded from attending any school by reason only of his being an aborigine.
 - (2) No aboriginal child attending any school shall be obliged to attend, any religious instruction unless the prior consent of his father or of his mother if his father is dead, or of his guardian should both parents be dead, is notified to the Commissioner, and is transmitted by the Commissioner in writing to the headmaster of the school concerned.
 - (3) Any person who acts in contravention of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred dollars.
18. (1) No person who is not himself an aborigine of the same ethnic group shall adopt or assume the care, custody or control of any aboriginal child except with the consent of the Commissioner and in giving the consent the Commissioner may impose such conditions as he thinks fit.
 - (2) Any person who acts in contravention of this section or commits a breach of any condition imposed by the Commissioner shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

Section 17 and 18 both relate to children: section 17(2) is interesting on the questions of religion given the current Muslim missionary drive in Malaysia and the provisions of section 3(2) which direct that Orang Asli status is to be retained on conversion.

As we shall see a little below, these are contradictory demands and some policy solution acceptable to all concerned is necessary.

Section 18 is purely protective in nature and follows a practice long established both in Peninsula Malaysia and in Sabah and Sarawak.³⁵

19. (1) The Minister may make regulations for carrying into effect the purpose of this Act and in particular for the following purposes:

This section lists fourteen particular circumstances which are the creation of Orang Asli settlements, reserves and areas, control of entry, the appointment of headmen, registration of Orang Asli, the method of evidencing and recording rights of occupancy, planting of specified

products, felling of jungle, taking of jungle produce, taking of animals and birds, establishment of schools, prescribing terms and conditions of employment, the regulation of written or printed matter introduced into Orang Asli inhabited places, control of intoxicating liquor and prescribing the terminology by which Orang Asli are to be described.

To summarize the Act: its main concern is with the control of a jungle population for purposes of security. This appears to be a continuing concern. However, the main assumption on which the Act is based, that Orang Asli society is static in economic development and in terms of its social structures, is no longer (if it ever were) acceptable. As for economic development, Malaysia has undergone striking changes since 1954. By and large the Orang Asli have not benefitted from these and this exclusion is partly a matter of JOA policies based on the colonial ordinance, and partly a result of the overriding security concerns. So far as social structures are concerned, it is impossible to suppose that a single policy can adequately encompass the different groups with their varying characteristics and different need.³⁶

We turn now to the next relevant laws affecting the Orang Asli.

ISLAM AND CONVERSION

We have already noted that government policy seems to be tending towards assimilation of Orang Asli by way of conversion. As recently as 1983, the then Director General of the JOA, Dr. Baharon Azhar Rafie'i said³⁷ that Malay attitudes and behaviour are decisive in "influencing Orang Asli to embrace Islam" while bad examples are a hindrance. The influence of neighbouring Malays is more lasting than just setting up *suraus* or having *ceramahs*. The Orang Asli who are already Muslim should "influence other members of their community to do likewise".

This brings us back to section 3(2) of the Aboriginal Peoples Act which preserves the status of Orang Asli despite conversion to (in this case) Islam, provided an aboriginal way of life is maintained. This provision dates from the original Ordinance of 1954. However, from 1952 onwards each of the states of the Federation enacted its own legislation providing for the administration of Islamic law. The enactments,³⁸ while varying in detail from state to state, all rest on one fundamental proviso. This is that the Syariah Courts of each State have exclusive jurisdiction over Muslims resident in the State in all matters of personal status and inheritance. The Aboriginal Peoples Act is therefore in direct conflict with the States' Islamic law enactments. The proviso a way of life is not a qualification recognized in Syariah in which, on the contrary, the sole criterion is adherence to the religion of Islam. "Adherence" means a public profession of the faith, and neither extent of

knowledge of Islam nor the non-practise of ritual (i.e. prayers, fasting, payment of *zakat* and so on) will be taken as disturbing the status of "Muslim". In other words, a properly attested conversion of itself gives rise to a public recognition of the status of an individual (Orang Asli) as "Muslim" whether or not he actually abides by the tenets of Islam. From this follows Syariah Court jurisdiction.

