



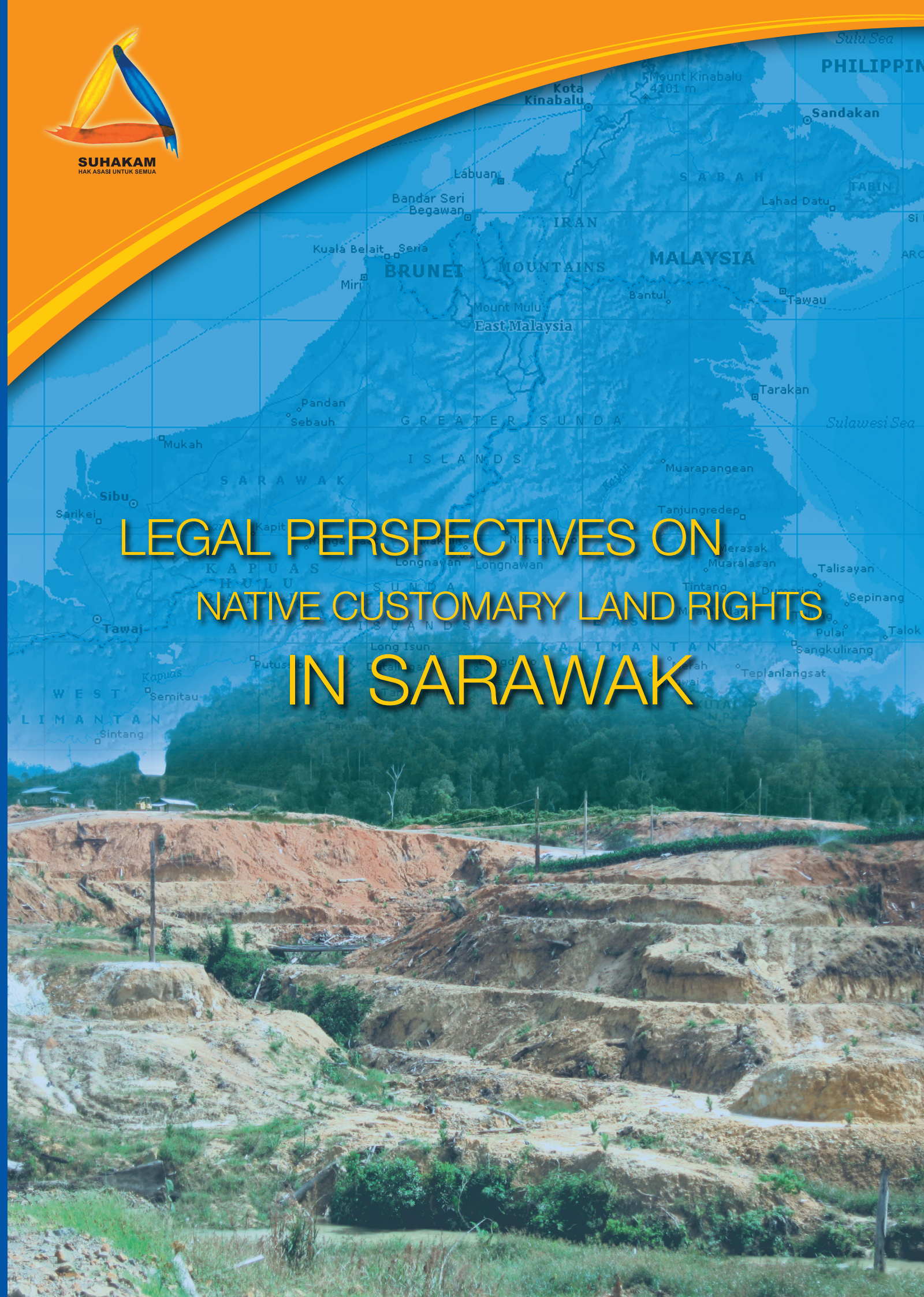
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LEGAL PERSPECTIVES ON NATIVE CUSTOMARY LAND RIGHTS IN SARAWAK

# LEGAL PERSPECTIVES ON NATIVE CUSTOMARY LAND RIGHTS IN SARAWAK





SHM.NCLR/2/08

# **LEGAL PERSPECTIVES ON NATIVE CUSTOMARY LAND RIGHTS IN SARAWAK**

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with  
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## FOREWORD

Since its establishment of its sub-office in Sarawak in 2000, the Human Rights Commission of Malaysia (SUHAKAM) has received various complaints and memorandums from the communities in Sarawak alleging various forms of human rights violations. Out of the total of 287 complaints received, 158 complaints relate to Native Customary Land Rights (NCLR).

SUHAKAM conducted investigations into specific cases, carried out field studies, held dialogues with the relevant communities, roundtable discussions with the State Government and the relevant agencies as well as the private enterprises indicated in these complaints. Special Reports such as the reports on Hak Masyarakat Asli Sarawak (which looked into the resulting issues of the Bakun Dam); The Penan Benalih Blockade Issue; and Penan in Ulu Belaga: Right to Land and Socio-Economic Development, were published and submitted to the relevant parties. NCLR has been highlighted in each of SUHAKAM's Annual Reports.

SUHAKAM has identified core issues in these complaints. They include a perception gap of the native communities' perception of Customary Land legislations (such as the concepts of *pemakai menoa* and *pulau galau* amongst the Iban and *molong* and *Tana' mengurip* amongst the Penan) against what is defined in the Sarawak Land Code 1958 and the other supportive ordinances like the National Park and Forest Ordinances. The lack of legal documentation of NCLR adds further problems, for example compensation of extinguished NCLR, boundary conflicts between licensee holders and the native communities. Recent amendments within the Land Code add further burden to the native communities in establishing their NCLR.

SUHAKAM Act 1999 stipulates that human rights issues must be addressed within the scope of existing relevant laws. In view of this, the Commission engaged Prof. Dr. Ramy Bulan, the Deputy Dean of the Faculty of Law in University Malaya, with expertise in the issues of NCR to land in Sarawak to

look into the legal issues relating to the promotion and protection of the right of the natives of Sarawak to land based on their customs and traditions.

The researcher has looked extensively into the customs and traditions that govern the establishment and inheritance of land both at personal, family, communal and inter-communal levels. Local legal instruments like the Federal Constitution and more specifically the Sarawak Land Code 1958 were researched into. International Common Law applications in judicial decisions governing Indigenous community's right to land were also looked at. These provided the basis of human rights based recommendations made at the end of the report.

SUHAKAM after deliberating on the report through its Economic, Social and Cultural Rights Working Group (ECOSOC) and subsequently the full Commission, has endorsed the contents of the report.

In light of the above and based on the findings of the report, SUHAKAM makes the following recommendations:

- (i) The Sarawak State Government should take the relevant steps to review the current Sarawak Land Code 1958 to ensure that it serves to promote and continually protect the rights of the indigenous groups to their customary land;
- (ii) Such review should include the following:
  - a. The recognition of Customary Rights to land as part of law and the right of the natives to land by virtue of Customary Law is consistent with those rights;
  - b. The recognition of the methods of native occupation that arise out of native customs and traditions is proof of ownership to land and therefore not to be dictated by the Sarawak Land Code 1958 which imposes burden to establish ownership of lands via documentary evidence;

- c. The Constitutional protection on the native title rights cannot be taken away except in accordance to the law and upon payment of just compensation;
- d. It is a fiduciary obligation of the government officials to consult and obtain consent from the native communities prior to taking action that may infringe their native title rights.

SUHAKAM expresses its appreciation to all parties including representatives from Government agencies, NGOs, local communities, experts and other groups and individuals that have contributed to SUHAKAM's previous work relating to NCR to land in Sarawak which has led to the preparation and publication of this report.

Special thanks to Prof. Dr. Ramy Bulan who had shared her time from her busy schedule to carry out the research and prepare this report.

Finally, deepest appreciation to the SUHAKAM Commissioners and Secretariat who have relentlessly carried out their tasks towards not only the advocacy of customary rights but also their persistent efforts to uphold civil, political, as well as economic, social and cultural rights in Malaysia.



.....  
**DATUK DR. DENISON JAYASOORIA**  
SUHAKAM Commissioner /  
Chairperson of the Economic, Social  
and Cultural Rights Working Group  
(ECOSOC)

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# I

## INTRODUCTION

## I. INTRODUCTION

### A. Purpose of Report

This Report, prepared by researchers at the University of Malaya for the Malaysian Human Rights Commission ('SUHAKAM'),<sup>1</sup> presents Malaysian constitutional, statutory, and case law recognizing and affirming native customary land rights held pursuant to native title, with particular focus on Sarawak. Although this study will examine native customary rights ('NCR') to land in Sarawak, the term will be used interchangeably with native title. The latter is a wider term that includes aboriginal customary title to land and native customary rights to land. Native title is used in the dual sense, both as an entitling condition as well as a 'right' to land. As an entitling condition, only a native or an aboriginal person may claim a right that flows from that entitlement. It is a right that is fundamentally imbedded in native laws and customs based on historical occupation of ancestral lands since time immemorial.<sup>2</sup>

The Report will examine the basis of recognition, the content and proof of native title and its protection. In addition to domestic obligations, the Report explores Malaysia's responsibilities under international customary law protecting indigenous land rights. The Report also considers the case law and mechanisms through which other jurisdictions have recognised and affirmed indigenous land rights.

### B. Summary of Report and note on terminology

#### 1. Overview of Report

Part II is an executive summary of this Report. Part III provides background on the laws and concepts important to native title. Part IV is an overview of the law and theory supporting common law recognition of native title. Part V explains the

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<sup>1</sup> More particularly, the Terms of Reference for the Research on Native Customary Land Rights (Sarawak) ('Terms of Reference') noted that SUHAKAM 'had received numerous complaints from the natives from Sarawak. Most of their complaints pertain to their status of claim on native customary land and encroachment of their traditional territories by commercial companies.' The research objectives, as described in the Terms of Reference, include the following:

- 'i. to identify legal issues confronted by the natives/indigenous communities in Sarawak in relation to their right to native customary land;
- ii. To study current laws which may give rise to advantages or disadvantages to the indigenous community in terms of their right to native customary land;
- iii. To identify the consequences arising from the deprivation of their native customary land;
- iv. To come up with the findings on the issue on [sic] NCLR in Sarawak.'

<sup>2</sup> Ramy Bulan, *Native Title in Malaysia: Kelabit Land Rights in Transition* (PhD thesis, Australian National University, 2005) 36. ('PhD thesis')

customary laws and traditions underlying native title in Sarawak.<sup>3</sup> Part VI examines Sarawak statutory regulation of NCR under the *Sarawak Land Code 1958* (Cap 81). Part VII surveys Malaysian common law on native title. Part VIII reviews authorities from other common law jurisdictions, which have recognized and adjudicated indigenous land rights. Because Malaysian courts have relied on judicial precedents from foreign jurisdictions in resolving native title claims, the examination of foreign law provides important insights into the scope of native title and suggests different approaches for resolving claims implicating such rights. Part IX examines the growing body of international human rights law requiring that states protect indigenous land rights. Part X reviews the constitutional dimensions of native title and the potential for advancing native land rights within the framework of human rights based on the *Federal Constitution*.

## 2. Terminology

The rights of indigenous peoples to their lands are described in a myriad of ways. This Report uses the term ‘indigenous’ generically to refer to aboriginal peoples, natives, Indians, and other ‘original people’ around the world who occupied territories subsequently claimed by European colonizers. In Malaysia, the term indigenous is used to refer to the Malays, the aboriginal peoples or Orang Asli and the natives of Sarawak and Sabah. Article 160 of the *Federal Constitution* defines a Malay as one who speaks Malay, practices Malay customs and is a Muslim,<sup>4</sup> while an aboriginal person is an ‘aborigine of peninsula Malaysia’. Further, s 3 of the *Aboriginal Peoples Act 1954* stipulates certain criteria for identification as Orang Asli to include matters such as parentage, language, habitually following an aboriginal way of life and belief and membership in an aboriginal community.

Article 161A of the *Federal Constitution* uses the term ‘native’ to refer to the heterogeneous indigenous peoples of Sabah and Sarawak. In relation to Sarawak, a native is a person who is a citizen and either belongs to the races specified in clause (7) of art 161A as indigenous to the state or is of mixed blood deriving from those races. This list is based on the schedule to the *Sarawak Interpretation Ordinance*. A person may also be deemed a native under s 20 of the *Native Court Ordinance 1992* if the court makes that declaration.<sup>5</sup>

In relation to Sabah, a native is a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born either in Sabah or to a father domiciled in Sabah at the time of birth. The *Sabah Interpretation (Definition of Native) Ordinance 1958* establishes additional requirements for native status. The

<sup>3</sup> Although Part V focuses on the customs of the Kelabit, Iban and Penan communities, the issues facing native communities that are described in this Report are not isolated to those communities. Some or all of the obstacles to securing land rights identified in this Report are equally relevant to the circumstances of other native communities in Sarawak.

<sup>4</sup> Each of the Malay states has its own definition of Malay. With slight variations, all the state definitions emphasize the Malayan origins of the person and the habitual speaking of the Malay language.

<sup>5</sup> The court may take into account a person’s conduct, public opinion, testimony of responsible members of the community and opinion of assessors of the Native Court.



amendment of the ordinance in 1958 provided that a declaration of native status must be based on proof of good character, and the applicant must have lived and been a member of the native community for at least three to five years, with his stay not limited by the *Immigration Act 1959/63*.<sup>6</sup> In addition to these definitions, a person may be deemed a native by declaration of the Native Court upon fulfillment of required conditions.<sup>7</sup>

As this Report will make clear, a determination of aboriginal or native status is necessary because customary laws apply as personal laws. The entitlement to native title, which originates in native law and customs, is a personal right that constitutes a full beneficial right of ownership in property.

The terms ‘native customary rights’ or ‘customary title’ describe the interests of the natives of Sarawak and Sabah in their traditional lands.<sup>8</sup> While s 5 of the *Sarawak Land Code 1958* (Cap 81) refers to native customary rights, this Report uses the term in a broader sense, not limited to the scope reflected in that section. Such broader usage is consistent with the case law.<sup>9</sup> The term ‘aboriginal customary title’ or ‘aboriginal title’ describes the interest of the aborigines in Peninsula Malaysia in their lands.<sup>10</sup> Although the land laws in Peninsula Malaysia, Sarawak, and Sabah developed differently and to some extent, independently, courts in Malaysia have described NCR in Sarawak as synonymous with the aboriginal title of the aborigines in Peninsula Malaysia.<sup>11</sup> As noted above, this Report will use native title<sup>12</sup> as an umbrella term, covering the concepts of native customary rights and aboriginal title.

<sup>6</sup> A native community is defined as any group or body of persons the majority of whom are natives and who live under the jurisdiction of the local authority, or under the jurisdiction of a native chief or headman.

<sup>7</sup> There are a number of judicial decisions on the determination of native status by the courts. For a detailed discussion, see Ramy Bulan, ‘Native Status and The Law’ in Wu Min Aun (ed), *Contemporary Public Law in Malaysia* (1999) Ch 9.

<sup>8</sup> Ramy Bulan, ‘Native Title in Malaysia: A ‘Complementary’ *Sui Generis* Proprietary Right under the Federal Constitution’ (2007) 11 *Australian Indigenous Law Review* 54, 62 (‘Native Title in Malaysia’).

<sup>9</sup> *Superintendent of Land & Surveys Miri Division and Government of Sarawak v Madeli bin Salleh (Suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2007] Civil Appeal No. 01-1-2006(Q) (Unreported) 33 (‘*Madeli III*’) (noting that limitations under s 66 of *Land Settlement Ordinance 1933* (Cap. 27) did not apply to native customary rights acquired or recognised prior to the effective date of that statute).

<sup>10</sup> *Kerajaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors* [2005] 6 MLJ 289, 308 (‘*Sagong II*’). Aboriginal title is also used in Canada to refer to the title held by Indians and recognized under Canadian common law. *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (‘*Delgamuukw*’).

<sup>11</sup> *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241, 245 (‘*Nor Nyawai I*’), aff’d in part, *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another* [2005] 1 MLJ 256 (‘*Nor Nyawai II*’); *Amit Bin Salleh & Ors v The Superintendent, Land & Survey Department Bintulu & Ors* [2005] 7 MLJ 10, 22 (‘*Amit*’).

<sup>12</sup> Native title is also used in Australia to refer to the rights held by aborigines in their country. *Mabo and Others v State of Queensland* (1992) 107 ALR 1, 42 (‘*Mabo (No 2)*’)(Brennan J).

# II

## EXECUTIVE SUMMARY

## II. EXECUTIVE SUMMARY

### A. Overview

Native title arises from the traditional customs and laws of native communities. These customs are recognised as part of the law of Malaysia under s 160(2) of the *Federal Constitution*. In addition to customary laws, the English common law, the *Land Code 1958* and protections under the *Federal Constitution* are relevant in defining the content and scope of native title in Malaysia. With regard to the *Federal Constitution*, the primacy of equality between the various ethnic groups that comprise the Malaysian citizenry and special protections for the natives of Sarawak and Sabah are important guiding principles in defining and protecting native title.

### B. Sarawak's history of recognising native title and the broader legal and theoretical framework

Throughout its history, the various governments of Sarawak have recognised native title and the customs from which it emerged. From the time of the Sultan of Brunei, during the rule of the three Rajahs from 1841 until 1946, throughout the reign of the British Crown, and upon Sarawak's entry into the Federation of Malaysia in 1963, the rights of natives to their traditional lands and their associated land tenure customs have been recognised and protected.

Sarawak's recognition of native title and customary law is consistent with contemporaneous developments in international and English common law. Under these authorities, upon expressing intent to acquire sovereignty over a new colony, the Crown obtained radical title to the land comprising the territory. This assumption of radical title, however, did not equate with beneficial rights of ownership over the property. Private property rights were unaffected by a change in sovereignty and continued unmodified until expressly and clearly extinguished by an act of the Crown. In particular, the rights of native inhabitants were unchanged by the Crown's acquisition of sovereignty. In addition, local laws and customs were left undisturbed, so long as they were consistent or compatible with the change in sovereignty. In the absence of a clear and express intent to extinguish, property rights and local customs were respected and protected by the Crown.

The Crown frequently imported the doctrine of tenures into newly acquired territories. This doctrine established the legal fiction that, at one time, the King and Crown occupied and possessed all property and subsequently issued grants to Crown subjects, under which rights to property were conferred. The doctrine of tenures reflects the importance of occupation and possession under the English common law on property. A person in occupation was presumed to be the rightful possessor or owner of the land, a status retained unless rebutted by another holding a better title. Possession could be established through evidence of entry on and intent to occupy land. Occupation could take the form of cultivating lands, constructing dwellings, excluding trespassers, mining, fencing, cutting plants, fishing, hunting, and gathering natural products. The type of occupation required to demonstrate possession varied depending

on the nature, value, and location of the property, and the habits, ideas, and norms of the surrounding community. Because they used land for settlement, farming, hunting, fishing and gathering, the land tenure customs of indigenous peoples were consistent with the methods used to assess occupation and possession under the English common law.

### C. Native land tenure in Sarawak

Malaysian native title law requires that the content and scope of that title be defined with reference to the unique customs of each native community. The Kelabit, Iban and Penan are three of the numerous native communities in Sarawak that continue to follow the land tenure customs of their ancestors and for the purpose of this Report, have been used as a focus of discussion.

In general, the customs of the Kelabit and Iban dictate that land is held communally, with individual members acquiring rights to use land and resources by being the first to clear and cultivate virgin jungle or by seeking permission from the community. Typically, Kelabit and Iban territories are comprised of longhouse settlement areas, cultivated lands, communal jungle land, hunting and fishing grounds, grazing lands, old longhouse sites and burial sites. Tree tenure customs govern how individual and communal rights to trees are acquired and maintained.

The Penan, which began settling in longhouse communities in the mid-20<sup>th</sup> century, have adopted some of the customs of the traditional longhouse communities, while maintaining many of the customs associated with their formerly nomadic lifestyle. All of the communities recognise boundaries, typically in the form of natural landmarks such as rivers, hills, and mountains, that physically separate villages and communities and serve to maintain peaceful relations among distinct groups.

All three communities follow a tradition of utilising forest resources. The Kelabit and Iban maintain jungle areas within their territories for this purpose. The Penan follow a custom of *molong*, which requires the community and/or individual members to assume stewardship responsibilities with respect to forest resources. The Kelabit, Iban and Penan also continue to practice the land tenure customs of hunting and fishing. In light of their hunter-gatherer tradition, the Penan customs of hunting and fishing are particularly important in maintaining their cultural practices.

In addition to their settlement areas, and the use of their territories for cultivation, hunting, fishing and gathering, the Kelabit and the Penan follow distinct traditions of recording their histories in the physical landscape. The Kelabit custom of erecting cultural landmarks to honor distinguished or deceased members of the community is evident throughout the Kelabit highlands. These landmarks, which include, *inter alia*, burial sites and graves, and stone monuments and monoliths, serve to commemorate community members and families and the history of the Kelabit. The Penan follow a similar tradition of marking their landscape with a record of community history. These monuments are sometimes physical, as in the case of burial sites, trails, and former campsites, but are also subtle, long-entrenched connections based on stories associated



with particular places and the practice of naming rivers, ridges, mountain peaks, and places along trails in association with people and historical events.

The land tenure customs of the Kelabit, Iban, and Penan are an integral part of their community structure and more generally, their unique historical, cultural, and religious traditions. The customs underpin the native occupation of their lands, their territorial domains and their connection to their ancestral lands. Their customs, which have evolved over centuries, are well-established customary laws that govern relations among community members and to some extent with other communities.

#### D. The Land Code 1958

The Sarawak *Land Code 1958* (the Code) stipulates the methods for creating NCR over Interior Area Lands after 1957. NCR created before 1 January 1958 are recognised under the laws in force before that date. The Code also establishes the process that the state must follow to terminate NCR. It imposes on natives an onerous burden in establishing ownership of lands over which they exercise NCR. Section 5(2) fails to fully recognize the methods of native occupation that arise out of native customs and traditions. As such, the statutory means through which natives obtain documentary proof of ownership of land over which they exercise NCR have proven inadequate. Furthermore, Sarawak's broad statutory authority to extinguish NCR rights exposes natives to additional risks, as the loss of NCR through extinguishment has the potential to destroy irreplaceable features of their cultural, spiritual, and community life.

In sum, the current *Land Code 1958* makes it impossible for natives to secure indefeasible rights and title to native customary lands, while providing the state with the power to use native lands or terminate NCR over lands, subject only to notice and compensation.

#### E. Malaysian common law on native title

There is an emerging body of judicial authorities reaffirming recognition of and protections for native title arising out of traditional laws and customs. Native title protects the rights of natives in and to the land and thus, represents full beneficial ownership of land. Where that property interest is extinguished, the government must pay adequate compensation according to the requirements of art 13 of the *Federal Constitution*.

Native title represents a non-documentary title held by the community. Natives may only transfer the land subject to native title to other natives or the government. Because the land subject to native title is an essential component of community life, art 5 of the *Federal Constitution* protects the interest as a right to livelihood.

#### F. Native title law in other common law jurisdictions

The case law from the United States, Australia, Canada and South Africa, as well as Privy Council decisions illustrate that, to various degrees, indigenous conceptions of property ownership are relevant in determining the native title rights recognised under the common law. Although these courts have offered various justifications for recognising native title based on native custom, the jurisdictions are uniform in identifying equality of treatment between natives and non-natives in the enjoyment of their property rights as a key objective in affirming indigenous land rights according to native laws and customs.

Beyond recognition of indigenous land rights, these jurisdictions have sought to define the limits on governmental authority to extinguish native title. The case law reflects the serious implications of governmental actions infringing on or extinguishing native title to lands. If left unchecked, this extraordinary power has the potential to usurp a resource that has underpinned communities, economies, cultures, religions, and traditions for centuries. Disruption of this magnitude is not only unjust, but fundamentally inconsistent with the protections historically applied to safeguard native interests. For this reason, several jurisdictions have concluded that the government's power to terminate native title is subject to a fiduciary obligation. One important restraint associated with the fiduciary obligation, as described in *Mabo (No 2)* and *Delgamuukw*, is the requirement that the government consult the indigenous community before taking actions that impact its rights in traditional lands.

#### G. International human rights law

International human rights law has influenced the development of Malaysian common law on native title. Beyond native title law, Malaysian case law generally recognises that international human rights principles expressed in the UN Universal Declaration of Human Rights are persuasive, although not binding authority. Furthermore, international customary law is part of Malaysian common law through s 3(1) of the *Civil Law Act 1956*. Finally, human rights are recognised as inherent to a democratic society, with the common law serving as one vehicle through which such rights are incorporated into domestic law.

Protections for indigenous rights have developed into international customary law. More particularly, indigenous rights must be accorded equal status under law, states are obligated to protect indigenous rights to traditional lands, to respect indigenous customs, including those associated with land tenure, and to consult with and obtain the consent of indigenous communities prior to taking actions that may affect their rights.

#### H. Constitutional protections for native title in Malaysia

The *Federal Constitution* protects rights critical to maintaining the special relationship between native communities and their lands. This relationship underlies the spiritual, cultural, economic, and social existence of native communities. The right to property,

livelihood, and equality before the law, safeguards for native interests, the fiduciary obligation of government officials and recognition of customs as law all play a role in the recognition and protection of native title.

Native title arises out of native customs, and these customs, which define the content of native title, are part of the law of Malaysia and are protected under the *Federal Constitution*. Because they embody and protect the special relationship between natives and their land, the application of customs in recognising native title ensures the continuation of native communities. The implementation of customs is also consistent with the common law, which directs courts to define native title with reference to native customs.

The Constitutional protection for equality before the law requires recognition of native customs on an equal basis with non-native property rights. The principle of equality also requires that, once recognized, native title must be afforded the same protections provided to non-native property interests. This means methods for registering and protecting native title must be implemented on a basis of equality with non-native property interests. In practical terms, this requires surveying lands, properly registering native title interests, and issuing documentary titles to natives and native communities once they have established NCR. In sum, in terms of proprietary rights, equality between natives and non-natives will only be achieved when comparable protections under law and customs take their rightful place alongside the other sources of law in Malaysia. Anything short of full recognition for the relevant native law and customs would perpetuate the discrimination that has resulted in the erosion of their fundamental human rights.

In addition to its role as a vehicle for implementing native customary land tenure, native title is a property right which is given constitutional protection. It is a right that cannot be taken except in accordance with law and upon payment of just compensation. Recognition and protection for native title is also required as part of the constitutional right to livelihood, which guarantees native title based on the essential role of land in the economies and cultural identity of native communities. In determining adequate compensation for deprivation of native title, the role of land in the livelihood of native communities is a relevant factor. In addition, damages other than money compensation may be necessary in cases where the deprivation of property also constitutes a deprivation of livelihood.

Underlying the protection of NCR is the fiduciary obligation of the Sarawak and Federal Government towards natives. This obligation is based on the legacy of the Brooke government, provisions in the *Federal Constitution* calling for special protections for the natives of Sarawak, and the unique nature of native title as inalienable and subject to extinguishment. To meet the fiduciary obligation, government officials must not take actions that are inconsistent with the interests of its beneficiary and may not delegate its discretionary power to a third party. Furthermore, the fiduciary obligation requires that government officials consult with and obtain the consent of native communities prior to taking action that may infringe on or extinguish their native title rights.

Finally, given the interplay between the common law, the legislative provisions, the *Federal Constitution*, the existence of indigenous customary practices and the native conception of property, a morally defensible concept of native customary rights must not only look to the common law and the statutory provisions, but must fully incorporate the native perspectives. Where the rights are provided by statute, any inadequacy must be compensated by reference to the constitutional provisions to give full recognition of the customary rights to land.





# III

## BACKGROUND OF APPLICABLE LAWS

### III. BACKGROUND OF APPLICABLE LAWS

#### A. Introduction

As a multi-ethnic, multicultural, and multi-religious country, the Malaysian legal system is a plural legal system, integrating English common law, written laws, syariah law and customary laws with the *Federation Constitution* as the supreme law of the land.<sup>13</sup> For purposes of providing background on the laws relevant to native title, Part III focuses on English common law, customary laws and the Malaysian Constitution, all of which play a part in defining the concept of native title in Sarawak. This Part also provides a brief overview of native title.

#### B. Sarawak's reception of English principles of common law and equity

##### 1. Background

Sarawak was a British protectorate from 1888 until 1946, when it became a Crown colony. *Order L-4 (Laws of Sarawak Ordinance) 1928* first introduced English law in Sarawak, subject to the Rajah's modifications, native customs and local conditions.<sup>14</sup> The *Sarawak Application of Laws Ordinance 1949* introduced English law for a second time, but only to the extent that as local circumstances and native customs rendered necessary.<sup>15</sup> The *Civil Law Act 1956 (Act 67) ('CLA')*, which reproduced similar provisions under s 3, was extended to Sarawak on 1 April 1972.<sup>16</sup>

In the absence of written law, the courts in Malaysia may apply common law and rules of equity existing in England according to the following dates:

- 6 April 1956 for West Malaysia;
- 1 December 1951 for Sabah; and
- 12 December 1949 for Sarawak.

Section 3(2) of the *CLA* further authorizes the application of English statutes of general application to Sarawak, in the absence of any specific local legislation.<sup>17</sup>

<sup>13</sup> See Wan Arfah Hamzah and Ramy Bulan, *An Introduction to the Malaysian Legal System* (2002) 23-180 for an overview of these various sources of law.

<sup>14</sup> Wan Arfah and Bulan, *ibid* 110.

<sup>15</sup> *Ibid*, 111.

<sup>16</sup> *Civil Law Ordinance (Extension) Order 1971*.

<sup>17</sup> *Civil Law Act 1956*, s 3, provides: 'Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall-- . . . (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered and in force in England on the 12 December 1949, subject however to sub-paragraph 3(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

The application of the qualification commonly referred to as the ‘local circumstances’ proviso of s 3(1) of the *CLA* requires the courts to consider the circumstances of local inhabitants. To use the words of Maxwell CJ in *Choa Choon Neoh v Spottiswoode*, the application of English law is subject ‘to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.’<sup>18</sup>

Of particular relevance to this Report is s 6 of *CLA*, which excludes the application in Malaysia of ‘any part of the law of England relating to tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.’ Section 6 was enacted to prevent English law, applicable under s 3(1) of the *CLA*, from displacing local legislation, which is based on the Torrens system of registration of land titles, and the deed system (in Melaka and Penang). Furthermore, although questions have been raised as to whether English principles of equity apply to land dealings in Malaysia, it has been established beyond doubt that s 6 does not exclude or abrogate the rules of equity.<sup>19</sup> The Torrens system may have altered the application of particular rules of equity, ‘but only so far as is necessary to achieve its own special objects’.<sup>20</sup> In any event, s 6 is not meant to be an absolute prohibition on the application of English land law principles.<sup>21</sup> Equitable principles like the bare trust and the equitable mortgage still apply, despite the terms of the *National Land Code* (‘*NLC*’).<sup>22</sup> After 7 April 1956, which is the reception date of the *CLA*, the development of the common law and equity is entirely in the hands of the courts, subject to the limitations contained in the *CLA*.<sup>23</sup>

Common law recognition of native title has been challenged based on the argument that the effect of s 6, when read with s 3, is that common law principles cannot be applied to land matters in Malaysia on grounds that the *NLC* is complete and comprehensive.<sup>24</sup> As explained in more detail below, this issue has been finally resolved by the Federal Court

<sup>18</sup> [1869] 1 Ky. 216, 221. See also the decision of the Privy Council in *Khoo Hooi Leong v Khoo Chong Yeok* [1930] AC 346, 355.

<sup>19</sup> See *Halsbury’s Laws of Malaysia*, Vol. 8 (Kuala Lumpur: Malayan Law Journal, 2003 Reissue), at ¶ 150.478 (‘*Halsbury’s*’). In Peninsular Malaysia, it has been argued that equitable principles are totally excluded because the Torrens system contained in the *National Land Code* is a comprehensive system of land law, leaving no room to import rules of English law. See *United Malaysian Banking Corporation v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87, 91. There is another view, which argues that the *National Land Code* only regulates the rights and obligations of the parties after and not before registration, and there is no express provision excluding the application of equity principles before registration. In any case, under s 206(3) of the *National Land Code*, contractual principles governing land transactions as a whole are not affected by the *National Land Code*.

<sup>20</sup> Taylor J in *Wilkins v Kannammal* (1951) 1 MLJ 99, 100. See also *Wong See Leng v Sarawathy Ammal* (1954) MLJ 20.

<sup>21</sup> See *Halsbury’s*, above n 19, para 150.478. A number of Federal Court cases show the general application of equitable principles is not excluded by s 6, e.g. *Margaret Chua v Ho Swee Kiew* [1961] 27 MLJ 173; *Karupiah Chettiar v Subramaniam* [1971] 2 MLJ 116; *Yong Tong Hong v Siew Soon Wah* [1971] 2 MLJ 105; *Oh Hiam v Tham Kong* [1980] 2 MLJ 159 (PC); *Lian Keow v Overseas Credit Finance* [1988] 2 MLJ 449.

<sup>22</sup> *Halsbury’s*, above n 19, para 150.478. See also *Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261, 265; *Borneo Housing Mortgage Finance Bhd v Time Engineering* [1996] 2 MLJ 12, 28.

<sup>23</sup> *Halsbury’s*, *ibid.*

<sup>24</sup> See RR Sethu, ‘The Orang Asli Cases and Property Rights: An Aboriginal Title Perspective’, in Andrew Harding and HP Lee (eds) *Constitutional Landmarks in Malaysia: The First Fifty Years* (2007) Ch 17.

in its recent decision in *Superintendent of Lands & Surveys, Miri Division & Anor v Madeli bin Salleh, suing as Administrator of the estate of the deceased ('Madelli III')*,<sup>25</sup> a case that involved interpretation of native customary rights in Sarawak and its regulation by statutes. The full bench of the Federal Court wholly agreed with the views expressed in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor (HC) ('Adong I')*<sup>26</sup>, affirmed by *Kerajaan Negeri Johor v Adong bin Kuwau (CA) ('Adong II')*<sup>27</sup> and *Nor anak Nyawai v Borneo Pulp Plantations & Ors ('Nor Nyawai I')*<sup>28</sup> that the common law respects the pre-existing rights of natives based in native laws and customs. Although the Court did not elaborate further, as indicated earlier, ss 3 and 6 of the *CLA* envisage English law on immovable property on the one hand and the Torrens registered title on the other. Given that customary title is a pre-existing right, which has its origin in traditional laws and customs, it does not owe its existence to any statute. Section 6, therefore, does not preclude common law recognition of native or customary title in Malaysia.

## 2. Native title, generally

Native title is not a creation of common law, nor does it have the customary incidents of common law title to land.<sup>29</sup> While common law recognises native title, that title arises from native laws and customs. Consequently, the nature of the title must be ascertained by reference to the traditional laws of indigenous inhabitants.<sup>30</sup> Native title originates in and emerges from the prior and historical occupation and possession of land in Sarawak by native communities, in accordance with their customs and traditions. For that reason, each native community's customs are relevant in defining the nature of various interests in land that are subject to native title.

Customs are recognised as part of the law of Malaysia under art 160(2) of the *Federal Constitution*, the supreme law of the land. On this basis, one of the main thrusts of this Report is that native customary rights must not merely be seen through the prism of common law, but that native title be taken in its own context, as a fundamental right under the *Federal Constitution*.

<sup>25</sup> Dato' Alauddin Mohd Sherrif FCJ, Dato' Ariffin Zakaria FCJ, Dato' Azmel Maamor FCJ.) (8/10/07) Civil Appeal No. 01-1-2006 (Q) (Unreported) 26.

<sup>26</sup> *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 412.

<sup>27</sup> [1998] 2 MLJ 158.

<sup>28</sup> [2001] 6 MLJ 241, aff'd in part, in *Superintendent of Lands & Surveys, Bintulu v Nor anak Nyawai & Ors & Another Appeal* [2006] 1 MLJ 256 CA (*Nor Nyawai II*)

<sup>29</sup> *State of Queensland v Mabo (No 2)* (1992) 107 ALR 1.

<sup>30</sup> *Nor anak Nyawai v Borneo Pulp Plantations & Ors (Nor Nyawai I)* [2001] 6 MLJ 241, 245, aff'd in part, *Nor Nyawai II* [2006] 1 MLJ 256, 269-70; *Madeli Bin Salleh (Suing as Administrator of the Estate of the deceased Salleh Bin Kilong) v Superintendent of Land & Surveys Miri Division and Government of Sarawak* [2005] 5 MLJ 305, 330 (*'Madeli II'*), aff'd, *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006 (Q) (Unreported) 29; *Jalang anak Paran & Anor v Government of the State of Sarawak and Anor* [2007] 1 MJL 412, 421-22 (*'Jalang Paran'*); *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, 426-30 (*'Adong I'*); *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors ('Adong II')* [1998] 2 MLJ 158, 162-63; *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi ('Sagong II')* [2005] 6 MLJ 289, 301.



C. Customs as a source of law under the Constitution and an integral part of the legal system

As noted above, the definition of law under art 160(2) of the *Federal Constitution* includes ‘custom or usage having the force of law’, making customary law an integral part of the legal system in Malaysia.

Customary law refers to the regular patterns of social behaviour, accepted by a given society as binding upon itself. It is prescribed behaviour found to be beneficial as a means of generating harmonious inter-personal relations and for solving conflicts so that a cohesive society is maintained.<sup>31</sup> Norms related to what is perceived as correct social behaviour, prescribed rules for ceremonies including marriage and religious rites, agricultural systems and settlement of disputes are all part of customary law.<sup>32</sup> In some jurisdictions this system of law is also referred to as ‘traditional law’ or ‘tribal law’. In Malaysia, the term customary law is used interchangeably with *adat* or ‘native law and custom’.

Established through long usage, and common consent of the community, customs become the accepted norm or the law of the place.<sup>33</sup> A custom would be upheld if it is of great antiquity, and is immemorial, meaning that in the absence of sufficient rebutting evidence there is ‘proof of the existence of the custom as far back as living witnesses can remember’.<sup>34</sup> Where traditionally, a custom has become the mould that the community wishes to maintain, and the elders would use whatever coercive powers they may possess to do so, the force of customary law may be ascribed to such custom.<sup>35</sup>

Since customary laws in Malaysia are largely unwritten, and because proof may be difficult, the ordinary courts have applied a number of tests to determine the existence, validity and proof of customs. To be accepted by the courts, customs must be reasonable and not offend ‘humanity, morality and public policy.’<sup>36</sup> They should not be ‘inhumane, unconscionable’<sup>37</sup> or ‘repugnant to good administration’.<sup>38</sup> An example of a case in which a court examined and enforced customs is *Sahrip v Mitchell & Anor*,<sup>39</sup> where the Malay system of customary land tenure, which provided for the payment of one tenth of the total produce, was approved by the court as being a ‘good and reasonable custom’.

<sup>31</sup> See Lakshman Marasinghe, ‘Customary Law as an Aspect of Legal Pluralism: With Particular Reference to British Colonial Africa’ (1998) 25 *Journal of Malaysian and Comparative Law* 7-44.

<sup>32</sup> See Jayl Langub, ‘The Ritual Aspects of Customary Law in Sarawak with Particular Reference to the Iban’ (1998) 25 *Journal of Malaysian and Comparative Law* 45-60.

<sup>33</sup> See Sir Benson Maxwell's decision in *Sahrip v Mitchell & Anor* (1877) Leic. Reports 466 at 468.

<sup>34</sup> *Halsbury's Laws of England*, Vol 12, 4<sup>th</sup> edn, 1975, ¶ 422, quoted in *Nor Nyawai I* [2001] 6 MLJ 241, 258.

<sup>35</sup> Joseph Minattur, ‘The Nature of Malay Customary Law’, in David Buxbaum (ed), *Family Law And Customary Law in Asia: A Contemporary Legal Perspective* (1968) 17-39.

<sup>36</sup> Notes for the Guidance of Officers in Interpreting *Order No. L-4* (Law of Sarawak Ordinance) 1928 (Cap. 1) (Revised Edn. 1947) (‘Guidance’) (quoted in MB Hooker (ed), *Laws of South-East Asia, Volume II, European Laws in South East Asia* (1988) 420). See *Edet v Essien* (1932) 11 NLR 47, for the use of the repugnancy test in another common law jurisdiction.

<sup>37</sup> *Civil Law Ordinance 1938*, s 3.

<sup>38</sup> Guidance, above n 36, 420.

<sup>39</sup> (1877) Leic Reports 466.

Customs may also be proved by reference to public records, from village oral traditions, and by opinion of persons likely to know of the existence of such traditions. There is a great body of traditional knowledge that relates to the social and physical aspects of indigenous existence, ranging from social relationships, to ceremonial practices and their own relationship with the land within their own peculiar cultural practices. These may take the form of oral narratives and stories, songs and ballads. These sources provide an indigenous perspective that must be given weight.

Proof of customs through oral traditions was allowed in both *Nor Nyawai I* and *Sagong bin Tasi and Ors v Kerajaan Negeri Selangor and Ors* ('*Sagong I*'), two of the leading Malaysian cases on common law recognition of native title.<sup>40</sup> In *Sagong I*, Mohd Noor Ahmad J ruled that oral histories of the Orang Asli relating to their practices, customs and traditions and their relationship with the land be admitted as evidence subject to the terms of the *Evidence Act 1950*, s 32(d) and (e). Furthermore, s 48 and 49 of the *Evidence Act 1950* allows the opinions of a living person as to the general right or customs, tenets or usages. Mohd Nor J said the statements on oral histories must be:

- of public and general interest;
- must be made by a competent person who 'would have been likely to be aware' of the existence of the right or the correct customs; and
- the statement must be made before the controversy as to the right or the customs.<sup>41</sup>

It has been argued that custom is equivalent to *adat*, which covers social etiquette or norms of correct social behavior. Furthermore, it has been asserted that customs become 'customary laws' only when they are codified.<sup>42</sup> This Report contends that the definition of customary laws as 'customary laws that are recognized by the laws of Sarawak' does not mean that the laws of Sarawak are only those that are written or contained in statutes. The Federal Court in *Superintendent of Land & Surveys Miri Division and Government of Sarawak v Madeli bin Salleh* took pains to reiterate that common law has the same force and effect as statutory law.<sup>43</sup> Unwritten laws have the same validity as written laws. By that token, customary law, which is entrenched in the *Federal Constitution*, must be given the same recognition as written law.

Not only are customary laws defined as part of the law under art 160(2), art 150 provides constitutional protection for native law and customs as part of the basic structure of the *Federal Constitution*. Furthermore, under art 150(5) of the *Federal Constitution*, in a state

<sup>40</sup> *Sagong I* [2002] 2 MLJ 591, 622-24; *Nor Nyawai I* [2001] 6 MLJ 241, 251.

<sup>41</sup> *Sagong I* [2002] 2 MLJ 591, 623.

<sup>42</sup> See J C Fong 'Native Customary Laws and Native Rights Over Land in Sarawak' in SUHAKAM (ed), *Penan in Ulu Belaga: Right to Land and Socio-Economic Development* (2007) 175, 177 for an explanation of this argument.

<sup>43</sup> [8/10/07] Civil Appeal No. 01-1-2006(Q) (Unreported) 22. *Madeli II* expressly holds that s 22 of the *Land Regulations (Sarawak Order No VIII) 1920* demonstrate 'that customary laws were being given recognition to as a pre-existing law, without its existence having to depend on any specific legislation "creating" it.' [2005] 5 MLJ 305, 330.

of emergency, Parliament may make laws with respect to any matters if it appears that the law is required by the emergency. Clause 6A of art 150, however, states that this power does not extend to any matter of native law and customs in the states of Sabah and Sarawak. This indicates the weight of recognition that is intended and affords a very important and unique protection for rights based on customs, whatever form they take.

The right to hold native title is a ‘personal’ right in the sense that entitlement to the right is based on customary law as a personal law of the natives. A person may only be entitled to claim based on his identity as a native, or because he is a member of a native community. It is also a communal right over land, which may be exercised by a community over a particular territory. To that extent, the customary title is an inalienable right that cannot be transferred outside the native system. The inalienability of the title means that the land may only be transferred to another native or otherwise surrendered to the government.

While legislation or executive action stating a clear and unambiguous intent can extinguish or modify native title, based on an overall reading and intent of the *Federal Constitution*, this Report explains that under arts 160 and 150(6A), native title is not an interest that can be easily abolished. As the Report will further illustrate, native title is not simply a right to conduct activities on land, but rather, constitutes a proprietary interest in the land protected by art 13 of the *Federal Constitution*. The Report will further argue that native title is a beneficial right entrenched under the *Federal Constitution*, with status equivalent to fundamental liberties under Part II of the Constitution.

#### D. Equality

The status of customs as part of Malaysian law is a cornerstone of the *Federal Constitution*. Similarly, equality of treatment among the various groups of people that comprise the multi-racial citizenry of Malaysia is part of the basic framework of the *Federal Constitution*. Article 8(1) of the *Federal Constitution* guarantees equality before the law for all persons in Malaysia. Article 8(2) prohibits discrimination against citizens based on their race or descent in regard to any law relating to the holding or disposition of property. Furthermore, as this Report will demonstrate, equality and the prohibition against discrimination based on indigenous status are fundamental features of both international human rights law and the common law on native title in Australia, Canada and South Africa. The principle of equality requires that, with respect to property rights, native communities are provided the same protections accorded to non-native communities.

Native title’s modern origin in Malaysian common law, native customs and the principle of equality has evolved from a broader theoretical and legal common law framework affirming indigenous land rights. The next Part IV examines this framework in detail.

E. Conclusion

The supreme law of the Federal of Malaysia is the *Federal Constitution*. While English common law and principles of equity are the main sources of law, customs are equally important bodies of law, along with written laws. All rights conferred under applicable laws must be construed within the spirit and intendment of the *Federal Constitution*. Native title rights involve the interplay between the common law, native customs, as well as written laws within the framework of the *Federal Constitution*.

# IV

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THE THEORETICAL  
AND LEGAL BASIS FOR  
RECOGNITION OF NATIVE  
CUSTOMARY RIGHTS  
UNDER COMMON LAW

#### IV. THE THEORETICAL AND LEGAL BASIS FOR RECOGNITION OF NATIVE CUSTOMARY RIGHTS UNDER COMMON LAW

##### A. Introduction

Malaysia's recognition of the rights of natives and aborigines in their lands is consonant with developments in other common law jurisdictions. While not binding, decisions from these other jurisdictions regarding indigenous land rights have influenced Malaysian common law on native title.<sup>44</sup> Although each country has developed its own unique body of law and terminology on indigenous rights, there are common threads that run throughout these laws. Like Malaysia, courts in Australia, Canada, the United States and South Africa have concluded that aboriginal title to land is recognised under and protected by the common law.<sup>45</sup> This recognition is based, in whole or part, on prior occupation and possession of lands by indigenous peoples preceding British acquisition of sovereignty, an event that did not alter the pre-existing rights of indigenous people.

The earliest rationale for the recognition of native customary rights was the need for equality and to give 'full respect for existing rights' of the indigenous inhabitants. Lord Haldane spoke of the need to ascertain rights possessed by indigenous peoples through their own laws, customs and usages in *Amodu Tijani v Secretary of State, Southern Nigeria*.<sup>46</sup> That case is part of the body of English common law that developed to address the status of law, property rights, and related matters upon Britain's acquisition of sovereignty over the territories comprising its colonial Empire. The balance of this Part IV focuses on the historical, theoretical, and legal underpinnings of native title under these laws. Before turning to those authorities, it is instructive to examine Sarawak's long history of recognising native customs.

##### B. Recognition of native title or customary land rights in Sarawak

Throughout Sarawak's history, native title has been consistently recognised and protected, despite several transitions in sovereignty. In the period preceding the Sultan of Brunei's transfer of sovereignty over Sarawak to James Brooke, the Sultan exercised what has been described as suzerainty, which 'consisted of securing acknowledgment of the overlordship of Brunei and the obtaining of tribute from the subject peoples. It did not consist in rights of ownership or other rights in the land itself.'<sup>47</sup> Under the Sultan's rule, issues of land rights in Sarawak were subject to *adat* or native customary law.<sup>48</sup> Thus, prior to Brooke's

<sup>44</sup> See Wan Arfah and Bulan, above n 13, 96-97 (noting that '[d]ecisions of courts outside of the Malaysian judicial hierarchy are not binding. They are persuasive.').

<sup>45</sup> *Mabo (No 2)* (1992) 107 ALR 1, 34 (Brennan J); *Delgamuukw* (1997) 153 DLR (4<sup>th</sup>) 193, ¶ 112 (noting aboriginal title explained in part by common law property principles); *Richtersveld Community and Others v Alexkor Ltd and Another*, 2003(6) BCLR 583 (SCA), 2003 SACLX LEXIS 17, 57-58 (noting that mere change in sovereignty did not extinguish native property rights); *Mitchel v U.S.*, 34 US 711, 746 (1835) (noting that Indian right of occupancy was 'as sacred as fee simple of whites').

<sup>46</sup> [1921] 2 AC 399.

<sup>47</sup> Dato Peter Mooney, 'Land Law in Sarawak', in J Sihombing and Ahmad Ibrahim (eds), *The Centenary of the Torrens System in Malaysia* (1989) 239. AJN Richards, *Sarawak Land Law and Adat: A Report* (1961) 5, 10-11.

<sup>48</sup> Mooney, above n 47, 239; *Nor Nyawai I* [2001] 6 MLJ 241, 252-53.



acquisition of sovereignty over Sarawak, the Sultan recognised and respected the pre-existing land rights of natives.

In 1841, Rajah Muda Hassim, the Sultan of Brunei's viceroy to Sarawak, transferred "the Government of Sarawak together with the dependencies thereof its revenues and all its future responsibility" to James Brooke.<sup>49</sup> Importantly, this transfer was subject to the condition that, under Brooke's rule, "the laws and customs of the Malays of Sarawak forever be respected".<sup>50</sup> In 1842, the Sultan of Brunei ratified Rajah Muda Hassim's transfer by appointing Brooke to serve as the Sultan's representative and "govern the province of Sarawak".<sup>51</sup> Finally, in 1846, the Sultan issued an outright grant of Sarawak to Brooke.<sup>52</sup>

James Brooke, the first Rajah, Charles Brooke, the second Rajah, and Vyner Brooke, the Third Rajah, governed Sarawak from 1841 until May, 1946.<sup>53</sup> During this time, the Rajahs issued numerous orders and laws relating to land rights in Sarawak.<sup>54</sup> Through these authorities, the Rajahs recognised and affirmed the title of the native people of Sarawak, the same title and associated rights, which, before and during the Sultan's reign, were exercised pursuant to and governed by customary law.

In 1946, the Third Rajah ceded Sarawak to the British Crown, including all of its lands "subject to existing private rights and native customary rights".<sup>55</sup> The *Sarawak Royal Instructions 1946*, instructed the Governor 'to the utmost of his power to ensure that the fullest regard is paid to the religious and existing rights and customs of the inhabitants of Sarawak . . . by all lawful means, to protect them in their persons and in the free enjoyment of their possessions'.<sup>56</sup> Thus, native title, which originated in and was defined by native customs and traditions, was recognised under the Sultan's reign and continued to exist after the acquisition of sovereignty by the Rajah in 1841, was also acknowledged by the British Crown in 1946.<sup>57</sup> The final change in sovereignty occurred upon Sarawak's entry into the Federation of Malaysia on 16 September 1963. As had occurred in each of the prior transitions, Malaysia recognised the pre-existing native title and associated land rights of the indigenous people in Sarawak. This is borne out by the many

<sup>49</sup> Mooney, *ibid* 239, 240; A F Porter, *Land Administration in Sarawak: An Account of the Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time (1841-1967)* (Land and Survey Department, Kuching, 1967), 19; Richards, above n 47, 6, 12.

<sup>50</sup> Mooney, above n 47, 240; Porter, above n 49, 20; Richards, above n 47, 15-16.

<sup>51</sup> Mooney, above n 47, 241; Porter, above n 49, 20.

<sup>52</sup> Mooney, above n 47, 240; Porter, above n 49, 22-23. Although Brooke originally exercised his governorship over a small area in the valley of the Sarawak River, subsequent grants in 1855, 1861, 1884, and 1885 from the Sultan and a 1904 transfer from the British North Borneo Company of the Lawas-Trusan District extended the land area of Sarawak to its present size. Mooney, above n 47, 240; Porter, above n 49, 23.

<sup>53</sup> Mooney, above n 47, 241, 243.

<sup>54</sup> See *Nor Nyawai II* [2001] 6 MLJ 241, 262-78 for an examination of the various orders.

<sup>55</sup> *Nor Nyawai II* [2001] 6 MLJ 241, 279. In 1946, the British Crown assumed sovereignty over and the administration of Government of Sarawak by the Sarawak Cession Order in Council. Mooney, above n 47, 243; Richards, above n 47, 15. See also *Nor Nyawai I* [2001] 6 MLJ 241, 279.

<sup>56</sup> *The Sarawak Royal Instructions 1946*, The Laws of Sarawak (revised edition) (1958) Vol VI, 55, 59.

<sup>57</sup> Mooney, above n 47, 243.

judicial decisions that recognise the existence of NCR.<sup>58</sup> Furthermore, when Sarawak joined Malaysia, the *Federal Constitution* included ‘custom or usage having the force of law’ as part of the definition of law, thereby continuing the recognition of native laws and customs and the rights derived therefrom.

Thus, from the time of the Sultan of Brunei’s, up to the present day, there has been a consistent and unbroken line of recognition of the pre-existing native title and customary laws from which the title and corresponding rights emerge. With this background in mind, the next section explains how the history of consistent recognition of native title and customs under Sarawak and Malaysian law accords with general principles under international law governing the Crown’s acquisition of sovereignty over new territories, the municipal (i.e., domestic) law of Britain on the status of private property rights upon the Crown’s acquisition of territorial sovereignty, and English common law on property.

### C. Basis for recognition of indigenous land rights

#### 1. Introduction

The recognition of the pre-existing property rights of natives in Sarawak is consistent with the common law that has developed to address indigenous land rights. Before turning to those developments, it is essential to keep in mind that the balance of this Part IV is not designed to state the law of Malaysia on native customary rights to land, although Malaysian courts have recognized some of the authorities and concepts described in this Part. The purpose of this Part is to explain the underlying justification for the recognition of indigenous land rights by common law jurisdictions. The theories and legal rules described below have served as a foundation, on which each individual common law jurisdiction has built its own unique body of laws governing the land rights of indigenous people. Despite this common starting point, as will be explained in greater detail later in this Report, the law of each country has evolved differently. Therefore, while it is accurate to say that several common law jurisdictions have based their recognition of indigenous land rights on the same basic theoretical and legal framework, it is important to keep in mind that each country, including Malaysia, has taken its own path in defining the body of law that governs those rights.

<sup>58</sup> *Nyalong Anak Bungan v Superintendent Lands and Surveys 2<sup>nd</sup> Division* [1967] 2 MLJ 249; *Jalang Paran* [2007] 1 MJL 412, 421-22; *Madeli II* [2005] 5 MLJ 305, 330-31.

## 2. Distinction between acquisition of territorial sovereignty and acquisition of beneficial ownership of land

At the time that the British Crown was extending its presence and influence in foreign territories, the law recognised a distinction between the rights of territorial sovereignty and the proprietary or ownership rights over land that the Crown acquired upon assuming sovereignty over a new territory. The acquisition of territorial sovereignty was determined with reference to international and constitutional law, while the issue of whether a sovereign acquired property rights and title to the new territory turned primarily on municipal (i.e., domestic) law.<sup>59</sup> It was possible for the Crown to acquire territorial sovereignty without acquiring absolute beneficial title to the land over which it exercised sovereignty.<sup>60</sup> The High Court of Australia explained the difference as follows:

The Crown was treated as having the radical title to all the land in the territory over which the Crown acquired sovereignty. The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty. As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne. By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. But it is not a corollary of the Crown's acquisition of radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants.<sup>61</sup>

The Crown's acquisition of sovereignty over a new territory was not complete under English law until the Crown expressly accepted the sovereignty. The Crown's acceptance, which was a matter of municipal law, took various forms including signing a treaty of cession, authorizing British subjects to settle an unclaimed area on its behalf, or otherwise clearly stating its intent to assert sovereignty.<sup>62</sup> In territories acquired by cession, local laws and customs 'in so far as they were not unconscionable or incompatible with the change in sovereignty, remained in force until altered or replaced by the Crown, which had the power to make laws not contrary to fundamental principles until a representative legislative assembly was promised or created'.<sup>63</sup>

<sup>59</sup> Kent McNeil, *Common Law Aboriginal Title* (1989) 108; *Mabo (No 2)* (1992) 107 ALR 1, 31 (Brennan J).

<sup>60</sup> McNeil, above n 59, 108-09. See also Richards, above n 47, 11, ¶ 36 (noting that '[i]t was no longer possible to say what land rights the Sultan of Brunei had been [in] a position to transfer to the Rajah: some peoples had never even acknowledged Brunei Sovereignty and must therefore be accorded "full sovereignty rights".')

<sup>61</sup> *Mabo (No 2)* (1992) 107 ALR 1, 33-34 (Brennan J). Followed by *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 26.

<sup>62</sup> McNeil, above n 59, 111-12.

<sup>63</sup> McNeil, *ibid* 113-114 (footnotes omitted); See also *Richtersveld Community and Others v Alexkor Ltd and Another*, 2003(6) BCLR 583 (SCA), 2003 SACLX LEXIS 17, 57-58 (noting that upon acquisition of sovereignty, indigenous rights and interests in land continued) and *Mabo (No 2)* (1992) 107 ALR 1, 23 (Brennan J) (noting that in ceded territories, upon acquisition of sovereignty, existing laws continued until Crown altered the rules, subject to conditions in treaty of cession).

Once the Crown acquired territorial sovereignty, its property rights were determined under the act of state doctrine.<sup>64</sup> Under that doctrine, in territories obtained through cession, the Crown acquired the public property rights held by the former ruler.<sup>65</sup> The Crown could seize private property, thereby acquiring title.<sup>66</sup> Such action, as an act of a sovereign power, was not subject to challenge in the courts.<sup>67</sup> But once the Crown accepted territorial sovereignty, it no longer functioned under the act of state doctrine, but as the new government, with authority over the citizens of the former sovereign, who became British subjects.<sup>68</sup> At that point, the Crown acted under its legislative powers and could extinguish property rights until a local representative body was created or English law introduced.<sup>69</sup>

There has been some debate regarding whether the Crown was required to expressly recognise private property rights to save them from a presumptive seizure under the act of state doctrine (i.e., doctrine of recognition) or if private property rights continued upon the Crown's acquisition of sovereignty (i.e., doctrine of continuity).<sup>70</sup> The prevailing view, which the Federal Court of Malaysia has expressly adopted, is that, under the doctrine of continuity, private property rights remain intact upon acquisition of sovereignty, unless expressly and clearly extinguished.<sup>71</sup> In any event, it is clear that, in Sarawak, upon assuming sovereignty, the First Rajah, the British Crown, and Malaysia explicitly recognised the pre-existing property rights of the natives.<sup>72</sup>

<sup>64</sup> McNeil, above n 59, 162. *Mabo (No 2)* (1992) 107 ALR 1, 20, 39-40 (Brennan J).

<sup>65</sup> McNeil, *ibid*.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid* 163.

<sup>68</sup> *Ibid* 163-66.

<sup>69</sup> *Ibid* 164.

<sup>70</sup> *Ibid* 175-79. See also *Mabo (No 2)* (1992) 107 ALR 1, 39-40 (Brennan J) (noting that weight of authority supports doctrine of continuity) and *Richtersveld Community and Others v Alexkor Ltd and Another*, 2003(6) BCLR 583 (SCA), 2003 SACLX LEXIS 17, 51-52 (noting doctrine of recognition is 'not in accordance with the weight of authority and has been criticised as unworkable in practice and wrong in law and logic'). Furthermore, while it appears that, through his 1931 Order (Land Ordinance Cap 27), the Rajah indicated that some lands within Sarawak were 'Crown land', see *Nor Nyawai I* [2001] 6 MLJ 241, 270 (suggesting that the Rajah, as a British subject, had acquired sovereignty over Sarawak on behalf of the Crown), this proposition is debatable because, as noted earlier, the Crown must expressly state her intent to exercise dominion over the area. See McNeil, above n 59, 116-17, n 35. Nevertheless, it is unnecessary to resolve the precise nature of the Rajahs' sovereignty over Sarawak since the Crown expressly acquired Sarawak by cession in 1946 subject to the pre-existing native customary rights to land. Mooney, above n 47, 243; *Nor Nyawai I* [2001] 6 MLJ 241, 279-80.

<sup>71</sup> *Madeli III* (Dato' Ariffin Zakarai FCJ) [8/10/07] Civil Appeal No. 01-1-2006 (Q) (Unreported) 23-24.

<sup>72</sup> Porter, above n 49, 19; Mooney, above n 47, 240, 243; *Nor Nyawai I* [2001] 6 MLJ 241, 279-80; *Madeli II* [2005] 5 MLJ 305, 330. In *Adong I* [1997] 1 MLJ 418, 430, the court affirmed that the common law also respects the pre-existing rights of the Orang Asli in Peninsula Malaysia based on their aboriginal laws and customs.

### 3. Doctrine of tenures

#### a. General rule

Under the doctrine of continuity, the Crown's acquisition of sovereignty did not diminish or extinguish existing property rights of natives in Sarawak. With the acquisition of sovereignty, however, the Crown, acquired radical title to property in a new territory.<sup>73</sup> As noted above, radical title did not vest in the Crown absolute beneficial ownership of property in a territory or diminish the rights of indigenous people already in occupation of that territory.<sup>74</sup> Instead, radical title enabled the Crown to grant and acquire interests in land pursuant to the doctrine of tenures.<sup>75</sup>

The doctrine of tenures serves the limited purpose of explaining the relationship between the King, as feudal lord, over his subjects, as the actual occupiers of land within the King's domain.<sup>76</sup> Under the doctrine, the King is deemed to own all land in England, having, at one point in the past, physically occupied all lands within its territory. Subsequent to this deemed occupation, the King issued grants to subjects entitling them to certain property rights, as tenants on the lands.<sup>77</sup> In this manner, all owners hold tenure to their land based on a grant from the King. But the doctrine is based on legal fiction, since the King was never in occupation or possession of all of the land and it was rare that a subject held his/her rights pursuant to written grants issued by the King. Instead, the King's possession and the subject's grants were deemed to have occurred for the purpose of explaining the basis for the land system in England after the Norman Conquest.<sup>78</sup>

Despite the legal fiction, the doctrine of tenures illustrates the emphasis of the English common law on occupation of land and the legal conclusion that flows from it, namely possession or ownership of the land.<sup>79</sup> Under English law, a person in occupation of land, also known as a 'mere possessor', acquired a 'title that goes with possession' and presumptive title, even if his/her occupation was unlawful.<sup>80</sup> If the mere possessor remained in possession for a prescribed statutory period, he/she also acquired title by limitation.<sup>81</sup> Upon loss of possession, however, a mere possessor lost the title that goes with possession, but retained presumptive title and title by limitation.<sup>82</sup> If ousted from the land, a mere possessor also had *prima facie* title by being wrongfully dispossessed.<sup>83</sup> Presumptive title, title by limitation, and title by being wrongfully dispossessed, unless

<sup>73</sup> *Madeli III*, (Dato' Ariffin bin Zakaria FCJ) [8/10/07] Civil Appeal No. 01-1-2006 (Q) (Unreported) 26; *Mabo (No 2)* (1992) 107 ALR 1, 33-34 (Brennan J).

<sup>74</sup> *Mabo (No 2)* (1992) 107 ALR 1, 34 (Brennan J).

<sup>75</sup> *Mabo (No 2)* (1992) 107 ALR 1, 33-34 (Brennan J).

<sup>76</sup> McNeil, above n 59, 84. See also *Mabo (No 2)* (1992) 107 ALR 1, 16-17 (Brennan J) (doctrine of tenures was a fiction, under which the Crown was '*universal occupant*' with all property and rights originally flowing from the Crown).

<sup>77</sup> McNeil, above n 59, 82; *Mabo (No 2)* (1992) 107 ALR 1, 32-33 (Brennan J).

<sup>78</sup> McNeil, *ibid* 81-82; *Mabo (No 2)* (1992) 107 ALR 1, 16 (Brennan J) (doctrine served "'ends of government, for the good of the people'")

<sup>79</sup> McNeil, *ibid*.

<sup>80</sup> *Ibid* 74-75.

<sup>81</sup> *Ibid* 77.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid*.

rebutted by one with better title, allowed a recently ousted possessor to recover title through an action in ejectment or action for recovery of land.<sup>84</sup> Thus, the common law afforded extensive rights to property based on occupation of land. The next part considers how occupation was established under the English common law.

b. Indicia of occupation for purposes of establishing possession

The earliest recognition of traditional land rights of indigenous peoples were in judicial decisions of the U.S. Supreme Court rejecting the contention that European ‘discovery’ of the Americas ‘annulled the pre-existing rights of its ancient possessors’<sup>85</sup> and acknowledging that indigenous ‘rights of occupancy . . . [were] as sacred as the fee simple of the whites’.<sup>86</sup> The rights of the Indians, as acknowledged in what later became known as the Marshall trilogy, arose from the fact of occupation of their homelands since time immemorial.<sup>87</sup>

Under English common law ‘ownership could not be acquired by occupying land that was already occupied by another’.<sup>88</sup> A person could establish that he or she occupied and therefore, possessed land, by demonstrating actual physical entry on the land and an act that indicated his or her intent to occupy.<sup>89</sup> The extent of the control necessary to establish occupancy varied depending upon whether the occupier or some other person held title (i.e., if another held title, more evidence of occupancy was required), ‘the nature, utility, value, and location of the land, and the conditions of life, habits, and ideas of the people living in the locality.’<sup>90</sup> The course of conduct that a proprietor might reasonably be expected to follow with regard to his own interests would greatly vary under various conditions.<sup>91</sup>

Actions illustrating a person’s intent to hold or use the land for his/her own purposes were evidence of occupation and included obvious undertakings such as fencing, farming, mining, constructing buildings, excluding trespassers, cutting plants, and fishing.<sup>92</sup> These actions would establish occupancy depending upon the ‘reasonable purposes’ for which the land could be put in light of the nature of the land (i.e., if not suitable for farming, then it would not be expected that farming would be a reasonable use).<sup>93</sup> It was not necessary to show physical occupation of every part of the land. In the absence of physical presence, control over land that excluded strangers from interfering established occupation.<sup>94</sup> When

<sup>84</sup> Ibid.

<sup>85</sup> *Worcester v State of Georgia*, 31 US 515 (1832) (‘*Worcester*’).

<sup>86</sup> *Mitchel v United States*, 31 US 711, 746 (1835).

<sup>87</sup> This series of cases, decided by Marshall CJ, included *Johnson v M’Intosh*, 21 US 543 (1823), *Worcester*, 31 US 515 (1832), and *Cherokee Nation v Georgia*, 31 US 1 (1831).

<sup>88</sup> *Mabo (No 2)* (1992) 107 ALR 1, 31 (Brennan J).

<sup>89</sup> McNeil, above n 59, 199.

<sup>90</sup> McNeil, ibid 201. See also *Mabo (No 2)* (1992) 107 ALR 1, 166 (Toohey J).

<sup>91</sup> *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, 288. See also *Cadija Umma v S Manis Appu* [1939] AC 136, 141-2.

<sup>92</sup> McNeil, above n 59, 199.

<sup>93</sup> Ibid 200.

<sup>94</sup> *Madeli III* (Dato’ Ariffin bin Zakaria FCJ, [8/10/07] Civil Appeal No. 01-1-2006 (Unreported) 34, following Lord Denning’s definition of occupation in *Newcastle City Council v Royal Newcastle Hospital*



land was not cultivated, but existed in a natural, undeveloped state, the actions required to establish occupancy were not necessarily the same as those required to show occupancy of developed land.<sup>95</sup> Thus, regularly shooting wild game on uncultivated land could establish occupancy on undeveloped land, although such actions would not necessarily be sufficient for purposes of demonstrating occupancy of cultivated land.<sup>96</sup>

The occupation and use of land, as conceived under the traditional customs of the natives in Sarawak, is described in detail below. These customs demonstrate that indigenous occupancy resembles occupancy, as configured under the English common law.<sup>97</sup> In particular, in addition to using land for cultivation and as sites for permanent dwellings, indigenous people following a sedentary lifestyle used specific tracts of lands for purposes of hunting, fishing, gathering natural products of the land, and herding domestic animals.<sup>98</sup> These uses of the land were to the exclusion of others.<sup>99</sup> Sedentary indigenous people also used areas located at some distance from their primary community sites, albeit on an occasional basis. They occupied those areas in the same way that an English lord exercised occupancy over ‘waste’ lands contiguous to his immediate ‘manor.’<sup>100</sup>

In addition, nomadic indigenous groups occupied lands according to the English common law. Nomadic groups consistently and exclusively used certain tracts of land for their activities.<sup>101</sup> Rather than being ‘indiscriminate wanderers’, they kept to certain areas with which they have a spiritual relationship, had knowledge of the resources, and could use without creating conflicts with other groups.<sup>102</sup> Others could access the area once they obtained permission from the group in occupation.<sup>103</sup> The occupation by a nomadic group was not isolated to the area where they currently engaged in activities, but extended to include the entire range of land they used. This is consistent with the English common law, which recognises that temporary absence does not defeat occupation, so long as the occupier had the intent and ability ‘to retain exclusive control and return to the land’ and no one occupies the land during the absence.<sup>104</sup>

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[1959] 1 All ER 734, 736. Lord Denning’s definition was accepted and applied in *Hamit bin Matusin v Superintendent of Lands and Surveys & Anor* [1198] MD 2. *Madeli II* [2005] 5 MLJ 305, 325.

<sup>95</sup> *Mabo (No 2)* (1992) 107 ALR 1, 166 (Toohey J).

<sup>96</sup> McNeil, above n 59, 200.

<sup>97</sup> *Ibid* 201-04. McNeil argues that indigenous inhabitants acquired common law aboriginal title upon the Crown’s assertion of sovereignty at 216-221. Common law aboriginal title is distinct from native title, as it is a creature of the common law, rather than native customs and traditions. See *Mabo (No 2)* (1992) 107 ALR 1, 139 (Toohey J). Common law aboriginal title is based on the premise that at the time of the Crown’s acquisition of sovereignty, indigenous inhabitants in occupation and possession of land according to the common law requirements were deemed to hold their land in fee simple pursuant to a grant issued by the Crown. See also McNeil, above n 59, 218. As a creature of the common law, the Crown could not dispossess indigenous people of land held pursuant to common law aboriginal title, unless it could establish that it held a better title. *Mabo (No 2)* (1992) 107 ALR 1, 165; McNeil, above n 59, 219. In *Mabo (No 2)*, 107 ALR 1, 167. Toohey J suggests that common law aboriginal title may be an alternative basis for holding that the Meriam people retained property rights in their territories upon Queensland’s annexation of their land.

<sup>98</sup> McNeil, above n 59, 201-02.

<sup>99</sup> *Ibid* 202.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid* 203.

<sup>102</sup> *Ibid*.

<sup>103</sup> *Ibid* 204.

<sup>104</sup> *Ibid* 204.

#### D. Conclusion

From the time of the Sultan of Brunei up to the present, the pre-existing rights of natives in Sarawak have been recognised and respected. Despite numerous changes in sovereignty, from the Sultan of Brunei to the White Rajahs, the cession of Sarawak to the British Crown, and Sarawak's entry into the Malaysian Federation, native title and the accompanying traditions and customs continue.

The long-standing affirmation of native title in Sarawak is consistent with the general rules governing the Crown's acquisition of sovereignty over new territories. Although each country has developed its own unique body of law governing indigenous land rights, these rules form the basic legal foundation for the recognition of indigenous rights in many common law countries. Under those rules, barring inconsistency or incompatibility with the change in sovereignty, local laws and customs continue in force. Furthermore, under the doctrine of continuity, upon the Crown's acquisition of sovereignty, private property rights are left undisturbed, unless the Crown has expressly extinguished those rights. Recognition of the property rights associated with native title is also consistent with English common law rules on property. Under those rules, occupation was critical in establishing possession and ownership of property.

Native occupation and possession of land in Sarawak according to native customs also satisfies English common law conceptions of occupation. Native customs, which, as noted earlier, are accorded status as law under art 160(2) of the *Federal Constitution*, have become the touchstone for native customary rights under Malaysian law. These customs are described below in Part V.

# V

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CUSTOMARY RIGHTS  
BASED ON NATIVE LAWS  
AND CUSTOMS: PROOF  
OF OCCUPATION AND  
PROOF OF CUSTOMS AND  
TRADITIONAL PRACTICES

## V. CUSTOMARY RIGHTS BASED ON NATIVE LAWS AND CUSTOMS: PROOF OF OCCUPATION AND PROOF OF CUSTOMS AND TRADITIONAL PRACTICES

### A. Introduction

Part III.B described the legal status of customs under Malaysian law. For purposes of this Part V, it is necessary to consider further the intersection between customary law, common law, statutory law and the Constitution.

Throughout Sarawak's history, the pre-existing native customs and traditions with regard to land tenure have been recognised and affirmed. As noted earlier, while native title is recognised under the common law, it originates in native customs and traditions. Native title is not a creature of the common law and consequently, the interests associated with native title are not limited by common law conceptions of property. The courts have been cognizant of the uniqueness of the rights that are sourced in native law and customs. As Lord Haldane observed in the Privy Council case of *Amodu Tijani v Secretary, Southern Nigeria*

There is a tendency, operating at times unconsciously, to render [] [native] title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence.<sup>105</sup>

The rights protected by native title are defined by the customs in which that title is housed. Consequently, customs are the key to defining the real property interests held by natives. Article 160(2) of the *Federal Constitution* defines law to include 'custom or usage having the force of law'. In consonance with this constitutional recognition, some native customs have been codified in Sarawak.<sup>106</sup>

Beginning with the *Adat Iban Order of 1993* and followed by the *Adat Bidayuh Order 1994*, other codes have been drafted based on the structure reflected in the Adat Iban model.<sup>107</sup> The general explanation of the *Adat Iban Order of 1993* states that the leaders

<sup>105</sup> [1921] 2 AC 399, 403. This case has been cited by the courts in *Sagong I* [2002] 2 MLJ 591, 611, *Adong I* [1996] 1 MLJ 418, 427 and *Madel I* [8/10/07] Civil Appeal No. 01-1-2006(Q) 24. Other common law jurisdictions have also relied on this case. See *Mabo (No 2)* (1992) 107 ALR 1, 35 (Brennan J); *Calder et al. v. Attorney-General of British Columbia* [1973] S.C.R. 313, 34 D.L.R. (3d) 145, 175, ¶ 100 (Hall J dissenting) ('*Calder*').

<sup>106</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 285, 291.

<sup>107</sup> The Adat Iban comprises 8 chapters. The first chapter consists of the definition of words and expressions, and chapter II deals with customs relating to longhouses, including longhouse construction and the various taboos with respect to adat practices. Chapter III deals with the infringement of farming rites. Chapter IV deals with offences relating to matrimonial or sexual matters and prohibited degrees of marriages, and matters relating to divorce and child maintenance. Chapter V deals with the distribution of property following

of the community met in Kapit in March 1981 and agreed to codify the Iban customary laws throughout Sarawak based on the existing *Tusun Tunggu Iban (Sea Dayak) Third Division 1952* and *Dayak Adat Law Second Division 1963*, which were compiled and edited by AJN Richards. Concepts of Iban customary laws were identified and translated into terminologies that were not only acceptable to Iban throughout Sarawak, but also suitable for administrative and legislative purposes. Some provisions of the *Tusun Tunggu Iban (Sea Dayak) Third Division 1952* were rewritten and recast and variations among the riverine groups excluded while the core or the commonly practiced *adat* were included in the *Adat Iban Order of 1993*.

These codified customs are not exhaustive.<sup>108</sup> A savings clause provides that an action or suit in respect of any breaches of other customs recognized by the community but not expressly provided for in the code, may be instituted by any person in any Native Court having original jurisdiction over such matter and the court may impose such penalty or award as it may consider appropriate in the circumstances.<sup>109</sup> Uncodified and codified customs are therefore equally valid sources of law, as uncoded customs are still practiced and govern the lives of the communities.<sup>110</sup> In *Nor Nyawai I*, Chin J concluded that customs are

not dependent for [[their] existence on any legislation, executive or judicial declaration (*The Wik Peoples v Queensland* (1996-1997) 187 CLR 1, at p 84) though they can be extinguished by those acts. Therefore, I am unable to agree with Ms Gau that native customary rights owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights had been extinguished.<sup>111</sup>

Some of the most important uncoded customs are those relating to land tenure, which continue to be practiced by native groups and are protected under Malaysian law. These customs lie at the core of the economic, spiritual and cultural longevity of native communities. They touch on fundamental aspects and values of native communities and are inextricably linked to the continued existence of those communities.

The importance of land rights (and the native customs from which they emerge) to native communities was acknowledged in *Adong I* and *Nor Nyawai I*, where the courts held that, for native and aboriginal communities, the deprivation of rights to land amounted to deprivation of their right to life. This is similar to the rights of aboriginal people in other jurisdictions where land is expressed as having “an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it.”<sup>112</sup>

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divorce as well as division of ancestral property. Chapter VI deals with customs relating to death and burial while chapter VII deals with adoption of a child below 18 years. Chapter VIII deals with miscellaneous matters including a savings provision.

<sup>108</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 285-86; *Bhe and Others v. Khayelitsha and Others, Shibi v. Sithole and Others, South African Human Rights Commission and Another v President of the Republic of South Africa and Another*, 2004 SACLR LEXIS 22, \*38, \*71; *Madhu Kishwar and Others v Bihar and Others*, A.I.R. 1996 S.C. 1864, 1875-76.

<sup>109</sup> In the *Adat Iban Order of 1993*, this provision is included as section 198 under the heading ‘miscellaneous’.

<sup>110</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 268, 287.

<sup>111</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 269.

<sup>112</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 129.

This understanding of the role of land in indigenous communities is the basis for the recognition and protection of indigenous rights under international customary law. In the Jose Martínez Cobo study, commissioned by the United Nations in 1971, the author noted that:

It must be understood that, for indigenous populations, land does not represent simply a possession or means of production . . . . It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.<sup>113</sup>

The balance of this Part V describes the land tenure customs of the Kelabit, Iban, and Penan. Because their customs bear some resemblance to each other and to the customs of other native communities in Sarawak, they are useful for purposes of providing a general introduction to customary laws on land tenure in Sarawak. The Kelabit live in the interior of Sarawak, in the highlands. While traditionally, the Kelabit were shifting cultivators, at present, they are mainly sedentary and wet padi agriculturalists. The Iban, on the other hand, occupy the lowland areas and are largely shifting cultivators, but also cultivate cash crops. Historically nomadic, the Penan recently began to settle like the rest of the native groups, sometimes in areas traditionally settled by other groups. Despite the similarities, each group has its own unique set of customary practices, which must be individually recognised and respected.

## B. Kelabit customs<sup>114</sup>

### 1. The longhouse community and their territorial sphere

The basic unit of the Kelabit community is the *lubang ruma'* (household). An aggregation of *lubang ruma'* comprises the *bawang* (village), which encompasses the physical structures of the *ruma' kadang* or *ruma' rawir* (longhouse) and the residents, or *uwang bawang* (contents of the bawang). Each *bawang* is territorially discrete and maintains its own demarcated area separate from that of a neighbouring *bawang*. Boundaries between the *bawang* are marked by rivers, ridge tops or valleys. These are observed as a means of the managing the communal territorial sphere.

In addition to the existing *ruma' kadang* (longhouse), a *bawang* encompasses the *ruma' ma'un* (old longhouse sites) and the agricultural domain of its occupants. When a *bawang* has settled in one place, the land cultivated by the *uwang bawang* is their *tana' inan mudang* (lit. land to live on). This is a concept similar to the Iban concept of *menoa rumah* (demarcated longhouse territory). Although not delineated by strict boundary lines, the *bawang* keeps certain lands as *ulung* (reserved land) for fruit trees in the wild, or for

<sup>113</sup> S.James Anaya, *Indigenous Peoples in International Law* 167 n 90 (2<sup>nd</sup> Ed. 2004) (quoting UN Subcommission on Prevention of Discrimination and Protection of Minorities, Jose Martínez Cobo, special rapporteur, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7, Add.4 at 39 (1986)).

<sup>114</sup> The following discussion is based on excerpts from Ramy Bulan, 'Kelabit Native Title: Occupation of an Ancestral Homeland' in *Native Title in Sarawak, Malaysia: Kelabit Land Rights in Transition* (PhD thesis, Australian National University, 2005) 125-155 ('PhD Thesis').



the supply of timber for the residents. The community's consent is required before these areas are cleared for cultivation or for other purposes.

A broader territory of the *bawang* is the *tana' bawang* (communal village territorial land), which encompasses not only the land used for agriculture or their *lati'* (farm), but incorporates the *ruma' ma'un* (old longhouse sites) and land on which the activities of the community – including farming, hunting, fishing and gathering of forest produce – are carried out. The *tana' bawang* is similar to the Iban *pemakai menoa* (land to eat from). Also included within the *tana' bawang* are the *binatuh* burial lands, which were often situated in *lubang batuh* (stone holes) or stone caves. This is one of the most guarded areas in the Kelabit *bawang*.

Two concepts associated with the boundaries between different Kelabit *bawang* are *tung* and *apu'*. All economic pursuits are carried out by *bawang* members within the *tung*. *Tung* boundaries are often marked by, or coincide with, mountain ranges, ridge tops, rivers, or other natural features, such as an *ulung* (island) of virgin jungle left untouched to serve as a reserve and boundary. Closely linked to the concept of *tung* is that of *apu'*. Exchanges or trading transactions take place at the *apu'* (meeting point). The villagers meet at an established meeting point midway between the two *bawang*.

Boundaries between areas inhabited by the Kelabit and other native groups like the Lun Bawang, the Kayan and Kenyah, follow natural features such as rivers, mountain ranges, ridge tops or gorges. In swidden cultivation, although villages moved successively through the valleys in their *tana' bawang*, they did not move into territories traditionally occupied and farmed by other *bawang*. No *bawang* encroached upon another's territory without informing the leaders of that *bawang* and obtaining their consent.

## 2. Rights to land and resources

### a. Communal ownership and communal lands and activities

The *tana' bawang* is land accessed by the community and under its recognised control. The rights to these lands are communal, out of which are carved the individual rights of the residents. Within the *tana' bawang*, the Kelabit recognise the existence of *tana' tu'en mulong* or, simply, *ulung*, which is land reserved for the general use of the village for timber, firewood and other jungle products. It is a designated area outside the boundaries of established secondary jungle or *amug*. As noted below, trees may be owned individually, for fruit or for timber, but the taking of honey by the Kelabit from *tapang* trees is a communal venture. No individual may claim an exclusive right to a *tapang* tree containing *bua tikan umung* (a collection of beehives) in one area or on one tree. A tree reserved for communal use is marked with four sticks intertwined together to form a square.

Surrounding the longhouse sites are the *laman* (grazing grounds) for buffaloes and, occasionally, cows. The *laman* are considered common property with rights of access based on residence in the *bawang*, as well as membership in the *lubang ruma'* domestic household.

Historically, hunting was done only within the *bawang* territory. Today, with better means of transport, hunting appears to have transcended village boundaries and is not restricted to the *tana' bawang*. Fishing, particularly tuba fishing, is done respecting the territorial rights of the *bawang*.

The Kelabit produce their own iodine-rich salt through a process of evaporation of salt water obtained from the numerous salt springs found in the highlands. While these salt springs are available to any Kelabit to produce salt, a salt spring remains the common property of the community, subject to the control of the village within whose *tana' bawang* it is located.

b. Individual rights to land and resources

Rights to resources are based on residence in a particular *bawang* or membership of a household or through kinship ties or genealogical descent. Within the expanse of the *bawang*, the residents practise a pioneer system of land use where virgin jungle is felled and cultivated, followed by a rotational fallow system. The pioneering household or its descendants (as is the established practice) have first right of claim over the *amug* (secondary jungle) for later farm sites. The Kelabit practice a rotational system of farming, where virgin jungle is cleared for cultivation and later left to fallow. A piece of land that is being cultivated is called a *lati'* (farm) and if it maintained as a garden or vegetable or fruit grove it is called *ira*. *Amug* is farming land that is left to fallow for up to 7 years, *amug dari*, secondary growth of 8 to 15 years, *genalut* is land comprising secondary growth of 16-25 years, and *amug kura* is a piece of land comprising secondary growth older than 25 years.

The long period of fallow means that every *bawang* has large areas of *amug* in various stages of growth. Each *lubang ruma'* retains the right to recultivate fallow land. That right may also be given to a relative. Other members of the *bawang* may farm the lands in the later stages of *amug*, but not without first making their intention known to, and getting the assent of, the pioneering household. General members of the *bawang* may access the *amug* for hunting and fishing.

With regard to wet rice cultivation, lands cleared for farming through slash and burn is left upon the move to a new longhouse site. The priority of recultivation of these lands remains with the pioneering household whose consent is necessary before another household or a kindred is allowed to farm it.

Rights to planted trees belong exclusively to the planter's household. In the wild, the first person to find a fruit tree or tree for timber may claim it by clearing the undergrowth around its base and placing an *etu* (mark) on the tree, which establishes exclusive rights over the tree on behalf of the finder's household. A Kelabit household may have an individual claim over *tumuh* (*Agathis borneensis*) trees, for the *nateng* (resin or *damar*). A family who first discovered and marked the tree with the recognised *etu* or *epang* could own heritable rights to the trees. It is also common to find *ulung bua'* (fruit groves) named after the person who planted the fruit trees located in an area within the boundaries of an *amug*. The *ulung bua'* are the property of individual households and are heritable.

Since access to land belongs to each *bawang* territory, and entitlement is based on membership in a household, a person who migrates to another *bawang* may be subject to fines and forfeit his right to fruit trees in the communal lands and to the common grazing grounds unless he maintains kinship ties to the village. Exceptions are made with regard to more permanent cultivations like *lati' baa'* (wet rice) or private *laman* (grazing lands) subject to government subsidy. The latter could be left in the care of relatives in the former village. Where migration is necessary because a member of a household 'finds it difficult to earn a living in the present longhouse', and the headman acquiesces, a household is not subject to the usual fines and restrictions.

### 3. Customary practices marking Kelabit occupation of their land: cultural landmarks

Cultural landmarks on the landscape are evidence of occupation of land by its inhabitants. A clear example of distinctive marks of settlement and occupation of land can be seen in the unique Kelabit megalithic stone constructions associated with burial rites. On the island of Borneo, no other known megalithic culture in the ancient or recent past is identical to that of the Kelabit.

As a mark of respect, upper-class Kelabit families gave huge feasts in honour of their parents or other elderly persons. This might happen while the parents were alive, but primarily it was done posthumously. On such occasions, an individual or household erected or carved rocks, monoliths, stone 'tables', 'seats', dolmens and stone bridges in memory of the dead. They also constructed slab graves, 'forts' and deep stone burial urns, in which the bones of the dead were placed.

The Kelabit practised a form of primary and secondary burial. During the primary burial, an earthen jar would be used as a coffin in which the body was placed and kept out of the immediate longhouse compound. After approximately one year, a secondary burial was held and the bones were laid in the communal *binatuh* (burial ground), which was the permanent burial place. Every *bawang* (village community) maintained a *binatuh*. A number of *binatuh* are spread out in the highlands, each historicising the settlement of people in the area.

Secondary burial was accompanied by three common forms of practice that marked the landscape. A monument in stone was erected as *batu sinuped*, which was a single stone slab or menhir, or as *batu perupun*, which were multiple stones slabs laid on top of each other in a table-like structure. The monuments also took the form of a conical shaped mound or capstones mounted on stone legs or dolmens. The stones and slabs were often quarried elsewhere, carried a few kilometres overland and erected at the chosen spot. *Batu sinuped* were sometimes burial sites where heirlooms were buried with the body.

Memorialisation also took the form of a *kawang* cutting a clearing through virgin forest to form a serrated edge, a kind of battlement along a mountain ridge, often on the most difficult, isolated and distinctive peaks that could be seen from miles around. Alternatively, a commemoration in honour of the deceased might involve the construction of a *nabang*, a canal in the ground, or even a ditch across a ridge tract, constructed either to divert the course of a river, to reclaim a large meander as arable land, or to redirect the flow of water. This often resulted in the formation of a lake, which would then be named

after the person for whom the honour was given. The lake may also be named after the person who sponsored or created the feast.