What would be the High Court's answer, for example, on an appeal from the non-Muslim relative of a deceased Muslim Orang Asli against a distribution endorsed by a Syariah Court? The answer is impossible to predict but no court should be placed in this position. The question has not yet arisen but as increasing numbers of Orang Asli acquire property, particularly land, then it will come up. Again, to take another example, what is the position an Orang Asli Muslim convert who decides to renounce Islam? This is not an idle or malicious question. It is raised here to direct attention to Orang Asli religious thought and any colleagues in the sociology of religion can discuss the issue better than I. My point is that conversion to and apostacy from Islam have direct legal consequences in Malaysian law. As these laws now stand the potential for conflict and misunderstanding is clear and obvious.

ORANG ASLI STATUS RE: THE CONSTITUTION AND "BUMIPUTRA"

In the constitution of Malaysia incorporating amendments to July 1985 the Orang Asli are mentioned twice. Article 8 which provides for the equality of all persons before the law continues in para. 5(c) that notwithstanding the general provision the article does not prohibit

any provision for 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 terms used in this paragraph, notably the reservation of land and public service provisions remind us of the parallel provisions in Art. 153, on Malay "special rights", a point to which we will return later.

The second reference is in Art. 160(2), the interpretation article which merely says that – "Aborigine" means an aborigine of the Malay Peninsula". This article also defines Malay as one who professes Islam, habitually speaks the Malay language, conforms to Malay custom and was born in the Federation before Merdeka and has at least one parent who has the birth qualification.

These two definitions are quite separate and Art. 160(2) does *not* assimilate "Orang Asli" to "Malay". On the other hand, however, some congruence of meaning may be found in Arts. 153 (special rights) and 89

(Malay reservation) though I hasten to add that this is not clear and I am reading *possible* interpretations. So far as Art. 153 is concerned, though the phraseology is rather more elaborate than in Art. 8(5)(c) the intention to create special rights appears to be the same. Moreover, the rights themselves are exactly the same, employment opportunities (though not educational privileges) and land reserves.

Turning now to Art. 89, Malay reservations, the interesting provisions are in sub-section 5 & 6 which are as follows.³⁹

(5) Without prejudice to Clause (3), the Government of any State may, in accordance with law, acquire land for the settlement of Malays or other communities, and establish trusts for that purpose.

(6) In this Article "Malay reservation" means land reserved for alienation to Malays or to natives of the State in which it lies. and "Malay" includes any person who, under the law of the State in which he is resident, is treated as a Malay for the purposes of the reservation of land.

Sub-section 5 can be taken as a reference to the Orang Asli area and reserve provisions, but sub-section 6 is even more interesting in its reference to persons being "treated as Malay" under State laws. In other words, for purposes of land reservation an Orang Asli may be a "Malay" and examples can be found in the Kelantan, Perlis and Kedah Malay Reservation Enactments where the respective qualification to own reserve land is that the applicant must be for example, "a native of Kelantan" among the definitions of which is a simple birth qualification.

These arguments must of course be read as very tentative. There is no constitutional congruence of "Malay" and "Orang Asli", nor for that matter is there any Constitutional definition of "Bumiputra". However, there are three pieces of evidence which do suggest that a congruence exists in fact if not in the constitution itself. They are as follows:

- (a) Census classification: In the census returns for both 1970 and 1980 the class "Malay" includes: Malay, Indonesian, Negrito, Jakun, Semai, Semelai, Temiar, other Orang Asli, and other Malay race. The census classes, therefore, are considerably wider than the definition in the Constitution. We appear to have here an "alternative" definition for practical use.
- (b) This impression is confirmed when we look at statements made in public by responsible Ministers of Government, Members of Parliament and civil servants. In a recent paper, Drs. Siddique and Suryadinata⁴⁰ forwarded several examples of the debate and discussion which had surrounded the term "bumiputra". In 1965

the then Prime Minister of Malaysia, Tunku Abdul Rahman said that it had “no legal meaning” but he also later pointed out that the benefits under Art. 153 would be reserved for “the natives of Malaysia... who are less advanced and less able to compete⁴¹. Again, in 1968 the term as used in Peninsular Malaysia was defined in Parliament to refer exclusively to Malays and aborigines⁴². It is at this point that the definition of Malay” becomes crucial because it involves the religion of Islam. The fact that one is Muslim (e.g. an Indian Muslim citizen of Malaysia) does not qualify one for the status of “Malay-bumiputra”. This was stated in 1978 by the then Prime Minister, Datuk Hussein Onn,⁴³ who insisted that being a member of an ‘indigenous race’ was an essential criterion. There is no doubt that the Orang Asli are such and given the stress on this qualification together with the census class “Malay” it is easy to understand the drive for association by way of conversion to Islam. We have already seen something of the legal problems which can arise on conversion but even more bizarre is one instance of “reconversion” reported in 1984.⁴⁴ Here, an Orang Asli family living on Carey Island, Kuala Langat was reconverted after its members were found to have “deviated” from the religion. It had “gone back to its former way of life”.

The most recent reference I have been able to trace appears in the statement⁴⁵ made by Mr Mohamad Amin Haji Daud urging the government to grant bumiputra status to the Orang Asli apparently on the ground, that they “had always voted for the Barisan Nasional”. They should also be permitted to settle and work in FELDA and other schemes and that the JOA needed restructurings.⁴⁶ He also urged a revision of “Aborigines Act 1954” [sic] “... to provide more benefits to the Orang Asli”.

- (c) If we look finally at a last example of government usage, in this case the *Malaysian Plans*, we find that the orang asli are consistently classed as bumiputra. Drs Siddique and Suryadinata provide a number of examples.⁴⁷

The fact remains, however, that no constitutional definition is yet in place. The Constitution clearly differentiates “aborigine” and “Malay” but in the areas just now described there is a consistent use which includes Orang Asli with Malay. The usage is, of course, plainly political.

THE LAND QUESTION

As we have seen no Orang Asli who remains "as such" can get title to land. The nearest approach is a licence to occupy area or reserve land and even where compensation is paid for disturbance to occupation the payment is controlled by the JOA. This is both the law (the Aboriginal Peoples Act) and JOA policy.

This state of affairs is increasingly meeting with critical comment from outside the Orang Asli community⁴⁸ as well as from within. The latter is potentially the most important and the recent papers circulated by the *Persatuan Orang Asli* (Orang Asli Association)⁴⁹ make quite clear the importance of land. The POA proposes reform directed toward certainty of occupation and ownership. In the remainder of this essay I would like to make some suggestions as to how this might be achieved beginning with a number of assumptions.

First, it is clear that the static preservation policy conducted by government toward the Orang Asli is no longer viable. This is not to say that an element of protection is entirely unnecessary but I feel it should be converted into positive discrimination as is the case with the Malays. Second, and following from this, the status of the Orang Asli as bumiputra must be clearly stated and the benefits under the Constitution (Art. 153) and various land programmes (below) extended to them.

This brings us to the land questions. For the past thirty years or so the Malaysian government has implemented an ambitious land policy to provide for the rural (Malay) populations. Development has been and is controlled by agencies such as FELDA and FELCRA as well as others.⁵⁰ Our interest here, however, is in the legislation which governs the land laws as such as well as in development legislation. The main issue in both cases is the title question particularly with reference to (a) occupation and (b) full ownership.

Land matter in Peninsular Malaysia are governed by the National Land Code (No. 56/1965) which came into force in January 1966. The Code established a uniform system of tenure under which title to an interest in land depends on registration. The register reflects all material facts relating to land. So far as the Constitution is concerned, land is a state subject though the Federation does have powers to legislate to ensure common policies and a common system of administration. National land policy is formulated by the National Land Council (Art. 91-Federal Constitution) and its policies are binding on the state government but the relationship between Federal and State authorities on land is quite complicated in constitutional terms.⁵¹

In addition to the National Land Code the following legislation is also of particular importance.