Burial rites remained a feature of Kelabit life until they turned to Christianity in the mid-1940s. During that period, the Kelabit abandoned expensive burial rites in favour of simple funerals. They then transformed the practice of creating *nabang* into creating a *bakut*, which involved the digging of deep drains to create wide laterite roads for public use.

In the late 1940s and early 1950s, the Kelabit employed a form of memorialisation called *kawang ebpa*, which involved the digging of trenches on meandering rivers to create 'new waterways' and to straighten the water course such that villages would boast about having the 'most straight rivers'. These forms of commemorations exist in various combinations. Evidence of *kawang ebpa* is found at a site in Pa' Berang. That site has a group of eight menhirs on a knoll. Four monoliths are between six and over seven feet high, another four small ones are about two to three feet high and another four cut stones of about six feet long serve as bridges over man-made ditches (*nabang*). It is said that when the Kelabit migrated from Patar Lem Liu, they lived at Pa' Berang for a time. They moved into the higher grounds because the frequent flooding of the Pa' Debpur river brought fish that ate the stems of their padi plants, ruining their crops.

These cultural landmarks and stone burial monuments are revisited as indicators and proof of the occupation of the highlands by the Kelabit. Despite the absence of a surveyed and well-delineated boundary, it is clear that the Kelabit have lived and exclusively occupied the highlands as their ancestral homeland for generations since time immemorial.<sup>115</sup>

### C. Iban customs

The Iban closely associate land with their religious beliefs and traditional Iban farming combines both religious and cultural practices.<sup>116</sup> This part describes three aspects of Iban land ownership and use: the composition of the longhouse community, the nature of communal and individual rights to land, and management of the land and resources.

#### 1. Features of the longhouse community

The Iban live within a *pemakai menoa*, which is the geographical location of the longhouse community.<sup>117</sup> The location of the *pemakai menoa* is important for the resources it offers, including land suitable for farming, water, fishing, hunting, and forest produce.<sup>118</sup> Groups of families come together to create the longhouse itself, which is a structure large enough to accommodate the families in rooms that are joined together and

<sup>115</sup> For a detailed description of this practice and other customary practices relating to customary land tenure and boundary marks on the land, see Ramy Bulan, 'Boundaries, Territorial Domains, and Customary Practices: Discovering the Hidden Landscape' (2003) 34 *Borneo Research Bulletin* 18.

<sup>116</sup> Richards, above n 47, 24, ¶ 10; Dimbab Ngidang, 'Transformation of the Iban Land Use System in Post Independence Sarawak' (2003) 34 *Borneo Research Bulletin* 62, 63.

<sup>117</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 247-49; Ngidang, above n 116, 63.

<sup>118</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248.

arranged in a row.<sup>119</sup> The longhouse is designed to expand and support new families.<sup>120</sup> A ritual ceremony, *punggul menoa*, precedes the creation of a *pemakai menoa* and signals that ‘the first cutting of virgin jungle for settlement and farming can commence.’<sup>121</sup>

The *pemakai menoa* includes *tanah umai* (cultivated land), *tembawai* (the old longhouse site), *pendam* (cemetery) and a forest area.<sup>122</sup> The longhouse and contiguous area are known as the *menoa*.<sup>123</sup> The *menoa* includes the farms and gardens, the water running through it, the forest within a half day’s walk of it, and fruit groves, all of which are located within a defined boundary, known as the *garis menoa*.<sup>124</sup> The *garis menoa* serves the important purpose of separating one longhouse community from another and provides a means of distributing resources among longhouse communities and among members of the same longhouse.<sup>125</sup>

The farming land within the *menoa* is called the *temuda*.<sup>126</sup> *Antara umai* are the boundaries between individual farm plots.<sup>127</sup> The jungle from which the Iban gather forest products is the *galau* or *pulau galau*.<sup>128</sup> The *pulau* is the primary forest preserved by the Iban to supply forest products, for water catchment, for hunting, and to honour distinguished people.<sup>129</sup> The boundary of the *pemakai menoa*, which separates it from the next longhouse, is determined with reference to mountains, ridges, rivers, and other geographical features.<sup>130</sup>

## 2. Communal and individual rights to land

The communal rights associated with the *pemakai menoa* may be inherited and therefore, rights retained by the current longhouse community are passed to future generations.<sup>131</sup> The right to cultivate cleared land is also a community right, but the heirs of the person who cleared the land have priority with respect to the right.<sup>132</sup> The community determines if individual rights to land can be alienated to a person outside the community.<sup>133</sup>

*Pulau* or forest reserve can be collectively or individually owned.<sup>134</sup> The community can designate certain forest products as available freely for the personal use of members of the community. With respect to certain valuable resources, however, including rattan, timber,

<sup>119</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248.

<sup>120</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248.

<sup>121</sup> *Nor Nyawai I* [2001] 6 MLJ 249; Ngidang, above n 116, 63.

<sup>122</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249; Ngidang, above n 116, 63-64.

<sup>123</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248.

<sup>124</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248, 249; Ngidang, above n 116, 63.

<sup>125</sup> Ngidang, above n 116, 63.

<sup>126</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248, 250.

<sup>127</sup> Ngidang, above n 116, 63.

<sup>128</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248, 250.

<sup>129</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 250; Ngidang, above n 116, 65.

<sup>130</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249.

<sup>131</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249.

<sup>132</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249.

<sup>133</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249.

<sup>134</sup> Ngidang, above n 116, 65.

and fruit trees, the community may restrict access to ensure that the whole community benefits from these products.<sup>135</sup>

An individual Iban can obtain rights to land by clearing virgin jungle.<sup>136</sup> A person who then farms the cleared land obtains a right over the *temuda*, which may be passed down to his/her heirs. The descendent group of the person who originally cleared the land is known as the *turun*.<sup>137</sup> An individual obtains rights to *pulau* in areas adjacent to his *temuda*.<sup>138</sup> Prior to clearing jungle that borders a *temuda*, a person must obtain the permission of the owner of the *temuda*, as the owner has first claim to that area.<sup>139</sup> Permanent cultivation of a reasonable density is evidence of customary ownership, as distinct from customary user rights.<sup>140</sup>

An individual establishes rights to trees by clearing the undergrowth around a tree or by planting trees.<sup>141</sup> Rights to trees may be inherited.<sup>142</sup> The owner of trees can require compensation from a person who burns or fells the trees.<sup>143</sup>

*Tanah umai* (land cultivated with paddy or cash crops) may be owned by an individual family and bequeathed to its heirs.<sup>144</sup> Upon moving to another district, a user loses his/her rights to land.<sup>145</sup> Alternatively, a user can transfer to a relative individual rights to land in exchange for *tungkus asi* (token gift).<sup>146</sup>

### 3. Management of the land

The right to farm cleared land is restricted by the rule that farming activities must preserve the land's maximum fertility.<sup>147</sup> The Iban determine the methods employed to achieve maximum fertility.<sup>148</sup> A community or individual is not allowed to use land in excess of that which is required but with the exception of a prohibition on destroying valuable trees and vegetable tallow, no restrictions apply to clearing the jungle.<sup>149</sup>

The Iban allow *temuda* to lay fallow to allow the soil to regain fertility and for regrowth of forest produce within the jungle, a process that could take up to 25 years. Land is identified within the forest-fallowing cycle according to four stages: (1) *jerami* or *redas*, land one to two years following the harvest of a padi crop (2) *temuda*, land following a three to ten year fallow period, (3) *damun*, land following a ten to twenty year fallow

<sup>135</sup> Ibid.

<sup>136</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248; Ngidang, *ibid*.

<sup>137</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248.

<sup>138</sup> Ngidang, above n 116, 65.

<sup>139</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248.

<sup>140</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249.

<sup>141</sup> Ngidang, above n 116, 65.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249.

<sup>145</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249-50; Ngidang, above n 116, 64.

<sup>146</sup> Ngidang, above n 116, 64.

<sup>147</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249.

<sup>148</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 249.

<sup>149</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 248.



period, and (4) *pengerang*, which resembles virgin forest, but is secondary growth or *temuda* laid to fallow for greater than 25 years.<sup>150</sup> The practice of maintaining the *pulau* or jungle that supplies forest products is “important for the survival of the Iban community.”<sup>151</sup> This is because the *pulau* is the source of raw materials used for constructing housing, farm huts, and boats, the place from where the Iban gather fruits and vegetables and hunt, and a place to ‘honour distinguished persons.’<sup>152</sup>

#### D. Penan customs

Two distinct groups constitute the Penan in Sarawak: the Eastern Penan and the Western Penan.<sup>153</sup> Originally hunter-gatherers, by the 1960s, and with the encouragement and assistance of the Sarawak government, the Penan began to establish permanent settlements and farm.<sup>154</sup> By the 1970s, nearly all Penan had settled and presently, less than four hundred Eastern Penan remain nomadic.<sup>155</sup> The Eastern Penan live at the Baram and Limbang watersheds, while the Western Penan primarily inhabit the Balui watershed.<sup>156</sup> The customs of the Penan settled in longhouse communities resemble those of the Kelabit and Iban. Nevertheless, the Penan legacy as hunter-gatherers results in unique land tenure traditions that reflect occupancy of their lands.

The settled Penan, which is now the vast majority, live in longhouse communities and practice swidden agriculture, with rice and cassava as their main crops.<sup>157</sup> The Penan longhouse settlements are located in the areas they previously occupied as nomads.<sup>158</sup> Prior to settlement, the Penan practiced a range of customs in which they used and controlled land and the associated forest resources. Although they did not physically occupy their territories at all times, portions of territories temporarily abandoned were later reoccupied.<sup>159</sup>

<sup>150</sup> Ngidang, above n 112, 64.

<sup>151</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 250.

<sup>152</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 250.

<sup>153</sup> J. Peter Brosius, ‘Between Politics and Poetics: Narratives of Dispossession in Sarawak, East Malaysia’ in Aletta Biersack and James B. Greenburg (eds) *Reimagining Political Ecology* (2006) (‘Between Politics’) 281, 284. Although there are some important cultural differences between these groups, unless otherwise indicated, the discussion in this Part refers to both the Eastern and Western Penan.

<sup>154</sup> Brosius, *Between Politics*, above n 153, 284.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> J. Peter Brosius, ‘Local Knowledges, Global Claims: On the Significance of Indigenous Ecologies in Sarawak, East Malaysia’ in J Grim and L Sullivan (eds) *Indigenous Traditions and Ecology* (2001) (‘Local Knowledges’) 125, 130; Jayl Langub, ‘Briefing to Human Rights Commission of Malaysia on Various Issues Raised by the Penan of Seping, Plieran and Danum Rivers, and also the 5 Villages of Penan in Upper Belaga River’ in SUHAKAM (ed), *Penan in Ulu Belaga: Right to Land and Socio-Economic Development* (2007) 87, 93 (‘Briefing’).

<sup>158</sup> Langub, *Briefing*, above n 157, 90; Khoo Khay Jin, ‘Briefing on the Penan and the EIA for the Shin Yang Forest Plantation’ in SUHAKAM (ed), *Penan in Ulu Belaga: Right to Land and Socio-Economic Development* (2007) 99, 105-106; Dr. J. Peter Brosius, ‘Briefing on the Penans in Ulu Belaga’ in SUHAKAM (ed), *Penan in Ulu Belaga: Right to Land and Socio-Economic Development* (2007) 113, 117-118.

<sup>159</sup> Brosius, *Local Knowledges*, above n 157, 133.

### 1. Centrality of forest

Whether nomadic or settled, Eastern or Western, the resources of the forest, both plant and animal, are essential to the Penan way of life.<sup>160</sup> Plant products provide the Penan with a source of food and materials used in constructing boats and buildings and making baskets and mats.<sup>161</sup> The Penan sell rattan baskets and mats, which enables them to participate in the cash economy.<sup>162</sup> Sago palm trees provide the Penan with sago starch, the primary carbohydrate in their diet.<sup>163</sup> The Penan allow for regeneration of sago clumps by leaving fallow land formerly containing sago.<sup>164</sup> Penan also use the forest to hunt for pig, deer, primates, squirrels, and other small game.<sup>165</sup>

### 2. Community boundaries

Both Eastern and Western Penan view themselves as holding their territories pursuant to 'shared corporate estate[s] over which all members of a community have rights.'<sup>166</sup> The Penan hunt and gather in the areas they call *tana' pengurip*.<sup>167</sup> This term encompasses both the area where they live and engage in foraging activities.<sup>168</sup> The boundaries of the *tana' pengurip* follow natural features of the landscape, including streams, mountain ridges, and similar markers.<sup>169</sup> Where the territories of different groups overlap, the groups may agree to common use of an area.<sup>170</sup> The Eastern Penan assert their rights to a foraging area based on the status of the area as the group's ancestral land (*okoo' bu 'un*) or place of origin (*tana' pohoo'*).<sup>171</sup>

### 3. Management of and claims to resources

The Penan manage land within their territorial boundaries according to the practice of *molong*, which means to preserve or foster.<sup>172</sup> According to this tradition, which is based on sustainable harvesting methods, resources cared for or managed by the Penan are

<sup>160</sup> Langub, Briefing, above n 157 93; Brosius, Between Politics, above n 153, 288; SUHAKAM, 'SUHAKAM's Report' in SUHAKAM (ed), *Penan in Ulu Belaga: Right to Land and Socio-Economic Development* (2007) 7, 21.

<sup>161</sup> Langub, Briefing, above n 157, 93; Brosius, Between Politics, above n 153, 295.

<sup>162</sup> Langub, Briefing, *ibid.* Brosius, Between Politics, *ibid.*

<sup>163</sup> Brosius, *ibid.* 130.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> Jayl Langub, 'Native Customary Rights Land: Indigenous Perspectives' (Paper presented at the Malaysian Forest Dialogue "Challenges in Implementing and Financing Sustainable Forest Management", Kuala Lumpur, 22-23 October 2007) 6 ('Native Customary Rights').

<sup>168</sup> Langub, Native Customary Rights, above n 167, 6.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> Although Brosius argues that the *molong* tradition appears to have only a minimal influence on the Eastern Penan's management of resources, see Brosius, Local Knowledges above n 157, 132, other authors describe *molong* as a practice of both Western and Eastern Penan. Langub, Native Customary Rights, above n 167, 7 noted minor language differences between the Eastern and Western Penan, but explained that in socio-cultural terms, the groups 'are quite similar to one another'.

claimed by communities or individuals.<sup>173</sup> For example, an entire community may manage or *molong* an area of a watershed to ensure the resources are available for future harvest.<sup>174</sup> Likewise, individuals may *molong* specific clumps of sago or fruit trees, thereby establishing individual rights to stewardship over the resources.<sup>175</sup> The person who first claims the resource establishes rights of tenure.<sup>176</sup> Access by others to a resource subject to an individual claim requires permission from the steward.<sup>177</sup> Individual rights acquired pursuant to the *molong* custom may be inherited.<sup>178</sup> When a person moves away from the community, he or she loses these rights.<sup>179</sup> According to the *molong* tradition, young plants of sago or rattan are left to mature, while older plants are cut for immediate use.<sup>180</sup> The practice of *molong* among the Penan has been compared to the Iban tree tenure system.<sup>181</sup>

The *molong* tradition enables the community to maintain an inventory of resources in vast areas and conserve those resources for future use.<sup>182</sup> The *molong* system informs the overall land tenure customs of the Western Penan based on their ‘sense of belonging to a particular portion of landscape’, a belief ‘validated economically and historically by the management of resources in an area.’<sup>183</sup>

#### 4. Places on the landscape

In addition to identifying geographical boundaries and engaging in the *molong* tradition, it is a custom of the Western Penan to record their history at the places in their territories associated with significant events. Sometimes, physical evidence marks these places, as in the case of prior camps (*lamin*), burial sites, markers erected by colonial officers, and trails.<sup>184</sup> In other instances, however, an examination of the landscape does not reveal indications of Western Penan occupation. Nevertheless, ethnographic studies document the Western Penan custom of registering historical events on the land.<sup>185</sup>

The Western Penan carefully and extensively map their territories, especially with reference to rivers, but also by identifying other landforms such as ridges, trails, and other natural landmarks.<sup>186</sup> The Western Penan use over 2000 names to identify and map rivers and streams in their territories.<sup>187</sup>

<sup>173</sup> Brosius, Local Knowledges, above n 157, 131.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Langub, Briefing, above n 157, 92.

<sup>179</sup> Langub, Native Customary Rights, above n 167, 7.

<sup>180</sup> Langub, Briefing, above n 157, 92.

<sup>181</sup> Langub, Native Customary Rights, above n 167, 7.

<sup>182</sup> Brosius, Local Knowledges, above n 157, 131.

<sup>183</sup> Ibid 131-32.

<sup>184</sup> Ibid 134.

<sup>185</sup> Ibid.

<sup>186</sup> Brosius, Local Knowledges, above n 157, 134-37.

<sup>187</sup> Ibid 135.

Beyond the pragmatic need to facilitate navigation within their lands, the Western Penan practice of naming rivers and other natural landmarks is an essential aspect of their cultural traditions. Rivers are named for a tree or fruit located near its mouth or on its banks or for other natural features, such as a stone outcropping.<sup>188</sup> River names also refer to significant events, such as a successful hunt, the death of a hunting dog, or a productive fruit harvest.<sup>189</sup> The Western Penan name rivers to commemorate an individual's birth or a significant event in that individual's life.<sup>190</sup> People may also be named after rivers. In accordance with the prohibition on mentioning the dead by name, the Western Penan refer to a deceased person by the name of the river where they died and are buried.<sup>191</sup> The Penan explain that they have inherited the land from their ancestors, a claim they support by reference to the burial sites that populate the landscape.<sup>192</sup> The names of the rivers are also derived from historical events significant to the community as a whole.<sup>193</sup>

In addition to rivers, the Western Penan name other natural features within their territories, including mountain peaks, ridges, steep parts of and resting places along trails, and rock faces.<sup>194</sup> These places are connected by well-defined trails built and used by the Western Penan to travel throughout their territories.<sup>195</sup> While the Western Penan do not name the trails, they do name places along these trails, such as resting spots, dips in ridges, steep portions, and passages between rock faces.<sup>196</sup>

The effect of this linking of places within the landscape with people and historical events is that, for the Western Penan, the landscape is a record of their history.<sup>197</sup> The Penan's sense of the connection to the land is unique in that they 'speak . . . of a more general sense of belonging or of their land having been bestowed upon them by a higher power.'<sup>198</sup>

#### E. Conclusion

The land tenure customs of the Kelabit, Iban, and Penan are an integral part of their community structure and more generally, their unique historical, cultural, and religious traditions. The customs underpin the native occupation of their lands, their territorial domains and their connection to their ancestral lands. These customs, which have evolved over centuries, are well-established customary laws that govern relations among community members and between diverse communities. The importance of these customary laws, however, extends beyond the internal affairs of native individual and communities.

<sup>188</sup> J. Peter Brosius, 'River, Forest and Mountain The Penan Gang Landscape' (1986) 36 *Sarawak Museum Journal* 173, 175 ('River, Forest').

<sup>189</sup> Brosius, River, Forest, above n 188, 175.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> Brosius, Between Politics, above n 153, 298.

<sup>193</sup> Brosius, Local Knowledges, above n 157, 135-36.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.* 137.

<sup>197</sup> *Ibid.* 135.

<sup>198</sup> Brosius, Between Politics, above n 153, 298.

Furthermore, as noted above, although Part V focuses on the customs of the Kelabit, Iban and Penan communities, the issues facing native communities that are described in this Report are not isolated to those communities. Some or all of the obstacles to securing land rights identified in this Report are equally relevant to the circumstances of other native communities in Sarawak. As described below in Part VI, these customs, and the broader concept of native title, are recognised as part of Malaysian and Sarawak law





# VI

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## STATUTORY RECOGNITION OF NATIVE CUSTOMARY RIGHTS TO LAND

## VI. STATUTORY RECOGNITION OF NATIVE CUSTOMARY RIGHTS TO LAND

### A. Introduction

Native title under Malaysian law has been described as a *sui generis* right, based in statute, common law and native laws and customs. Courts must determine the nature of the right with reference to all three bodies of law, to give substance to what the courts have called a ‘complementary’ right.<sup>199</sup>

The *Sarawak Land Code 1958* (Cap 81) (*‘Land Code 1958’*)<sup>200</sup> is the primary statute relevant to native title in Sarawak. This Part VI provides a summary of the *Land Code 1958* and its predecessors. This Part also highlights those aspects of the *Land Code 1958* that undermine and are inconsistent with the other bodies of laws governing native title: the common law, native laws and customs, and the *Federal Constitution*.

### B. Sarawak Land Code 1958 (Cap 81)

#### 1. Land Classification

NCR may be exercised over land that falls within certain of the six land categories first introduced under the *Land (Classification) Ordinance 1948* (*‘Land Ordinance 1948’*). These categories include:

- (a) Mixed Zone Land (‘MZL’), which may be held by any citizen,<sup>201</sup>
- (b) Native Area Land (‘NAL’), which is land held by a native under registered title,
- (c) Native Communal Reserve (‘NR’), which is State land<sup>202</sup> declared by the Minister for use by a native community under a native system of personal law under s 6 of the *Land Code 1958*,<sup>203</sup>
- (d) Reserved Land (‘RL’), which is land (1) the Government reserves under s 38 of the *Land Code 1958* or prior law, (2) located within a National Park, Forest Reserve, Protected Forest, or Communal Forest, (3) occupied by the Federal or State Government without a document of title, or (4) ‘otherwise lawfully constituted or declared to be reserved land’,<sup>204</sup>

<sup>199</sup> Bulan, Native Title in Malaysia, above n 8, 64 (footnote omitted).

<sup>200</sup> Unless otherwise indicated, the ‘*Land Code 1958*’ refers to the original statute, as amended.

<sup>201</sup> MZL includes land (1) designated as MZL under certain previous laws, or (2) that becomes MZL under ss 4(1), 4(4)(a), or 38(5) of the *Land Code 1958*. *Land Code 1958*, s 2.

<sup>202</sup> State land includes ‘all land for which no document of title has been issued’ and titled land that has been forfeited, surrendered to or resumed by the government. *Land Code 1958*, s 2.

<sup>203</sup> *Land Code 1958*, s 6(1). A native system of personal law is defined as the customary law of a native community. *Land Code 1958*, s 2.

<sup>204</sup> RL is land (1) the Government reserves under s 38 of the *Land Code 1958* or prior law, (2) located within a National Park, Forest Reserve, Protected Forest, or Communal Forest, (3) occupied by the Federal or State

- (e) Native Customary Land, which is land on which native customary rights have been exercised,<sup>205</sup> and
- (f) Interior Area Land, which is land that does not fall under any of the other land categories.

These classifications continue in the *Land Code 1958*.

The most important land categories with respect to NCR are Native Customary Land ('NCL') and IAL. NCL includes land:

- (1) over which NCR 'have lawfully been created prior to the 1<sup>st</sup> day of January, 1958, and still subsist as such',
- (2) within a reserve under s 6 of the *Land Code 1958*, or
- (3) IAL over which NCR 'have lawfully been created pursuant to a permit under section 10' of the *Land Code 1958*.<sup>206</sup>

Interior Area Land ('IAL') is the residuary category and includes lands not within the definition of RL, NCL, NAL, or MZL.<sup>207</sup> IAL is significant because it is the only category of land over which natives can create new NCR pursuant to s 5 of the *Land Code 1958*.

The Minister is authorised to convert one category of land to another. For example, land currently categorised as NAL or IAL can be declared MZL, unalienated MZL declared NAL, and IAL can be declared NAL.<sup>208</sup>

## 2. Creation of NCR after 1957

Under s 5(1) of the *Land Code*, NCR can be created in IAL if occupation is established based on the clearing and occupation of virgin jungle, planting fruit trees on land, occupying cultivated land, using land for burial grounds or shrines, and using lands for rights of way. A residuary category, which allowed for the creation of NCR 'by any lawful method', was deleted from the law in 2000, but is yet to be gazetted.<sup>209</sup>

The *Land Code 1958* prohibits the creation of new NCR from 1 January 1958, except in accordance with the requirements of the statute, namely that a permit is acquired from the

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Government without a document of title, or (4) 'otherwise lawfully constituted or declared to be reserved land'. *Land Code 1958*, s 2.

<sup>205</sup> *Land Code 1958*, s 2.

<sup>206</sup> *Land Code 1958*, s 2.

<sup>207</sup> *Land Code 1958*, s 2.

<sup>208</sup> *Land Code 1958*, s 4(1)-(3).

<sup>209</sup> Bulan, PhD Thesis, above n 2 178.

Superintendent.<sup>210</sup> The occupation of NCL or RL other according to requirements of law is unlawful occupation.<sup>211</sup> Until the Government issues a title, natives in lawful occupation of State land are deemed licensees.<sup>212</sup> This was the general position explained by Digby J in *Keteng v Tua Kampong Suhaili*.<sup>213</sup>

In general, under s 8 of the *Land Code 1958*, non-natives may not deal or acquire rights over NAL, NCL, or IAL.<sup>214</sup> For instance in *Law Tanggie v Untong ak Gantang and Anor*, a claimant of Chinese (father) and Iban parentage was only able to receive NCR lands after he obtained a declaration by the native court that deemed him Iban.<sup>215</sup> In general, only natural persons are entitled to designation as native. Nevertheless, the *Land Code 1958* authorizes the incorporation of a non-native company as native, a status that entitles the company to hold native property, particularly in areas designated as ‘development areas’.<sup>216</sup>

### 3. Pre-existing NCR

The *Land Code 1958* recognizes NCR created prior to 1 January 1958.<sup>217</sup> Whether a native or native community has acquired or lost NCR prior to 1 January 1958 is determined under the law in effect on 31 December 1957.<sup>218</sup> The law in existence prior to 1 January 1958 NCR is the *Land (Classification) (Amendment) Ordinance 1955* (‘1955 Ordinance’).<sup>219</sup> Under that law, NCR can be created in IAL after 16 April 1955 if a permit is obtained from the District officer.<sup>220</sup>

The *1955 Ordinance* was the first prohibition on the creation of new NCR, but because it had no retrospective application, it did not affect existing NCR and any pre-existing rights of the natives prior to that date.<sup>221</sup> Prior to 16 April 1955, statutory law consistently reaffirmed, but did not otherwise limit, native title. In *Nor Nyawai II*, the Court of Appeal expressly held that ‘the Sarawak Land Code “does not abrogate whatever native customary rights that exist before the passing of that legislation.”’ However, natives are no

<sup>210</sup> *Land Code 1958*, s 5(1).

<sup>211</sup> *Land Code 1958*, s 10(2).

<sup>212</sup> *Land Code 1958*, s 5(2)(i). As noted below, *Nor Nyawai II* [2006] 1 MLJ 256, 269-270, holds that native title confers a property interest in and over land. Thus, contrary to the definition of proprietor in s 2, which excludes those holding land under a licence from the Government, natives holding their lands pursuant to a license do have a property interest in those lands.

<sup>213</sup> [1951] SCR 9.

<sup>214</sup> *Land Code 1958*, s 8(a).

<sup>215</sup> [1993] 2 MLJ 530, 543.

<sup>216</sup> One such company is the Land Consolidated Development Authority (LCDA), which was incorporated through the Land Consolidated Development Authority Ordinance 1984. Ramy Bulan, ‘Native Customary Land: The Trust as a Device for Land Development in Sarawak’ in Fadzilah Majid Cooke, ed., *State, Communities and Forests in Contemporary Borneo* (Asia-Pacific Environment Monograph 1, Australian National University, E Press (2006)) 49, 52 (‘Native Customary Land’). LCDA is one of the main vehicles for joint venture development of native NCL. Ibid.

<sup>217</sup> *Land Code 1958*, s 5(2)(ii).

<sup>218</sup> *Land Code 1958*, s 5(2)(ii).

<sup>219</sup> Bulan, PhD Thesis, above n 2, 178.

<sup>220</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 284.

<sup>221</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 284.

longer able to claim new territory without a permit under s 10 of that legislation'.<sup>222</sup> Therefore, NCR based in native law and custom and in existence prior to 16 April 1955 are recognised under the common law.<sup>223</sup>

A strict reading of s 5(2)(ii) and the *1955 Ordinance* gives rise to an anomalous situation with regard to NCR created between 1955 and 1 January 1958. In *Hamit Bin Matusin v Superintendent of Lands and Surveys and Anor*, the court appeared to resolve this issue by pronouncing 1 January 1958 as the date by which NCR must exist to come within the protection of s 5(2)(ii).<sup>224</sup>

#### 4. Amendments

In 1996, the *Land Code 1958* was amended to provide that a native claimant has the burden of proving the existence of customary rights. Those amendments also stipulated a presumption that the State owned land free and clear of NCR until such NCR are proved.<sup>225</sup> Furthermore, the occupation of land without a permit from the Superintendent does not confer any right on a native or native community, regardless of law or custom to the contrary.<sup>226</sup> In 2000, another amendment added a new term 'native rights', which are rights lawfully created under the *Land Code 1958*, rights and privileges over NR under s 6(1) of the *Land Code 1958*, and rights within a village reserve under s 7 of the *Land Code 1958*.<sup>227</sup>

#### 5. Termination of rights

Another major subject of amendment is the termination of rights. Under s 5(4) of the *Land Code 1958*, the Government of Sarawak may terminate NCR created under ss 5(1)-(2). Compensation must be paid for such termination, and upon termination, the land formerly subject to the rights is 'resumed by the Government'. This process of resumption, which includes resumption of land for a public purpose, is governed by ss 45-83. To fully understand the two sections, s 5(4) must be read with s 15(1) of the *Land Code 1958*, which provides that, where NCR have been created over State land, no alienation or use of such land for a public purpose may be made until all NCR over the land are surrendered, terminated, or compensation has been paid. Where the land is to be transferred pursuant to a deed of surrender, the Superintendent must provide notice to the community and examine and respond in writing to objections from individuals alleging they hold NCR over the land.<sup>228</sup>

<sup>222</sup> [2006] 1 MLJ 256, 270.

<sup>223</sup> Prior to 16 April 1955, statutory law consistently reaffirmed native title. *Nor Nyawai I* [2001] 6 MLJ 241, 284. In any case, the *Land Code 1958* is not an exhaustive body of law that addresses all aspects of land tenure in Sarawak. This is especially true in light of s 5(2) of the *Land Code 1958*, which makes no attempt to define the parameters of native customary rights in existence prior to 1 January 1958.

<sup>224</sup> [2001] 3 MLJ 535, 541.

<sup>225</sup> Bulan, PhD Thesis, above n 2, 189.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Land Code 1958*, s 7A(1).

<sup>228</sup> *Land Code 1958*, s 15(2)(a)-(c).

The State of Sarawak, through the Minister, may declare that NCL<sup>229</sup> is needed for one of the purposes described in s 46 of the *Land Code 1958*.<sup>230</sup> The declaration must describe the public purpose for which the land is required, state that any NCR to the land acquired under ss 5-7 of the *Land Code 1958* are deemed terminated as of the date the declaration is published, and state that compensation claims for such termination of rights may be pursued under s 49 of the *Land Code 1958*.<sup>231</sup>

#### 6. Registration of native rights over untitled land

Section 7A(2) of the *Land Code 1958* establishes the Register of Native Rights. As of the date of this Report, the administrative infrastructure necessary to implement the Register of Native Rights has yet to be established. Rights created under ss 5 and 6(1) of the *Land Code 1958* may be registered and the person registering the rights is deemed the lawful owner of the land until the High Court issues a contrary order.<sup>232</sup> In contrast, s 132(1) of the *Land Code 1958* provides that a person who registers an interest in land in the Register required by s 112 holds the interest subject to other interests registered on the Register, but free of all other interests save certain categories delineated in the statute.

Thus, the effect of registration on the Register of Native Rights is simply to state a claim to rights, which can subsequently be challenged in court. In contrast, registration on the Register required by s 112 has the legal effect of protecting the registered interest against all but a narrow category of competing interests.

#### 7. Tension between customary law and *Land Code 1958*

The process leading up to the *Land Ordinance 1948* has been criticised for failing to consider whether reform of the Sarawak land law based on western conceptions of property was appropriate.<sup>233</sup> Furthermore, the *Land Ordinance 1948* fails to account for the actual practices regarding land that were in existence at the time of the adoption of the legislation.<sup>234</sup>

Similar criticisms have been directed against the *Land Code 1958*, which purports to establish a Torrens system of registered title, but fails to provide any process for registering interests based on customary rights.<sup>235</sup> In addition, the *Land Code 1958* provides that persons claiming ownership interests in land must show they have a title document, but if no document is available, the law deems that the land belongs to the

<sup>229</sup> As noted earlier, NCL includes land within a reserve under s 6 of the *Land Code 1958*, IAL over which NCR have been created pursuant to a permit under s 10 of the *Land Code 1958*, and land over which NCR were created prior to 1 January 1958. Thus, in comparison to the lands potentially subject to termination under s 5(4), a broader category of lands may be terminated under s 46.

<sup>230</sup> *Land Code 1958*, s 48(1).

<sup>231</sup> *Land Code 1958*, ss 48(1), 48(2)(a) and 48(2)(b).

<sup>232</sup> *Land Code 1958*, s 7A(1).

<sup>233</sup> Bulan, PhD Thesis, above n 2, 174.

<sup>234</sup> *Ibid.*

<sup>235</sup> As noted earlier, s 7A(2) of the *Land Code 1958* establishes the Register of Native Rights for new NCR created pursuant to s 5, but as of the date of this Report, Sarawak has not implemented this provision.



state.<sup>236</sup> Finally, the *Land Code 1958* provides a system for delineating boundaries for titled land, with the government providing assurances for such boundaries and title, but fails to establish a comparable system for NCL.<sup>237</sup>

## 8. Challenges

The *Land Code 1958* has created several challenges for native communities seeking to secure their rights over traditional lands. In general, these challenges relate to the statute's failure to recognize traditional forms of occupation according to native customary laws, the non issuance of documentary titles to lands over which natives exercise NCR, and the Government's broad authority to extinguish NCR.

### a. Failure to recognize traditional forms of occupation

Section 5(2) of the *Land Code 1958* defines occupation for purposes of creating NCR as of 1 January 1958 in a limited manner that fails to fully account for the traditional means by which natives have occupied lands. As noted above in Part V, a central feature of the customary laws of the Kelabit, Iban, and Penan is the maintenance of uncultivated jungle within their territories, which they use for hunting, gathering, to record their history and to commemorate significant events and people. Some of these native customs have been recognised by Malaysian courts. In *Nor Nyawai II*, the Court of Appeal acknowledged the Iban tradition of '*pulau or pulau galau* which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce.'<sup>238</sup> In *Adong I*, the Orang Asli used the claimed native title lands for hunting and gathering activities:

[T]he aboriginal people were given the freedom to roam about these lands and harvest the fruits of the jungle. Some of these lands have been gazetted as forest reserves. The plaintiffs, however, continue to live in and/or depend upon this unalienated land. It was not denied that some of them had lived on these lands, and all of them still consider the jungle as their domain to hunt and extract the produce of the jungle just like their forefathers had done.<sup>239</sup>

Section 5(2) sets out a narrow category of occupation, primarily by settlement or cultivation. Although a residual category authorizing the creation of NCR 'by any lawful method' captured other methods of occupation based on native customs, that provision was deleted in 2000, purportedly for 'the sake of legal certainty and clarity'.<sup>240</sup>

The preference for occupation through permanent settlement or cultivation of lands has historical roots. During the period of colonization, Europeans sought to justify their acquisition of lands already occupied by indigenous people based on the rationale that

<sup>236</sup> See *Land Code 1958*, s 2 (defining state land as 'all land for which no document of title has been issued' and titled land that has been forfeited, surrendered to or resumed by the government).

<sup>237</sup> See *Land Code 1958* ss 104, 105, 106, 108.

<sup>238</sup> [2006] 1 MLJ 256, 263.

<sup>239</sup> [1997] 1 MLJ 418, 430. Although *Sagong II* and *Nor Nyawai II* purportedly refused to recognize the full beneficial ownership of native communities in lands used for hunting and gathering, *Adong I* clearly holds that the rights to hunt and gather on native title lands constitutes a property right compensable under art 13 of the *Federal Constitution*.

<sup>240</sup> Bulan, Native Customary Land, above n 216, 49.

‘Europeans had a right to bring lands into production if they were left uncultivated by indigenous inhabitants.’<sup>241</sup>

This sense of entitlement had its origins in the elevation of European conceptions of beneficial uses of land, which favored agricultural endeavors, over hunting, fishing and gathering, activities viewed by Europeans as the underutilization of valuable agricultural land. More fundamentally, the Europeans denigration of native land tenure practices departing from the agricultural ideal stemmed from the characterization of indigenous people as backwards, uncivilized, and in need of the Christianizing influence of Europe.<sup>242</sup> According to this view, the failure of indigenous people to cultivate land relegated them to a lower status on the scale of development, thereby justifying European intervention, purportedly, to correct the deficiency.

While developments in the law have rejected that rationale elsewhere,<sup>243</sup> it appears that, the legacy of bias against occupation of land through hunting, fishing and gathering activities is evident in the s 5(2) of the *Land Code 1958*. It is well to note that in *Amodu Tijani*, the Privy Council warned courts to take special precautions so as not to limit common law recognition of indigenous land rights to interests known to English property law. Recognition of native laws and customs are critical to the determination of native occupation for purposes of establishing native title. And pursuant to those customs, natives have historically accessed lands over which they exercise hunting, fishing, and gathering rights. Any prejudice against land tenure practices that fail to conform with western conceptions of beneficial land use should have no place in modern law.

b. Documenting and protecting NCR

Two provisions of the *Land Code 1958* anticipate the issuance of documentary title to natives with respect to lands over which they exercise NCR. Section 5(2) provides that ‘until a document of title has been issued’ natives lawfully in occupation are deemed to hold the land as licensees. Section 18(1) authorizes the Director to issue grants in perpetuity over any lands occupied and used by a native ‘in accordance with rights acquired by customary tenure amounting to ownership’.

<sup>241</sup> *Mabo (No 2)* 107 ALR 1, 21 (Brennan J). The bias against nomadic cultures is also reflected in the defendant’s argument in *Johnson v. M’Intosh*, 21 US 543 (1823), 1823 US LEXIS 293, 32-35.

On the part of the defendants, it was insisted, that the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations.

<sup>242</sup> *Mabo (No 2)* 107 ALR 1, 21 (Brennan J).

<sup>243</sup> As early as 1835, the U.S. Supreme Court acknowledged that nomadic Indian tribes occupied land in a manner that established rights recognised under the common law: ‘their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.’ *Mitchel v US*, 34 US 711, 746 (1835). See also *Mabo (No 2)* 107 ALR 1, 189 (Toohey J) ‘It is clear, however, that a nomadic lifestyle is not inconsistent with occupancy.’..

Prior to issuing titles reflecting native interests in their lands, the State must first survey and map those lands. Sarawak has identified lack of funding as the primary reason it has failed to survey NCL and issue titles.<sup>244</sup> Despite the lack of surveys, the Government has acknowledged 1.6 million hectares of NCL in Sarawak.<sup>245</sup> Even if the State of Sarawak does not issue a title document, it could still issue a permit to natives pursuant to s 10 of the *Land Code 1958*, which as noted earlier, is a mandatory requirement for establishing NCR over IAL.<sup>246</sup> However, a 1964 policy of the Sarawak Government, which it continues to follow, effectively prohibits the issuance of these permits to individual natives.<sup>247</sup> Furthermore, as noted above, although s 7A(2) of the *Land Code 1958* requires Sarawak to establish a Register of Native Rights, as of the date of this Report, no such register has been established.

Even without surveys or the issuance of individual title reflecting native rights, the *Land Code 1958* authorizes the issuance of leases to parties who may not be native. Under s 18A of the *Land Code 1958*, the Superintendent may issue a provisional lease to ‘a body corporate’ for up to 60 years over ‘unalienated State land, over which a native . . . acquired ownership thereof by exercise of native customary rights under section 5’ where such land is within a Development Area or a Sarawak Land Development Area.

The Superintendent may lease contiguous areas of native and state land after the land is combined into one parcel ‘for the purpose of granting a single document of title to the body corporate.’<sup>248</sup> A body corporate for this purpose is defined as a corporation that has been deemed a native pursuant to s 9(1)(d) ‘for the purpose of or relating to a dealing under this Code, in or over Native Area Land.’<sup>249</sup> Once the lease expires, the native whose land had been subject to the lease can request that the Superintendent to issue a grant over the land or any part of land.<sup>250</sup> The Superintendent has the discretion, subject to the Director’s approval, to issue the grant.<sup>251</sup>

Ironically, although s 18A recognizes natives as the owners of the land prior to the issuance of the lease, they are not entitled to receive a title to their land until after the lease expires. In the meantime, another entity may be granted interests in the land, which are represented in a title (i.e. lease) issued by the state. In some instances, the uncertainty

<sup>244</sup> Baru Bian, Advocate & Solicitor, High Court of Sabah & Sarawak, ‘Native Customary Rights Over Land in Sarawak-A Case Study’ (Paper presented at the Malaysian Forest Dialogue “Challenges in Implementing and Financing Sustainable Forest Management”, Kuala Lumpur, 22-23 October 2007) 6-7. This author suggests that *Nor Nyawai I* may have identified the true source of Sarawak’s reluctance to survey native lands and issue titles: ‘In so far as the enquiry and record of the limits of the customary rights are concerned, these were not carried out because ‘according to Ansin (in Sibul) the Land Office was afraid there would be no land left to alienate if the demarcations were complete.’ [2001] 6 MLJ 241, 275.

<sup>245</sup> Bian, above n 244, 7.

<sup>246</sup> *Land Code 1958*, s 5(1).

<sup>247</sup> Z.K. Zainie, ‘Native Customary Land: Policies and Legislation’ (Paper presented at a seminar on ‘Native Customary Land’, Kuching, 29 September-3 October, 1994).

<sup>248</sup> *Land Code 1958*, s 18A(2).

<sup>249</sup> *Land Code 1958*, s 18A(4). The reference to Native Area Land suggests that the only land for which the Superintendent may issue a lease under s 18A is Native Area Land.

<sup>250</sup> *Land Code 1958*, s 18A(3).

<sup>251</sup> *Land Code 1958*, s 18A(3).

surrounding the title of the native landowners could result in a lessee gaining greater rights over the land.<sup>252</sup>

Further adding to the difficulty created by the lack of documentary title is the 1996 amendment to the *Land Code 1958*, which provides that the burden of proving the existence of customary rights is on the native claimant and the occupation of land without a permit from the Superintendent confers no right on a native or native community, regardless of law or custom to the contrary.<sup>253</sup> The 1996 amendment also creates a presumption that the State owns land free and clear of NCR until NCR are established.<sup>254</sup> This presumption must be balanced by the mandate of s 15(1) of the *Land Code 1958*, which requires that lands subject to NCR ‘shall not be used . . . for a public purpose until all native customary rights have been surrendered or terminated or provision for compensating the persons entitled thereto have been made’.

c. Definition of state lands

Section 2 of the *Land Code 1958* defines State land as ‘all land for which no document of title has been issued’. This definition implicitly suggests that lands held by natives under native title are State lands. The Federal Court in *Madeli III*, however, held that upon acquisition of sovereignty, the Crown (and its successors, which include Sarawak) obtained radical, but not absolute beneficial ownership of land.<sup>255</sup> At most, Sarawak holds radical title to lands over which natives exercise NCR.<sup>256</sup> That provision cannot be taken to extinguish native title. As explained below in Part VIII, the courts in Australia and South Africa, in interpreting statutory provisions similar to s 2 of the Code, have rejected the construction that such a statutory provision extinguish native title. The court in *Mabo (No 2)* had said that such a construction ‘would be truly barbarian.’<sup>257</sup>

d. Extinguishment of NCR

Sarawak’s statutory authority to extinguish NCR has a significant impact on native communities. The customs summarized in Part V demonstrate the central importance of land to natives as the essence of their community and spiritual life and the key input in their economies. Any termination of land rights without adequate compensation could cause irretrievable damage to native communities.