- (a) The Land (Group Settlement Areas) Act of 1960. The purpose of this act is to allow the state authority to declare virgin land to be a group settlement area in which landless settlers are given 8-10 acres of land and, under the direction of FELDA, to develop the land. After fifteen years of repayment of the development costs and a premium for the land, full titles are issued to the settlers.⁵²
- (b) The National Land Rehabilitation and Consolidation Authority Act (FELDA Act) 1966. The purpose of this act is to rehabilitate and develop abandoned land in Peninsular Malaysia. It has no power to order consolidation of fragmented lots.
- (c) The Land Acquisition Act, 1960. This act takes its authority from Art. 76(4) of the Constitution and give power to the State authority to acquire private land for public purpose including agriculture.

This complex of legislation covers both the title and development aspects of land in Malaysia. As we have seen the Aboriginal Peoples Act adds nothing specific to this legislation. Its provisions for area and reserve land have no development or title implications. The issues, therefore, is to see whether the land law can be used to provide security of tenure for the various Orang Asli groups and this will be considered under the following heads.

Alienation This means the disposal of state land either in perpetuity or for a term of years. The most immediately suitable form for those Orang Asli who settled and the subject of development programme⁵³ are the rights given under The Land (Group Settlement Areas) Act of 1960, the schemes run by FELDA and the appropriate state agencies. There is already some Orang Asli participation⁵⁴ but it is essential that the participants understand clearly that after the fifteen year period they will receive the freehold title⁵⁵ and the land then becomes subject to the provisions of the National Land Code including its rules on alienation. Important among these is section 16 of the Code which, on the death of a holder, prohibits distribution among a number of beneficiaries. The purpose is to prevent fragmentation and this is achieved by requiring that land be assigned to a single holder, who then pays compensation to the others entitled. This is likely to prove difficult, particularly for the single holder to raise money to pay off the other heirs. Credit will certainly not be extended unless the holder has a free simple title.

This leads us to a further crucial issue. Land developed or under development and alienated in the way just described has a market value. It can be sold, mortgaged, or leased within the terms of the National Land Code. The problem is to retain it in Orang Asli hands over succeeding generations. This is not a new problems in Malaysia, the obvious example being the Malay Reservation Enactments of 1913 and

the various successor enactments in the F.M.S. and I.F.M.S.⁵⁶ The intention was to confine dealings in reserved land only to "Malays" and to certain specified statutory bodies. This, however, proved difficult in practice. Although such dealings on the (Land) Register were prohibited, this was commonly avoided by ordinary private agreements which were prohibited, this was commonly avoided by ordinary private agreements which were not registered. Another method was to grant powers of attorney to non-Malays which, being not registerable, allowed such persons to occupy the land.⁵⁷ On the other hand, while reservation scheme did protect Malay interest in land, the restriction on dealings effectively denied investment so that the land remained either undeveloped or only minimally developed. The Constitution of Malaysia directly provides for Malay reservations (Art. 89) (Art. 90(3) for Terengganu).

So far as the Orang Asli are concerned, a similar reserve scheme, with all its faults, would seem to be necessary. On the other hand, the FELDA schemes, in which titles are not issued for fifteen years from the date of initial development do provide a minimum security for this period. This brings us to the role of FELDA.