The only statutory restraints on the extinguishment authority require that compensation be paid to the native owners and the Director provide notice in the *Gazette*, on the notice boards of the Superintendent and District Officer for the area where the land is located, and in the case of NCL, in a newspaper circulating in Sarawak.<sup>258</sup> This method of

<sup>252</sup> Bulan, Native Customary Land, above n 216, 60 -61. If the native owners are not provided with adequate compensation for the lease of their land, then s 18A violates s 13(2) of the *Federal Constitution*.

<sup>253</sup> *Land Code (Amendment) Ordinance 1996* (Cap A42).

<sup>254</sup> *Land Code 1958*, s 5(3).

<sup>255</sup> [8/10/07] Civil Appeal No.01-1-2006 (Q) (Unreported) 26.

<sup>256</sup> [8/10/07] Civil Appeal No.01-1-2006 (Q) (Unreported) 26.

<sup>257</sup> *Mabo (No 2)* (1992) 107 ALR 1, 48 (Brennan J).

<sup>258</sup> *Land Code 1958* s 48(2)(c). Section 15(2)(b) also requires that before signing a deed of surrender, the Superintendent must post a notice in the District Office and ‘other Government places in the neighbourhood

providing notice is frequently ineffective, as natives residing on IAL do not regularly visit the offices of the Superintendent or District Officer. In most circumstances, by the time actual notice is received, the process of termination is complete. Furthermore, many natives are illiterate. Thus, even assuming written notices are posted in areas they regularly access, without additional assistance, there is no guarantee that they will receive actual notice of the termination.

The Malaysian courts have held that native title constitutes a property right in and to the land and therefore, constitutes more than a license to occupy.<sup>259</sup> Its status as a full beneficial ownership interest in land is inconsistent with the ability of Sarawak to unilaterally extinguish that interest. As Dean and Gaudron JJ said in *Mabo (No.2)*, such a broad power implies that native title is ‘no more than a permissive occupancy which ..] [S [the state] was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for their traditional purposes.’<sup>260</sup> If this implication were accepted, native titleholders would be deprived of any security ‘since they would be liable to be dispossessed at the whim of the Executive.’<sup>261</sup> Given the importance of land to the continued economic, cultural and spiritual existence of native communities, it is essential that the power to extinguish native title be subject to proper consultation with the affected community. The absence of meaningful restraints on Sarawak’s power to extinguish NCR exacerbates the existing vulnerabilities and hurdles native communities face with regard to establishing and protecting NCR.

### C. Conclusion

The Sarawak *Land Code 1958* establishes the process natives must follow to create NCR over IAL after 1957. NCRs created before 1 January 1958 are recognised under the laws in force before that date. The *Land Code 1958* sets out the procedures Sarawak must follow to terminate NCRs.

The statutory means through which natives could obtain documentary proof of ownership of land over which they exercise NCR have proven inadequate. Issuance of s 10 permits and the establishment of the Register of Native Title have been slow in coming and the lack of government funding for surveys precludes the possibility of title under s 18. At the same time, the state has issued provisional leases to non-natives over lands on which natives claim to exercise NCR or in areas they consider as their ancestral lands.

Title issues aside, the *Land Code 1958* imposes on natives an onerous burden in establishing ownership of lands over which they exercise NCR. Section 5(2) fails to fully recognise the methods of native occupation that arise out of native customs and traditions, despite Malaysian common law expressly recognising native law and customs as the

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where the land is located’ inviting objections to the intended surrender of NCR. The Superintendent must also serve a copy of the notice on the Headman of the area where the land is located. Objectors are given 21 days from the date of the posting in the *Gazette* to submit an objection in writing to the Superintendent. Presumably, the reference to notice in the *Gazette* is the notice required by s 48(2)(c).

<sup>259</sup> *Sagong I* [2002] 2 MLJ 591, 615.

<sup>260</sup> *Mabo (No 2)* (1992) 107 ALR 1, 90 (Dean and Gaudron JJ).

<sup>261</sup> *Mabo (No 2)* (1992) 107 ALR 1, 90 (Dean and Gaudron JJ).





# VII

COMMON LAW  
RECOGNITION OF NATIVE  
TITLE: THE MALAYSIAN  
CASES

## VII. COMMON LAW RECOGNITION OF NATIVE TITLE: THE MALAYSIAN CASES

Part VI focused on the impact of the *Land Code 1958* on NCR and highlighted the problems created by that statute. As noted earlier, statutes are only one part of the legal framework that governs the rights and interests of natives in their ancestral territories. The judge-made common law, native laws and customs, and Constitutional law also inform the content of native title. This Part VII examines common law recognition of NCR.

### A. Review of leading cases

The following summary examines the decisions in *Adong*, *Sagong*, *Nor Nyawai*, and the Federal Court's recent decision *Madeli*. These authorities constitute the leading cases on native title under the Malaysian common law.

#### 1. *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*

In *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* at the High Court ('*Adong I*'), 262 the 52 plaintiffs were representatives and heads of Orang Asli families living around Sungei Linggui catchment area in the state of Johor. The defendants were the State of Johor and its Director of Lands and Mines. The defendants had acquired a total of 53,273 acres of land for the purpose of constructing a dam to supply water to Johor and the Republic of Singapore. The plaintiffs claimed the compensation that Singapore had paid to Johor on the grounds that the lands within the vicinity of Sungei Linggui were their traditional and ancestral lands upon which they depended for their livelihood. They claimed rights to the lands both under common law and statute, as well as property rights under the Federal Constitution.

The court accepted into evidence various historical and judicial documents, which established that the plaintiffs had inhabited or occupied the area since time immemorial. The learned judge surveyed the state of native title law in various common law jurisdictions from North America, Africa and India,<sup>263</sup> and finally referred to the Australian High Court's decision in *Mabo (No 2)*.<sup>264</sup> In a decision later affirmed by the Court of Appeal and the Federal Court, Mokhtar Sidin JCA determined that the Orang Asli have a common law right to their ancestral land based on a continuous and unbroken occupation and enjoyment of rights to the land since time immemorial.

<sup>262</sup> *Adong I* [1997] 1 MLJ 418.

<sup>263</sup> For example, the court referred to *Worcester*, 31 US 515 (1832), *Re Southern Rhodesia* [1918] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, *Calder* [1973] SCR 313, and *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1980) 107 DLR (3d) 513.

<sup>264</sup> (1992) 107 CLR 1. Mokhtar Sidin JCA quotes at length from *Pareroutja & Ors v Tickner* (1993) 117 ALR 206, where the main findings of the High Court of Australia in *Mabo (No 2)* are summarised. *Adong I* [1997] 1 MLJ 418, 429.

In reaching this conclusion, the court noted that the Malays had traditionally occupied the coastal areas, while the Orang Asli lived in the interior areas of Peninsular Malaysia, in some cases, exclusively and indisputably occupying those areas. In his decision, Mokhtar Sidin JCA noted:

Before the introduction of the Torrens land system, these lands were unclaimed land in the present sense but were ‘kawasan saka’ to the aboriginal people. On the introduction of the Torrens system, all the kawasan saka became state land but the aboriginal people were given the freedom to roam about these lands and harvest the fruits of the jungle. Some of these lands have been gazetted as forest reserves. The plaintiffs, however, continue to live in and/or depend upon this unalienated land. It was not denied that some of them had lived on these lands, and all of them still consider the jungle as their domain to hunt and extract the produce of the jungle just like their forefathers had done.

My view is that, and I get support from the decision of Calder’s case and Mabo’s case, the aboriginal peoples’ right over the land 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. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in the Calder case at p 156 where His Lordship said the rights . . . include ‘. . . the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished . . . .’ I would agree with this ratio and rule that in Malaysia the aborigines’ common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers. (emphasis added)<sup>265</sup>

In further explication of the term native title, Mokhtar Sidin JCA said that, although in the general sense, title denotes a document of title, native title consists not of a document of title, but a right acquired in law.<sup>266</sup> The court gave a wide interpretation to proprietary rights under the *Federal Constitution*, and held that the plaintiffs’ rights were proprietary rights protected under art 13. Their right was, however, a right to the produce of, but not a right to, the land. Thus, the holders of the title had no right to convey, lease out or rent the land. Nonetheless, deprivation of the rights by the defendants without compensation was unlawful.

In *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* (‘*Adong II*’), the Court of Appeal agreed entirely with the views expressed by the High Court, stating that ‘[t]hose views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect’.<sup>267</sup> *Adong* was soon followed in *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*, where the principles in *Adong* were reiterated and other issues clarified.

<sup>265</sup> *Adong I* [1997] 1 MLJ 418, 430.

<sup>266</sup> *Adong I* [1997] 1 MLJ 418, 428.

<sup>267</sup> *Adong II* [1998] 2 MLJ 158, 162 (Gopal Sri Ram JCA). The Federal Court issued a decision awarding interest on the compensation awarded to the respondents.

2. *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*

In *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* ('*Sagong I*'), the plaintiffs were Orang Asli families of the Temuan tribe evicted from a strip of 38,477 acres of land running through their gazetted aboriginal reserve, as well as other lands they customarily occupied.<sup>268</sup> The land is situated at Kampong Bukit Tampoi, Dengkil, Selangor and is classified as an aboriginal area or aboriginal inhabited place. In March 1996, the land was acquired for the purpose of the construction of a portion of a highway to the Kuala Lumpur International Airport. The Selangor State Government, the acquiring body, was the first defendant. The second defendant, United Engineers (M) Bhd, was the contractor engaged to construct the highway. The third defendant, Lembaga Lebuhraya Malaysia, supervised and executed the design construction and maintenance of the highway, while the fourth defendant, the Federal Government, was the decision maker in the construction of the highway.

The plaintiffs based their claims on rights under common law, statute and the Federal Constitution. At common law, they claimed native title and usufructuary rights over the land based on customs. The land was customary and ancestral land occupied by them and their forefathers for generations; hence, they had customary and proprietary rights in and over the land. Under statutory law, they claimed rights under the *Aboriginal Peoples Act 1954* ('*APA 1954*'). Under the *Federal Constitution*, they claimed proprietary rights in the land and alleged that the State of Selangor breached its fiduciary duty.

The court held that the lands were customary and ancestral land belonging to the Temuan based not only on present occupation, but also a traditional connection that had existed for generations. The lands had been continuously occupied and maintained by the plaintiffs to the exclusion of others in pursuance of their culture, and inherited by them from generation to generation in accordance with their customs and thus fell within the meaning of 'land occupied under customary right' within the meaning of the *Land Acquisition Act 1960*. The *APA 1954* did not extinguish the common law rights, and therefore the eviction of the plaintiffs from their lands was unlawful. The first and second defendants were thus liable in trespass against the possession of the land by the plaintiff.

The court recounted evidence presented on a wide range of cultural practices which it characterised as essential practices on the land, such as the customs relating to land tenure, burial practices, religion, language, place names based on the Temuan spoken language and a system of inheritance. The court concluded that the plaintiffs belonged to an organised society, followed an aboriginal way of life, practised their own customs and beliefs, and possessed their own language, which they used to the present day.

Defendants adduced evidence to suggest that the plaintiff's cultural life had been so altered by modernisation that they should no longer be considered traditional Temuan. These included, for instance, the fact that some or all of the plaintiffs or members of the Temuan: (1) no longer depended on the land to forage for their livelihood in accordance with their tradition; (2) cultivated the lands with non-traditional crops such as palm oil;

<sup>268</sup> *Sagong I* [2002] 2 MLJ 591, 597.

(3) in addition to Temuan, spoke other languages; (4) had embraced other religions and/or married outsiders; and (5) worked outside the aboriginal reserves or inhabited areas prior to and after acquisition.

The court held that these facts ‘do not change their origin’ or their aboriginal identity.<sup>269</sup> Under s 3(2) of the APA 1954, conversion to another religion did not affect Orang Asli ethnic identity, neither did election of a leader to the JKKK (the Committee For Village Security and Development) constitute an abandonment of *adat*. That committee was established by the government for administrative purposes only. This had not changed their cultural practices of having a ‘Balai Adat’ as the custodian of their *adat*, neither did it change their identity as Temuan.

The *Sagong* decisions are significant because they established that:

- Oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with land are admissible, within the confines of the *Evidence Act*; <sup>270</sup>
- The Temuan held a proprietary and full beneficial interest in and to the land, albeit only to areas of settlement and not to the areas used as foraging lands; <sup>271</sup>
- The *APA 1954* does not extinguish the rights enjoyed by the aboriginal peoples under the common law and in order to determine the extent of the full rights, the common law and the statute had to be looked at ‘conjunctively’, for both rights were ‘complementary’; <sup>272</sup> and
- The Governments of Selangor and Malaysia owed fiduciary duties and had breached those duties towards the plaintiffs. <sup>273</sup>

### 3. Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors

Another case that broadened the concept of native customary rights is *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* (*‘Nor Nyawai I’*).<sup>274</sup> In *Nor Nyawai I*, the plaintiffs were residents of Rumah Luang and Rumah Nor, two longhouses located along the Sekabai River in Bintulu, Sarawak. They claimed that the defendant timber companies had trespassed and damaged their ancestral land. The Bintulu Superintendent of Lands and Survey, the third defendant, had issued a provisional lease to the first defendant, Borneo Pulp Plantations Sdn Bhd, covering the disputed land. The first defendant then subleased the land to the second defendant, Borneo Pulp & Paper Sdn Bhd, the contractor company responsible for clearing the land for a tree plantation.

<sup>269</sup> *Sagong I* [2002] 2 MLJ 591, 607.

<sup>270</sup> *Sagong I* [2002] 2 MLJ 591, 623-24.

<sup>271</sup> *Sagong I* [2002] 2 MLJ 591, 613; *Sagong II* [2005] 6 MLJ 289, 308.

<sup>272</sup> *Sagong I* [2002] 2 MLJ 591, 616.

<sup>273</sup> *Sagong I* [2002] 2 MLJ 591, 619; *Sagong II* [2005] 6 MLJ 289, 312.

<sup>274</sup> *Nor Nyawai I* [2001] 6 MLJ 241.

The plaintiffs did not hold documentary title to the land. Their claim rested on their exclusive use and occupation of the land under a customary system of territorial control. More particularly, they claimed that under Iban custom, they had acquired native customary rights to lands that they regarded as *pemakai menoa*, part of which had been encroached upon by the defendants. The plaintiffs argued that their rights to native customary lands were protected under the common law and constituted statutory rights recognised by the Land Code 1958 and its predecessors.

The High Court held that the disputed area fell within the boundaries of the longhouse, occupied and accessed by the plaintiffs' ancestors for hunting, fishing and collection of forest produce in exercise of NCR. The High Court further held that this right was passed down through the generations. Each claimant's rights arose by virtue of being a member of a community in lawful occupation and possession of the claimed lands. Ian Chin J held that the customs presently practised were the same customs practised by the plaintiffs' ancestors. Evidence of present occupation was, the court held, proof of past Iban occupation of the land. Ian Chin J made references to other customary rights of the Iban. Beyond the rights to clear virgin jungle for cultivation, which formed *tanah umai* within the *pemakai menoa*, they could access the lands for hunting, fishing and collection of forest produce.

The court chronicled the extensive history of the regulation of customary land use and occupation, starting with the Rajah's Orders from 1863, 1875, 1899, 1921, 1931, the subsequent *Land Settlement Rules 1934*, the *Land (Classification) Ordinance 1948* and the *Land Code 1958*. Fishing rights of the natives were clearly recognised by the Brooke government.<sup>275</sup> Hunting in the jungle was also acknowledged as a customary right of the Dayak.<sup>276</sup> The right to collect jungle produce was also preserved by early orders of the Rajah.<sup>277</sup> References were also made to other legislation, including the *Native Courts Ordinance of 1955* and its successor in 1992. The High Court concluded that the 'pre-existing rights' had not been extinguished by the legislation.<sup>278</sup>

<sup>275</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 265. See the *Tuba Fishing Order 1900* and the *Tuba Fishing Ordinance 1949*. Under Malaysian law, the *Fisheries Act 1985*, which applies in Sarawak through the *Fisheries (Adoption) Ordinance 1994*, and the Sarawak Inland Fisheries Rule 1995 contain no prohibition against natives with regard to fishing in any river in exercise of their native customary rights. In general, the rules only forbid the use of certain equipment and devices. The Resident may grant an exception to the prohibition on fishing certain species.

<sup>276</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 265. The orders and ordinances existed only to regulate or modify that right. In 1884, the *Pig Traps Order* prohibited the setting of pig and deer traps in the jungle. This order was modified in 1924 by the *Pig and Deer Traps Ordinance* to allow the setting up of traps in or on the boundaries of rice fields or cultivated gardens.

<sup>277</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 265-66. Order XIV 1921, rule 11, for instance, allowed for removal of any timber or other forest produce required for a person's own use and not for sale, exchange or profit. That right was protected under the Forest Ordinance 1934 s 55(1) and, although restrictions were imposed by way of the *Forest Rules 1947*, the underlying protection remains. The *Forest Ordinance 1934* was replaced by the *Forest Ordinance 1953*, but s 65(1) retained the same right. Similarly, the *Forest Rules of 1954* did not abolish the native customary right of taking forest produce, but only prohibited the felling of certain trees or injuring of trees for the purpose of collection of fruits and damar. These rights are retained as 'pre-existing rights and privileges' of natives.

<sup>278</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 284.



Furthermore, the High Court noted the Brooke administration's regular acknowledgement of the existence and importance of customary laws, referring to them as "the indefeasible rights of the Aborigines".<sup>279</sup> The High Court also noted that 'James Brooke was "acutely aware of the 'prior presence of the native communities, whose own laws in relation to ownership and development have been consistently honoured"''.<sup>280</sup> Native customary law existed and operated side by side with the Orders of the Rajah. Those orders explicitly recognized and referred to matters of *temuda*, *pulau* and *pemakai menoa*. To the extent that the natives could show they exercised jurisdiction over a certain area at the time of acquisition of sovereignty, first by the Brookes, the British colonial government and then Malaysia, they were entitled to a form of native title at common law. Citing the decisions in *Mabo (No. 2)*, *The Wik Peoples v The State Of Queensland And Ors* ('*Wik Peoples*')<sup>281</sup> and *Adong*, the court held that the common law respected the pre-existing rights under native law and custom. The court declared that 'native customary rights are similar rights to those under native title of the Australian Aborigines . . . enforceable as common law rights.'<sup>282</sup> Extinguishment of this title could only occur as a result of 'clear and unambiguous words' of the legislature.<sup>283</sup>

Despite increasingly comprehensive regulatory legislation, the court found that the government had not indicated a clear intention to eliminate customary rights. Ian Chin J found that the 'native customary rights of an Iban to do things associated with the terms *temuda*, *pulau* and *pemakai menoa* have not been abolished' but survived through the Brooke orders and ordinances of the colonial period up to the present.<sup>284</sup>

In *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another* ('*Nor Nyawai II*'), the Court of Appeal overturned the High Court's ruling on the grounds that there was insufficient evidence to show occupation.<sup>285</sup> The Court of Appeal held that the trial judge did not take into account the unchallenged testimony of one Sapit, who testified that no *temuda* existed in the disputed area. The Court of Appeal found that the trial court had relied upon 'self-serving testimonies by some of the respondents which carry little or no weight in the absence of some other credible corroborative evidence' regarding whether there was *pulau* in the disputed area.<sup>286</sup> Since the plaintiffs' burden of proof required they demonstrate that, on a balance of the probabilities, occupation had been established, it appears that Ian Chin J's weighing of the evidence before him was made on that basis. With respect, the credibility of the witnesses and the weight given to the evidence of the witnesses before him must be a matter that is within the power of the trial judge to decide.

The trial judge's decision on occupation of the disputed land was based on evidence adduced that the area in question was the *pemakai menoa* of the plaintiffs. The Court of

<sup>279</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 267.

<sup>280</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 267.

<sup>281</sup> *Wik Peoples* [1996–1997] 187 CLJ 1.

<sup>282</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 251.

<sup>283</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 245.

<sup>284</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 267.

<sup>285</sup> *Nor Nyawai II* [2006] 1 MLJ 256.

<sup>286</sup> *Nor Nyawai II* [2006] 1 MLJ 256, 272.

Appeal focused on whether the plaintiffs occupied the land according to the custom of *temuda*, thereby emphasising cultivation of the land over other uses and modifying the basis on which the decision was made.

The Court of Appeal began its analysis by noting that the doctrine of native title required the group to be in continuous occupation of the land in dispute. It then quoted with approval the High Court's decision in *Sagong I* regarding the limitation that the High Court placed on the area that may be claimed: "However, this conclusion [that native title exists] is limited only to an area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of settlement and its size, it is a question of fact in each case."<sup>287</sup> For the Court of Appeal, occupation other than by settlement and cultivation was beyond protection. Otherwise, it would mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed and foraged in the areas.

Despite reversing the High Court on the issue of occupation, the Court of Appeal affirmed that the Iban customary practice of *pemakai menoa* existed as an established custom relating to land. With respect, the Court of Appeal's decision is a contradiction in terms. On the one hand, it endorsed the High Court's decision and affirmed that the practice of *pemakai menoa* was part of the Iban customary practice. On the other hand, it narrows occupation to settlement and cultivation, which is only part of the *pemakai menoa*. This contrast is at odds with the basic concept of the *pemakai menoa*. Furthermore, the claims in *Sagong* did not concern areas over which the Orang Asli exercise hunting and foraging rights. Therefore, the holding relating to their rights in those areas is *obiter dicta*.

With the exception of the High Court's determination on occupation, the Court of Appeal agreed with the High Court's conclusions on the law. In this regard, the Court of Appeal noted:

In respect of the other expositions of the law by the learned judge in relation to native customary rights, we are inclined to endorse them. And briefly, they are as follows:

- (a) that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;
- (b) that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished;
- (c) that the Sarawak Land Code 'does not abrogate whatever native customary rights that exist before the passing of that legislation'. However, natives are no longer able to claim new territory without a permit under s 10 of that legislation from the Superintendent of Lands and Surveys'; and

<sup>287</sup> *Nor Nyawai II* [2006] 1 MLJ 256, 269.

- (d) that although the natives may not hold any title to the land and may be termed licensees, such licence ‘cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation.’<sup>288</sup>

4. *Madeli bin Salleh (Suing as Administrator of the Estate of the deceased, Salleh bin Kilong) v Superintendent of Land & Surveys Miri Division and Government of Sarawak*

a. Court of Appeal

In *Madeli bin Salleh (Suing as Administrator of the Estate of the deceased, Salleh bin Kilong) v Superintendent of Land & Surveys Miri Division and Government of Sarawak* (*‘Madeli II’*), in a decision handed down by Clement Skinner J, the Court of Appeal reversed the High Court’s dismissal of the plaintiff’s claim seeking a declaration that he acquired NCR to certain land in Miri and claiming damages for the State of Sarawak’s extinguishment of those rights.<sup>289</sup>

At the Court of Appeal, the appellant sought review of the High Court’s determination that he had not acquired NCR over the claimed land prior to 1921, the year in which the land became subject to *Rajah Order (Sarawak No XXIX) 1921* setting it aside for use by Sarawak Shell Oilfields Limited (*‘1921 Order’*).<sup>290</sup> In reaching this holding, the High Court rejected the appellant’s claim that his father and grandfather had acquired NCR by cultivating the land with rubber and fruit trees in accordance with the requirements of s 22 of the *Land Regulations—Order No VIII 1920* (*‘1920 Regulations’*).<sup>291</sup> The *1920 Regulations* provided, *inter alia*, that natives could occupy lands without charge for cultivation of certain crops ‘in accordance with the customary laws’.<sup>292</sup> The High Court found that the *Order No L-2 (Land Settlement) 1931* (*‘1931 Order’*) had repealed the *1920 Regulations* and therefore, the *1920 Regulations* would not be considered in assessing whether the appellant had acquired NCR before 1 January 1958.<sup>293</sup>

The High Court further found that s 22 of the *1920 Regulations* did not create or provide for the acquisition of NCR, but simply provided that those natives with registered interests had the right to occupy, without granting title to the occupied land.<sup>294</sup> The High Court concluded that s 66 of the *Order No L-7 (Land Settlement) 1933* (*‘1933 Order’*) constituted the first recognition of NCR.<sup>295</sup> The High Court further held that once the land was reserved for use by Sarawak Shell Oilfields Limited under the *1921 Order*, the appellant unlawfully occupied the land and even assuming the appellant held NCR under

<sup>288</sup> *Nor Nyawai II* [2006] 1 MLJ 256, 269-70.

<sup>289</sup> *Madeli II* [2005] 5 MLJ 305, 311. (CA) Clement Skinner J, Abdul Kadir Sulaiman JCA and Tengku Baharuddin Shah JCA with him.

<sup>290</sup> *Madeli II* [2005] 5 MLJ 305, 312, 319.

<sup>291</sup> *Madeli II* [2005] 5 MLJ 305, 312, 318-19.

<sup>292</sup> *Madeli II* [2005] 5 MLJ 305, 312, 319.

<sup>293</sup> *Madeli II* [2005] 5 MLJ 305, 312, 319.

<sup>294</sup> *Madeli II* [2005] 5 MLJ 305, 312, 319.

<sup>295</sup> *Madeli II* [2005] 5 MLJ 305, 312, 319.

the *1920 Regulations*, the *1921 Order* extinguished those rights.<sup>296</sup> The Court of Appeal reversed the High Court's determinations.

The Court of Appeal first found that the *1931 Order* did not repeal the *1920 Regulations*, but instead, expressly preserved the validity of rights and interests created under the repealed orders.<sup>297</sup> The Court of Appeal also rejected the High Court's holdings that the *1920 Regulations* did not recognise NCR and that such rights were first recognised by s 66 of the *1933 Order*.<sup>298</sup> The Court of Appeal found that as early as 1875, in *Rajah's Order IX 1875* ('*1875 Order*'), NCR were recognised in Sarawak.<sup>299</sup> The Court of Appeal held that the *1920 Regulations* constituted recognition of the means by which natives acquired NCR, that is, pursuant to native customary laws.<sup>300</sup> The Court of Appeal also rejected the assumption underlying the High Court's conclusion that s 66 of the *1933 Order* was the first recognition of NCR, namely that 'there must first be laws or regulations authorising natives to create or acquire native customary rights before such rights could be created and acquired and that s 66 of the 1933 Order was the first such law.'<sup>301</sup> The Court of Appeal noted that the reference to 'customary laws' in the *1920 Regulations* was 'significant, in that, it shows that customary laws were being given recognition to as a pre-existing law, without its existence having to depend on any specific legislation "creating" it'.<sup>302</sup>

The Court of Appeal construed the *1920 Regulations* as the Rajah's acknowledgment 'that before his rule of Sarawak began, the indigenous people already had a pre-existing system of customary laws concerning land, which he recognised and gave effect to'.<sup>303</sup> In further support of this holding, the Court of Appeal cited: (1) the decision in *Adong I* for the principle that 'the common law respects the pre-existing rights under native law or custom of the aboriginal people of Malaya'; (2) the decision in *Calder*, recognising that tribal interests in land were legal interests predating European conquest; and (3) the decision in *Nor Nyawai I*, where Ian Chin J cited the dissent in *Calder*, in which Hall J rejected principle that conquest defeated the pre-existing rights of indigenous peoples.<sup>304</sup>

The Court of Appeal also reversed the High Court's holding that the *1921 Order* extinguished any NCR held by the appellant.<sup>305</sup> The Court of Appeal noted that the *1921 Order* contained no express or clear intent of retrospective application and that in the absence of such intent, the *1921 Order* could not have the effect of extinguishing the appellant's NCR.<sup>306</sup>

<sup>296</sup> *Madeli II* [2005] 5 MLJ 305, 312, 320.

<sup>297</sup> *Madeli II* [2005] 5 MLJ 305, 312, 327.

<sup>298</sup> *Madeli II* [2005] 5 MLJ 305, 312, 328.

<sup>299</sup> *Madeli II* [2005] 5 MLJ 305, 312, 328.

<sup>300</sup> *Madeli II* [2005] 5 MLJ 305, 312, 328.

<sup>301</sup> *Madeli II* [2005] 5 MLJ 305, 312, 330.

<sup>302</sup> *Madeli II* [2005] 5 MLJ 305, 312, 330.

<sup>303</sup> *Madeli II* [2005] 5 MLJ 305, 312, 330.

<sup>304</sup> *Madeli II* [2005] 5 MLJ 305, 312, 330-31.

<sup>305</sup> *Madeli II* [2005] 5 MLJ 305, 312, 332.

<sup>306</sup> *Madeli II* [2005] 5 MLJ 305, 312, 332.

The Court of Appeal also rejected the High Court's holding that the appellant had failed to establish the acquired NCR between 1954 and 1958.<sup>307</sup> The Court of Appeal noted that the appellees were bound by the admission in their pleadings that the appellant had acquired rights during that period. The Court of Appeal further held that the appellees had failed to establish facts that allowed them to avoid the legal consequences of the admission.<sup>308</sup> But even assuming that the issue of whether appellant had acquired NCR between 1954 and 1958 was still outstanding, the Court of Appeal rejected the High Court's determination that appellant failed to establish those rights because: (1) in 1941, the appellant had moved out of the house on the claimed land after a fire; and (2) failed to establish occupation according to the requirements of s 5(2) of the *Land Code 1958*.<sup>309</sup> Appellant had demonstrated that he continued to regularly visit the property at least once a month and maintained fruit trees on the land.<sup>310</sup> The Court of Appeal said the High Court had 'equated occupation with actual physical presence on the said land when that need not necessarily be so.'<sup>311</sup> Appellant's failure to live on the land did not defeat his claim that he continued to control or occupy it.<sup>312</sup> The Court of Appeal also found s 5(2) of the *Land Code 1958* only applied in establishing the acquisition of NCR from 1 January 1958 and therefore, was not relevant to the case because appellant alleged he had acquired NCR prior to that date.<sup>313</sup>

b. Federal Court

On 8 October 2007, the Federal Court handed down its decision in *Superintendent of Land & Surveys Miri Division and Government of Sarawak v Madeli bin Salleh (Suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* ('*Madeli III*').<sup>314</sup> Although the government appellants appealed a number of the Court of Appeal's holdings, the Federal Court focused its decision on the finding that Madeli's native customary rights over land were not extinguished as a result of the *1921 Order*.<sup>315</sup> The Federal Court also considered the issue of whether ss 3(1) and 6 of the *CLA 1956* ('*CLA*') and Federal, Sarawak, and customary law precluded courts from relying on *Adong I* and *Nor Nyawai I* in light of the courts' reliance in those decisions on foreign judgments from the High Court of Australia and the Supreme Court of Canada.<sup>316</sup>

i. Common law recognition of native title

In *Madeli III*, the Federal Court reviewed and commented on a number of Privy Council, High Court of Australia, and Supreme Court of Canada decisions stating the common law on indigenous property rights. The Federal Court acknowledged the rule that, upon

<sup>307</sup> *Madeli II* [2005] 5 MLJ 305, 312, 324.

<sup>308</sup> *Madeli II* [2005] 5 MLJ 305, 312, 324.

<sup>309</sup> *Madeli II* [2005] 5 MLJ 305, 312, 325.

<sup>310</sup> *Madeli II* [2005] 5 MLJ 305, 312, 325.

<sup>311</sup> *Madeli II* [2005] 5 MLJ 305, 312, 325.

<sup>312</sup> *Madeli II* [2005] 5 MLJ 305, 312, 326.

<sup>313</sup> *Madeli II* [2005] 5 MLJ 305, 312, 326.

<sup>314</sup> *Madeli III*, (8/10/07) Civil Appeal No. 01-1-2006(Q) (Unreported). (Alauddin Mohd Sherriif FCJ, Ariffin Zakaria FCJ, Azmel Maamor FCJ.)

<sup>315</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 15.

<sup>316</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 17-18.



acquiring sovereignty, courts assume the Crown intends to respect existing property rights.<sup>317</sup> Further, the Crown's acquisition of sovereignty did not disturb indigenous land rights held pursuant to customs, although the Crown could extinguish such rights with clear and unambiguous legislation.<sup>318</sup> Following the decision in *Mabo (No 2)*, the Federal Court explained that the Crown did not acquire absolute beneficial ownership of land, but instead, obtained radical title, subject to any indigenous rights over land.<sup>319</sup> Finally, the Federal Court cited a Privy Council decision emphasizing the importance of understanding indigenous rights and customs on their own terms "without importing English conceptions of property law."<sup>320</sup>

Applying these rules to Sarawak, the Federal Court noted that prior to the orders of James Brooke concerning lands in Sarawak, customary laws governed native land rights.<sup>321</sup> Orders issued by Rajah Brooke expressly recognised those rights.<sup>322</sup> The Federal Court referred to the holding in *Nor Nyawai II* that the common law respects NCR under native customs, although those rights can be extinguished by clear and unambiguous legislation.<sup>323</sup> The Federal Court determined that *Nor Nyawai II*'s reference was to the English common law, which constitutes substantive law applicable to Sarawak under s 3(1)(c) of the *CLA* and existing law within the meaning of art 162 of the *Federal Constitution*.<sup>324</sup> The Federal Court also noted the holding in *Sagong II*, which expressly relied on the holding in *Adong I* that aborigines held common law rights over land. Based on its review of the common law rules and their application by the Malaysian courts in recognising native title, the Federal Court rejected the Attorney General's argument that *Adong I* and *Nor Nyawai II* should not be followed.<sup>325</sup>

## ii. Native customs, occupation and extinguishment of native title

In the second part of its decision, the Federal Court considered whether the respondent's NCR had been extinguished as a result of the *1921 Order*. The Federal Court considered the content of the native land tenure customs at the time of Brooke's arrival in Sarawak.

<sup>317</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 23, 27.

<sup>318</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 22, 26.

<sup>319</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 24.

<sup>320</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 23-24 (quoting *Oyekan and Others v. Adele 2* All E.R. 785).

<sup>321</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 20-21.

<sup>322</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 20-21.

<sup>323</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 22.

<sup>324</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 22.

<sup>325</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 25-26. Precedents from other common law jurisdictions do not bind Malaysian courts and are only persuasive authority. Nonetheless, where the decisions pertain to points of law in *pari material* with Malaysian law, the courts have never lightly treated them or refused to follow them, unless "we can successfully distinguish them or hold them as per *incuriam*. Other than for these reasons, we should as a matter of judicial comity and for the orderly development of the law, pay due and proper attention to them." Per Chang Min Tat FJ *Director-General of Inland Revenue v Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214, 216. Furthermore, in *Sagong I* [2001] 2 MLJ 591, 613, after reviewing the authorities from other common law jurisdictions regarding indigenous land rights, Mohd Noor Ahmad J noted that

I am compelled not to be blinkered by the decisions of the courts of other jurisdictions which deserve much respect, in particular on the rights of the aboriginal people which are of universal interest, especially when there is no clear and plain indication to the contrary in our laws.



The Federal Court found that the *1875 Order* of James Brooke, which referred to the practice of native communities to clear and later abandon areas of jungle, constituted recognition of native rights.<sup>326</sup> The Federal Court said this recognition was reinforced in the *1920 Regulations*, which recognised native customs to cultivate trees and other crops.<sup>327</sup> The Federal Court rejected the High Court's finding that NCR originated in s 66 of the *1933 Order*.<sup>328</sup>

After reviewing this history of recognition of native customs, the Federal Court found that the respondent had established occupation of the land subject to the *1921 Order* through evidence that he visited the property every month to care for fruit trees.<sup>329</sup> The Federal Court referred to additional proof in the form of a letter reflecting that the respondent's father occupied the land before it became subject to the *1921 Order*.<sup>330</sup> The Federal Court noted that actual physical presence was not required to establish occupation, so long as sufficient control was exercised over the land to exclude strangers.<sup>331</sup>

The Federal Court then reviewed the *1921 Order*, which, according to the State of Sarawak, extinguished respondent's NCR over the land. The Federal Court found that the order contained no express language to that effect:

Reading the 1921 Order we are of the view that its effect is merely to reserve a specified area for the purpose of the operations of the Sarawak Oilfields Limited. Future use of the land so reserved are governed by the said Order, but it did not go further to provide that land which are already in occupation by native under the customary laws ceased to have effect and continued occupation of land by the native shall become illegal.

The Federal Court continued by saying that '[s]uch a drastic measure [extinguishing native title] needs to be expressed in clear language and cannot be derived by mere implication.'<sup>332</sup>

In response to the Attorney General's argument that the *1921 Order* extinguished the respondent's rights because he ceased to control the land after the State established it as a reserve, the Federal Court found that the order created a trust or reservation for a public purpose, which, did not necessarily extinguish native title.<sup>333</sup> The Federal Court found support for its conclusion in *Mabo (No 2)*, which held that, depending upon the nature of a reservation of land for future use, occupation anticipated by the reservation could be consistent with continued enjoyment of native title.<sup>334</sup> The Federal Court noted that Sarawak Oilfields never took possession of the land and the respondents had maintained occupation until Sarawak reserved the land as a public park and later developed into a school.<sup>335</sup> Thus, the *1921 Order* did not extinguish respondent's NCR.<sup>336</sup>

<sup>326</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 30.

<sup>327</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 31-32.

<sup>328</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 32-33.

<sup>329</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 33.

<sup>330</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 34.

<sup>331</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 35.

<sup>332</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 40.

<sup>333</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 44-45.

<sup>334</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 43-44.

<sup>335</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 45.

The Federal Court's decision is significant because it affirms critical holdings of the lower courts on native title. The decision reiterates that courts must consult native customs to determine the extent of native occupation. It also confirms that the theoretical foundation for Malaysia's recognition of native title is the English common law described above in Part IV. The decision also points to the high burden government must meet to effect an extinguishment of NCR. In the absence of language expressly indicating intent to terminate the rights, natives continue to enjoy NCR. Finally, the decision acknowledges that even in the absence of continuous physical presence, occupation over land may still be established through other evidence reflecting control over land.

#### B. Summary: emerging features of native title

From the preceding cases, as well other decisions from the Malaysian courts, certain key features of native title emerge. It is an inalienable title based on first occupation and possession of land and native laws and customs. While it often represents communal property, native persons or households may hold individual native title. These features are described in more detail below.

##### 1. Pre-existing right

Malaysian common law recognises the pre-existing rights embodied in native title.<sup>337</sup> These pre-existing rights arise from the prior and first occupation and possession of lands by natives according to their traditional laws and customs.

Occupation of land by natives is central to establishing native title and native customary rights.<sup>338</sup> Occupation does not require that every part of the land be physically occupied.<sup>339</sup> The occupier must take some action to prevent strangers from interfering with use.<sup>340</sup> It is not necessary that the occupier live on the land.<sup>341</sup> For example, monthly visits to the land are sufficient, where other evidence supports a finding of occupation.<sup>342</sup>

Native occupation can be demonstrated by inheritance rights to land, use of land for housing, farms (both subsistence and cash crops), hunting and fishing, the presence of cemeteries, recognition of ownership by other members of the community, neighboring native and non-native communities, and government officials, religious traditions closely tied to the land, and evidence of daily activities indicating a long-term presence in an area, such as trees from which resources have been extracted (especially where trees are conspicuous), place names in the native language, and community meeting buildings.<sup>343</sup> Documentary evidence indicating the occupier's attempts to obtain title will also support a

<sup>336</sup> *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 45.

<sup>337</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 245, aff'd in part, *Nor Nyawai II* [2006] 1 MLJ 256, 269; *Madeli II* [2005] 5 MLJ 305, 330; *Jalang Paran* [2007] 1 MJL 412, 421; *Adong I* [1997] 1 MLJ 418, 430; *Adong II* [1998] 2 MLJ 158, 162-63; *Sagong II* [2005] 6 MLJ 289, 301-02.

<sup>338</sup> *Nor Nyawai II* [2006] 1 MLJ 256, 269.

<sup>339</sup> *Madeli II* [2005] 5 MLJ 305, 320-26, aff'd *Madeli III* [8/10/07] Civil Appeal No. 1-1-2006 (Q) 34.

<sup>340</sup> *Madeli II* [2005] 5 MLJ 305, 320-26; aff'd *Madeli III* [8/10/07] Civil Appeal No. 1-1-2006 (Q) 34.

<sup>341</sup> *Madeli II* [2005] 5 MLJ 305, 320-26; aff'd *Madeli III* [8/10/07] Civil Appeal No. 1-1-2006 (Q) 34-35.

<sup>342</sup> *Madeli II* [2005] 5 MLJ 305, 320-26; aff'd *Madeli III* [8/10/07] Civil Appeal No. 1-1-2006 (Q) 33-34.

<sup>343</sup> *Sagong I* [2002] 2 MLJ 591, 609-10.

claim of occupation.<sup>344</sup> Where occupation without title has been tolerated for an extended period of time, the occupier obtains title by prescription to a significant part of the rights associated with the land.<sup>345</sup>

## 2. Native title based in native laws and customs

Native title originates in the traditional laws and customs of the natives and does not rely on or find its source in statutes.<sup>346</sup> Nevertheless, NCR under the common law and statute are complementary rights and must be viewed conjunctively.<sup>347</sup> Determining the particular rights associated with native title requires an examination of the customs and practices of each individual community, and therefore, is a question of fact.<sup>348</sup> Where customs are codified, such codification does not extinguish uncoded, related customs.<sup>349</sup> Native customs are afforded the status of law under the *Federal Constitution*.<sup>350</sup>

## 3. The inalienability of native title

Native title under the Malaysian common law has been described as including ‘inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.’<sup>351</sup> This title protects the right of natives to enjoy their land without ‘disturbance or interference’, but does not extend to allow natives to sell, lease, or alienate the land and its products.<sup>352</sup>

Native communities do not hold documentary title to land held pursuant to native title,<sup>353</sup> but their property interest in their lands can only be extinguished according to law and with adequate compensation, as required by art 13 of the *Federal Constitution*.<sup>354</sup> Furthermore, the government can extinguish native title only through clear and unambiguous legislation.<sup>355</sup> Native title creates both a right to use and occupy land, as

<sup>344</sup> *Madeli II* [2005] 5 MLJ 305, 326; aff’d *Madeli III* [8/10/07] Civil Appeal No. 1-1-2006 (Q) 34.

<sup>345</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 284.

<sup>346</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 268, 286; *Madeli II* [2005] 5 MLJ 305, 330; *Jalang Paran* [2007] 1 MJL 412, 421.

<sup>347</sup> *Adong I* [1997] 1 MLJ 418, 431; *Sagong II* [2005] 6 MLJ 289, 301-08.

<sup>348</sup> *Sagong Tasi II* [2005] 6 MLJ 289, 301-02.

<sup>349</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 285-86.

<sup>350</sup> *Federal Constitution*, art 160(2).

<sup>351</sup> *Adong I* [1997] 1 MLJ 418, 430.

<sup>352</sup> *Adong II* [1998] 2 MLJ 158, 162. Because native title is ‘not an institution of the common law’, it is inalienable under the common law. *Mabo (No 2)* (1992) 107 ALR 1, 42 (Brennan J). Instead, it is alienable according to the customs from which it is derived. *Ibid*.

<sup>353</sup> Natives are said to hold their land as licenses of the government. *Nor Nyawai II* [2006] 1 MLJ 256, 270.

In common law usage, the term licensee suggests a right short of a property interest. Bulan, Thesis, above n 110, 182. Nevertheless, *Nor Nyawai II* [2006] 1 MLJ 256, 268 makes clear that the interest held pursuant to native title is a property interest in and to land. As noted above, the tendency of courts to equate the attributes of native title with property interests under the common law can result in the use of terminology that misidentifies the attributes of native title, as is the case of the use of the term licensee.

<sup>354</sup> *Nor Nyawai II* [2006] 1 MLJ 256, 270.

<sup>355</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 245; *Nor Nyawai II* [2006] 1 MLJ 256, 269; *Jalang Paran* [2007] 1 MJL 412, 421.

well as an interest in and to the land.<sup>356</sup> Native title represents ‘a customary community title of a permanent nature’ and is determined with reference to the traditional customs and laws of the community.<sup>357</sup> Part X will go further to describe in more detail how the interest of native communities in land subject to native title finds protection in art 5 of the *Federal Constitution*, which shelters the right to life and livelihood.