National Agricultural Policy The agricultural sector is the single largest sector of the Malaysian economy contributing about 36% of foreign exchange and about 22% of the GNP. Given this importance it is clear that the national agricultural policy and the national land use policy are crucial to the disposal of land to individuals. The agency which implements the national agricultural policy is FELDA (established by the Land Development Ordinance of 1956) specifically through the Land (Group Settlement Areas) Act of 1960. The important elements in its approach to land development include the encouragement of collective work, the provision of financial aid, the establishment of co-operatively owned factories, and the creation of local councils. Joint alienation is not permitted but the usual problem arises on the devolution of the estate of a deceased person. The existing legislation⁵⁸ which governs devolution makes no particular provision for land held under the Land (Group Settlement Areas) Act. So far as the Orang Asli are concerned, the planting schemes already in existence⁵⁹ share the same characteristics and problems although to their advantage they are not required to make repayment of development costs.

A new alternative to the present land policy has recently been suggested by FELDA and is at present under consideration by the National Land Council. This is that scheme settlers would not be issued with individual titles as at present but instead allocated with shares proportionate to the acreage in the scheme once FELDA costs have been

paid. They would, however, receive titles to their housing lots. The title for the agricultural land would be registered in the name of a settlers co-operative for which FELDA would be the management agent. The intention is to introduce modern "estate management". This may be a suitable alternative for the Orang Asli.

CONCLUDING REMARKS

It is clear from these comments that the present position of the Orang Asli in Malaysian law is unsatisfactory on a number of points.

1. First, their status as bumiputera needs to be established as certain. One consequence of this will be a lessening of JOA responsibility for health, education, and development by transfer to the appropriate government departments.
2. The conversion to Islam or its absence must not be allowed to influence the status of Orang Asli as bumiputera. As things now stand conversion raises or can raise legal problems which have no obvious solution.
3. The Aboriginal Peoples Act is deficient being designed for a static status no longer appropriate to modern Malaysia.
4. The key to integration and development lies in the acquisition of security of tenure of land. This may be by way of
 - (a) inclusion in FELDA/FELCRA type schemes with restrictions on title similar to those in the Malay reservation system and an investigation into the NCC "share" proposals.
 - (b) for those deep jungle dwellers for whom this is inappropriate at the moment, the gazetting of reserves (similar again to the Malay reserve system) with guaranteed security of occupation. The present temporary licence is insufficient.

NOTES

1. See the literature cited in Geoffrey Benjamin, "Achievements and Gaps in Orang Asli Research," pp. 17-21, paper presented at the Orang Asli Symposium National University of Malaysia, 22-23 Sept. 1986.
2. *Ibid* at pp. 12-14 (basic ethnology), 15 (material aspects) 16 (economics and sociology).
3. Statement of Policy regarding the Long Term Administration of the Aboriginal Peoples in the Federation of Malaya. Kuala Lumpur: Ministry of the Interior, 1961 updated and reissued in 1977 with no fundamental change.
4. *Ibid*, p.7.
5. If one expects the forced relocations carried out during the Emergency.