#### 4. Limitation on rights over lands used for foraging

*Adong I* and *Adong II* recognized aboriginal peoples’ rights to the area that they foraged. While *Sagong I* recognized the property interest in and to the land that forms the settlement areas of native communities, the High Court held that such recognition did not extend to lands used for foraging. *Nor Nyawai II* reasoned that ‘vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search of food.’<sup>358</sup> Nevertheless, natives hold rights to access lands traditionally used for hunting and gathering and these rights constitute property for which a deprivation triggers an obligation on the part of the government to provide compensation.<sup>359</sup> Furthermore, the Malaysian common law acknowledges that the customs and traditions of the native community define the nature of their land rights.<sup>360</sup> When those customs include foraging activities on lands outside of settlement areas, limiting common law recognition of the native title to the property rights associated with settlement areas does not take into cognizance the rule that the customs define the nature and scope of rights associated with native title.

#### C. Conclusion

The *Land Code 1958* is not the only law relevant to native title. There is an emerging body of Malaysian judicial precedents recognizing and reaffirming pre-existing native title arising out of traditional laws and customs. Native title protects the rights of natives in and to the land and thus, represents full beneficial ownership of land. Where that property interest is extinguished, the government must pay adequate compensation according to the requirements of art 13 of the *Federal Constitution*. Native title represents a non-documentary title held by the community. Natives may only alienate the land subject to native title to other natives or the government. Because the land subject to native title is an essential component of community life, art 5 of the *Federal Constitution* protects the interest as a right to livelihood.

<sup>356</sup> *Nor Nyawai II* [2006] 1 MLJ 256, 268 (citing *Sagong II* [2002] 2 MLJ 591).

<sup>357</sup> *Sagong II* [2005] 6 MLJ 289, 301-02; *Sagong I* [2002] 2 MLJ 591, 611.

<sup>358</sup> *Nor Nyawai II* [2006] 1 MLJ 256, 269; *Sagong I* [2002] 2 MLJ 591, 615. As will be noted below, excluding native rights over land based on the need to preserve the land for non-native uses is inconsistent with international human rights law.

<sup>359</sup> *Adong I* [1997] 1 MLJ 418, 431, 433.

<sup>360</sup> *Sagong II* [2005] 6 MLJ 289, 301-02.

# VIII

## BEST PRACTICES FROM OTHER JURISDICTIONS

## VIII. BEST PRACTICES FROM OTHER JURISDICTIONS

### A. Introduction

The preceding review of Malaysian native title law raises several unresolved issues. *Nor Nyawai II* is inconsistent in that it both recognises *pulau galau*, the Iban custom of hunting, fishing and gathering in forests within their territories, but holds that ‘the claim [of native title] should not be extended to areas’ used for foraging.<sup>361</sup> *Adong I* and *Adong II* recognises the right of aboriginal people in West Malaysia to forage in areas within their traditional territories.<sup>362</sup> This holding was expanded in *Sagong I*, which recognized that the property interest of aboriginal peoples in and to the land that forms their settlement areas, but refused to extend that recognition to property rights ‘in and to the land’ to jungles used for foraging.<sup>363</sup>

An issue closely related to the distinction between native property rights in settlement and foraging lands is the methods by which natives in Sarawak can establish new NCR as of 1 January 1958. The methods delineated in s 5(2) of the *Land Code 1958* focus on the narrow categories of settlement and cultivation, ignoring that native customs establish occupation through other activities, including hunting, fishing, and foraging and through cultural practices on the land which serve to record the history of native communities on the landscape. Section 5(2) is inconsistent with the case law holding that customs define the nature of the rights held under native title and the status of native customs as law under the *Federal Constitution*. Finally, the non-issuance of documentary title reflecting native interests and the broad authority of the Government of Sarawak to extinguish NCR without consultation with native communities creates uncertainties that undermine the ability of those communities to enjoy their property rights under law and ultimately, to maintain their existence, which is inseparable from the land.

These issues are not new. They have arisen in contexts outside of Malaysia. The manner in which these challenges have been addressed by other common law jurisdictions and international human rights law provides useful insights, which Malaysia may choose to consider in resolving these issues with respect to native title claims in Sarawak.

Parts VIII and IX focus on how other common law jurisdictions and international law address issues related to the basis, the scope and the role of customs in determining native title. It also looks at restraints on the government’s authority to terminate native title and associated rights. In light of the authorities reviewed in Parts VIII and IX, Part X reconsiders Malaysian law, draws together the threads from the international positions and examines the role of the *Federal Constitution* in defining and protecting native title.

<sup>361</sup> [2006] 1 MLJ 256, 269.

<sup>362</sup> *Adong I* [1997] 1 MLJ 418, 430; *Adong II* [1998] 2 MLJ 158, 162-64.

<sup>363</sup> *Sagong I* [2002] 2 MLJ 591, 615. In *Sagong II*, the Court of Appeal did not expressly comment on this point, but did refer to the two areas in dispute, i.e., the area gazetted as Aboriginal areas under the *Aborigines Peoples Act 1954* as well as ungazetted areas, as areas ‘settled upon by the plaintiffs’. [2005] 6 MLJ 289, 299. Ultimately, the Court of Appeal reversed, in part, the High Court’s decision by ordering compensation for ‘those settled’ on ungazetted areas. [2005] 6 MLJ 289, 314.

## B. Basis for and scope of native title

Australia and Canada offer two distinct formulations of native title. This Report examines the two leading cases from these jurisdictions, including *Mabo and Others v State of Queensland* ('*Mabo (No 2)*') and *Delgamuukw v British Columbia*.<sup>364</sup> Because Malaysia has relied on these cases in developing its common law on native title, it is important to understand the variations in the land and other rights enjoyed by indigenous people in the two countries. In addition to Australia and Canada, early case law from the United States ('U.S.') also defines the nature of the rights associated with aboriginal title, as it is called in that country.

The following summary first considers the cases from the U.S. The discussion then turns to the case law from Australia and Canada.

### 1. Decisions of the Supreme Court of the U.S.

Often referred to as the Marshall trilogy, as they were all handed down by Chief Justice Marshall in the 1820s and 1830s, *Johnson v. M'Intosh* ('*M'Intosh*'), *Cherokee Nation v. Georgia* ('*Cherokee Nation*'), and *Worcester v. Georgia* ('*Worcester*') established the fundamental precepts of aboriginal title in the U.S. In addition to these three decisions, the case of *Mitchel v. U.S.* ('*Mitchel*') further elucidated the principles governing aboriginal title. *Cherokee Nation* and *Worcester* primarily addressed the relationship between tribal governments, the U.S. federal government, and State of Georgia. Consequently, the following summary briefly describes *Cherokee Nation* and *Worcester* and focuses on the decisions in *M'Intosh* and *Mitchel*.

#### a. *Johnson v. M'Intosh*

In 1773, the Illinois Nation sold land to certain persons, including William Murray.<sup>365</sup> In 1775, the Piankeshaw Nation sold land to certain persons, including Thomas Johnson.<sup>366</sup> After the American Revolution, the State of Virginia conveyed to the U.S. the land subject to the 1773 and 1775 grants.<sup>367</sup> In 1818, the U.S. conveyed to M'Intosh parcels of land located within the boundaries of the land subject to the 1773 and 1775 grants.<sup>368</sup> Thomas Johnson died in 1819 and the portion of the land subject to the 1775 grant was devised to his son and grandson, Joshua Johnson and Thomas Graham.<sup>369</sup> Neither Murray, Johnson, nor any other of the grantees ever took possession of the land because of the American Revolution and associated disputes that preceded the war.<sup>370</sup> These grantees were precluded from obtaining possession after the war and from 1781 they had, at

<sup>364</sup> For the purpose of providing context for these leading cases, this Part also summarises several other important decisions from Australia and Canada.

<sup>365</sup> *M'Intosh*, 21 US 543, 1823 US LEXIS 293, \*\*\*10.

<sup>366</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*16.

<sup>367</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*22.

<sup>368</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*24.

<sup>369</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*24.

<sup>370</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*25.



various times, unsuccessfully sought Congressional affirmation of their interests in the lands.<sup>371</sup>

Chief Justice Marshall acknowledged that the chiefs representing the Nations that sold the land subject to the 1773 and 1775 grants had authority to do so and that the Nations were in rightful possession of the land.<sup>372</sup> This issue was whether the Indians had the authority to give and private individuals the ability to receive a title from the Indians that would be sustained in the U.S. courts.<sup>373</sup> Discovery, Chief Justice Marshall concluded, gave title to the European colonizers to the exclusion of all other European nations seeking to assert dominion over the lands that ultimately comprised the U.S.<sup>374</sup> The doctrine gave the nation making the 'discovery' the exclusive rights to acquire land from natives and to establish settlements.<sup>375</sup> Although these rights diminished the interests of the Indians, their rights to occupy the land, their legal and 'just' claim to retain possession, and their rights to use the land according to their customs continued to be recognised.<sup>376</sup> The Indians could not, however, dispose of their land because that right would conflict with the exclusive rights associated with the title acquired by discovery.<sup>377</sup>

Ultimate dominion over the land acquired by the discovering nation included the power to grant interests in the land even while it was still possessed and occupied by Indians.<sup>378</sup> Marshall CJ reviewed the history of the English charters granting to various colonial governments and companies the whole of the U.S. while occupied by Indians.<sup>379</sup> The grants conveyed both interests in land as well as powers of government, although the 'right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government'.<sup>380</sup> In the course of recounting this history, Marshall CJ emphasized that these charters and grants had never been challenged and that 'our whole country [has] been granted by the crown while in the occupation of the Indians', a fact that highlighted the extent to which the property system depended on the continued validity of these grants.<sup>381</sup> The conflicts between the nations vying for control over North America and the resolution of these contests through treaties also evidenced reliance on the principle that discovery gave title to the discoverer of land, even while in possession of the Indians.<sup>382</sup>

<sup>371</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*26.

<sup>372</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*38.

<sup>373</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*38.

<sup>374</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*39.

<sup>375</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*40.

<sup>376</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*40. The court in *Sagong I* referred to these principles in support of its conclusion that native title was a property interest in and to the land rather than simply a usufructuary right. [2002] 2 MLJ 591, 613.

<sup>377</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*40.

<sup>378</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*41.

<sup>379</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*43-\*\*\*49.

<sup>380</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*47.

<sup>381</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*47.

<sup>382</sup> *M'Intosh*, 1823 US LEXIS 293, \*\*\*49-\*\*\*53.

Marshall CJ then queried whether the American States had accepted the notion of ‘the exclusive right of the discoverer to appropriate the lands occupied by the Indians’.<sup>383</sup> At the conclusion of the American Revolution, the States succeeded to Great Britain’s interests, which included ‘powers of government, and the right to soil’ subject to the Indian rights of occupancy.<sup>384</sup> Upon formation of the U.S., the various American States ceded to the federal government their territories, ‘occupied by numerous and warlike tribes of Indians’, along with the exclusive right to extinguish Indian title and to grant the land.<sup>385</sup>

Marshall CJ acknowledged the ‘extravagant [] pretension of converting the discovery of an inhabited country into conquest’. Nevertheless,

if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.<sup>386</sup>

Because the exclusive right to acquire the Indian title of occupancy belonged to the U.S. government, the U.S. courts would not recognise the attempted transfer of title by the Nations through the 1773 and 1775 deeds.<sup>387</sup>

Despite the limitations on their right to alienate lands held under aboriginal title, *M’Intosh* establishes the legal right of Indians to occupy and possess their lands according to their traditional customs.

b. *Cherokee Nation v. Georgia*; *Worcester v. Georgia*

In *Cherokee Nation*, the Cherokee Nation (‘Nation’) brought an original action in the U.S. Supreme Court against the State of Georgia (‘State’), challenging the State’s attempt to assert jurisdiction over and annex the Nation’s reservation located within State boundaries. Chief Justice Marshall issued an opinion concluding that the Nation was not a foreign state within the meaning of the U.S. Constitutional provision authorizing suits between foreign and domestic states. On that basis, the action was dismissed. In the course of the opinion, however, Marshall CJ reiterated that Indian tribes hold an ‘unquestioned right to the land they occupy, until that right shall be extinguished by a voluntary cession to our government’.<sup>388</sup>

<sup>383</sup> *M’Intosh*, 1823 US LEXIS 293, \*\*\*53.

<sup>384</sup> *M’Intosh*, 1823 US LEXIS 293, \*\*\*54.

<sup>385</sup> *M’Intosh*, 1823 US LEXIS 293, \*\*\*57.

<sup>386</sup> *M’Intosh*, 1823 US LEXIS 293, \*\*\*63.

<sup>387</sup> *M’Intosh*, 1823 US LEXIS 293, \*\*\*80.

<sup>388</sup> *Cherokee Nation*, 30 US 1, 17 (1831).

Although Marshall's decision in *Worcester* also concerns the sovereignty of the Cherokee Nation *vis-à-vis* the State, the decision touches briefly, albeit significantly on the scope of Indian title.<sup>389</sup> In the case, an individual, who was subject to imprisonment by the State for residing on the Cherokee Nation's reservation without a permit from the State, challenged Georgia's power to apply its law within the reservation.

In reexamining the doctrine of discovery, Marshall CJ seemed to limit its scope and affect on Indian title. The doctrine was designed to regulate the European powers seeking to acquire North America, 'but could not affect the rights of those already in possession . . . as aboriginal occupants'.<sup>390</sup> The titles acquired by the discoverer were good 'against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned'.<sup>391</sup> The discoverer holding title under the doctrine obtained the exclusive right to purchase, 'but did not found that right on a denial of the right of the possessor to sell'.<sup>392</sup>

Marshall noted that the State had acquiesced in

the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere.<sup>393</sup>

Based on the history of European colonization and the treaties between the Nation and the U.S., Marshall CJ ultimately concluded that the law of Georgia had no force or effect within the boundaries of the Nation's reservation.<sup>394</sup>

*Worcester* and *Cherokee Nation* reiterate the full right of Indians to enjoy their traditional lands without interference from state governments, until that right is extinguished through a voluntary transfer to the U.S. government.

c. *Mitchel v. U.S.*

In *Mitchel*, the owners of certain lands in Florida sought declarations confirming the validity of their titles. The owners' predecessors in title obtained the lands through grants issued by the Seminole and Creek Tribes ('Tribes') in 1806.<sup>395</sup> These grants were approved by the governor of Florida, who was the representative of the Spanish

<sup>389</sup> In *Nor Nyawai II*, the court generally referred to *Worcester* in support of its conclusions regarding the substance of native title rights in Malaysia. *Nor Nyawai II* [2005] 1 MLJ 256, 269. The *Adong I* court also cited *Worcester* as one of the earliest decisions acknowledging indigenous land rights. [1997] 1 MLJ 418, 426. The *Adong I* court cited the passage in *Worcester* in which Marshall CJ questioned the doctrine of discovery as conferring on the discoverer a claim of authority over the Indians or their lands in light of the fact that Indians maintained their own institutions and governed themselves according to their own laws.

<sup>390</sup> *Worcester*, 31 US 515, 544 (1932).

<sup>391</sup> *Worcester*, 31 US 515, 546 (1932).

<sup>392</sup> *Worcester*, 31 US 515, 544 (1932).

<sup>393</sup> *Worcester*, 31 US 515, 560 (1932).

<sup>394</sup> *Worcester*, 31 US 515, 561 (1932).

<sup>395</sup> *Mitchel*, 34 US 711, 727 (1835).

government, which at the time, exercised sovereignty over Florida.<sup>396</sup> The Tribes approved the sales at general council meetings, which the governor attended.<sup>397</sup> Spain ceded Florida to the U.S. under an 1819 treaty, which recognized the Indian tribes' property rights. The U.S. claimed it had purchased the lands by treaty.<sup>398</sup>

Justice Baldwin, who gave the decision of the court, concluded that the grants issued by Tribes to Mitchel's predecessors were valid. Baldwin J rejected the U.S.'s arguments that Indian tribes had no legal title to convey and that absolute title was held by Spain. In reaching this determination, Baldwin J articulated the 'nature and extent' of Indian title.<sup>399</sup> He noted that with regard to British settlements in what became the U.S., the British protected 'friendly' Indians' possession of lands and viewed them as owning the lands 'by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation'.<sup>400</sup> The Crown or colonial legislatures held the 'ultimate fee' to the lands, which they could grant even while Indians remained in possession, but the possession could not be taken without Indian consent.<sup>401</sup> Individuals were prohibited from purchasing Indian lands without permission from the Crown, colonial legislatures, or under colonial laws and upon purchase, the Crown's ultimate fee was joined with the Indian title to form a complete title in the purchaser.<sup>402</sup>

With regard to Indian possession, Baldwin J noted that it

[w]as considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.

....

[T]heir right of occupancy is considered as sacred as the fee simple of the whites.<sup>403</sup>

Baldwin J also referred to the rules that apply in the case of the Crown's conquest of a territory or upon cession, namely that the laws in existence continue in force until modified by the new sovereign and that private property rights remained intact.<sup>404</sup> Thus, the *British Royal Proclamation of 1763*,<sup>405</sup> under which indigenous land rights in North

<sup>396</sup> *Mitchel*, 34 US 711, 727 (1835).

<sup>397</sup> *Mitchel*, 34 US 711, 721 (1835).

<sup>398</sup> *Mitchel*, 34 US 711, 738 (1835).

<sup>399</sup> *Mitchel*, 34 US 711, 745 (1835).

<sup>400</sup> *Mitchel*, 34 US 711, 745 (1835).

<sup>401</sup> *Mitchel*, 34 US 711, 745-46 (1835).

<sup>402</sup> *Mitchel*, 34 US 711, 746 (1835).

<sup>403</sup> *Mitchel*, 34 US 711, 746 (1835). The court in *Adong I* quoted this passage in the course of explaining that, '[t]he study of native land rights shows that common law recognizes native land rights, even in countries practising the Torrens land system where the authorities issue titles pursuant to statutory powers.'

[1997] 1 MLJ 418, 426-27.

<sup>404</sup> *Mitchel*, 34 US 711, 748 (1835).

<sup>405</sup> Among other things, the *Royal Proclamation of 1763* ('*Royal Proclamation*') defined the boundaries of British colonies in North America and sought to protect Indian lands from encroachment by colonial governments and subjects. The Avalon Project at Yale Law School, 'Royal Proclamation—October 7, 1763' *Documents in Law, History and Diplomacy* <<http://www.yale.edu/lawweb/avalon/proc1763.htm>> on 7

America were protected, remained the law after Spain succeeded to Great Britain's rights to lands in Florida.<sup>406</sup> Under the *Royal Proclamation of 1763*, 'the Indians of Florida had a right to the enjoyment of the lands and the hunting grounds reserved and secured to them by' the Proclamation.<sup>407</sup> These same rules (i.e. the doctrine of continuity) applied upon the U.S.'s assumption of sovereignty over Florida.<sup>408</sup>

Because the Tribes had issued a valid grant to Mitchel's predecessors in title, the U.S. was obligated to honor these private property rights upon acquiring sovereignty over Florida.<sup>409</sup> Thus, *Mitchel* recognises the property rights of Indians as reflected and exercised in accordance with their own traditional laws and usages.

#### d. Summary

The basic principles governing aboriginal title, as summarized by the U.S. Court of Appeals for the Second Circuit in *Oneida Indian Nation of New York v. State of New York*, as are follows:

- Fee title to lands occupied by Indians vested in the first European nation to 'discover' the land, but the Indians retained a right of occupancy or Indian title, valid against all but the discovering sovereign.
- The fee title of the discovering sovereign governed the relationship between the sovereign and competing European nations. The title gave the discovering sovereign the right against all others to purchase the Indian's right of occupancy. The sovereign's fee title did not confer absolute ownership and provided no right of possession.
- The relationship between the discovering sovereign and the Indians in occupation was subject to a distinct set of rules. Indians held their land under Indian title, which constituted a legal and just claim to remain in possession until such title was extinguished by a sovereign act.<sup>410</sup>

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January 2008. In particular, the *Royal Proclamation* defined the boundaries and established the governments of the British colonies of Quebec, East Florida, West Florida and Grenada, gave the Governors of the colonies of Quebec, East Florida and West Florida the authority to grant interests in lands within those colonies, and prohibited the Governors of those three colonies from surveying or granting interests in land beyond the boundaries of the colonial territories. Ibid. The *Royal Proclamation* also prohibited governors in other British colonies in North America from granting interests in lands roughly situated west of the Mississippi River. Ibid. In the interest of security and with respect to those Indian tribes and nations under the protection of the British Crown, the *Royal Proclamation* protected the right of Indians to enjoy their hunting grounds free from molestation or disturbance and reserved to the tribes those lands they had not ceded to Britain. Ibid. It further prohibited all private purchases from Indian tribes except with the Crown's consent or through the procedure established by the Crown for that purpose. Ibid. The *Royal Proclamation* required those wishing to trade with Indians to acquire a licence and comply with Crown regulations. Ibid. Finally, the *Royal Proclamation* directed persons present on reserved Indian lands to leave and provided for the apprehension of criminals who had fled to Indian reserves. Ibid.

<sup>406</sup> *Mitchel*, 34 US 711, 748 (1835).

<sup>407</sup> *Mitchel*, 34 US 711, 748 (1835).

<sup>408</sup> *Mitchel*, 34 US 711, 734-36 (1835).

<sup>409</sup> *Mitchel*, 34 US 711, 735 (1835).

<sup>410</sup> 691 F.2d 1070, 1075-76 (1982).

## 2. Decisions of the High Court of Australia

### a. *Mabo and Another v the State of Queensland and Another*<sup>411</sup>

In *Mabo and Another v the State of Queensland and Another* ('*Mabo (No 1)*'), representatives of the Miriam<sup>412</sup> people alleged rights to the lands comprising the Murray Islands ('Islands') in Queensland, Australia on the basis that they had inhabited and exclusively possessed the Islands since time immemorial, under traditional native title and pursuant to local custom.<sup>413</sup> A majority of the justices found that the *Queensland Coast Islands Declaratory Act 1985* (Q.) ('*Queensland Act*'), which extinguished the property rights of the Miriam people, violated the *Racial Discrimination Act 1975* (Cth), which prohibited discrimination based on race, colour, or ethnic or national origin.

The decision in *Mabo (No 1)* was the precursor to *Mabo (No 2)*, which, as described in more detail below, affirmed native title rights, in part based on the need to remedy historical discrimination against the indigenous peoples of Australia. Malaysian courts have relied extensively on *Mabo (No 2)* in crafting Malaysian common law on native title. Furthermore, the *Racial Discrimination Act 1975* (Cth) is designed to implement Australia's obligations under the United Nations International Convention on the Elimination of All Forms of Discrimination ('CERD'),<sup>414</sup> which states the widely accepted international customary law prohibiting racial discrimination. The principle of non-discrimination and the equality among the races is the basis for many of the guarantees supporting the international human rights of indigenous peoples. For these reasons, *Mabo (No 1)* is important to understanding Malaysia's obligations with respect to native title.

The *Queensland Act* vested title to the Islands in the Crown in right of the State.<sup>415</sup> The *Queensland Act* also characterized the Islands as Crown waste lands, subjected the Islands to Crown lands legislation and made them available for use as Crown lands.<sup>416</sup> The legislation further provided that no compensation would be paid with respect to rights said to exist prior to Queensland's annexation of the Islands in 1879.<sup>417</sup>

The Miriam people argued that the *Queensland Act* was inconsistent with ss 9 and 10(1) of the *Racial Discrimination Act 1975* (Cth) ('*Commonwealth Act*').<sup>418</sup> More particularly, the plaintiffs argued that the State's authority under the *Queensland Act* to grant interests in land, which the State could exercise without regard to the Miriam people's traditional rights to the Islands, violated s 9 of the *Commonwealth Act*, which prohibited a person from doing an act based on a racial distinction that had the purpose or effect of nullifying

<sup>411</sup> [1988] 166 CLR 186, 188.

<sup>412</sup> In *Mabo (No 2)*, an alternative spelling of 'Meriam' is used to describe the inhabitants of the Murray Islands.

<sup>413</sup> [1988] 166 CLR 186, 188.

<sup>414</sup> International Convention on the Elimination of All Forms of Discrimination, opened for signature, 21 December 1965 (entry into force 4 January 1969).

<sup>415</sup> *Mabo (No 1)* [1988] 166 CLR 186, 210 (Brennan, Toohey and Gaudron JJ).

<sup>416</sup> *Mabo (No 1)* [1988] 166 CLR 186, 210 (Brennan, Toohey and Gaudron JJ).

<sup>417</sup> *Mabo (No 1)* [1988] 166 CLR 186, 210 (Brennan, Toohey and Gaudron JJ).

<sup>418</sup> *Mabo (No 1)* [1988] 166 CLR 186, 201 (Wilson J).



or impairing a human right.<sup>419</sup> The Miriam people also argued that the *Queensland Act* deprived them of rights based on their race, which constituted a violation of the guarantee of equality under s 10(1) of the *Commonwealth Act*.<sup>420</sup>

The parties to the case expressly requested that the Court not consider the nature and extent of the Miriam peoples' rights that survived the State's annexation of the Islands.<sup>421</sup> (The High Court subsequently considered these issues in *Mabo (No 2)*.) Instead, the Court assumed such rights continued to exist after annexation and focused on whether s 3 of the *Queensland Act* extinguished those rights and was inconsistent with ss 9 and 10(1) of the *Commonwealth Act*.

Five members of the High Court of Australia rendered opinions in *Mabo (No 1)*. A majority of the Court concluded that, assuming the Miriam people held proprietary rights to the Islands, the *Queensland Act* extinguished those rights.<sup>422</sup> A different majority held that the *Queensland Act* was invalid because it violated the *Commonwealth Act*.<sup>423</sup>

Dawson J held that the State acted within its authority when it enacted the *Queensland Act*, contrary to plaintiffs' argument that the State Parliament's authority was subject to the reservation by the Crown of interests it held prior to the State's annexation of the Islands.<sup>424</sup> Dean J dissented, finding that s 3 of the *Queensland Act* could be read narrowly as simply providing the declaratory basis for s 4, which validated any past actions taken under Crown lands legislation after the State annexed the Islands.<sup>425</sup> Under this construction, s 3 only extinguished those rights that would have impacted the validity of past disposals of the Islands under Crown lands legislation.<sup>426</sup>

Two members of the Court, Mason CJ and Wilson J, held that the question of whether s 3 of the *Act* violated s 9 of the *Commonwealth Act* could not be determined until the State actually exercised its power to grant lands under s 3.<sup>427</sup> Dawson J found no inconsistency between s 3 of the *Queensland Act* and s 9 of the *Commonwealth Act* and agreed with Wilson J that the extent to which the exercise of authority under the *Act* violated s 9 could not be determined in the absence of a concrete factual situation in which the State was exercising its authority.<sup>428</sup> Mason CJ and Dawson J similarly held that, because the purpose of s 10(1) of the *Commonwealth Act* was to grant rights previously denied to a person based on his or her race, colour, ethnic or national origin, the question of whether s 3 of the *Queensland Act* violated s 10(1) could not be resolved until the nature of the plaintiffs' rights to the Islands were defined.<sup>429</sup>

<sup>419</sup> *Mabo (No 1)*[1988]166 CLR 186, 203-04 (Wilson J).

<sup>420</sup> *Mabo (No 1)*[1988]166 CLR 186, 204 (Wilson J).

<sup>421</sup> *Mabo (No 1)*[1988]166 CLR 186, 211 (Brennan, Toohey and Gaudron JJ).

<sup>422</sup> *Mabo (No 1)*[1988]166 CLR 186, 213-14 (Brennan, Toohey and Gaudron JJ)(Wilson J concurring).

<sup>423</sup> *Mabo (No 1)*[1988]166 CLR 186, 219 (Brennan, Toohey and Gaudron JJ); 166 CLR 186, 231-32 (Deane J).

<sup>424</sup> *Mabo (No 1)*[1988]166 CLR 186, 238-39 (Dawson J).

<sup>425</sup> *Mabo (No 1)*[1988]166 CLR 186, 225 (Deane J).

<sup>426</sup> *Mabo (No 1)*[1988]166 CLR 186, 227 (Deane J dissenting).

<sup>427</sup> *Mabo (No 1)*[1988]166 CLR 186, 198 (Mason CJ) and 166 CLR 186, 204 (Wilson J).

<sup>428</sup> *Mabo (No 1)*[1988]166 CLR 186, 242 (Dawson J).

<sup>429</sup> *Mabo (No 1)*[1988]166 CLR 186, 198 (Mason CJ) and 166 CLR 186, 242-43 (Dawson J).



In their opinion on the issue of whether s 3 of the *Queensland Act* was inconsistent with s 10 of the *Commonwealth Act*, Brennan, Toohey and Gaudron JJ found that s 3 extinguished all legal rights that arose under native law and customs while confirming all legal rights originating in Queensland or Crown legislation.<sup>430</sup> The justices observed that s 9 of the *Commonwealth Act* did not prohibit the enactment of a law extinguishing legal rights over land, but barred the doing of an act that impaired rights on the basis of race.<sup>431</sup> The justices queried whether the *Queensland Act* was consistent with s 9 simply because it changed rights rather than constituted an act, but decided it was unnecessary to resolve the issue because the law clearly violated s 10 of the *Commonwealth Act*.<sup>432</sup>

Section 10 protected the right of a person belonging to a racial or ethnic group to enjoy rights on an equal basis with other persons not belonging to that group.<sup>433</sup> The rights to which s 10 of the *Commonwealth Act* referred included all rights identified in CERD, including the right to own and inherit property.<sup>434</sup> The justices noted that the preamble to CERD stated the treaty's intent to protect human rights as a means of preserving and advancing "the dignity and equality inherent in all human beings" and to "promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion."<sup>435</sup> Therefore, the rights enforceable under s 10 of the *Commonwealth Act* were human rights, "not necessarily [] legal right[s] enforceable under the municipal law."<sup>436</sup> The justices noted that the human right to own and inherit property was recognized under the Universal Declaration of Human Rights, 1948.<sup>437</sup> Even though this right to own and inherit property was not necessarily a legal right, the justices observed that it was

a human right the enjoyment of which is peculiarly dependent upon the provisions and *administration* of municipal law. Inequality in the enjoyment of that right may occur by discrimination in the provisions of the municipal law or by discrimination in the *administration* of the municipal law or by both. When inequality in enjoyment of a human right exists between persons of different races, colours or national or ethnic origins under Australian law, s. 10 operates by enhancing the enjoyment of the human right by the disadvantaged persons to the extent necessary to eliminate the inequality.<sup>438</sup>

The Miriam people enjoyed the right to own and inherit property on the same basis as non-natives if such rights arose under Crown lands legislation.<sup>439</sup> In the absence of the *Queensland Act*, however, assuming native rights survived the State's annexation of the Islands and the common law recognized those rights, Queensland law recognized both 'traditional rights held and rights granted in pursuance of Crown lands legislation.'<sup>440</sup> If the traditional property rights of the Miriam peoples were accorded the status of legal

<sup>430</sup> *Mabo (No 1)*[1988]166 CLR 186, 214 (Brennan, Toohey and Gaudron JJ).

<sup>431</sup> *Mabo (No 1)*[1988]166 CLR 186, 216 (Brennan, Toohey and Gaudron JJ).

<sup>432</sup> *Mabo (No 1)*[1988]166 CLR 186, 216 (Brennan, Toohey and Gaudron JJ).

<sup>433</sup> *Mabo (No 1)*[1988]166 CLR 186, 216 (Brennan, Toohey and Gaudron JJ).

<sup>434</sup> *Mabo (No 1)*[1988]166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ).

<sup>435</sup> *Mabo (No 1)*[1988]166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ).

<sup>436</sup> *Mabo (No 1)*[1988]166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ).

<sup>437</sup> *Mabo (No 1)*[1988]166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ).

<sup>438</sup> *Mabo (No 1)*[1988]166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ)(emphasis added).

<sup>439</sup> *Mabo (No 1)*[1988]166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ).

<sup>440</sup> *Mabo (No 1)*[1988]166 CLR 186, 218 (Brennan, Toohey and Gaudron JJ).

rights, the application of the *Queensland Act* resulted in the arbitrary deprivation of the Miriam peoples' human rights to own and inherit property to the same extent as other members of the Australian community, in violation of s 10 of the *Commonwealth Act*.<sup>441</sup> The justices explained that a state law seeking to extinguish traditional native title would

fail because s. 10(1) of the Racial Discrimination Act clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.<sup>442</sup>

As a result, the State's attempt to extinguish the property rights of the Miriam people failed because it violated their human right to inherit and own property on the same basis as others.<sup>443</sup>

Wilson J dissented from this holding. He held that s 3 restored equality by removing what he described as the inequality that resulted by conferring on the Miriam people a traditional right to property not held by persons of other races.<sup>444</sup> Despite this finding, Wilson J admitted that

a deep sense of injustice may remain. This is because formal equality before the law does not always achieve effective and genuine equality. The latter will only be achieved by reason of the former when the factual circumstances in which the different groups are placed are comparable. The extension of formal equality in law to a disadvantaged group may have the effect of entrenching inequality in fact . . . The Convention [CERD] recognizes that formal equality before the law may nevertheless result in factual discrimination because of racial or other disadvantage.<sup>445</sup>

To address the inequality that persisted despite formal equality before the law, CERD authorized state parties to adopt special measures “to ensure the adequate development and protection of certain racial groups . . . for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms”.<sup>446</sup> In other words, the goal of special measures was to bring about substantive equality between the races.<sup>447</sup> Such measures did not constitute discrimination under CERD.<sup>448</sup> Wilson J concluded that s 10 of the *Commonwealth Act* was not a special measure within the meaning of CERD and therefore, did not assist the Miriam people with respect to their claim. Nevertheless, Wilson J noted that if the State passed a law that recognized the Miriam peoples' traditional rights to the Islands, such a law would likely constitute a special measure, permissible under CERD.<sup>449</sup>

<sup>441</sup> *Mabo (No 1)*[1988]166 CLR 186, 218 (Brennan, Toohey and Gaudron JJ).

<sup>442</sup> *Mabo (No 1)*[1988]166 CLR 186, 219 (Brennan, Toohey and Gaudron JJ).

<sup>443</sup> *Mabo (No 1)*[1988]166 CLR 186, 219 (Brennan, Toohey and Gaudron JJ).

<sup>444</sup> *Mabo (No 1)*[1988]166 CLR 186, 206 (Wilson J).

<sup>445</sup> *Mabo (No 1)*[1988]166 CLR 186, 206 (Wilson J).

<sup>446</sup> *Mabo (No 1)*[1988]166 CLR 186, 206 (Wilson J).

<sup>447</sup> *Mabo (No 1)*[1988]166 CLR 186, 207 (Wilson J).

<sup>448</sup> *Mabo (No 1)*[1988]166 CLR 186, 207 (Wilson J).

<sup>449</sup> *Mabo (No 1)*[1988]166 CLR 186, 207 (Wilson J).

Contrary to the majority, Wilson J held that s 3 of the *Queensland Act* did not violate s 10 of the *Commonwealth Act*. Nevertheless, his opinion is important because it examines the role of affirmative action measures in bringing about substantive versus formal equality. In light of the Malaysia Constitutional requirement of special protections for the natives of Sarawak, Wilson J's opinion explores an aspect of equality directly relevant to Malaysia.

b. *Mabo and Others v State of Queensland*<sup>450</sup>

i. Introduction

Following the High Court of Australia's decision in *Mabo (No 1)*, the plaintiffs in that case pursued their claim of native title under the common law in subsequent litigation. That litigation culminated in the decision in *Mabo and Others v State of Queensland* ('*Mabo (No 2)*'), a case in which the Meriam people asserted rights to their traditional lands on the Murray Islands ('Islands') in the Torres Strait in Queensland, Australia.

ii. Historical Background

Before analyzing the claim, Brennan J reviewed the history of the Meriam people in relation to the annexation of the Island. Brennan J noted that on 10 October 1878, the Colonial Office in Westminster issued Letters Patent to the Governor of Queensland, authorizing him to declare the Island annexed to Queensland, subject to the Queensland Legislature adopting a law to that effect.<sup>451</sup> The Queensland Legislature enacted the required law, and on 21 July 1879, the Governor declared the annexation of the Islands, effective 1 August 1879.<sup>452</sup> In 1882, Queensland 'reserved' Murray or Mer, the largest of the Islands that comprised the Murray Islands, for the 'native inhabitants.'<sup>453</sup> Later that year, Queensland issued a lease to the London Missionary Society ('Society') for two acres of land on Mer Island.<sup>454</sup> The Society was responsible for law and order and resolution of disputes.<sup>455</sup>

Prior to Queensland annexation of the Islands, the Meriam people had limited contact with Europeans. Evidence of early European contacts revealed that Meriam 'society was regulated more by custom than by law.'<sup>456</sup> After annexation, Queensland's administration of the Islands increased, leading Brennan J to conclude that after annexation, Queensland

<sup>450</sup> (1992) 107 ALR 1. Four opinions were rendered in *Mabo (No 2)*. Mason CJ and McHugh J joined in Brennan J's decision. Deane and Gaudron JJ wrote a separate opinion, as did Toohey J. Dawson J wrote a dissenting opinion. Despite the separate opinions, six justices agreed that Australian common law recognises native title. Where such title is not extinguished, it entitles aborigines to their traditional lands according to their laws and customs. 107 ALR 1, 7. The summary of *Mabo (No 2)* in this Part VI focuses on the judgment of Brennan J.

<sup>451</sup> *Mabo (No 2)* (1992) 107 ALR 1, 11 (Brennan J).

<sup>452</sup> *Mabo (No 2)* (1992) 107 ALR 1, 11 (Brennan J).

<sup>453</sup> *Mabo (No 2)* (1992) 107 ALR 1, 12 (Brennan J).

<sup>454</sup> *Mabo (No 2)* (1992) 107 ALR 1, 12 (Brennan J).

<sup>455</sup> *Mabo (No 2)* (1992) 107 ALR 1, 12 (Brennan J).

<sup>456</sup> *Mabo (No 2)* (1992) 107 ALR 1, 10 (Brennan J).

effectively administered the Islands.<sup>457</sup> Despite the exercise of administrative authority, in 1898, an anthropological team from Cambridge visited the Islands and reported that the Queensland Government had little impact on native land tenure.<sup>458</sup>

iii. Issues addressed by court

Brennan J described the ‘chief question’ of the case as whether annexation of the Islands on 1 August 1879 vested in the Crown absolute ownership and legal possession of and exclusive power to confer title to all land in the Islands.<sup>459</sup> Brennan J noted several cases supporting this argument, but ultimately concluded that the theory ‘invites critical examination.’<sup>460</sup> The effect of the argument was that, upon British subjects settling the colony, the rights of indigenous inhabitants were extinguished, though they had never ceded their lands to the Crown or lost them through conquest.<sup>461</sup> Brennan J rejected the notion that the common law

took from indigenous inhabitants any rights to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.<sup>462</sup>

Importantly, the court noted that in defining the common law to bring it in line with ‘contemporary notions of justice and human rights’ it could not undermine any fundamental principles on which the Australian law was based, if the effect would be to destroy the legal system.<sup>463</sup>

iv. International law on acquisition of sovereignty

In updating the existing common law to ensure its consistency with modern norms, Brennan J explored the foundations of that law with reference to the international law in effect at the time the Crown established colonies in Australia. Historically, international law recognised three methods for acquisition of sovereignty over new lands: conquest, cession, and occupation or settlement of territories that were *terra nullius* or unoccupied.<sup>464</sup> The occupation of territories *terra nullius* had been expanded to allow for the acquisition of sovereignty over lands inhabited by indigenous people who were not politically or otherwise organized in a manner that met European standards of civilization.<sup>465</sup> Several theories were advanced to justify the expansion of the doctrine of *terra nullius*.<sup>466</sup> The idea that indigenous peoples were backwards, would benefit from

<sup>457</sup> *Mabo (No 2)* (1992) 107 ALR 1, 14 (Brennan J).

<sup>458</sup> *Mabo (No 2)* (1992) 107 ALR 1, 14 (Brennan J).

<sup>459</sup> *Mabo (No 2)* (1992) 107 ALR 1, 15 (Brennan J).

<sup>460</sup> *Mabo (No 2)* (1992) 107 ALR 1, 16-18 (Brennan J).

<sup>461</sup> *Mabo (No 2)* (1992) 107 ALR 1, 18 (Brennan J).

<sup>462</sup> *Mabo (No 2)* (1992) 107 ALR 1, 18 (Brennan J).

<sup>463</sup> *Mabo (No 2)* (1992) 107 ALR 1, 19 (Brennan J).

<sup>464</sup> *Mabo (No 2)* (1992) 107 ALR 1, 21 (Brennan J).

<sup>465</sup> *Mabo (No 2)* (1992) 107 ALR 1, 21 (Brennan J).

<sup>466</sup> *Mabo (No 2)* (1992) 107 ALR 1, 21 (Brennan J).

Christianity and European civilization, and the failure of indigenous people to cultivate their lands all served to legitimize European settlement of lands already occupied by indigenous people.<sup>467</sup> It was argued that, under this expanded notion of *terra nullius*, the Crown acquired sovereignty over the Islands.<sup>468</sup>

The fiction that New South Wales (of which the Islands were formerly a part) was unoccupied at the time it was acquired by Britain was successfully advanced in *Milirrpum & Others v Nabalco Pty. Ltd. and the Commonwealth of Australia (the Gove Land Rights Case)* ('*Milirrpum*'),<sup>469</sup> the only reported decision prior to *Mabo (No 2)* in which an Australian court addressed the merits of a aboriginal claim asserting land rights.<sup>470</sup> In *Milirrpum*, certain aboriginal clans in the Northern Territory argued that they held communal native title to land subject to mining by Nabalco, a company acting pursuant to a mining lease issued by the Commonwealth.<sup>471</sup> The land was formerly part of New South Wales and therefore, the status of New South Wales at the time of colonization was important to the Supreme Court for the Northern Territory's ultimate determination of the plaintiffs' claim.

Among other things, the Supreme Court held that it was bound by the prior determination of *Cooper v Stuart* [1889] 14 App. Cas. 286, in which the Privy Council concluded that Britain acquired the Colony of New South Wales through the settlement of unoccupied territory.<sup>472</sup> The *Milirrpum* court found that the question of the status of New South Wales was a matter of law.<sup>473</sup> Thus, the plaintiffs' success in proving that aborigines were in occupation of New South Wales and that they followed a highly developed set of customs and laws governing land tenure, did not modify the Privy Council's former legal determination that New South Wales was unoccupied and without settled laws at the time it was acquired by Britain through settlement.<sup>474</sup>

#### v. Reception of English law

Brennan J next considered the question of the English law received in Queensland and the Islands.<sup>475</sup> In the case of ceded territories or those acquired by conquest, the laws of the country continued until altered by the new sovereign.<sup>476</sup> With regard to uninhabited territories, English law applied to the extent it was suitable to the circumstances of the colony. English law was received as the personal law of the settlers.<sup>477</sup> In colonies settled under the enlarged notion of *terra nullius*, where indigenous inhabitants already occupied

<sup>467</sup> *Mabo (No 2)* (1992) 107 ALR 1, 21 (Brennan J).

<sup>468</sup> *Mabo (No 2)* (1992) 107 ALR 1, 22 (Brennan J).

<sup>469</sup> [1971]17 F.L.R. 141.

<sup>470</sup> *Mabo (No 2)* [1992] 107 CLR 1, 101 (Deane and Gaudron JJ).

<sup>471</sup> [1971]17 F.L.R. 141, 144, 146.

<sup>472</sup> [1971]17 F.L.R. 141, 243-44.

<sup>473</sup> [1971]17 F.L.R. 141, 242.

<sup>474</sup> [1971]17 F.L.R. 141, 243-44.

<sup>475</sup> *Mabo (No 2)* (1992) 107 ALR 1, 22 (Brennan J). This was the law received in the Colony of New South Wales, as Queensland was part of the Colony of New South Wales until 6 June 1859. Ibid 14, 22.

<sup>476</sup> *Mabo (No 2)* (1992) 107 ALR 1, 23 (Brennan J).