- These were, without exception disastrous. See Iskander Carey. The Administration of the Aboriginal Tribes of Western Malaysia in David J. Banks (ed) *Changing Identities in Modern Southeast Asia*. pp. 43-69. The Hague: Mouton 1976.
6. See Jimin bin Idris, *A Brief Note on the Orang Asli of West Malaysia and their Administration* published by the Dept. of Orang Asli Affairs: Ministry of National and Rural Development, 1972.
 7. See Benjamin *op.cit* n.1 at pp. 13-14 for references.
 8. In the CIRIDAP (Country Report, Malaysia) entitled Planning & Administration of Development Programmes for Tribal Peoples (1983) at pp. 114 ff.
 9. *Ibid*: 120 f.
 10. *Ibid*: 95 ff.
 11. CRIDAP Report (above n. 8) for examples.
 12. CRIDAP Report (above n. 8) Appendix.
 13. Data/refs.
 14. CRIDAP Report at p. 90 f.
 15. *Ibid*: 90-91.
 16. Art 3(1).
 17. See L.A., Sheridan & H.E, Groves, *The Constitution of Malaysia*, p. 37. Singapore: Malayan Law Journal Ltd. (3rd ed).
 18. List II, the Ninth Schedule to the Constitution, see Sheriden & Groves *op.cit*.p. 485.
 19. See R.F. Ellen "Social Theory..." in M.B. Hooker (ed).
 20. See A. Terry Rambo, "Orang Asli Adaptive Strategies, Implications for Malaysian Natural Resource Development Planning". East-West Center, Honolulu, Reprint no. 46.
 21. See Rambo *op.cit* n. 21 *Islam in South-East Asia* pp. 50-91. Brill. 1983.
 22. No 134 revised laws of 1974, originally the Aboriginal Peoples Ordinance. No. 3/1954. amended by Ordinance 60/1956. L.N. 332/1958. Act 16/1967.
 23. See Maeda, "Authority & Leadership among the Orang Hulu" paper, Centre for Southeast Asian Studies, Kyoto, 1971.
 24. See references in Benjamin *op.cit* n.1.
 25. No 56 of 1965 as amended.
 26. See Judith Sihombing (ed). *The National Land Code*. Singapore: Malayan Law Journal Ltd. 1981, at pp. 132-160.
 27. See the *Manual for Land Administration*, pp. 16-24 published by the Federal Land and Mines Dept. Kuala Lumpur, 1980.
 28. Benjamin *op.cit*.n. 25, Maeda *op.cit*.n.24.
 29. Ref.
 30. L. Andaya. *The Kingdom of Johor 1641-1728*. Kuala Lumpur. Oxford University Press.
 31. See any textbook on the post Merdeka period.
 32. Except to the extent that later provisions provide for compensation – but this is not appeal. See below section 9(3) 11 & 12.
 33. See above n. 28 for details.
 34. I am open to correction on this point.
 35. See M.B. Hooker, *Native Law in Sabah and Sarawak*. Malayan Law Journal

- Ltd. 1981.
36. There are indications that the JOA is itself aware of this but in the absence of a national development plan for the Orang Asli it appears not to carry the weight it should.
 37. *New Straits Times*, 7th May 1983 at p. 7.
 38. See M.B. Hooker, *Islamic Law in South-East Asia* . Ch. 3. Oxford University Press 1984.
 39. Emphasis added.
 40. "Bumiputera and Pribumi..." (1981-82) *Pacific Affairs* 54(4): 662-687.
 41. *Ibid*: 673.
 42. *Ibid*: 674.
 43. Cited *ibid*: 680.
 44. *New Straits Times*, 15th November 1984 at p. 2.
 45. Reported in the *New Straits Times* of 29th March 1986 at p. 6.
 46. Not the first criticism of the JOA, see the *New Straits Times* 13th January 1985.
 47. *Op. cit.* p. n. 22. See also *New Straits Times* of 16th November 1981 Moves to split aslis and other bumiputras. See also *New Straits Times*, 10th October 1985 "Orang Asli not left out of the NEP".
 48. See for example: *The Star* 26th November 1980, p. 18 *New Straits Times* of 15th January 1983, *New Straits Times* , 13th January 1985, *Utusan Malaysia* 4th February 1985, *The Star* 7th February 1985.
 49. Circulated in mimeo, 1982.
 50. A useful outline description is in Wolfgang Senfleben, *Background to Agricultural Land Policy in Malaysia*, Wiesbaden, Harrassowitz 1978.
 51. See the Ninth Schedule to the Constitution.
 52. See Senfleben *op.cit.* n. 52 for details.
 53. See CIRDAP Report (above n. 8) at pp. 110-135.
 54. *Ibid*.
 55. See reports in *Utusan Malaysia*, 4th February 1985 and *The Star* 7th February 1985.
 56. See David Wong, *Tenure & Land Dealing in the Malay States*. University of Singapore Press, 1971.
 57. See Paul Kratoska, Ends that we cannot foresee... (1983) *Journal Southeast Asian Studies* xiv (I) pp. 149-168.
 58. Small Estates (Distribution) Enactment 1955. Distribution Ordinance 1985 and Probate and Administration Enactment 1959 (revised, 1972).
 59. See CIRDAP Report (above n. 8) at p.