<sup>477</sup> *Mabo (No 2)* (1992) 107 ALR 1, 23 (Brennan J).

the territory, the English law applied based on the fiction that no local law existed.<sup>478</sup> The indigenous people were viewed to be without a sovereign and without laws based on their primitive social organization.<sup>479</sup> English law was received in the colony not only as the personal law of the settlers, but based on the notion that because the settlers brought with them the sovereignty of the Crown, English law also applied to indigenous inhabitants.<sup>480</sup>

vi. Rejection of common law principles based on expanded doctrine of *terra nullius*

Brennan J found that the conclusion that the indigenous inhabitants of Australia had no laws at the time the country was settled by the Crown was not only factually inaccurate, it would have had the effect of conferring common law protection on indigenous inhabitants, and in the next moment, taking away their right to occupy their lands.<sup>481</sup> Furthermore, the notion was based ‘on a discriminatory denigration of indigenous’ people that had no place in Australian society.<sup>482</sup> Brennan J also noted that the International Court of Justice had condemned the expanded doctrine of *terra nullius*.<sup>483</sup> Brennan explained:

If the international notion that inhabited land may be classified as *terra nullius* no longer commands general support, then the doctrines of common law which depend on that notion that native peoples may be “so low in the scale of social organization” that it is “idle to impute to such people some shadow of the rights known to our law” can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.<sup>484</sup>

In refusing to follow the common law notions that depended on the expanded notion of *terra nullius*, Brennan J also rejected the associated denial of indigenous rights to lands.<sup>485</sup> Brennan said that the denial of these rights, which was based on the fiction that indigenous people were without laws or organization meeting European standards of civilization, was inconsistent with international human rights law:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>486</sup>

In addition to rejecting the discriminatory basis for denying indigenous land rights, Brennan J also refused to follow cases holding that the Crown acquired full beneficial

<sup>478</sup> *Mabo (No 2)* (1992) 107 ALR 1, 24 (Brennan J).

<sup>479</sup> *Mabo (No 2)* (1992) 107 ALR 1, 21 (Brennan J).

<sup>480</sup> *Mabo (No 2)* (1992) 107 ALR 1, 21 (Brennan J).

<sup>481</sup> *Mabo (No 2)* (1992) 107 ALR 1, 26 (Brennan J).

<sup>482</sup> *Mabo (No 2)* (1992) 107 ALR 1, 27 (Brennan J).

<sup>483</sup> *Mabo (No 2)* (1992) 107 ALR 1, 27 (Brennan J).

<sup>484</sup> *Mabo (No 2)* (1992) 107 ALR 1, 28 (Brennan J). Commentators have been careful to note that *Mabo (No 2)* did not reject the doctrine of *terra nullius*. See e.g. Richard Bartlett, *Native Title in Australia* [2.22] (LexisNexis Butterworths Australia 2004).

<sup>485</sup> *Mabo (No 2)* (1992) 107 ALR 1, 28 (Brennan J).

<sup>486</sup> *Mabo (No 2)* (1992) 107 ALR 1, 29 (Brennan J). This principle was followed by the court in *Sagong I* [2002] 2 MLJ 591, 615.



ownership of lands upon asserting sovereignty over the colonies of Australia.<sup>487</sup> Brennan J said these cases conflated sovereignty with the role of a sovereign as the owner of land.<sup>488</sup> The two were distinct, and thus it was possible for the Crown to acquire sovereignty and title to a territory without acquiring ownership of the land comprising the territory.<sup>489</sup>

Brennan also noted that under the common law, the Crown held all land in England, but this was not equivalent to the Crown's ownership of land.<sup>490</sup> Under the common law, ownership was acquired through occupation of land and could not be obtained if land was already occupied by another.<sup>491</sup> Once the notion that the Crown acquired sovereignty and beneficial ownership of the Colony of New South Wales was rejected, the Crown could not be found to have acquired ownership of land already in occupation.<sup>492</sup>

#### vii. Radical title of Crown

The concept that the Crown held all land in England pursuant to the doctrine of tenure, however, still applied in the Colony.<sup>493</sup> Nevertheless, the Crown, held only radical title to the Colony, which was a necessary condition for the doctrine of tenure and an aspect of sovereignty.<sup>494</sup> This radical title, however, was not equivalent to the Crown's absolute beneficial ownership over the Islands upon annexation.<sup>495</sup> Brennan J noted that this conceptualization of the Crown's radical title accommodated recognition of pre-existing rights of indigenous inhabitants, which did not depend upon a grant from the Crown for their existence.<sup>496</sup> Early Privy Council decisions, such as *Amodu Tijani*, recognised the title of indigenous inhabitants and the efforts of courts to fit native title into terms familiar to the English common law, a tendency that 'has to be held in check closely.'<sup>497</sup> Brennan J also noted that in *Amodu Tijani*, the Privy Council recognised the community title of indigenous people.<sup>498</sup>

Brennan J elaborated on the community title as a property interest over land in the exclusive possession of the community.<sup>499</sup> The community's ownership of the land was not undermined by the fact that it was inalienable.<sup>500</sup> Furthermore, the fact that individuals in the community held only usufructuary rights to the land under the community's customs did not reduce the property and ownership interest of the

<sup>487</sup> *Mabo (No 2)* (1992) 107 ALR 1, 30 (Brennan J).

<sup>488</sup> *Mabo (No 2)* (1992) 107 ALR 1, 30-31 (Brennan J).

<sup>489</sup> *Mabo (No 2)* (1992) 107 ALR 1, 30-31 (Brennan J).

<sup>490</sup> *Mabo (No 2)* (1992) 107 ALR 1, 31 (Brennan J).

<sup>491</sup> *Mabo (No 2)* (1992) 107 ALR 1, 31 (Brennan J).

<sup>492</sup> *Mabo (No 2)* (1992) 107 ALR 1, 31 (Brennan J).

<sup>493</sup> *Mabo (No 2)* (1992) 107 ALR 1, 33 (Brennan J).

<sup>494</sup> *Mabo (No 2)* (1992) 107 ALR 1, 33-34 (Brennan J).

<sup>495</sup> *Mabo (No 2)* (1992) 107 ALR 1, 34-35 (Brennan J); *Madeli III* follows this holding. [2007] Civil Appeal No. )1-1-2006 (Q) 26.

<sup>496</sup> *Mabo (No 2)* (1992) 107 ALR 1, 34 (Brennan J).

<sup>497</sup> *Mabo (No 2)* (1992) 107 ALR 1, 35 (Brennan J).

<sup>498</sup> *Mabo (No 2)* (1992) 107 ALR 1, 35 (Brennan J).

<sup>499</sup> *Mabo (No 2)* (1992) 107 ALR 1, 36 (Brennan J).

<sup>500</sup> *Mabo (No 2)* (1992) 107 ALR 1, 36 (Brennan J). This principle was adopted by the court in *Sagong I* [2002] 2 MLJ 591, 613.

community or preclude common law recognition of ‘a proprietary community title.’<sup>501</sup> Brennan J reasoned that if the Crown could extinguish indigenous land rights and subsequently grant property interest in the same land, it would be inconsistent to characterize the indigenous land rights as non-proprietary.<sup>502</sup> Furthermore, the common law was capable of recognizing non-proprietary rights of the individual community members, which were held according to the community’s laws and customs and were dependent on the community’s title.<sup>503</sup>

viii. Doctrine of continuity of private property rights

After quickly disposing of the arguments that the Crown enjoyed absolute beneficial ownership of the Islands based on their status as the patrimony of the nation or royal prerogative, Brennan J considered the defendants’ argument that unless the Crown expressly recognised indigenous property rights upon acquiring sovereignty, it was presumed that the Crown extinguished such rights.<sup>504</sup> Brennan J reviewed the decision in *Vajesingji Joravarsingji v Secretary of State for India*,<sup>505</sup> which held that the new sovereign must expressly recognize property rights that existed under the old regime before those rights could be recognized by the common law. This view, however, did not ‘accord with the weight of authority’, which followed the doctrine of continuity.<sup>506</sup> Under the doctrine of continuity, a change in sovereignty did not disturb private property interests and such interests were presumed to survive the change.<sup>507</sup> Brennan J found support for this conclusion in several Privy Council decisions, including *Amodu Tijani* and *Adeyinka Oyekan v Musendiku Adele*,<sup>508</sup> as well in the Supreme Court of Canada’s decision in *Calder*.<sup>509</sup> Brennan J held that native title represented a burden on the Crown’s radical title.<sup>510</sup> Recognition of native title was necessary to ensure that all Australian citizens were treated equally before the law and to reject the discriminatory characterization of aboriginal people as ‘too low in the scale of social organization to be acknowledged as possessing rights and interests in land.’<sup>511</sup>

<sup>501</sup> *Mabo (No 2)* (1992) 107 ALR 1, 36 (Brennan J). This principle was adopted by the court in *Sagong I* [2002] 2 MLJ 591, 614.

<sup>502</sup> *Mabo (No 2)* (1992) 107 ALR 1, 36 (Brennan J).

<sup>503</sup> *Mabo (No 2)* (1992) 107 ALR 1, 36 (Brennan J).

<sup>504</sup> *Mabo (No 2)* (1992) 107 ALR 1, 37-39 (Brennan J).

<sup>505</sup> (1924), L.R. 51 Ind. App. 357.

<sup>506</sup> *Mabo (No 2)* (1992) 107 ALR 1, 40 (Brennan J).

<sup>507</sup> *Mabo (No 2)* (1992) 107 ALR 1, 40 (Brennan J). *Nor Nyawai I* cites *Mabo (No 2)* for the principle that indigenous people had pre-existing legal systems and associated rights, which continued until a new sovereign modified or extinguished such rights by legislative or executive action. *Nor Nyawai I* [2001] 6 MLJ 241, 245. *Nor Nyawai I* also cites *Mabo (No 2)* in support of its holding that ‘[n]ative customary law existed and operated side by side with the orders and other legislation of the Rajah until they were abolished by the Rajah.’ *Nor Nyawai I* [2001] 6 MLJ 241, 286.

<sup>508</sup> [1957] 2 All ER 785.

<sup>509</sup> *Mabo (No 2)* (1992) 107 ALR 1, 40-41 (Brennan J).

<sup>510</sup> *Mabo (No 2)* (1992) 107 ALR 1, 41 (Brennan J). This principle was adopted in *Sagong I* [2002] 2 MLJ 591, 612 and *Madeli III* [2007] Civil Appeal No. )1-1-2006 (Q) 26. The court in *Nor Nyawai II* subsequently adopted this rule, as articulated in *Sagong I*. *Nor Nyawai II* [2005] 1 MLJ 256, 269.

<sup>511</sup> *Mabo (No 2)* (1992) 107 ALR 1, 41 (Brennan J).

ix. Native title defined

Brennan J next sought to describe basic aspects of native title:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>512</sup>

Although the nature of native title depended upon traditional laws and customs, which were factual matters, Brennan J stated several ‘general propositions’, including:

- Native title could not be alienated under the common law because it is not derived from the common law. Lands subject to native title could be sold or voluntarily surrendered to the Crown.<sup>513</sup>
- Native title existed so long as the community continued to acknowledge traditional laws, to the extent possible, observe customs, and maintained its traditional connection to its land.<sup>514</sup>
- Native title was protected by legal and equitable remedies, which varied depending upon the nature of the rights and interests established under the laws and customs. These rights could include property, personal, or use rights possessed by a community, group, or individual.<sup>515</sup>
- Laws and customs of indigenous communities changed, but this change did not affect entitlement to communal native title so long as an identifiable community continued with members identified by each other as belonging to the community, living under its laws and customs.<sup>516</sup>
- An indigenous community possessing or entitled to possess land under a proprietary native title could enforce its right to possession through a representative action brought on behalf of the community or the individuals who hold rights that dependent on the communal native title.<sup>517</sup>
- Native title could be extinguished by clear and plain executive or legislative action.<sup>518</sup>

<sup>512</sup> *Mabo (No 2)* (1992) 107 ALR 1, 42 (Brennan J). *Nor Nyawai I* adopts this formulation of native title. [2001] 6 MLJ 241, 268-69.

<sup>513</sup> *Mabo (No 2)* (1992) 107 ALR 1, 42 (Brennan J).

<sup>514</sup> *Mabo (No 2)* (1992) 107 ALR 1, 43 (Brennan J).

<sup>515</sup> *Mabo (No 2)* (1992) 107 ALR 1, 44 (Brennan J).

<sup>516</sup> *Mabo (No 2)* (1992) 107 ALR 1, 44 (Brennan J).

<sup>517</sup> *Mabo (No 2)* (1992) 107 ALR 1, 44 (Brennan J).

<sup>518</sup> *Mabo (No 2)* (1992) 107 ALR 1, 46 (Brennan J). *Sagong I* relies on this principle. [2002] 2 MLJ 591, 612. The court in *Nor Nyawai II* subsequently adopted this rule, as articulated in *Sagong I*. *Nor Nyawai II* [2005] 1 MLJ 256, 269.

In their separate opinion, Dean and Gaudron JJ noted that the common law recognised a wide range of interests traditionally held by natives in their land. Uncultivated lands used for hunting and fishing, as well as cultivated lands, and settlements were capable of recognition and protection.<sup>519</sup>

x. Malaysian courts and *Mabo (No 2)*

The Malaysian courts have relied extensively on the determination in *Mabo (No 2)* in defining the scope and content of native or aboriginal title. In *Adong I*, the court noted that the decisions *Calder* and *Mabo (No 2)* made reference to *Worcester* and *Mitchel*.<sup>520</sup> The *Adong I* decision also noted the following principles established by *Mabo (No 2)*, as restated in *Pareroutja & Ors v Tickner & Ors*:

As mentioned earlier, *Mabo (No 2)* is authority for the proposition that the common law of Australia recognizes a form of native title which, except where it has been extinguished, reflects the entitlement of the indigenous inhabitants in accordance with their laws or customs to their traditional land which is preserved as native title. Native title has its origins in and is given its content by the traditional laws acknowledged by, and the traditional customs observed by, the indigenous inhabitants of the territory. The nature of native title must be ascertained by reference to the traditional laws and customs of the indigenous inhabitants of the land. Native title does not have the customary incidents of common law title to land, but it is recognized by the common law. It may not be alienated under the common law. If a group of aboriginal people substantially maintains its traditional connection with the land by acknowledging the laws and observing the customs of the group, the traditional native title of the group to the land continues to exist. Once the traditional acknowledgment of the laws and observance of the customs of the group ceases, the foundation of native title to the land expires and the title of the Crown becomes a full beneficial title. The possession of land under native title may be protected by representative action brought on behalf of the people concerned . . . .<sup>521</sup>

The court in *Adong I* cited *Mabo (No 2)* in support of its conclusion that native rights existed and were recognized by the common law. *Adong I* also cited *Mabo (No 2)* for the proposition that aboriginal title included rights to move freely on their land without disturbance, to live off the produce of the land, but not to the land itself such that the aborigines could alienate the land.<sup>522</sup> *Adong I* referred to the Australia Parliament's adoption of the *Native Title Act 1993* (Cth), which provided compensation 'on just terms' for lands unlawfully taken, and concluded that compensation for the taking of aboriginal titled lands in Malaysia should be made on the same basis.<sup>523</sup> The court in *Adong II* quoted the portion of *Adong I* that relied on *Mabo (No 2)* for its holding that aboriginal title included the right to move freely on land.<sup>524</sup>

*Sagong I* noted that *Mabo (No 2)* cautioned courts to refrain from construing native title based on English property principles.<sup>525</sup>

<sup>519</sup> *Mabo (No 2)* (1992) 107 ALR 1, 62-64 (Dean and Gaudron JJ).

<sup>520</sup> *Adong I* [1997] 1 MLJ 418, 429.

<sup>521</sup> *Adong I* [1997] 1 MLJ 418, 429 (quoting *Pareroutja & Ors v Tickner & Ors* (1993) 117 ALR 206, 213).

<sup>522</sup> *Adong I* [1997] 1 MLJ 418, 430.

<sup>523</sup> *Adong I* [1997] 1 MLJ 418, 435.

<sup>524</sup> *Adong II* [1998] 2 MLJ 158, 162.

<sup>525</sup> *Sagong I* [2002] 2 MLJ 591, 612.

*Nor Nyawai I* and *Madeli III* cited *Mabo (No 2)* for the principle that the common law recognizes native title.<sup>526</sup> *Nor Nyawai II* cited *Mabo (No 2)* for the principle that continuous occupation was required to establish native title.<sup>527</sup> In holding that the lower court should not have relied on biased witness testimony regarding occupation, *Nor Nyawai II* cited *Mabo (No 2)*, where the court rejected the testimony of the plaintiff Mabo as self-serving to the extent it was not supported by other credible evidence.<sup>528</sup>

xi. *Native Title Act 1993 (Cth)* and *Native Title Amendment Act 1998 (Cth)*

The potential of *Mabo (No 2)* to disrupt non-native land rights prompted a swift response from the Parliament of Australia in the form of the *Native Title Act 1993 (Cth)* (*'Native Title Act'*), which, among other things, established an administrative process for determining native title claims. The *Native Title Act* represented a political compromise between indigenous and non-indigenous interests.<sup>529</sup>

The *Native Title Amendment Act 1998 (Cth)* amended the *Native Title Act*.<sup>530</sup> The amended legislation addresses three general time periods with respect to determination of native title rights: future, past, and pre-colonization to the present.

a. Future acts

Under the *Native Title Act*, future acts affecting native title and occurring on or after 1 January 1994 are valid only if they are defined as such by the *Native Title Act* (e.g. acts to which consent has been granted under an indigenous land use agreement, acts that have met the right to negotiate procedures, actions under certain agricultural and pastoral leases).<sup>531</sup> Nevertheless, a variety of acts that could affect the use of land subject to native title, such as production activities under renewed agricultural or pastoral leases, are valid future acts, and therefore, require no prior consultation with or permission from the indigenous community holding native title.<sup>532</sup>

b. Past acts

The *Native Title Act* establishes a scheme whereby the Commonwealth, states, and territories can validate certain past acts affecting native title. In some instances, the statute also authorizes the relevant government to extinguish native title with respect to land affected by the past act.<sup>533</sup> There are at least two major categories of acts that are subject to this scheme: acts taken by the Commonwealth, a state, or territory after 31 October 1975 but before 1 January 1993 or 1 January 1994, which affect native title, and

<sup>526</sup> *Nor Nyawai I* [2001] 6 MLJ 241, 245; *Madeli III* [2007] Civil Appeal No. )1-1-2006 (Q) 25.

<sup>527</sup> *Nor Nyawai II* [2005] 1 MLJ 256, 269.

<sup>528</sup> *Nor Nyawai II* [2005] 1 MLJ 256, 272.

<sup>529</sup> Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 539-542.

<sup>530</sup> Unless otherwise indicated, subsequent references to the *Native Title Act* refer to the amended legislation.

<sup>531</sup> *Native Title Act 1993 (Cth)* ss 24AA(2)-(5), 24OA, 233(1)(a)(ii).

<sup>532</sup> *Native Title Act 1993 (Cth)* s 24AA(4)(b); See also Tehan, above n 529, 554 (noting that the 1998 amendments removed from the future acts regimes many activities previously subject to that process).

<sup>533</sup> *Native Title Act 1993 (Cth)* s 23A(4).

in the absence of validation, would be invalid as a result of their inconsistency with the *Racial Discrimination Act 1975* (Cth)<sup>534</sup> and intermediate period acts, i.e. acts occurring on or after 1 January 1994 and on or before 23 December 1996.<sup>535</sup>

c. Pre-Crown sovereignty and present connection

The last relevant time period for purposes of the *Native Title Act* is prior to colonization of Australia up to the present. As noted above, the *Native Title Act* establishes an administrative process for establishing entitlement to native title. A claimant group initiates this process by filing an application with the Federal Court.<sup>536</sup> Indigenous Australians hold native title to an area if they possess the area ‘under the traditional laws acknowledged, and the traditional customs observed’, they have, ‘by those laws and customs . . . a connection with the land or waters’, and such rights are recognized under Australian common law.<sup>537</sup>

xii. UN Committee critiques of Australian’s laws and policies regarding indigenous land rights as violating international human rights law

Although indigenous Australians were closely involved in developing the original legislation, the 1998 amendments to the *Native Title Act* were crafted without input from or the consent of indigenous communities.<sup>538</sup> The United Nations Committee on Human Rights and the United Nations Committee on the Elimination of All Forms of Racial Discrimination have issued comments criticizing the 1998 amendments to the *Native Title Act* and more generally, Australian law and policies on indigenous land rights. These comments provide important insights on how state legislation addressing indigenous land rights can lead to violations of the international human right standards.

In 2000, the United Nations Committee on Human Rights (‘Committee’) expressed several concerns in its concluding observations on Australia’s 3<sup>rd</sup> and 4<sup>th</sup> periodic reports under the International Convention on Civil and Political Rights (‘ICCPR’). In the context of Australia’s obligations under article 1 of the ICCPR,<sup>539</sup> which recognises the right of self-determination for all peoples, the Committee stated that Australia has failed to take ‘sufficient action’ to ensure indigenous Australians exercise ‘meaningful control over their affairs.’<sup>540</sup> The Committee noted that despite progress on resolving indigenous land rights, the 1998 amendments had the effect of limiting native rights, especially with regard to indigenous participation in matters affecting their ownership and use of lands.<sup>541</sup> The Committee recommended that Australia take steps to ‘secure for the indigenous

<sup>534</sup> *Native Title Act 1993* (Cth) ss 13A(1), 228; *Western Australia v Ward* (2002) 213 CLR 1, 62-63.

<sup>535</sup> *Native Title Act 1993* (Cth) ss 21, 232A.

<sup>536</sup> *Native Title Act 1993* (Cth) s 61(1).

<sup>537</sup> *Native Title Act 1993* (Cth) s 223(1).

<sup>538</sup> Tehan, above n 529, 556.

<sup>539</sup> International Covenant on Civil and Political Rights, opened for signature, 16 December 1966 (entered into force 23 March 1976).

<sup>540</sup> United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia* (24/07/2000), ¶¶98-528, ¶506, 69<sup>th</sup> sess, UN Doc A/55/40 (2000) (‘HRC, *Concluding Observations*’).

<sup>541</sup> HRC, *Concluding Observations* ¶508.



inhabitants a stronger role in decision-making over their traditional lands and natural resources.<sup>542</sup>

The Committee noted the extreme poverty and exclusion of indigenous Australians and recommended that Australia address these circumstances by taking ‘further steps to secure the rights of its indigenous population under article 27’.<sup>543</sup> Article 27 of the ICCPR provides that peoples belonging to minority groups shall not be denied the right ‘in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’ The Committee suggested that Australia consider addressing these problems by protecting and restoring land rights and by contemplating amendments to the *Native Title Act*.<sup>544</sup> The Committee also noted that in making land use decisions, Australia did not always account for its obligation to secure the sustainability of traditional indigenous economies based on hunting, fishing, and gathering, and to protect religious and cultural sites of significance to indigenous communities, rights guaranteed by art 27 of the ICCPR.<sup>545</sup>

In 2005, the United Nations Committee on the Elimination of Racial Discrimination (‘CERD Committee’) raised similar concerns in its concluding observations on Australia’s 13<sup>th</sup> and 14<sup>th</sup> periodic reports under CERD.<sup>546</sup> The CERD Committee noted that the elimination of the Aboriginal and Torres Strait Islander Commission diminished the ability of indigenous people to participate in decision-making and impaired the Commonwealth’s ability to address indigenous issues.<sup>547</sup> The CERD Committee recommended that Australia ensure that actions affecting native communities be taken with their full informed consent, a requirement of CERD, as interpreted in the CERD Committee’s General Recommendation XXIII.<sup>548</sup> The CERD Committee further recommended that Australia ensure indigenous people have effective representative participation in public affairs and in decision-making and policies that affect their interests.<sup>549</sup>

The CERD Committee also suggested that the 1998 amendments to the *Native Title Act 1993* and case law interpreting those amendments might be inconsistent with CERD.<sup>550</sup> In particular, the CERD Committee said that ‘the 1998 amendments roll back some of the

<sup>542</sup> Ibid ¶ 507.

<sup>543</sup> Ibid ¶509.

<sup>544</sup> Ibid ¶509.

<sup>545</sup> Ibid ¶ 510.

<sup>546</sup> United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of The Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia*, 66<sup>th</sup> sess, CERD/C/AUS/CO/14 (2005) (‘CERD Committee, *Concluding Observations*’).

<sup>547</sup> CERD Committee, *Concluding Observations* ¶ 11.

<sup>548</sup> Ibid. In General Recommendation XXIII, the CERD Committee directed state parties to, *inter alia*, ensure indigenous people participate in decisions affecting their interests and provide their informed consent with regard to such decisions, protect indigenous peoples’ rights to own, control and develop their communal lands and where indigenous peoples have been deprived of such lands, that state parties take steps to return their lands. United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23 Indigenous Peoples*, 51<sup>st</sup> sess, UN Doc A/52/18 Annex V (1997).

<sup>549</sup> CERD Committee, *Concluding Observations* ¶ 11.

<sup>550</sup> Ibid ¶ 16.

protections previously offered to indigenous peoples and provide legal certainty for Government and third parties at the expense of indigenous title.<sup>551</sup> The CERD Committee directed that Australia refrain from repealing existing guarantees for indigenous rights and ensure that the informed consent of indigenous peoples is obtained prior to taking actions that affect their land rights.<sup>552</sup> The CERD Committee also recommended that Australia initiate discussions on the possibility of amendments to the *Native Title Act* to address the concerns of all parties involved.<sup>553</sup>

The CERD Committee expressed concern that the standard of proof that indigenous peoples were required to meet in order to establish their traditional connection to their lands was so stringent that many groups were unable to obtain recognition of native title.<sup>554</sup> The CERD Committee requested additional information from Australia on this issue and urged the state to review the standard, ‘bearing in mind the nature of the relationship of indigenous people to their land.’<sup>555</sup>

### 3. Decisions of the Supreme Court of Canada

One of the most significant cases relied on by the Malaysian courts in crafting the common law doctrine of native title is *Delgamuukw v British Columbia*. The *Delgamuukw* decision was preceded by several other important decisions that laid the foundation for common law recognition of aboriginal title in Canada.

#### a. Case law prior to *Delgamuukw v British Columbia*

The earliest recognition of aboriginal title was in 1888, when the Privy Council handed down its decision in *St. Catherine’s Milling and Lumber Company v. The Queen, on the Information of the Attorney-General for Ontario* (*‘St. Catherine’s Milling’*).<sup>556</sup> *St. Catherine’s Milling* concerned a dispute between the Province of Ontario and the Dominion of Canada regarding the power to issue a permit authorizing the cutting of timber by the appellant, St. Catherine’s Milling and Lumber Co. The timber was located on Indian lands, which had been ceded to the Dominion.<sup>557</sup>

The Privy Council concluded that the *British North America Act, 1867* vested in the provinces all right and title to Crown lands within the boundary of the province if such lands were vested in the Crown at the time of the union (i.e. the creation of the federal government in 1867). This result, however, was avoided if the Indians that ceded the lands to the Crown prior to 1867 held them in fee simple.<sup>558</sup> Because the Crown held a ‘present proprietary estate’ in the Indian lands, subject to Indian title, ‘a mere burden’ representing a ‘personal and usufructuary right, dependent upon the good will of the

<sup>551</sup> Ibid. .

<sup>552</sup> Ibid.

<sup>553</sup> Ibid.

<sup>554</sup> Ibid ¶ 17.

<sup>555</sup> Ibid ¶ 17.

<sup>556</sup> 14 App Cas 46.

<sup>557</sup> *St. Catherine’s Milling* (1888) 14 App Cas 46.

<sup>558</sup> *St. Catherine’s Milling* (1888) 14 App Cas 46.

Sovereign', the title to such lands passed to the Province of Ontario at the time of the formation of the union.<sup>559</sup> In other words, 'there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered'.<sup>560</sup> Such surrender occurred at the time of the cession under the 1873 treaty.<sup>561</sup>

*St. Catherine's Milling* identified the *Royal Proclamation of 1763* as the source of aboriginal title.<sup>562</sup> This conclusion was rejected in the 1973 decision of *Calder v. Attorney-General of British Columbia* ('*Calder*').<sup>563</sup>

In *Calder*, the Nishga Indian Tribe sought a declaration of their Indian title to land located in northwest British Columbia.<sup>564</sup> In the course of his decision, Judson J rejected the proposition that the *Royal Proclamation of 1763* was the exclusive source of aboriginal title in Canada and set forth the following definition of aboriginal title:

[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . . . What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".<sup>565</sup>

Ultimately, Judson J concluded that, through a series of statutes, the Dominion of Canada and the Province of British Columbia had established reserves for Indians and opened lands for settlement, actions that extinguished the Nishga Tribe's aboriginal title in the lands they claimed.<sup>566</sup>

In *Delgamuukw v British Columbia*, the Supreme Court of Canada further developed and clarified the basic principles established by *Calder*.

<sup>559</sup> *St. Catherine's Milling* (1888) 14 App Cas 46.

<sup>560</sup> *St. Catherine's Milling* (1888) 14 App Cas 46.

<sup>561</sup> *St. Catherine's Milling* (1888) 14 App Cas 46.

<sup>562</sup> *St. Catherine's Milling* (1888) 14 App Cas 46.

<sup>563</sup> [1973] 34 D.L.R. (3d) 145, 152.

<sup>564</sup> *Calder* [1973] 34 D.L.R. (3d) 145, 152.

<sup>565</sup> *Calder* [1973] 34 D.L.R. (3d) 145, 152, 156. *Adong I* adopts this definition of native title. [1997] 1 MLJ 418, 430. *Sagong I* notes *Adong I*'s reliance on *Calder*, cites *Adong I* for the principle that native title is based in law and not on a document of title, as stated in *Calder*, and notes that because it was decided before *Delgamuukw*, *Adong I* did not consider *Delgamuukw*'s holding that aboriginal title was an interest in the land and more than a right to engage in certain activities on the land. *Sagong I* [2002] 2 MLJ 591, 611-14. *Nor Nyawai II* cites *Calder* for the principle that aboriginal title arose from aboriginal occupation of land for centuries. *Nor Nyawai II* [2005] 1 MLJ 256, 269. *Nor Nyawai II* also refers to *Adong I*'s reliance on *Calder* for the principle that aboriginal title is based in law and not on a document of title. *Nor Nyawai II* [2005] 1 MLJ 256, 268. *Madeli III* cites *Calder* for the principle that the common law recognizes native title. *Madeli III* [2007] Civil Appeal No. )1-1-2006 (Q) 25-26.

<sup>566</sup> *Calder* [1973] 34 D.L.R. (3d) 145, 167. *Nor Nyawai I* cites Hall J's dissenting opinion in *Calder* for the principle that "a mere change in sovereignty does not extinguish native title to land ... but reference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so." *Nor Nyawai I* [2002] 6 MLJ 241, 245-46.

b. Delgamuukw v British Columbia

The *Delgamuukw* decision addressed the claim of the Gitksan and Wet'suwet'en people to 58,000 square kilometres of land in British Columbia based on aboriginal title.<sup>567</sup> Lamer CJ, who wrote the primary decision in the case, identified the issues in the case as follows:

- the specific content of aboriginal title;
- the test for proof of aboriginal title; and
- whether aboriginal title, as a right in land, required the Supreme Court of Canada ('Court') to rework the test for justification of infringement on aboriginal rights under s 35 of the Canadian Constitution.<sup>568</sup>

Lamer CJ also considered whether the common law rules of evidence required modification to account for the *sui generis* nature of aboriginal rights in light of the fact that oral histories were the primary source of evidence in establishing proof of those rights.<sup>569</sup> Finally, Lamer CJ addressed the authority of the province of British Columbia to extinguish aboriginal title.<sup>570</sup> The following summary of *Delgamuukw* primarily focuses on the first four issues identified by Lamer CJ.<sup>571</sup>

i. Features of aboriginal title

Lamer CJ explained that the analysis of aboriginal title's characteristics began with the Privy Council decision in *St. Catherine's Milling*,<sup>572</sup> which rather unhelpfully described the title as a "personal and usufructuary right".<sup>573</sup> Lamer CJ concluded that the Privy Council was trying to describe the *sui generis* nature of the title to distinguish it from those property rights familiar to the common law, such as fee simple title.<sup>574</sup> The interests in aboriginal title could not be wholly explained by reference to the common law.<sup>575</sup> Nor could those interests be described solely according to aboriginal customs.<sup>576</sup> Instead, both

<sup>567</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 7.

<sup>568</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 2.

<sup>569</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 3.

<sup>570</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 4.

<sup>571</sup> The appellant tribes originally styled their lawsuit as 51 individual claims, brought on the tribes' behalf and on behalf of their respective Houses, to ownership and jurisdiction over the land. On appeal to the Supreme Court of Canada, they amended their claims to reflect collective rights based on aboriginal title and self-government. Because the appellees did not have an opportunity to address the amended claims, Lamer CJ dismissed the appeal and ordered a new trial. *Delgamuukw* [1997] 3 SCR 1010, ¶¶ 73-77. Despite the dismissal, Lamer CJ issued a decision on the legal issues to guide the court at the new trial. *Delgamuukw* [1997] 3 SCR 1010, ¶ 108.

<sup>572</sup> (1888) 14 A.C. 46.

<sup>573</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 112.

<sup>574</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 112.

<sup>575</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 112.

<sup>576</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 112.

the common law and aboriginal perspectives were necessary to fully explain the features of the title.<sup>577</sup>

a. Inalienability

Lamer CJ noted that one feature of aboriginal title was its inalienability to third parties.<sup>578</sup> It is only in this sense that aboriginal title constituted a personal right and its inalienability did not transform the title into a non-proprietary interest representing only a licence to use and occupy land.<sup>579</sup>

b. Source of aboriginal title

The source of aboriginal title was not the *Royal Proclamation 1763* as identified by the Privy Council in *St. Catherine's Milling*, although that document did recognise the title.<sup>580</sup> Rather, aboriginal title resulted from the 'prior occupation of Canada by aboriginal peoples.'<sup>581</sup> The physical fact of occupation represented the common law principle that occupation was proof of possession in law.<sup>582</sup> This possession occurred before the British acquired sovereignty, distinguishing it from normal property interests under the English common law, which arose after British sovereignty.<sup>583</sup> Aboriginal title survived Britain's assertion of sovereignty, which was the second source of aboriginal title: 'the relationship between common law and pre-existing systems of aboriginal law.'<sup>584</sup>

c. Communal title

Lamer CJ found that aboriginal title was a collective right and as such, could not be held by an individual.<sup>585</sup> Instead, the collective membership of an aboriginal nation possessed the title,<sup>586</sup> with the community as a whole responsible for making decisions regarding the land.

d. Content of aboriginal title

Lamer CJ further found that aboriginal title was a right to exclusive use and occupation of land for a variety of purposes.<sup>587</sup> The uses of the land were not limited to aboriginal practices, customs and traditions integral to distinct aboriginal culture.<sup>588</sup> Land held under

<sup>577</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 112.

<sup>578</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 113.

<sup>579</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 113.

<sup>580</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 114.

<sup>581</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 114.

<sup>582</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 114.

<sup>583</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 114.

<sup>584</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 114.

<sup>585</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 115.

<sup>586</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 115.

<sup>587</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 117.

<sup>588</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 117. *Sagong I* cites this principle in support of its holding that, because aboriginal title is a right to the land itself, the use of the land is not limited to traditional activities. *Sagong I* [2002] 2 MLJ 591, 614.

aboriginal title could be used for any purpose so long as the use was ‘not irreconcilable with the nature of the group’s attachment to the land.’<sup>589</sup> This limitation on use, known as the ‘inherent limit’, meant that an aboriginal community could not use their lands in a manner inconsistent with their special, *sui generis* interest in the lands.<sup>590</sup>

The inherent limit was related to the purpose of legal protection afforded by recognition of aboriginal title, which was to protect the ‘historic patterns of occupation’ in ‘recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.’<sup>591</sup> This continuity was protected with respect to the future by limiting uses that would threaten a future relationship between the community and its land.<sup>592</sup>

The nature of the community’s special relationship with the land was relevant in determining the inherent limitations on the use of the land.<sup>593</sup> Thus, if the community established aboriginal title based on its occupation of lands for hunting purposes, then it could not put the land to a use that would undermine the purpose of the lands for hunting, such as strip mining.<sup>594</sup> Similarly, if aboriginal title was based on use of the lands for ceremonial purposes, it could not use the land for a parking lot, which would have the effect of eliminating the special relationship of the community to the land.<sup>595</sup> The inherent limit was also related to the inalienability of land subject to aboriginal title, since alienation would end the special relationship.<sup>596</sup> Like inalienability, the inherent limit served to protect aboriginal people of their interest in lands.<sup>597</sup>

Lamer CJ emphasised that the inherent limit did not restrict the community to traditional uses of the land.<sup>598</sup> Lamer CJ compared the inherent limit to the common law doctrine of waste, under which persons holding land pursuant to a life estate could not use the property in a way that destroyed its value.<sup>599</sup>

*e.*     Relationship between aboriginal title and aboriginal rights

The *Constitution Act, 1982* s 35(1) provides that “[t]he *existing* aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.<sup>600</sup> Lamer CJ explained that aboriginal title was a specific type of aboriginal right protected under the Constitution.<sup>601</sup> Aboriginal rights constituted a broad category encompassing a range

<sup>589</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 117.

<sup>590</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 125.

<sup>591</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 126.

<sup>592</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 127.

<sup>593</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 128.

<sup>594</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 128.

<sup>595</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 128.

<sup>596</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 129.

<sup>597</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 129.

<sup>598</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 132.

<sup>599</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 130.

<sup>600</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 133.

<sup>601</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 137.



of rights, including aboriginal title.<sup>602</sup> Lamer CJ described the rights protected by s 35(1) as falling along ‘a spectrum with respect to their degree of connection with the land.’<sup>603</sup>

On one end of the spectrum were aboriginal rights constituting ‘practices, customs, and traditions that are integral to the distinctive aboriginal culture of the group claiming the right’, but the conduct of the practice, custom or tradition did not constitute occupation and use of the land sufficient to support a claim of aboriginal title.<sup>604</sup> In the middle of the spectrum were practices that took place on land intimately connected with the practice, but the right was to conduct the practice on the specific piece of the land, rather than a right of aboriginal title to the land.<sup>605</sup> Thus, even if a community could not establish occupation that entitled them to aboriginal title, it could still have an aboriginal right to use land for certain activities.<sup>606</sup> Aboriginal title was on the other end side of the spectrum.<sup>607</sup> In contrast to aboriginal rights, aboriginal title was a right to the land itself.<sup>608</sup>

## ii. Test of proof of aboriginal title

In setting out the test for proof of aboriginal title, Lamer CJ noted that the purpose of s 35(1) of the *Constitution Act 1982* ‘to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty’ was relevant to the content of proof.<sup>609</sup> Aboriginal title could be established with proof of aboriginal occupation of lands at the time the Crown asserted sovereignty over those lands.<sup>610</sup> This was a modified version of the test that applied in proving aboriginal rights, which required proof that the activity protected by the right was “‘an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.’”<sup>611</sup> The requirement that land be integral to the aboriginal group’s distinctive culture was ‘subsumed by the requirement of occupancy’ under the test for establishing aboriginal title.<sup>612</sup> In other words, an indigenous group claiming title was required to establish that the land was of “‘central significance to their distinctive culture’”.<sup>613</sup> Nevertheless, because of the occupancy requirement for aboriginal title, Lamer CJ indicated that the need to establish the land as centrally significant should not limit or defeat a claim to title.<sup>614</sup> Land occupied before the Crown established sovereignty and with which the community

<sup>602</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 137.

<sup>603</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 138.

<sup>604</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 138.

<sup>605</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 138.

<sup>606</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 139.

<sup>607</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 138.

<sup>608</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 138. *Sagong I* cites this principle in support of its holding that aboriginal title is an interest in the land and not simply a use right or a right to engage in certain activities on the land. *Sagong I* [2002] 2 MLJ 591, 613, 614.

<sup>609</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 141.

<sup>610</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 144.

<sup>611</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 140.

<sup>612</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 142.

<sup>613</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 150.

<sup>614</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 151.

maintained a substantial connection was likely to be ‘sufficiently important to be of central significance to the culture of the claimants.’<sup>615</sup>

With regard to proof of occupancy, Lamer CJ said that both physical presence on the land and recognition of rights to the land according to the aboriginal perspective were relevant.<sup>616</sup> In this way, both the common law and aboriginal rules were important in establishing proof of occupancy.<sup>617</sup> The aboriginal perspective could be established with reference to aboriginal laws, although those laws were not the exclusive means for demonstrating aboriginal views on land holding.<sup>618</sup>

Physical occupation under the common law could be shown in various ways, including the construction of dwellings, cultivation, enclosure of fields, and ‘regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources’.<sup>619</sup> Factors relevant in determining if occupation was sufficient to establish title included the group’s size, “‘manner of life, material resources, and technological abilities, and the character of the lands claimed’.”<sup>620</sup>

Lamer CJ noted that proof of pre-sovereignty occupancy could be established with proof of present occupation, so long as there was continuity between past and present occupation.<sup>621</sup> Uninterrupted occupation was not required, only that the community substantially maintained its connection with the land.<sup>622</sup> Furthermore, the nature of occupation could change from the time of sovereignty to the present, but such a change did not defeat a claim of aboriginal title, so long as the community substantially maintained its connection with the land and the new use did not undermine continued use by future generations.<sup>623</sup>

The community could establish occupation based on proof from both the common law and aboriginal perspective.<sup>624</sup> For example, while the common law looked to facts showing occupation exclusive of others, in aboriginal societies, the fact of the presence of other aboriginal groups on the claimed lands need not defeat a finding of exclusivity.<sup>625</sup> If evidence demonstrated that the claimant group had the intent and ability to retain exclusive control, exclusivity was established.<sup>626</sup> Evidence of trespass and the presence of other groups could in fact buttress a claim of exclusivity by showing effective control to exclude trespassers and that permission from the claimant group was required to use their lands.<sup>627</sup> Lamer CJ also entertained the possibility of joint title through shared exclusivity

<sup>615</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 151.

<sup>616</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 148.

<sup>617</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 147.

<sup>618</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 148.

<sup>619</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 149.

<sup>620</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 149.

<sup>621</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 152.

<sup>622</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 153.

<sup>623</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 154.

<sup>624</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 156.

<sup>625</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 156.

<sup>626</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 156.

<sup>627</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 157.

or proof that two aboriginal groups lived together on a piece of land, recognised the rights of the other, and excluded all others from the land.<sup>628</sup> Finally, even if a community could not establish exclusive occupation, it might still be entitled to use the lands for specific purposes pursuant to aboriginal rights short of aboriginal title.<sup>629</sup>

Lamer CJ also considered the challenges faced by aboriginal peoples in establishing proof of occupancy through evidence regarding pre-sovereignty activities.<sup>630</sup> Although in general, the appeals courts would not overturn a trial court's findings of fact, where aboriginal rights were at issue, Lamer CJ noted that intervention by the appellate court was necessary if the trial court failed to appreciate the difficulty in producing evidence on activities that occurred at a time when there were no written records or where the trial court diminished the value of the evidence because it did not take a form familiar to the court.<sup>631</sup> Lamer CJ called for special rules to accommodate the aboriginal perspective in weighing evidence on aboriginal rights.<sup>632</sup> The court was required to account for this perspective and at the same time, take into account the common law, as a means of meeting the purpose of s 35(1) of the *Constitution Act, 1982* to reconcile prior aboriginal occupation and the Crown's assertion of sovereignty.<sup>633</sup> Thus, Lamer CJ directed an adaptation of 'the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this required courts to come to terms with oral histories of aboriginal societies, which for many aboriginal nations, were the only record of their past.'<sup>634</sup>

Lamer CJ noted that under conventional rules of evidence, many aspects of oral history were problematic in terms of admissibility and weight as evidence of prior events.<sup>635</sup> The object of the trial was a determination of historical truth, but the evidence of oral history was indirectly relevant to this objective, as it was a mix of history, legend, politics, and moral obligations.<sup>636</sup> In addition, oral histories were out-of-court statements passed down from generation to generation and as such, constituted hearsay.<sup>637</sup> Nevertheless, Lamer CJ held that rules of evidence were modified to provide equal treatment for this evidence on par with the other types of historical evidence with which the courts regularly dealt.<sup>638</sup>

Applying these modified rules to the evidence in the case, Lamer CJ criticized the trial judge's determination that oral histories would not be given weight based on their failure to accurately portray historical truth and because the histories were recounted by the

<sup>628</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 156.

<sup>629</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 159.

<sup>630</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 80.

<sup>631</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 80.

<sup>632</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 82.

<sup>633</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 81.

<sup>634</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 84.

<sup>635</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 86.

<sup>636</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 86.

<sup>637</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 86.

<sup>638</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 87. *Sagong I* cites this principle in support of its holding 'that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and . . . must interpret that evidence in the same spirit'. *Sagong I* [2002] 2 MLJ 591, 622.

communities to which the histories belonged and were not sufficiently detailed.<sup>639</sup> Lamer CJ noted that, because all oral histories shared these features, the trial judge's decision would have given no independent weight to any oral histories, rendering them useless as confirming evidence on aboriginal rights.<sup>640</sup> This result was inconsistent with the rule requiring courts to interpret evidence of aboriginal histories in light of the inherent difficulty of proving facts that occurred before written records were available.<sup>641</sup> Lamer CJ made similar rulings with respect to the appellant's evidence on aboriginal life and territorial affidavits.<sup>642</sup>

### C. Customs

As the preceding summaries of *Mabo (No 2)* and *Delgamuukw* demonstrate, the importance of customs in defining the content of native title varies. Like Australia, Malaysia gives content to native title based on native customs and traditions. In South Africa, customs are also the key to defining indigenous land rights. In addition, like the *Federal Constitution*, which includes customs as part of Malaysian law, the Constitution of South Africa requires courts to apply customs when relevant.

Based on these similarities between Malaysia and South Africa, the Constitutional Court of South Africa's decision in *Richtersveld Community*, which is described below, suggests an approach for applying customs in defining rights under native title in Sarawak. In addition, early decisions from the Privy Council emphasize the importance of defining indigenous land rights according to native custom, rather than limiting recognition to the notions of property that arise from the English common law. The Privy Council decisions are also described in this section.

#### 1. *Alexkor Ltd and Another v Richtersveld Community and Others*<sup>643</sup>

In *Alexkor Ltd and Another v Richtersveld Community and Others* ('*Richtersveld Community*'), members of an indigenous group, the Richtersveld Community ('Community') alleged they were entitled to compensation for dispossession of their land, which they held according to customary laws.<sup>644</sup> The Community sought redress under the *Restitution of Land Rights Act* ('*Act*'), which authorized restitution to communities holding 'a right in land' subsequently dispossessed on a racially discriminatory basis.<sup>645</sup> The *Act* defined a right in land to include 'a customary law interest'.<sup>646</sup> The Constitution of South Africa further provided that a community dispossessed of property as a result of past racially discriminatory laws could, to the extent provided by an act of Parliament, seek restitution or equitable redress.<sup>647</sup> The lower court found that the Community held an interest in their lands under customary law 'akin to ownership under common law' and

<sup>639</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 98.

<sup>640</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 98.

<sup>641</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 98.

<sup>642</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 101, 106.

<sup>643</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*8.

<sup>644</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*8.

<sup>645</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, 10-11.

<sup>646</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*11.

<sup>647</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*21.

this interest included ownership of the minerals.<sup>648</sup> The appellant challenged this finding on appeal to the Constitutional Court of South Africa ('CCSA').<sup>649</sup>

In examining the 'nature and the content of the rights' held by the Community and whether those rights survived the Crown's acquisition of sovereignty over the Community's territory in 1847, the CCSA noted that such rights 'must be determined by reference to indigenous law. That is the law which governed its land rights.'<sup>650</sup> The CCSA referred to the Privy Council decision in *Oyekan and Others v Adele*, holding that English property law should not be imported in determining land rights held under indigenous customs.<sup>651</sup>

The *Constitution of the Republic of South Africa, 1996* required that courts apply customary law where applicable, subject to Constitutional and legislative requirements regarding such laws.<sup>652</sup> According to the CCSA, customs were an independent source of law within the South African legal system, but were interpreted according to the values in the Constitution and subject to legislation.<sup>653</sup> In this way, 'indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.'<sup>654</sup> In addition to the Constitution, the statute on evidence authorized South African courts to take judicial notice of the content of indigenous law established through evidence.<sup>655</sup>

The CCSA explained that customs were not a 'fixed body of formally classified and easily ascertainable rules.'<sup>656</sup> Instead, they transformed and evolved as the lifeways and needs of the people changed.<sup>657</sup> Because they were not based on common law notions, customs 'must be considered in their own terms and not through the prism of the common law.'<sup>658</sup> The content of customs could be discerned through witness testimony or written sources, but with regard to the latter, the CCSA counseled caution 'when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it.'<sup>659</sup> The CCSA acknowledged the difficulty in determining the content of custom, especially in light of its ever-evolving nature, but noted that it was the duty of the judiciary to interpret customs and resolve conflicts between competing versions of traditional practices.<sup>660</sup> The CCSA observed that '[t]he determination of the real character of indigenous title to land therefore "involves the study of the history of a particular community and its usages." So does the determination of its content.'<sup>661</sup>

<sup>648</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*36.

<sup>649</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*36.

<sup>650</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*42.

<sup>651</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*42.

<sup>652</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*42-43, \*51.

<sup>653</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*42-43.

<sup>654</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*44.

<sup>655</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*44.

<sup>656</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*44.

<sup>657</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*44, \*46.

<sup>658</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*44.

<sup>659</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*47.

<sup>660</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*44.

<sup>661</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*49.



The CCSA noted that under Nama law, which was the indigenous law of the Community, land was communally owned and individuals had the right to reasonable occupancy and use of the land and its resources.<sup>662</sup> The community members enjoyed access to the land, but non-members were accorded no rights unless they obtained permission and paid to use the land.<sup>663</sup> Non-members using land without permission were fined by the Community.<sup>664</sup> The CCSA affirmed the lower court's finding that the evidence supported the Community's claim of communal ownership.<sup>665</sup> The CCSA referred to the evidence documenting the Community's history of prospecting for minerals on its land.<sup>666</sup> The CCSA further noted evidence indicating the Community's grant of mineral leases to non-members.<sup>667</sup> This evidence established the Community's ownership of the minerals in and on its lands.<sup>668</sup>

Based on its examination of the Community's customs, the CCSA determined that

The real character of the title that the [] Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the [] Community had a right of ownership in the subject land under indigenous law.<sup>669</sup>

## 2. Privy Council decisions

In rendering decisions on the content of indigenous land rights in Crown colonies, the Privy Council repeatedly emphasized the importance of customs. The Council's decisions also reiterate that courts examined such customs free from the limited notions of English common law property rights.

### a. *Amodu Tijani v The Secretary, Southern Nigeria*

In *Amodu Tijani*, a representative of the Oluwa community of Lagos, known as one of the Idejo White Cap Chiefs, sought compensation under the *Public Lands Ordinance (No. 5 of 1903)* ('*Ordinance of 1903*') for lands taken by the Governor for public purposes 'for an estate in fee simple or for a less estate'.<sup>670</sup> The *Ordinance of 1903* provided that, in the case of property held by a native community, the chief of the community could sell the

<sup>662</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACL R LEXIS 79, \*49.

<sup>663</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACL R LEXIS 79, \*50.

<sup>664</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACL R LEXIS 79, \*50.

<sup>665</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACL R LEXIS 79, \*51.

<sup>666</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACL R LEXIS 79, \*51.

<sup>667</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACL R LEXIS 79, \*51.

<sup>668</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACL R LEXIS 79, \*51.

<sup>669</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACL R LEXIS 79, \*53. *Sagong II* cites this passage in support of its conclusion 'that the plaintiffs enjoy a community title by custom is nothing out of the ordinary'. *Sagong II* [2005] 6 MLJ 289, 308.

<sup>670</sup> [1921] 2 AC 399.



land, despite contrary customs, and that any compensation paid for such sale must be distributed among community members or used to benefit the community as a whole.<sup>671</sup>

The issue before the Privy Council was the amount of compensation the Governor was obligated to pay for an interest acquired in the Oluwa community lands. The Supreme Court of Nigeria held that the community was not entitled to compensation equal to the full beneficial ownership rights in the land. Instead, the community would receive compensation for the rights held by the Idejo White Cap Chief, which amounted to rights of control and management of the land according to native customs. The Idejo White Cap Chief argued that upon the government's taking of the community's lands, he was entitled to the entire value of the land on the basis that if, he had sold the land to the Governor, as he was authorized to do under the *Ordinance of 1903*, he would have received payment for the full value of the land.

In reviewing the Supreme Court's decision, the Privy Council examined 'the real character of the native title to land.' It noted that in the British Empire, the interpretation of native title to land required 'much caution' as that title was often described or measured according to English property law concepts. In the Privy Council's opinion, this was a mistake, as native customs often did not recognise the English common law's division between property and possession. Under some native customs, the title was held by the community and was an usufructuary right, which qualified or burdened the Crown's radical title. But even this description was only partially correct, as the Privy Council noted that 'the history of the particular community and its usages' must be examined in each case to determine the true nature of the title.<sup>672</sup>

The need to treat each community's customs on their own terms was apparent in the case of the Oluwa community. According to Oluwa customs, the land belonged to the community and never to individuals. Each community member held an equal right in the land, with the chief of the community or family acting like a trustee. The chief could not make important decisions with respect to the land without consulting the community or family elders and grants to strangers were subject to their consent. The Privy Council considered these customs in interpreting the provisions in the *Ordinance of 1903*, which would have authorized the chief to sell the land. The Privy Council said that the provision authorizing the sale 'for an estate in fee simple' was evidence that 'it is for the whole of what he so transfers that compensation has to be made.'

The Privy Council examined the Supreme Court of Nigeria's decision, which determined that, because the Crown received rights to Lagos pursuant to a treaty of cession with Benin and the King of Benin was the real beneficial owner of the land in Lagos, the Crown obtained full beneficial title to the land. The Supreme Court of Nigeria further reasoned that, because the Crown was the beneficial owner, the Oluwa community,

<sup>671</sup> *Amodu Tijani* [1921] 2 AC 399.

<sup>672</sup> *Sagong II* identifies these principles as stating the 'definitive position at common law' regarding the nature of native title. *Sagong II* [2005] 6 MLJ 289, 301. *Sagong I* relies on these principles in support of its finding that aboriginal title is a 'right over the land but also an interest in the land'. *Sagong I* [2002] 2 MLJ 591, 611. *Nor Nyawai II* similarly relies on these principles in holding that the interest of the Temuan in their land is a communal interest in the land and as such, more than a use interest. [2005] 1 MLJ 256, 268.

through its chief, held only a right to control and manage land and compensation was limited to this right.

The Privy Council rejected these conclusions. It noted that the community's usufructuary occupation was 'so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference.' The treaty of cession between Benin and the Crown related only to rights of the sovereign and while the treaty passed radical or ultimate title to the land, the private property rights of the inhabitants were unaffected. The Crown obtained no beneficial ownership interests that displaced native title. Thus, the Governor was required to pay compensation based on the full ownership interest of the community.<sup>673</sup>

b. *Oyekan and Others v Adele*

*Oyekan and Others v Adele* ('*Oyekan*')<sup>674</sup> clearly illustrates the rule that customs, and not English common law concepts of property, must control the determination of the rights held under native title.

*Oyekan* concerned a competition between two families, each of which claimed property rights in the royal palace in Lagos. The Docemo family argued that they held the palace under a Crown grant, which they acquired after the Crown entered into an 1861 cession treaty with the family. According to the Docemo family, that treaty passed the entire territory of Lagos to the Crown. Subsequently, in 1870, the Crown issued a grant to the Docemo family for the palace. Adeniji Adele, who was the King of Lagos at the time of the case, claimed he was entitled to occupy the palace under customary law.

The Privy Council recited the rules that determined the status of private property rights upon the Crown's acquisition of sovereignty through cession. The courts assumed that the Crown intended to respect the property rights of the inhabitants. If the Crown enacted laws to acquire property, it was required to pay compensation for the acquired interest, even for rights not known to English law. Disputes between inhabitants regarding property rights were determined under native law and custom 'without importing English conceptions of property law'.<sup>675</sup>

The Privy Council analyzed what rights had passed to the Crown under the 1861 cession treaty and concluded only those rights possessed by the King in his official capacity, including his official residence, were subject to the transfer. The Crown, however, never took possession of the palace and in 1870, granted it to the King, "His heirs, executors,

<sup>673</sup> *Adong I* cites the principles of *Amodu Tijani* as stated in this paragraph as part of its review of the common law decisions recognizing native title. [1997] 1 MLJ 418, 427. *Madeli III* cites *Amodu Tijani* and in particular, the principles set out in this paragraph, in support of its determination that *Mabo (No 2)* and *Calder* state the common law position regarding native title 'throughout the Commonwealth.' *Madeli III* [2007] Civil Appeal No. 01-1-2006(Q) 26.

<sup>674</sup> [1957] 2 All ER 785.

<sup>675</sup> *Madeli III* cites *Okeyan* and in particular, the principles set out in this paragraph, in support of its finding that the common law rule requires courts to assume that the Crown will respect the property rights of indigenous inhabitants. [2007] Civil Appeal No. 01-1-2006(Q) 23-24.

administrators and assigns for ever’.” The Privy Council noted that this grant was effective in the context of a legal system under which one person could hold the entire interest in property, sell the property to anyone he desired, and on his death, dispose of the property to his heirs.

In the context of Lagos in 1870, however, the grant was inappropriate. Under the customs of the time, no person owned a piece of land absolutely, but rather, the land belonged to the family, with the chief responsible for the land as representative of the family. The chief could not sell the land, any member of the family could use it with permission from the chief and important decisions regarding the property could not be made without the consent of family elders. Upon the chief’s death, a new chief assumed control over the property.

The Privy Council noted that many Crown grants had been issued to owners of land previously governed by customary laws and that those grants allowed the grantee to claim rights superior to those of the rights held by the family under local customs. In resolving the conflicts that inevitably arose as a result of these grants, the Privy Council consistently held that the Crown grants did ‘not convey English titles or English rights of ownership.’ The grant was only effective to identify the chief who controlled the land at the time the grant was given, leaving intact the rights of the family, which were determined according to local customs. Thus, the 1870 Crown grant to the King vested in the King an estate, which was subject to any other rights recognised under native laws and customs. Because custom dictated that the right to occupy the palace was a temporary right of the King as long as he was in power, the Docemo family never acquired a fee simple interest in the palace and consequently, the Privy Council held that their claim failed.

### 3. Conclusion: equality of treatment based on customs

The preceding cases, as well as those summarized in Part VIII.B, illustrate that, to various degrees, indigenous conceptions of property ownership are relevant in determining the native title rights recognised under the common law. Like Malaysia, Australia recognizes native title rights reflected in traditional laws and customs. South Africa also defines indigenous land rights by reference to traditional laws and customs. Canadian law acknowledges the importance of the indigenous perspective in establishing proof of occupancy. United States law repeatedly refers to traditional occupation and possession of lands, which reflects the ‘habits and modes’ of different tribes. Many of the cases also recognise that lands occupied according to hunting and gathering customs are protected by the common law.

The importance of native laws and customs is hardly surprising given that what the common law seeks to recognise and protect are pre-existing property rights founded on those laws and customs. The Privy Council recognised early on that seeking to render those rights in English law concepts was unwise, unproductive, and ultimately undermined the object of recognition.

The courts have justified recognition of native title based on various theories, but all of the jurisdictions point to equality as a key objective in affirming indigenous land rights.

The U.S. Supreme Court acknowledged the Indian right of occupancy as equal to non-Indian property rights when it noted that the Indian right was ‘as sacred as the fee simple of the whites.’ The need to address past discrimination against indigenous people was the primary impetus for Australian common law recognition of native title in *Mabo (No 2)*, a decision that has been highly influential in the development of Malaysian native title law. *Mabo (No 1)* focuses on the human rights violations that resulted from the unequal treatment of native title arising out of customs when compared to property rights held pursuant to Commonwealth legislation.

The *Queensland Act* at issue in *Mabo (No 1)* is similar to the *Sarawak Land Code 1958*, in that both laws provide less protection for native land rights in comparison to non-native property rights. As noted earlier, Sarawak has yet to establish the Register of Native Rights. At the same time, a register for non-native property interests has been maintained by the registrars in the State. In addition, registration of interests in the Register of Native Rights does not provide for indefeasibility of title, but registration in the register maintained under s 112 of the *Sarawak Land Code 1958* guarantees indefeasibility of title for non-native property interests.

*Mabo (No 1)* is also important in its recognition that real equality between the races may not be achieved simply by providing formal equality under law. As Wilson J noted in his separate opinion in *Mabo (No 1)*, affirmative action in the form of laws that protect the unique interests represented by native title may be necessary to ensure substantive equality between natives and non-natives with regard to the property interests. The *Federal Constitution* authorizes special measures to protect the unique interests of natives in Sarawak. The recognition of native customs of hunting, fishing and gathering and of imbuing the natural landscape with cultural landmarks is consistent with the King’s obligations under art 153 of the *Federal Constitution* ‘to safeguard the special position of the Malays and natives of the States of Sabah and Sarawak’.

The imperative of equality is also evident throughout Brennan J’s opinion in *Mabo (No 2)*, in which he repeatedly emphasised the need to recognise the traditional laws and customs embodied in native title to ensure all Australian citizens were treated equally before the law. *Delgamuukw* explained the Constitutional protections for aboriginal rights as arising from the need to acknowledge aboriginal presence at the time of British colonization and reconcile that presence with the Crown’s acquisition of sovereignty over Canada. The Constitutional Court of South Africa’s recognition of native customs as part of South Africa law also reflects the importance of giving due regard to customs as a source of law within that country and to remedy past deprivations of indigenous land rights that resulted from discriminatory laws. Finally, the Privy Council decisions rely on the doctrine of continuity, which implicitly reflects a need to treat with equality and fairness the native customs and laws on property followed by the inhabitants of a territory over which the Crown has acquired sovereignty.

This equality of treatment should be embraced by Malaysia to give effect to the different ways in which natives use land according to their customs. As described in more detail below in Part X, the *Federal Constitution* requires that customs be given effect as law, on an equal basis with other Malaysian laws. The *Federal Constitution* also guarantees

equality before the law. Furthermore, as will be seen in Part IX, the principle of equality is an essential part of protecting indigenous rights under international human rights law.

D. Extinguishment of native title: The fiduciary obligation as a restraint on extinguishment of native title

The preceding discussion focused on the nature of native title and the importance of customs in defining its scope and content. This section examines limitations on a government's ability to diminish or terminate native title.

A common feature of native title across jurisdictions is inalienability. Nevertheless, indigenous communities can surrender, sell, or otherwise dispose of their lands to the government. The government can also acquire lands subject to native title through extinguishment. Some jurisdictions, like Canada, have instituted strict requirements prior to taking action that infringes or extinguishes aboriginal title. Australia has held that extinguishment can occur where a disposition of land subject to native title rights is inconsistent with the continued enjoyment of those rights. South Africa follows a similar rule. The following summaries of the relevant discussions on extinguishment in *Mabo (No 2)*, *Richtersveld Community*, and *Delgamuukw* explain these different approaches to extinguishment.

1. Power to extinguish

a. *Mabo and Others v State of Queensland*

In *Mabo (No 2)*, Brennan J examined how native title was extinguished. He observed that a sovereign had authority to create and extinguish private interests in land and upon a change in sovereignty, the new sovereign could extinguish those interests.<sup>676</sup> This action of the new sovereign must comply with any limitations on the power imposed by the law authorising extinguishment, although the merits of the action were not subject to review by the courts.<sup>677</sup> Because of the serious consequences that flowed from the extinguishment of native title, a government could not terminate those rights except where it expressed a clear and plain intent to do so.<sup>678</sup> A law that regulated enjoyment of native title did not constitute a clear and plain intent to extinguish.<sup>679</sup> A law that reserved land from sale for the use by indigenous inhabitants in enjoyment of their native title did not extinguish that title.<sup>680</sup>

Brennan J concluded that neither annexation nor reservation of land for use of the Meriam people extinguished native title.<sup>681</sup> Brennan J refused to interpret as extinguishment a statutory provision, which defined Crown land as all land except that which was lawfully granted in fee simple by the Crown, reserved for public purposes, or subject to a lease or

<sup>676</sup> *Mabo (No 2)* (1992) 107 ALR 1, 46.

<sup>677</sup> *Mabo (No 2)* (1992) 107 ALR 1, 46.

<sup>678</sup> *Mabo (No 2)* (1992) 107 ALR 1, 46.

<sup>679</sup> *Mabo (No 2)* (1992) 107 ALR 1, 47.

<sup>680</sup> *Mabo (No 2)* (1992) 107 ALR 1, 47.

<sup>681</sup> *Mabo (No 2)* (1992) 107 ALR 1, 47-48.



license issued by the Crown.<sup>682</sup> Brennan J said the definition was based on the mistaken notion that the Crown acquired absolute beneficial ownership of all lands in the Colony upon acquiring sovereignty.<sup>683</sup> The statute also authorized the removal of intruders on Crown land or land used for a public purpose, unless the person in occupation held a lease or licence.<sup>684</sup> According to Brennan J, this provision could not justify the eviction of the Meriam people from their land or support the characterization that the Meriam people occupied their land illegally, because such a conclusion ‘would make nonsense of the law.’<sup>685</sup> Brennan J noted that a similar argument was rejected in *Calder* and that such an interpretation of the statute ‘would be truly barbarian.’<sup>686</sup> Brennan J said that the statute authorizing removal of persons unlawfully in occupation was aimed at those occupying land under colour of a Crown grant but without rights, not to indigenous people occupying their lands under native title.<sup>687</sup>

Despite the requirement for clear and plain intent to extinguish native title, Brennan J said that actual intent of the government was irrelevant.<sup>688</sup> If legislation had the effect of granting an interest in land inconsistent with indigenous enjoyment of native title, then such effect constituted a clear and plain intent on the part of the government to extinguish.<sup>689</sup> Whether the Crown intended to extinguish native title by reserving land in trust, as a reserve, or for public purpose would sometimes turn on the facts in the case, the law, or both.<sup>690</sup> Reservation for a public purpose other than for the benefit of indigenous inhabitants could be consistent with continued enjoyment of native title.<sup>691</sup> Reservation for a future use would not disturb native title, but the erection of a structure on the land would extinguish native title.<sup>692</sup>

In *Mabo (No 2)*, the plaintiffs conceded that the Crown had the power to extinguish native title by clear and plain legislation and thus, the extent of the Crown’s power to extinguish was not at issue.<sup>693</sup> Nevertheless, in his separate opinion, Toohey J examined the underlying assumption that a government held unilateral power to terminate native title. He found support for the opposite principle, namely that extinguishment could only occur with the consent of the owners of the land subject to native title.<sup>694</sup> Toohey J pointed to

<sup>682</sup> *Mabo (No 2)* (1992) 107 ALR 1, 47-48.

<sup>683</sup> *Mabo (No 2)* (1992) 107 ALR 1, 48.

<sup>684</sup> *Mabo (No 2)* (1992) 107 ALR 1, 48.

<sup>685</sup> *Mabo (No 2)* (1992) 107 ALR 1, 48.

<sup>686</sup> *Mabo (No 2)* (1992) 107 ALR 1, 48.

<sup>687</sup> *Mabo (No 2)* (1992) 107 ALR 1, 48.

<sup>688</sup> *Mabo (No 2)* (1992) 107 ALR 1, 49.

<sup>689</sup> *Mabo (No 2)* (1992) 107 ALR 1, 49.

<sup>690</sup> *Mabo (No 2)* (1992) 107 ALR 1, 50.

<sup>691</sup> *Mabo (No 2)* (1992) 107 ALR 1, 50.

<sup>692</sup> *Mabo (No 2)* (1992) 107 ALR 1, 50. *Madeli III* follows this holding. See [2007] Civil Appeal No. )1-1-2006 (Q) 43-44.

<sup>693</sup> *Mabo (No 2)* (1992) 107 ALR 1, 152 (Toohey J).

<sup>694</sup> *Mabo (No 2)* (1992) 107 ALR 1, 150 (Toohey J). In *Sagong I*, the court relied on *Mabo (No 2)* for the proposition that the Crown was responsible for ensuring that native title was not impaired or extinguished without the consent of the indigenous community. *Sagong I* [2002] 2 MLJ 591, 618-19. In *Sagong II*, the court quoted the passage in *Sagong I* relying on *Mabo (No 2)* for the principle that the Crown had responsibly to protect native title. *Sagong II* [2005] 6 MLJ 289, 312. *Sagong II* also found that this principle supported the imposition of a fiduciary obligation on Selongor and the Federal Government. *Ibid*.



the decision in *Worcester*, where the U.S. Supreme Court held that one aspect of aboriginal title was the exclusive right to purchase land that Indians were willing to sell, which Toohey J described as a clear indication that consent to acquire aboriginal title lands was necessary.<sup>695</sup> Toohey J also noted the holding in *R v Symonds*<sup>696</sup> that native title “cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.”<sup>697</sup>

Toohey J also questioned the bases on which arguments for unilateral extinguishment had been laid. Cases suggested that sovereignty supported this power, but Toohey J noted that this distinction could not support different treatment for native title and non-native interests in land.<sup>698</sup> Another justification rested on the colonial policy to protect the interests of indigenous inhabitants, with extinguishment the corollary to inalienability.<sup>699</sup> Toohey J questioned how a principle of protection could justify unilateral termination of native title without consent.<sup>700</sup> Furthermore, inalienability was not relevant to the Crown’s authority, but rather pointed to restrictions on the rights of settlers and other potential purchasers of land subject to native title.<sup>701</sup>

The power of unilateral extinguishment was also attributed to the nature of native title as a personal and usufructuary, rather than a proprietary right.<sup>702</sup> Toohey J noted that this characterization of native title was a result of importing English notions of property in defining native title.<sup>703</sup> Toohey J referred to the decision in *Amodu Tijani*, which warned courts against falling into this trap.<sup>704</sup> Toohey J noted that the Supreme Court of Canada took this warning in account in *Calder*, where it held that calling aboriginal title a personal or usufructuary right was unhelpful in defining the nature of the right embodied in the title.<sup>705</sup>

Even assuming that the Crown had the unilateral power of extinguishment, Toohey J expressed skepticism at the notion that termination of native title occurred where legislation provided for alienation of waste lands of a colony or the Crown.<sup>706</sup> Nevertheless, Toohey J did not think it necessary that a legislature ‘identify with specificity particular interests to be extinguished if the legislative intention is otherwise clear.’<sup>707</sup>

Toohey J’s conclusions on unilateral extinguishment were echoed in the decision of Dean and Gaudron JJ. The justices noted the limitation on native title based its status as a

<sup>695</sup> *Mabo (No 2)* (1992) 107 ALR 1, 151 (Toohey J).

<sup>696</sup> [1847] N.Z.P.C.C. 387, 390.

<sup>697</sup> *Mabo (No 2)* (1992) 107 ALR 1, 151 (Toohey J).

<sup>698</sup> *Mabo (No 2)* (1992) 107 ALR 1, 151 (Toohey J).

<sup>699</sup> *Mabo (No 2)* (1992) 107 ALR 1, 151 (Toohey J).

<sup>700</sup> *Mabo (No 2)* (1992) 107 ALR 1, 152 (Toohey J).

<sup>701</sup> *Mabo (No 2)* (1992) 107 ALR 1, 152 (Toohey J).

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<sup>706</sup> *Mabo (No 2)* (1992) 107 ALR 1, 153 (Toohey J).

<sup>707</sup> *Mabo (No 2)* (1992) 107 ALR 1, 153 (Toohey J).

personal right, not based on a Crown grant. As such, the right was vulnerable to extinguishment if the Crown granted to a third party interests in land that were inconsistent with rights held under native title.<sup>708</sup> The Crown could also extinguish native title by reserving or dedicating land for a use inconsistent with the enjoyment of native title rights or where the Crown terminated the use or occupation of native titleholders.<sup>709</sup>

The ability of the Crown to work an implicit extinguishment pointed to native title as ‘no more than a permissive occupancy which the Crown was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for their traditional purposes.’<sup>710</sup> If this characterization were accepted, native titleholders were deprived of any security ‘since they would be liable to be dispossessed at the whim of the Executive, however unjust.’<sup>711</sup> Although the justices acknowledged that there was some case law for a broad power to extinguish native title, they found that the ‘weight of authority . . . and considerations of justice seem to us to combine to compel its rejection.’<sup>712</sup>

This authority included several Privy Council decisions explicitly rejecting the unilateral power of extinguishment or describing native title in a manner inconsistent with such power. In referring to *Attorney General for Quebec v Attorney General for Canada*,<sup>713</sup> Dean and Gaudron JJ noted the Privy Council’s recognition that Indian usufructuary title was a right, but personal only in the sense of its inalienability.<sup>714</sup> The justices found that if Indian title protected rights that were simply entitlements to use and occupy until the Crown terminated those rights, then

the term “title” would be misleading, the “rights” under it would be essentially illusory since they could be lawfully terminated at the whim of the Executive, the reference to inalienability “except by surrender” would be inappropriate, and the statements that the title was a “burden” on the Crown’s proprietary estate and that the title precluded the Crown from possessing “a plenum dominium” would be simply wrong.<sup>715</sup>

The justices noted that characterization of native title in *St. Catherine’s Milling* was inconsistent with the notion that it only conferred rights of permissive occupancy.<sup>716</sup> The Crown, whose title was subject to Indian occupancy, had the exclusive right to terminate Indian title “‘either by conquest or by purchase.’”<sup>717</sup> After rejecting the notion that the Crown had terminated the rights by conquest, Strong J, writing for the minority in *St. Catherine’s Milling*, held that Indian occupied lands under native title belonged to the Indians as the inalienable property until surrendered, their territorial rights being “‘strictly legal rights’.”<sup>718</sup>

<sup>708</sup> *Mabo (No 2)* (1992) 107 ALR 1, 67 (Dean and Gaudron JJ).

<sup>709</sup> *Mabo (No 2)* (1992) 107 ALR 1, 67 (Dean and Gaudron JJ).

<sup>710</sup> *Mabo (No 2)* (1992) 107 ALR 1, 67 (Dean and Gaudron JJ).

<sup>711</sup> *Mabo (No 2)* (1992) 107 ALR 1, 67 (Dean and Gaudron JJ).

<sup>712</sup> *Mabo (No 2)* (1992) 107 ALR 1, 67 (Dean and Gaudron JJ).

<sup>713</sup> [1921] 1 A.C. 401.

<sup>714</sup> *Mabo (No 2)* (1992) 107 ALR 1, 68 (Dean and Gaudron JJ).

<sup>715</sup> *Mabo (No 2)* (1992) 107 ALR 1, 68 (Dean and Gaudron JJ).

<sup>716</sup> *Mabo (No 2)* (1992) 107 ALR 1, 68 (Dean and Gaudron JJ).

<sup>717</sup> *Mabo (No 2)* (1992) 107 ALR 1, 68 (Dean and Gaudron JJ).

<sup>718</sup> *Mabo (No 2)* (1992) 107 ALR 1, 68 (Dean and Gaudron JJ).

Later Privy Council decisions clearly expressed the principle that the Crown had no unilateral right to extinguish native title. *Nireaha Tamaki v Baker*<sup>719</sup> cited *R v Symonds* for the proposition that native title could not be extinguished without “‘free consent’” of the natives.<sup>720</sup> Dean and Gaudron JJ also found support in *Amodu Tijani*, where the Privy Council described native title as a right that qualified and reduced the Crown’s legal title to “‘comparatively limited rights of administrative interference’”.<sup>721</sup> In *Administration of Papua and New Guinea v Daera Guba*<sup>722</sup> and *Getia Sebea v Territory of Papua*,<sup>723</sup> the High Court of Australia noted that alienation by natives to the Crown completed the Crown’s fee simple title and that compensation for a taking of native title was based on full ownership without deduction for its inalienability. These decisions led Dean and Gaudron JJ to conclude that the Privy Council never considered the Crown to have unilateral authority to extinguish native title.<sup>724</sup>

Ultimately, Dean and Gaudron JJ held that native title rights were ‘true legal rights’ enforceable by legal action and if wrongfully extinguished without clear, unambiguous legislation, the titleholders were entitled to compensatory damages.<sup>725</sup>

b. *Alexkor Ltd and Another v Richtersveld Community and Others*

Although dispossession was at issue in *Richtersveld Community*, the principles employed by the court in examining the question bear close resemblance to the rules on extinguishment. The CCSA began by considering the affect of the Crown’s acquisition of sovereignty over the Community’s land through its annexation as part of the Cape Colony.<sup>726</sup> The CCSA said that the Crown’s acquisition gave it the authority to make new laws, recognise existing rights, or extinguish existing and create new rights.<sup>727</sup> After concluding that the Annexation Proclamation, through which the Crown annexed the Community’s lands, did not extinguish the Community’s rights, the CCSA considered whether the Crown had extinguished those rights by explicit legislation pronouncing unlawful the Community’s exercise of its ownership rights pursuant to indigenous law or based on the Crown’s grant of rights in the Community land to third parties.<sup>728</sup>

The CCSA rejected the argument that upon annexation, the Crown acquired ownership of the Community’s lands or that the *Crown Lands Acts of 1860 and 1887* (‘Acts’) extinguished the Community’s rights.<sup>729</sup> The CCSA adopted the lower court’s analysis, which held that, while the legislature may have assumed that the Crown held all lands not

<sup>719</sup> [1901] A.C. 561.

<sup>720</sup> *Mabo (No 2)* (1992) 107 ALR 1, 69 (Dean and Gaudron JJ).

<sup>721</sup> *Mabo (No 2)* (1992) 107 ALR 1, 69 (Dean and Gaudron JJ).

<sup>722</sup> (1973) 130 C.L.R. 353.

<sup>723</sup> (1941) 67 C.L.R. 544.

<sup>724</sup> *Mabo (No 2)* (1992) 107 ALR 1, 70 (Dean and Gaudron JJ).

<sup>725</sup> *Mabo (No 2)* (1992) 107 ALR 1, 90 (Dean and Gaudron JJ).

<sup>726</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*54.

<sup>727</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*55.

<sup>728</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*59.

<sup>729</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*60.

granted under title, this implication could not be considered a legislative act extinguishing the Community's rights.<sup>730</sup>

The CCSA also noted evidence in the *Acts* and their legislative history indicating that the Crown had 'left open the possibility for recognition' of the Community's interest in their lands.<sup>731</sup> The *Acts* provided that land 'occupied bona fide and beneficially without title deed' would not be considered Crown land until the Governor resolved claims to the land.<sup>732</sup> The CCSA noted that the Community was in 'bona fide and beneficial occupation of the land without title deed.'<sup>733</sup>

The CCSA also rejected appellant's argument that the Community's title had to originate in a grant from the Crown, which was a view expressed by colonial officials at the time.<sup>734</sup> The CCSA said it was the law, not the views of colonial officials, which determined the Community's rights.<sup>735</sup> The CCSA also found that none of grants the Community issued to third parties limited the Community's ownership over its land and none of the enacted laws rendered unlawful the Community's exercise of ownership rights.<sup>736</sup>

The situation changed after 1927. In that year, the Parliament passed the *Precious Stones Act* ('*Stones Act*'), which authorized the government to issue proclamations permitting alluvial digging by the State for purposes of mining diamonds.<sup>737</sup> In 1928, the State issued a proclamation authorizing alluvial digging on a portion of the Community's land and by 1963, the States extended the proclamation to cover the entire area subject to the Community's claim in the case.<sup>738</sup> The proclamation expressly stated that the land subject to the alluvial digging was Crown land.<sup>739</sup>

The CCSA noted that to obtain relief under the *Restitution of Land Rights Act* and the Constitution, it was only necessary for the Community to establish that it had been dispossessed of its land; it was not required to show that ownership of its land had been transferred to another.<sup>740</sup> The CCSA noted that the *Stones Act* did not recognize the Community's interest in its lands because such rights were unregistered.<sup>741</sup> The *Stones Act* treated unregistered rights as unalienated Crown lands and deemed unlawful the occupation or use of such lands without permission if the lands were subject to a proclamation.<sup>742</sup> Thus, with the exception of registered surface owners and those occupying with permission from the registered owners, the *Stones Act* caused all others to

<sup>730</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*60.

<sup>731</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*62.

<sup>732</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*63.

<sup>733</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*63.

<sup>734</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*64.

<sup>735</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*65.

<sup>736</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*65.

<sup>737</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*71.

<sup>738</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*71-\*72.

<sup>739</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*72.

<sup>740</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*74.

<sup>741</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*74.

<sup>742</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, \*74.

lose their rights to occupy and exploit land subject to a proclamation.<sup>743</sup> The CCSA concluded that the *Stones Act* dispossessed the Community of its ownership rights.<sup>744</sup>

The CCSA then considered whether the dispossession of the Community was a result of racially discriminatory laws or practices.<sup>745</sup> The CCSA noted that owners with lands subject to digging under the *Stones Act* were protected if such lands were registered.<sup>746</sup> Those owners were allowed to access their lands, maintain their homes, and share in the minerals mined on those lands.<sup>747</sup> In general, whites held their land under the registration system.<sup>748</sup> In contrast, because there was no system of registering land held under indigenous customs, the Community's interests were not protected.<sup>749</sup> Although the *Stones Act* was not discriminatory on its face, its impact was disproportionately felt by indigenous owners, who held unregistered title to their lands.<sup>750</sup> In conclusion, the CCSA said

In this case, the racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The inevitable impact of this differential treatment was racial discrimination against the [] Community which caused it to be dispossessed of its land rights.<sup>751</sup>

c. *Delgamuukw v British Columbia*

In *Delgamuukw*, Lamer CJ examined infringement in the context of s 35(1) of the *Constitution Act, 1982*.<sup>752</sup> Before the government could infringe on the aboriginal rights protected under s 35(1), it had to satisfy the test of justification.<sup>753</sup> Under the test, the government was required to show that infringement on an aboriginal right furthered a compelling and substantial legislative objective.<sup>754</sup> Compelling and substantial objectives were those directed toward the purpose of recognizing and affirming aboriginal rights, recognizing prior aboriginal occupation and reconciling this occupation with the Crown's assertion of sovereignty.<sup>755</sup> In addition to establishing a compelling and substantial objective, the infringement on aboriginal rights must be consistent with the special fiduciary obligations of the Crown to aboriginal people.<sup>756</sup> This fiduciary obligation is described in more detail below.

<sup>743</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*75.

<sup>744</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*75.

<sup>745</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*76.

<sup>746</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*77.

<sup>747</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*77.

<sup>748</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*78.

<sup>749</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*78.

<sup>750</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*78.

<sup>751</sup> *Richtersveld Community* (2003) 12 BCLR 1301 (CC), 2003 SACLX LEXIS 79, \*80.

<sup>752</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 161.

<sup>753</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 161.

<sup>754</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 161.

<sup>755</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 161.

<sup>756</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 162.



d. Conclusion

Toohy J's decision in *Mabo (No 2)* and Lamer CJ's decision *Delgamuukw* suggests that at a minimum, governments must take the extinguishment of native title very seriously. For this reason, the government's power to terminate native title is subject to a fiduciary obligation. The dimensions of this obligation are described below with reference to *Delgamuukw* and *Mabo (No 2)*.

2. Fiduciary obligation

a. *Delgamuukw v British Columbia*

In *Delgamuukw*, Lamer CJ noted that the fiduciary obligation varied depending on the legal and factual context.<sup>757</sup> In the context of the aboriginal right to fish, the fiduciary obligation required that the Crown place the demands of aboriginal people first, although this did not mean that aboriginal peoples' demands would always have priority.<sup>758</sup> In other contexts, the fiduciary duty might require the government to address whether the infringement was the minimum necessary to accomplish the objective.<sup>759</sup> In the case of an expropriation of resources subject to aboriginal rights, the fiduciary duty could impose an obligation to consider whether fair compensation was available and in the case of conservation measures imposed on a resource, whether the government consulted the affected aboriginal community.<sup>760</sup> Thus, the nature of the fiduciary duty in a given case would turn on the particular aboriginal right at stake.<sup>761</sup>

The degree of scrutiny required by the fiduciary duty also varied depending on the right at issue.<sup>762</sup> For example, if protection of the aboriginal right would amount to exclusive use of fish, but that use would be limited to certain purposes, such as ceremonial and social, then priority must be given to Indian fishing.<sup>763</sup> If the use of the resource subject to the aboriginal right was not limited, as in the case of commercial use only limited by supply and demand, then the right to fish would amount to exclusive use to exploit for commercial purposes, a result which prompted Lamer J in *R v Gladstone*<sup>764</sup> to modify the fiduciary obligation with regard to the idea of priority.<sup>765</sup>

Under the modified approach, the government was required to show that, in prioritizing the aboriginal right (in *R v Gladstone*, fishing rights were at stake), it accounted for the aboriginal right in allocating the resource in a manner that respected the priority of aboriginal rights over other users of the fishery.<sup>766</sup> Under these circumstances, the

<sup>757</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 162.

<sup>758</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 162.

<sup>759</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 162.

<sup>760</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 162.

<sup>761</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 162.

<sup>762</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 163.

<sup>763</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 163.

<sup>764</sup> [1996] 2 S.C.R. 723.

<sup>765</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 164.

<sup>766</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 164.



aboriginal right had both procedural and substantive components.<sup>767</sup> The government was required to show that it accounted for and allocated the resource in a way that was respectful of those rights.<sup>768</sup> Questions aimed at determining if the government met this test in the context of allocating fishery resources included whether the government had reduced licence fees for aboriginal fishers or otherwise accommodated aboriginal rights to fish, whether the need to account for the priority of aboriginal rights was included in the government's objectives in enacting the regulations on fisheries, the percentage of aboriginal fishers participating in the fishery compared to their percentage in the total population, whether the government accounted for different aboriginal rights in a particular fishery, such as food versus commercial rights, the importance of the fishery to the economic well-being of the tribe, and government criteria used to allocate commercial licences.<sup>769</sup>

Lamer CJ then applied the two-part justification test in the context of an infringement on aboriginal title. In light of s 35(1)'s objective to reconcile the presence of aboriginals and the Crown's acquisition of sovereignty over Canada, Lamer CJ indicated that numerous legislative objectives could justify infringement of aboriginal title, including 'the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations'.<sup>770</sup>

Lamer CJ indicated that three features of aboriginal title were important in determining the applicable fiduciary duty in terms of the degree of scrutiny and the form of the duty: the right of exclusive use and occupation, the right to choose how the land will be used, and the economic aspect of aboriginal title.<sup>771</sup> If the fiduciary duty required that the government give aboriginal title priority, the modified approach to priority applied.<sup>772</sup> Thus, if fee simple titles, leases, or licences were granted in aboriginal titled land for the purpose of developing the resources of British Columbia, then those titles must reflect prior occupation of aborigines, aboriginal people must be involved in the development, and economic burdens on aboriginal development must be lessened, by, for example, reducing licensing fees for aboriginal use.<sup>773</sup>

The right of an aboriginal community to choose how it would use land subject to aboriginal title also influenced the form of the fiduciary duty by imposing on the government the requirement that aboriginal people be involved in decisions regarding their land:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is

<sup>767</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 164.

<sup>768</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 164.

<sup>769</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 164.

<sup>770</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 165.

<sup>771</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 166.

<sup>772</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 167.

<sup>773</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 167.

leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.<sup>774</sup>

Because the land subject to aboriginal title was an essential economic input, compensation was also relevant in determining justification for infringement on title.<sup>775</sup> Lamer CJ observed that the requirement of compensation for a breach of fiduciary duty was well-established and consistent with the duty of honour and good faith of the Crown.<sup>776</sup> The amount of the compensation depended on the 'nature of the particular aboriginal title affected and [] the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.'<sup>777</sup>

b. *Mabo and Others v State of Queensland*

The plaintiffs in *Mabo (No 2)* did not request relief for a breach of fiduciary obligation, but sought a declaration that the State of Queensland had such an obligation with respect to the Meriam people's interests in the Islands.<sup>778</sup> The plaintiffs argued that this obligation arose as a result of the annexation of the Islands to Queensland, an action in which they had no choice, the relative position of the Meriam people *vis-à-vis* the Queensland's government with respect to their interests in the Islands, and the course of dealings between the Crown and the Meriam people since annexation.<sup>779</sup>

Toohey J noted that, while the circumstances that produced a fiduciary obligation were not exhaustively defined, the obligation arose in the context of certain types of relationships, although the class of relationships was not closed.<sup>780</sup> The fiduciary relationship necessarily involved one actor with authority to exercise discretion that could affect the interests of another party: 'The undertaking to act on behalf of, and the power to detrimentally to affect, another' could arise as a result of an agreement, by statute, or such obligations might be assumed without the request of the other party.<sup>781</sup>

The State of Queensland argued that no authority imposed a fiduciary obligation with respect to its dealings with the Meriam people and the fact that the Crown could terminate native title necessary precluded such a duty.<sup>782</sup> Toohey J said that the fact of Queensland's power to extinguish native title gave it authority to affect the interests of the

<sup>774</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 168.

<sup>775</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 169.

<sup>776</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 169.

<sup>777</sup> *Delgamuukw* [1997] 3 SCR 1010, ¶ 169.

<sup>778</sup> *Mabo (No 2)*(1996) 107 ALR 1, 156 (Toohey J).

<sup>779</sup> *Mabo (No 2)*(1996) 107 ALR 1, 156 (Toohey J).

<sup>780</sup> *Mabo (No 2)*(1996) 107 ALR 1, 156 (Toohey J).

<sup>781</sup> *Mabo (No 2)*(1996) 107 ALR 1, 156 (Toohey J).

<sup>782</sup> *Mabo (No 2)*(1996) 107 ALR 1, 157 (Toohey J).

Meriam people, creating a vulnerability that called for the application of restraint through the fiduciary obligation.<sup>783</sup> Furthermore, Toohey J noted that Queensland and Australian policy exhibited an objective to protect native title, which indicated that the government would ‘take care when making decisions which are potentially detrimental to aboriginal rights.’<sup>784</sup>

Toohey J also rejected the State of Queensland’s argument that it had no fiduciary obligation because it had discretion and that a breach of the ‘political trust’ relationship between the government and its subjects was not subject to equitable remedies.<sup>785</sup> Toohey J distinguished the political trust cases, which involved the question of whether specific legislation or instruments created a trust, whereas the fiduciary obligation of Queensland to the Meriam people arose from the common law.<sup>786</sup>

Toohey J relied on the Supreme Court of Canada’s decision in *Guerin v The Queen*, where Dickson J held that the fiduciary relationship between the Crown and Indians was a result of the inalienability of Indian title.<sup>787</sup> Toohey J explained:

[I]f the Crown in right of Queensland has the power to alienate land the subject of the Meriam peoples’ traditional rights and interests and the result of that alienation is the loss of traditional title, and if the Meriam peoples’ power to deal with their title is restricted in so far as it is inalienable, except to the Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown. The power to destroy or impair a people’s interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure the position is not abused. The fiduciary relationship arises, therefore, out of the power of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power.<sup>788</sup>

Toohey J further found that the fiduciary obligation arose out of the course of dealings between the Crown and the Meriam people.<sup>789</sup> Toohey J noted that the creation of reserves for, appointment of trustees over, and exercise of authority over the Meriam under welfare legislation created a fiduciary obligation.<sup>790</sup>

Toohey J then examined the content of the fiduciary obligation. Toohey J found that the nature of the government’s obligation was as a constructive trustee.<sup>791</sup> In general, a fiduciary must act for the benefit of the beneficiaries.<sup>792</sup> The procedure for reaching a decision and the content of the decision must be informed by the duty.<sup>793</sup> The fiduciary could not delegate its discretion and must instead consider how discretion could be

<sup>783</sup> *Mabo (No 2)*(1996) 107 ALR 1, 156 (Toohey J).

<sup>784</sup> *Mabo (No 2)*(1996) 107 ALR 1, 157 (Toohey J).

<sup>785</sup> *Mabo (No 2)*(1996) 107 ALR 1, 156 (Toohey J).

<sup>786</sup> *Mabo (No 2)*(1996) 107 ALR 1, 156 (Toohey J).

<sup>787</sup> *Mabo (No 2)*(1996) 107 ALR 1, 158 (Toohey J) (citing *Guerin v R* [1984] 2 SCR 335).

<sup>788</sup> *Mabo (No 2)*(1996) 107 ALR 1, 158 (Toohey J).

<sup>789</sup> *Mabo (No 2)*(1996) 107 ALR 1, 159 (Toohey J).

<sup>790</sup> *Mabo (No 2)*(1996) 107 ALR 1, 159 (Toohey J).

<sup>791</sup> *Mabo (No 2)*(1996) 107 ALR 1, 159 (Toohey J).

<sup>792</sup> *Mabo (No 2)*(1996) 107 ALR 1, 159 (Toohey J).

<sup>793</sup> *Mabo (No 2)*(1996) 107 ALR 1, 159 (Toohey J).

exercised.<sup>794</sup> The fiduciary's actions must not be for its own benefit or the benefit of a third party.<sup>795</sup> Although a fiduciary must not place itself in a position of a conflict of interest, Toohey J noted this did not limit the legislative powers of the Queensland Parliament.<sup>796</sup> Nevertheless, legislation that adversely affected native titleholders or established a process that ignored their interests breached the fiduciary obligation.<sup>797</sup>

Toohey J found that the Crown's fiduciary obligation required that it not impair or destroy native title without the consent of or contrary to the interests of the Meriam people.<sup>798</sup> The Crown could not degazette the Island and terminate the reserve or alienate the Islands 'contrary to the interests of the Islanders; nor could it take these or any other decisions affecting the traditional title without taking account of that effect. If it did, it would be in breach of its duty and liable therefor.'<sup>799</sup>

In *The Wik Peoples v The State of Queensland and Ors*; *The Thayorre People v The State of Queensland and Ors*, Brennan CJ rejected the notion that a fiduciary obligation on the part of the government arose as a result of the inalienability of native title.<sup>800</sup> While he agreed that a fiduciary obligation could arise where a person or entity assumed a power to exercise discretion on behalf of another, the power of the government to extinguish native title was 'inherently inconsistent' with the idea that the government must exercise that power on behalf of the native titleholders.

Although the majority of the High Court of Australia has not embraced the fiduciary obligation as defined by Toohey J in *Mabo (No 2)*, his opinion describes the content of the responsibility consistent with the comparable obligation under Canadian law, as explained in *Delgamuukw*. Furthermore, in *Sagong II*, the Court of Appeal quoted the court in *Sagong I*, which adopted Toohey J's formulation in describing the fiduciary obligations of Malaysian government officials.<sup>801</sup> Thus, the fiduciary obligation, as defined by Toohey J in *Mabo (No 2)* has and should continue to inform the development of the equivalent standard under Malaysian law.

<sup>794</sup> *Mabo (No 2)*(1996) 107 ALR 1, 159 (Toohey J).

<sup>795</sup> *Mabo (No 2)*(1996) 107 ALR 1, 159 (Toohey J).

<sup>796</sup> *Mabo (No 2)*(1996) 107 ALR 1, 160 (Toohey J).

<sup>797</sup> *Mabo (No 2)*(1996) 107 ALR 1, 160 (Toohey J).

<sup>798</sup> *Mabo (No 2)*(1996) 107 ALR 1, 160 (Toohey J).

<sup>799</sup> *Mabo (No 2)*(1996) 107 ALR 1, 160 (Toohey J).

<sup>800</sup> 1996 Aust High Ct LEXIS 76, 87.

<sup>801</sup> *Sagong II* [2005] 6 MLJ 289, 312 (quoting *Sagong I* [2002] 2 MLJ 591).

### 3. Conclusion

Three justices of the High Court of Australia have questioned the unilateral power of government to extinguish native title. If left unchecked, this extraordinary power has the potential to render native title rights vulnerable to the loss of a resource that has underpinned communities, economies, cultures, religions, and traditions for centuries. Disruption of this magnitude is not only unjust, but fundamentally inconsistent with the protections historically applied to safeguard native interests. These safeguards have constitutional status in Canada and arise under the common law in Australia.

Even assuming that governments have authority to extinguish native title, it is clear that this power is subject to the limitations embodied in the fiduciary obligation owed to indigenous people. One important restraint associated with the fiduciary obligation, as described in *Mabo (No 2)* and *Delgamuukw* is the requirement that the government consult the indigenous community before taking actions that can impact its rights in traditional lands.





# IX

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## INTERNATIONAL HUMAN RIGHTS LAW AND INDIGENOUS RIGHTS

## IX. INTERNATIONAL HUMAN RIGHTS LAW AND INDIGENOUS RIGHTS

Part VIII examined how common law jurisdictions have addressed the task of defining and protecting native title. Cases from Australia, Canada, the United States, South Africa and Privy Council decisions define native title, in whole or part, by reference to native customs and traditions. These cases also articulate limits on a government's ability to infringe on and terminate native title by imposing a fiduciary obligation that, at a minimum, requires a government to consult with native titleholders on actions that may affect their interests. Finally, the need to provide equality of treatment between native and non-native property interest underlies common law recognition of native title. Protections for indigenous land rights based on the principles of equality and non-discrimination, recognition of native customs, and inherent limits on government authority over native title lands are consistent with developments in international human rights law.

International human rights law is a broad category of legal protections in the form of treaties, declarations, resolutions, and international customary law. Much of this authority is directed to the protection of individual rights. Nevertheless, a growing body of international law and policy guarantees rights particular to groups, including minority and indigenous groups.

There is vast scholarship on international human rights law and indigenous land rights. The modest purpose of this Part IX is to highlight some of the authorities relevant to native title issues in Sarawak.

### A. International human rights law as universal values constituting part of the common law

Malaysian courts have expressly recognized the relevance of international human rights protections to native title in Malaysia. In *Adong I*, Mokhtar Sidin JCA established the context for his examination of aboriginal land rights with the following introduction:

Of late, aboriginal peoples' land rights – or generally what is internationally known as native peoples' rights – has gained much recognition after the Second World War, with the establishment of the United Nations of which the UN Charter guarantees certain fundamental rights. Native rights have been greatly expounded on by the courts in Canada, New Zealand and Australia restating the colonial laws imposed on native rights over their lands. It is worth noting that these native peoples' traditional land rights are now firmly entrenched in countries that had and/or are still practising the Torrens land law – namely Canada, New Zealand and Australia – where special statutes have been enacted or tribunals set up in order for natives to claim a right over their traditional lands.<sup>802</sup>

*Adong* was the first case in which a Malaysian court considered common law protections for aboriginal land rights. By grounding that recognition in international standards, the court in *Adong I* set the stage for subsequent developments within the framework of human rights.

The role of international human rights law in the development of Malaysian common law was made explicit in *Sagong I*. In that case, Mohd Noor Ahmad J extended the ruling in

<sup>802</sup> *Adong I* [1997] 1 MLJ 418, 426.

*Adong I* by holding that aboriginal title was a right in the land itself and as such, constituted more than a limited bundle of rights authorizing activities or rights to exclusive use and occupation. According to Mohd J, refusing to extend recognition to the proprietary interest of aboriginal people would be ‘tantamount to taking a step backward to the situation prevailing in Australia before the last quarter of the 20<sup>th</sup> century where the laws, practices, customs and rules of the indigenous peoples were not given recognition, especially with regard to their strong social and spiritual connection with their traditional lands and waters.’<sup>803</sup>

Mohd J noted that Australia’s move to recognize native title was prompted by developments in international human rights law.<sup>804</sup> Mohd J quoted *Mabo (No 2)*, where Brennan J explained that,

“The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.”<sup>805</sup>

Based on the role of international human rights law in shaping the common law, Mohd J held that ‘in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interests of the orang asli in their customary and ancestral lands is an interest in and to the land.’<sup>806</sup> Thus, both *Adong I* and *Sagong I* establish international human rights as an influential body of law in the development of Malaysian common law on aboriginal and native title.

The importance of international human rights principles in shaping the common law on native title is consistent with Malaysian case and statutory law more generally. In *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Other Appeals* (‘*Ezam*’), the Federal Court recognized that, while not binding, the courts could consider the 1948 United Nations Universal Declaration on Human Rights in resolving legal claims.<sup>807</sup> The *Human Rights Commission of Malaysia Act 1999* also invites courts to consider the 1948 UN Declaration in evaluating claims.<sup>808</sup>

<sup>803</sup> *Sagong I* [2002] 2 MLJ 591, 615.

<sup>804</sup> *Sagong I* [2002] 2 MLJ 591, 615.

<sup>805</sup> *Sagong I* [2002] 2 MLJ 591, 615.

<sup>806</sup> *Sagong I* [2002] 2 MLJ 591, 615.

<sup>807</sup> [2002] 4 MLJ 449, 514. See *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, 366 (guarantees in the Universal Declaration of Human Rights (‘UDHR’) to equal access to education on the basis of merit and the right of parents to choose their children’s education were not legally binding because UDHR was ‘merely a statement of principles devoid of any obligatory character and is not a part of our municipal law’).

<sup>808</sup> *Human Rights Commission of Malaysia Act 1999*, s 4(4); *Ezam* [2002] 4 MLJ 449, 514.

Finally, human rights have been described as the inherent and fundamental rules of a “democratic civilised society.”<sup>809</sup> Thus, even in the absence of statutory or constitutional law explicitly setting out human rights guarantees, the common law is the traditional mechanism through which such rights are recognized and protected.<sup>810</sup> Consequently, international conventions requiring states to guarantee certain human rights “and the common law produce the same result”<sup>811</sup>.

The Malaysian courts have followed this rule. In *Sagong I*, Mohd J quoted with approval Brennan J’s holding in *Mabo (No 2)* that “[a] common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule.”<sup>812</sup>

## B. International customary law

### 1. Introduction

International law serves not only to inform the development of the Malaysian common law. As a member of the international community, Malaysia is legally subject to international customary law.<sup>813</sup> Leading international law professor Dr. Abdul Ghafur Hamid has noted that

There is no reason Malaysia should not apply an established rule of customary international law. Malaysia is a member of the international community and not an isolated State, staying aloof and alien, without any relations with other countries. It is a State actively involved in international relations and is an emerging economy, trading with other countries, and striving to become a developed country in the year 2020. Relations between States are conducted through various rules of customary international law (apart from treaties to which these States are parties). Without recognizing the rules of customary international law, no State can enter into relations with other States. It is therefore submitted that firmly established rules of customary international law accepted by almost all States of the world should be regarded as part and parcel of the Malaysian law to the extent that they are not contrary to Malaysian statutes and public policy of Malaysia.<sup>814</sup>

<sup>809</sup> Michael Beloff QC ‘The Human Rights Act 1998-A Year On’ 17 [2002] Reprinted from *The Jersey Law Review* (Cromwell Press, Wiltshire and the States Printers, Jersey).

<sup>810</sup> Ibid 17.

<sup>811</sup> Ibid.

<sup>812</sup> *Sagong I* [2002] 2 MLJ 591, 615.

<sup>813</sup> Abdul Ghafur Hamid @ Khin Maung Sein, ‘Judicial Application of International Law in Malaysia: A Critical Analysis’ (Paper presented at the Second Asian Law Institute (ASLI) Conference, Faculty of Law, Chulalongkorn University, Bangkok, Thailand, 26-27 May 2005) 6, 18. See also Gurdial Singh Nijar, ‘The Application of International Norms in the National Adjudication of Fundamental Rights’ in *Infoline* (December 2003 and April 2004); Dato’ Gopal Sri Ram, ‘Human Rights: Incorporating International Law into the Present System’ (Paper presented at the conference on Constitutionalism, Human Rights and Good Governance, Kuala Lumpur, 30 September to 1 October 2003); Ramy Bulan, ‘International Law and Indigenous Peoples: Integrating International Norms For the Protection of Indigenous Minorities in Malaysia’ (2007) 4 *Soochow Law Journal* 145, 148; C.L. Li, ‘Public International Law Before the Singapore and Malaysian Courts’ (2004) 8 *Singapore Year Book of International Law* 243.

<sup>814</sup> Abdul Ghafur, *ibid* 6-7.

Because Malaysia follows the doctrine of transformation, international customary law does not automatically become part of Malaysian law in the absence of legislation that transforms the international rules into municipal law (i.e. domestic law).<sup>815</sup> Under English law, international law is part of the common law so long as it does not conflict with a statute or a final judicial decision.<sup>816</sup> As noted earlier, s 3(1) of the *Civil Law Act 1956* provides that Malaysian courts apply English common law in the absence of written law and subject to local circumstances and local custom.<sup>817</sup> Malaysian courts have applied international customary law, albeit indirectly through the application of English common law.<sup>818</sup> The next part considers the formation of international customary law and the content of customary law on indigenous land rights.

## 2. The formation of international customary law

### a. Introduction

International customary law is the result of a uniform and consistent state practice to which states adhere based on their belief that they are legally obligated to follow the practice (i.e. *opinio juris*). A state can escape an obligation imposed by international customary law if, prior to the formation of the law, the state persistently objects to the custom.

### b. State practice

International customary law develops in the presence of state practice established through evidence that states follow a norm of customary law.<sup>819</sup> Evidence that states with a special interest in the norm follow the practice is particularly important.<sup>820</sup> Although state practice of long duration is not necessary, such practice should be extensive and virtually uniform.<sup>821</sup> The ICJ articulated a more relaxed version of this requirement in *Nicaragua v US (Merits)*, where it held that

[i]t is not expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it

<sup>815</sup> Abdul Ghafur, above n 813, 1, 7-8 (noting that '[t]he logical consequence is that by virtue of section 3(1) of the Civil Law Act, customary international law, as applied in the UK as part of the common law, is applicable in Malaysia, to the extent that it is not contrary to the Malaysian statutes and public policy of Malaysia' and while acknowledging some inconsistencies, noting that '[i]n practice, the courts in Malaysia appear to have applied customary international law when the occasion arose although the application is not direct but through the medium of English common law. In other words, Malaysian courts apply customary international law as part and parcel of common law'.).

<sup>816</sup> Ibid 8.

<sup>817</sup> Ibid.

<sup>818</sup> Ibid 8-12.

<sup>819</sup> *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of German/Netherlands) Case ('North Sea')* [1969] ICJ 3. In *North Sea*, Netherlands and Denmark argued that West Germany was bound to follow the equidistant method for determining the boundaries of territorial seas because that method had attained the status of international customary law. [1969] ICJ 3, 28, ¶ 37.

<sup>820</sup> *North Sea* [1969] ICJ 3, 42-43, ¶ 73.

<sup>821</sup> *North Sea* [1969] ICJ 3, 43, ¶ 74.

sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.<sup>822</sup>

Under ‘traditional international law, a general practice’ is ‘the result of the repetition of individual acts of States constituting consensus in regard to a certain content of a rule of law.’<sup>823</sup> In his dissenting opinion in the *South West Africa Cases*, in which he considered whether a prohibition on racial discrimination had achieved the status of international customary law, Judge Tanaka rejected the contention that a few dissident states could defeat the creation of customary law. Judge Tanaka concluded that the drafters of Article 38(1)(b) of the Statute of the International Court of Justice (‘ICJ Statute’)<sup>824</sup> did not intend to provide each state with veto authority over the creation of such law.<sup>825</sup> Judge Tanaka noted that resolutions and declarations of international organizations represented ‘evidence of general practice’ within the meaning of Article 38(1)(b) of the ICJ Statute.<sup>826</sup>

With regard to the required duration of state practice, Judge Tanaka observed that, prior to the development of international organizations such as the League of Nations and the United Nations, the formation of customs was a lengthy process because it relied on the individual acts of states.<sup>827</sup> In modern times, however, multilateral institutions provide a forum in which states can express their views on salient issues and receive immediate input from other members.<sup>828</sup> Thus, the international forum, along with rapid improvements in communications and transmission of information, accelerates the creation of custom.<sup>829</sup>

States acting in concert through international organizations also facilitate the development of custom. Declarations and resolutions adopted by such organizations represent ‘the collective will of the individual’ states and therefore, ‘the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process.’<sup>830</sup>

<sup>822</sup> ICJ Rep. 1986, ¶ 186.

<sup>823</sup> *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 291. The *South West Africa Cases* concerned applications of the Governments of Liberia and Ethiopia (‘Applicants’), challenging the Respondent Union of South Africa’s policy of apartheid as a violation of international standards and legal norms. [1966] ICJ Rep 10, 15. Although a majority of the court held that the Applicants did not have standing to challenge the apartheid policy because, as former members of the League of Nations (‘League’), Liberia and Ethiopia had no independent right to enforce the requirements of the Mandate, Judge Tanaka held that individual member states of the League possessed a legal interest in the enforcement of the Mandate based on each state’s interest ‘in the realization of social justice and humanitarian ideas’. *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 253. Thus, Judge Tanaka’s dissenting opinion examined the merits of Applicants’ application.

<sup>824</sup> Article 38(1)(b) of the ICJ Statute provides: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . b. international custom, as evidence of a general practice accepted as law’.

<sup>825</sup> *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 291.

<sup>826</sup> *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 291.

<sup>827</sup> *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 291.

<sup>828</sup> *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 291.

<sup>829</sup> *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 292.

<sup>830</sup> *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 292.



c. Opinio juris

With regard to *opinio juris*, states must ‘feel that they are conforming to what amounts to a legal obligation.’<sup>831</sup> According to this traditional formulation, the fact that states have habitually and frequently adhered to the norm is not enough to establish their subjective intent.<sup>832</sup> In contrast, in his dissenting opinion in *North Sea*, Judge Tanaka states the modern approach to the formation of international customary law. With regard to the requirement of *opinio juris*, a state indicates its belief that it is legally bound to follow a norm through state practice.<sup>833</sup> Thus, Judge Tanaka rejected the holding in *North Sea* that state practice alone was not enough to establish a state’s subjective belief that it was legally required to follow a norm.

Judge Tanaka’s view on evidence regarding *opinio juris* reflects ‘the modern tendency’ to not search ‘for direct evidence of a state’s psychological convictions, but to infer *opinio iuris* indirectly from the actual behaviour of states. Thus, official statements are not required; *opinio iuris* may be gathered from acts or omissions’.<sup>834</sup>

d. Persistent objector

States can escape the force of an international custom if they consistently protest against the formation of a rule, a status known as a ‘persistent objector’. In the absence of such consistent protests, however, a state will be bound by a general practice that has crystallized into an international customary norm.<sup>835</sup>

C. International customary law on indigenous rights

The preceding discussion points to two requirements for the formation of international customary law: state practice and *opinio juris*. Professor Anaya explains the process as follows:

Norms of customary law arise—or to use the now much favored term *crystallize*—when a preponderance of states and other authoritative actors converge on a common understanding of the norms’ contents and generally expect future behavior in conformity with those norms.<sup>836</sup>

With awareness to the modern trend towards discerning *opinio juris* not only from ‘physical episodic conduct’, Professor Anaya further explains that:

Today, however, interactive patterns around concrete events are not the only—or necessarily required—material elements constitutive of customary norms. With the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication of this sort may itself bring about a convergence of understanding and

<sup>831</sup> *North Sea* [1969] ICJ 3, 44, ¶ 77.

<sup>832</sup> *North Sea* [1969] ICJ 3, 44, ¶ 77.

<sup>833</sup> *North Sea* [1969] ICJ 3, 246-47.

<sup>834</sup> Peter Malanczuk, *Akehurt’s Modern Introduction to International Law* (7<sup>th</sup> ed 1997) 39, in Henry J Steiner and Philip Alston (eds) *International Human Rights in Context*, 72, 75 (2<sup>nd</sup> Ed 2000).

<sup>835</sup> Malanczuk, above n 834, 76.

<sup>836</sup> Anaya, above n 113, 61.

expectation about rules, establishing in those rules a *pull toward compliance*—to use the terminology of Professor Thomas Franck—even in advance of a widespread corresponding pattern of physical conduct. It is thus increasingly understood that explicit communication among authoritative actors, whether or not in association with concrete events, is a form of practice that builds customary rules. Of course, conforming conduct will strengthen emergent customary rules by enhancing attendant subjectivities of expectation.

There has been a discernible movement toward a convergence of reformed normative understanding and expectation on the subject of indigenous peoples; under the theory just sketched, this movement is constitutive of customary international law. Relevant norm-building international practice, which has been substantially driven by indigenous peoples' own efforts, has entailed information gathering and evaluation, discussion and articulation of policies and norms, and the reporting of domestic initiatives against the backdrop of developing norms.<sup>837</sup>

In other words, three processes, 'information gathering and evaluation, discussion and articulation of policies and norms, and the reporting of domestic initiatives' have contributed to the creation international norms on indigenous rights.

#### 1. Information gathering and norm building

The adoption of declarations, resolutions, and treaties on indigenous rights was preceded by a series of studies and conferences devoted to studying the status of indigenous people around the world.<sup>838</sup> The United Nations ('UN') commissioned the Martínez Cobo study in 1971, a multi-volume document issued in 1981-1983. In general, the Martínez Cobo study supported indigenous peoples' perspectives.<sup>839</sup> The study became the benchmark for dialogue regarding indigenous rights at the UN.<sup>840</sup> The study inspired similar efforts in regions around the world.<sup>841</sup> The UN Education, Scientific and Cultural Organization subsequently held the 1981 Conference of Specialists on Ethnocide and Ethnodevelopment in Latin America.<sup>842</sup> The conference led to a resolution affirming indigenous rights and resulted in other UN expert conferences addressing issues important to indigenous peoples.<sup>843</sup>

The Martínez Cobo study led to the UN's establishment of the UN Working Group on Indigenous Populations ('Working Group').<sup>844</sup> The Working Group is the author of the Declaration on the Rights of Indigenous Peoples ('Declaration'). The process of preparing the Declaration set the stage for the development of the International Labor Organization Convention 169 ('ILO Convention 169').<sup>845</sup> The ILO Convention No. 169, which is described in more detail below, represents a 'core of common opinion' regarding the content of indigenous peoples' rights.<sup>846</sup>

<sup>837</sup> Anaya, above n 113, 62 (footnotes omitted).

<sup>838</sup> Ibid 56-57.

<sup>839</sup> Ibid 62.

<sup>840</sup> Ibid.

<sup>841</sup> Ibid.

<sup>842</sup> Ibid 63.

<sup>843</sup> Ibid.

<sup>844</sup> Ibid.

<sup>845</sup> Ibid 64.

<sup>846</sup> Ibid.

The ILO Convention No. 169, which was adopted in 1989, in turn, influenced the content of the Declaration.<sup>847</sup> The Declaration, which is also addressed in more detail below, built on the basic rights established in the ILO Convention No. 169, but took that convention further with regard to concepts of indigenous land rights.<sup>848</sup> The process of drafting the Declaration spanned 10 years, during which governments, indigenous representatives, and others engaged in substantial dialogue and exchange on the content of indigenous rights.<sup>849</sup>

At the same time the Working Group was developing the document ultimately adopted as the Declaration, regional and other international organizations were articulating indigenous rights.<sup>850</sup> In 1989, the General Assembly of the Organization of American States directed the Inter-American Commission on Human Rights to prepare an instrument addressing indigenous rights.<sup>851</sup> In general, the work thus far on the instrument reflects a content consonant with that contained in the Declaration.<sup>852</sup> Other organizations adopting declarations or guidelines or taking other actions in the 1990s concerning indigenous rights include the state parties to the Amazonian Cooperation Treaty, the World Bank, the 1992 UN Conference on Environment and Development, the 1994 UN Conference on Population and Development and the European Parliament.<sup>853</sup> In 1994, the UN Human Rights Committee adopted guidance on art 27 of the International Covenant on Civil and Political Rights ('ICCPR'),<sup>854</sup> which delineated, among other things, state responsibility to secure indigenous land rights.

The vast array of instruments affirming indigenous land rights and imposing on states a corresponding obligation to protect and promote indigenous rights to land show little variation. As evidence of state practice and *opinio juris*, they are consistent in their direction that states recognize and facilitate indigenous rights to own and control traditional lands. Judge Tanaka's dissenting opinion in the *South West Africa Cases* suggests that the fact that some of these instruments are in draft form or represent the will of regional organizations only does not distract from their value in discerning state practice.<sup>855</sup> The 'convergence of opinion carries subjectivities of obligation and

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<sup>847</sup> Ibid 65.

<sup>848</sup> Ibid.

<sup>849</sup> Ibid.

<sup>850</sup> Ibid 66.

<sup>851</sup> Ibid.

<sup>852</sup> Ibid.

<sup>853</sup> Ibid 67-68. See e.g. UN Declaration on the Rights of Indigenous Peoples (adopted by the UN General Assembly on 13 September 2007); Proposed American Declaration on the Rights of Indigenous Peoples (adopted by Inter-American Commission on Human Rights on February 26, 1997). For additional declarations and resolutions concerning indigenous peoples, see Anaya, above n 109 54-55.

<sup>854</sup> International Covenant on Civil and Political Rights, opened for signature, 16 December 1966 (entered into force 23 March 1976).

<sup>855</sup> In his oft-cited dissenting opinion in the *South West Africa Cases*, Judge Tanaka observed the substantial body of UN General Assembly and Security Council resolutions and declarations interpreting the Charter of the United Nations, including draft documents such as the UN Draft Covenant on Civil and Political Rights and UN Draft Covenant on Economic, Social, and Cultural Rights, as well as the International Law Commission's Draft Declaration on the Rights and Duties of States and regional treaties and declarations adopted by European and American states. *South West Africa Cases (Second Phase)* [1966] ICJ Rep 10, 292-293. He noted that all of these sources prohibited racial discrimination or affirmed the non-discrimination

expectation attendant upon the rights, regardless of any treaty ratification or other formal act of assent to the norms articulated.<sup>856</sup>

Many of the instruments addressing indigenous land rights are multilateral treaties, declarations, and resolutions from international organizations. As such, they reflect the collective will of the states involved in their formation. Furthermore, the fact that they are of recent vintage does not diminish their contribution to the formation of customary law. As Judge Tanaka noted in the *South West Africa Cases*, the advent of international cooperation and the establishment of institutions to facilitate this goal have decreased the time required for state practice and *opinio juris* to ripen into customary law. International institutions have allowed for the rapid and succinct development of state practices with regard to indigenous land rights.

## 2. State reports on domestic initiatives

Another aspect of the process through which international customary law on indigenous rights has developed is the response of governments to the various declarations, resolutions, and treaties. Governments have submitted written and oral statements to international organizations, in which they described domestic initiatives protecting indigenous rights.<sup>857</sup> For example, the Working Group regularly receives government reports on domestic policies and initiatives as part of its mandate to review developments impacting indigenous human rights.<sup>858</sup> Governments also make statements on indigenous issues in the context of world conferences.<sup>859</sup> These statements have been made in the absence of any treaty obligation on the part of the states, strong evidence that the states believe they bear responsibilities in the area of indigenous rights on the basis of customary norms.<sup>860</sup>

Even in the absence of statements to international bodies, states indicate their subjective belief regarding their legal obligations under international custom by adopting municipal laws mirroring those obligations. Although Judge Tanaka did not conclude that the incorporation of the non-discrimination norm into municipal laws pointed to its adoption as customary law, he did determine that the norm had acquired the status of a general principle of law within the meaning of Article 38(c) of the ICJ Statute.<sup>861</sup> Similarly, a survey of state municipal laws reveals extensive attention to affirming the land rights of indigenous peoples.

Countries such as Canada, the United States, Australia, and New Zealand have well-developed bodies of statutory, common, and in the case of Canada, constitutional law recognizing and protecting indigenous rights to land. In the context of the UN General

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norm. Judge Tanaka concluded that these instruments were evidence of international custom prohibiting racial discrimination. *Ibid.*

<sup>856</sup> Anaya, above n 113, 68.

<sup>857</sup> *Ibid.* 70-71.

<sup>858</sup> *Ibid.* 70.

<sup>859</sup> *Ibid.* 72.

<sup>860</sup> *Ibid.*

<sup>861</sup> *South West Africa Cases* [1966] ICJ 10, 295-298.

Assembly's recent adoption of the Declaration on the Rights of Indigenous Peoples, the United States and Colombia issued oral comments explaining the protections for indigenous peoples under their domestic laws.<sup>862</sup>

Numerous countries in Latin America have adopted protections for indigenous land rights in their constitutions and have likewise, developed statutory schemes for implementing these rights.<sup>863</sup> Again, the robust presence of this principle in municipal laws suggests that these states believe they have some obligation to protect indigenous land rights. This recognition supports the argument that *opinio juris* has solidified around the principle.

### 3. Content of international customary law protecting indigenous land rights

Three features of the international customary law recognizing and affirming indigenous land rights are important to the issues raised in this Report with regard to native title in Sarawak:

- the principles of equality and non-discrimination;
- the importance of native customs in defining property rights; and
- the right of indigenous people to be consulted with regard to decisions affecting their lands.

The following summary focuses on the United Nations Declaration on the Rights of Indigenous Peoples, ICCPR, and ILO Convention No. 169 with regard to these subjects.<sup>864</sup>

In the interest of clarity, although Malaysia is not a party to the ICCPR and ILO Convention No. 169, it is legally bound to follow international customary law. As noted above, the ICCPR and ILO Convention No. 169 are cited, along with UN and regional declarations and resolutions, as evidence of state practice recognizing and protecting indigenous land rights, which states follow because they believe they are legally bound to

<sup>862</sup> United Nations, *General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Towards Human Rights for All, Says President*, UN General Assembly Press Release GA/10612 (13 September 2007) ('Press Release') <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> at 1 February 2008 (Remarks of Robert Hagen of U.S. and Jairo Montoya of Colombia).

<sup>863</sup> Anaya, above n 113, 192-94.

<sup>864</sup> Another important instrument is the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948. Office of the United Nations High Commissioner for Human Rights, *Universal Declaration of Human Rights* <[www.unhcr.ch/udhr/lang/eng.htm](http://www.unhcr.ch/udhr/lang/eng.htm)> at 1 February 2008. Article 2 of the UDHR protects equality of rights without regard to race, religion, political opinion, national or social origin or property. Article 3 protects the right to life. Article 7 protects the right to equality before the law. Article 8 protects the right to an effective remedy by national tribunals for acts violating fundamental rights granted by constitution or law. Article 17 protects the right to own property individually or in community with others and the right against arbitrary deprivation of property. Article 27 protects the right to participate in cultural life of a community. The rights identified in the UDHR are elaborated in subsequent UN conventions and declarations, including the International Covenant on Civil and Political Rights and the Declaration on the Rights of Indigenous Peoples.

do so. Therefore, the treaties are not cited on the basis that Malaysia is a party to them, but rather, because they reflect principles that have become part of international customary law, which Malaysia must follow based on its membership in the international community: ‘The claim here is not that each of the authoritative documents referred to can be taken in its entirety as articulating customary law, but that the documents represent core precepts that are widely accepted and, to that extent, are indicative of customary law.’<sup>865</sup>

a. UN Declaration on the Rights of Indigenous Peoples

On 13 September 2007, 143 members of the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (‘Declaration’).<sup>866</sup> As a member of the UN General Assembly, Malaysia voted to adopt the Declaration. The Working Group on initiated its work on a draft of the Declaration in 1985 and participants in the development of the document included, among others, Canada, Australia, and New Zealand.<sup>867</sup>

The Declaration is a comprehensive list of rights belonging to indigenous peoples. The Declaration contains 46 articles covering both individual and collective rights. Common themes in the articles include non-discrimination, land rights, indigenous customs, and state obligations to obtain the ‘free, prior and informed consent’ of the community prior to taking actions that threaten indigenous interests in traditional lands.

i. Background

The preambular paragraphs preceding the main body of the Declaration provide important background information regarding the need and purpose of the Declaration. After reiterating in multiple ways that discrimination in any manifestation, whether based on race, culture, national origin, ethnicity, or religion, is unequivocally prohibited, the Declaration explains that indigenous people ‘have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources’, a situation that has precluded them from exercising their right to development according to their own priorities. The preface to the Declaration also notes the ‘urgent need to respect and promote the inherent rights of indigenous peoples’, rights that emerge from their political, economic, social, and cultural traditions and philosophies, ‘especially their rights to their lands, territories and resources’. The need for indigenous control ‘over developments affecting them and their lands, territories and resources’ to maintain ‘their institutions, cultures and traditions’ is also recognized.

<sup>865</sup> Anaya, above n 113, 69-70.

<sup>866</sup> GA Res 295, 61 UN GAOR (107<sup>th</sup> and 108<sup>th</sup> plen mtgs), UN Doc A/RES/61/295 (2007); UN Permanent Forum on Indigenous Issues, *United Nations Declaration on the Rights of Indigenous Peoples Adopted by the General Assembly 13 September 2007* <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>> at 1 February 2008. Four members, Australia, Canada, New Zealand, and the United States, voted against the Declaration, and eleven members abstained.

<sup>867</sup> Anaya, above n 113, 63-64.



ii. Equality and protection for indigenous institutions; free, prior and informed consent

Article 2 states that indigenous peoples are equal to others and have the right to be free from discrimination in the exercise of their human rights. Article 5 provides that '[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.' Article 7(1) protects the right to life. Article 10 prohibits the forced removal of indigenous peoples from their lands and requires that governments obtain 'free, prior and informed consent of the indigenous peoples' prior to relocation. Relocation must also be based on an agreement providing for 'just and fair compensation' and if possible, providing the option for return. Article 11 protects the right to practice and revitalize cultural traditions and customs. This includes the right to protect archaeological and historical sites. States must provide redress where indigenous cultural, intellectual, religious or spiritual property is taken without free, prior and informed consent.

Article 12 states the right of indigenous peoples to practice their traditions and customs. Article 20(1) protects the right to maintain and develop indigenous political, economic, and social institutions. Article 21 protects the right of indigenous people to improved economic and social conditions and requires states to take measures to ensure such improvement. Article 34 protects the right to promote, develop and maintain distinctive customs and traditions in accordance with human rights standards.

Article 18 guarantees the right of indigenous peoples to participate in decisions that may affect their rights. Article 19 requires states to consult and cooperate with indigenous peoples before adopting legislation that may affect their interests.

iii. Land

Article 25 notes the right of indigenous peoples 'to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands'. Article 26(1) secures the right of indigenous peoples to the lands and resources they have traditionally owned, occupied, used, or acquired. Article 26(3) requires that states provide 'legal recognition and protection' for indigenous lands and that '[s]uch recognition shall be conducted with due respect to the customs, traditions and land tenure systems of' indigenous peoples. Article 27 requires states, in cooperation with indigenous peoples, to establish and implement 'a fair, independent, open and transparent process' to recognize and adjudicate indigenous rights to lands and resources traditionally owned, occupied, or used. This process must provide 'due recognition to indigenous peoples' laws, traditions, customs and land tenure systems'.

Article 28(1) secures the right to remedies in the event of the confiscation, occupation, use, or damage to the traditional lands of indigenous people without their free, prior and informed consent. The available remedies include restitution, but if not available, just, fair and equitable compensation must be paid. Article 28(2) requires that compensation shall be in the form of lands equal in quality, size, and legal status or of monetary compensation.

Article 32(2) requires states to consult and cooperate in good faith with indigenous people and obtain their free and informed consent before approving projects affecting indigenous lands, ‘particularly in connection with the development, utilization or exploitation of mineral, water or other resources.’ Article 40 ensures the right to prompt resolution of conflicts with states or others and effective remedies for infringements on individual or collective indigenous rights. These decisions must provide ‘due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned’.

Article 38 requires states to consult and cooperate with indigenous peoples in adopting appropriate measures to achieve the goals of the Declaration.

iv. Minimum standards

The Declaration states that the delineated rights ‘constitute the minimum standards for the survival, dignity and well-being of’ indigenous peoples.<sup>868</sup>

v. Statements of members upon adoption of Declaration

Members of the General Assembly present at the vote on the Declaration expressed a keen interest in its content, as evidenced by the oral comments submitted in connection with the instrument. The comments revealed the members’ understanding that the rights reflected in the Declaration are not new, but are based on existing international human rights.<sup>869</sup> In addition, many states were anxious to clarify that the affirmation of the right of indigenous peoples to self-determination was not intended to jeopardize the territorial integrity of existing states.<sup>870</sup> This issue is expressly addressed in art 46(1), which provides that the Declaration is not to be interpreted as authorizing action that would jeopardize the territorial integrity or political unity of the state.

Australia, Canada, and New Zealand, states that voted against the adoption of the Declaration, raised concerns about the impact of the Declaration’s provisions on land. Australia said that the Declaration could be interpreted as requiring recognition of rights without regard to other property owners. Canada noted that the land provisions were overly broad and open to various interpretations and failed to recognize the range of rights over land. New Zealand registered similar concerns.<sup>871</sup> Australia, Canada, and New Zealand also criticized the provisions on free, prior and informed consent, variously arguing that the provisions could be construed to confer on indigenous peoples a broad right to approve national legislation, approaching a power of veto.<sup>872</sup>

<sup>868</sup> Un Declaration on the Rights of Indigenous Peoples art 43.

<sup>869</sup> United Nations, Press Release, above n 862 (Remarks of Mr Punkrasin of Thailand; Kaire Mbuende of Namibia; Madhu Raman Acharya of Nepal; Jose Alberto Briz Gutierrez of Guatemala).

<sup>870</sup> United Nations, Press Release, above n 862 (Remarks of Karen Pierce of United Kingdom; Baghaei-Hamaneh of Iran; Aljai Malhortra of India; Juan Alfred Buffa of Paraguay; Mr Arguello of Argentina).

<sup>871</sup> United Nations, Press Release, above n 862 (Remarks of Robert Hill of Australia; John McNee of Canada; Rosemary Banks of New Zealand). See also comments of Takahiro Shinyo of Japan and Ulla Strom of Sweden.

<sup>872</sup> United Nations, Press Release, above n 862 (Remarks of Robert Hill of Australia; John McNee of Canada; Rosemary Banks of New Zealand).

In contrast, Jose Alberto Briz Guterrez of Guatemala praised the Declaration as ‘a balanced, useful instrument that would serve as a genuine guide for improving the living conditions of indigenous peoples. Great care had been taken to ensure that the Declaration was consistent with the principles of international law.’ Furthermore, Mr. Guterrez said the ‘Declaration was the expression of the international community’s political will to respect the rights of indigenous people.’ David Choquehauca, the Minister of Foreign Affairs for Bolivia, described the Declaration as ‘a step forward in allowing indigenous people to participate in global processes for the betterment of all societies, including their own traditional communities.’ Ms. Nuorgam of Finland explained the Declaration as ‘an important tool in underscoring the full participation of indigenous peoples in decision-making processes.’

In her statement on behalf of the General Assembly, Assembly Vice-President Aminu Bashir Wali of Nigeria noted that despite the UN’s progress over the past fifteen years in recognizing indigenous peoples’ rights, they ‘still faced marginalization, extreme poverty and other human rights violations’. The guarantees in the Declaration were directed to improving this situation. She noted that the Declaration was the result of over two decades of negotiation. By adopting the Declaration, the UN was taking a ‘major step forward towards the promotion and protection of human rights . . . [and] was also actively demonstrating the General Assembly’s important role in setting international standards.’<sup>873</sup>

#### vi. Malaysia’s adoption of the Declaration

Although not analysed in this Report, whether the Declaration is a binding legal instrument or simply aspirational principles that carry political or moral force is an outstanding issue.<sup>874</sup> Whatever its legal status, it is clear that the Declaration contributes to and reinforces the process out of which customary international law on indigenous rights has developed.

Furthermore, there is a reasonable expectation among the Malaysian public, including aboriginal and native communities, that, in light of Malaysia’s two actions on the Declaration (i.e. the approval of the draft Declaration on 29 June 2006 by Malaysia as a member of the Human Rights Council and Malaysia’s subsequent approval as a member of the UN General Assembly on 13 September 2007), Malaysia will take steps to implement the Declaration as part of its domestic law and/or policy. Furthermore, as a member of the Human Rights Council, Malaysia is obligated to ‘uphold the highest standards in the promotion and protection of human rights’.<sup>875</sup>

<sup>873</sup> United Nations, Press Release, above n 862 (Remarks of Aminu Bashir Wali of Nigeria).

<sup>874</sup> For a comprehensive analysis of this issue, see Yogeswaran Subramaniam ‘The United Nations Declaration on the Rights of Indigenous Peoples: More Enforceable Land Rights for the Orang Asli?’ (2007) *Malayan Law Journal* (Forthcoming). The author notes that, while the Declaration may not a binding legal instrument, it contributes to the formation of customary international law and is persuasive authority that should be considered by Malaysian courts in resolving native title claims.

<sup>875</sup> *Human Rights Council*, GA Res 60/251, UNGAOR, 60<sup>th</sup> Sess, UN Doc A/RES/60/251, ¶ 9 (2006).

b. International Covenant on Civil and Political Rights

The ICCPR is the foundational international human rights instrument elaborating on the civil rights protected under the UN Universal Declaration on Human Rights. The multilateral treaty, which entered into force on 23 March 1976, has been signed or ratified by 152 states.<sup>876</sup>

Article 27 of the ICCPR prohibits state parties from denying persons belonging to minority groups, their rights, ‘in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’<sup>877</sup> Article 27 rights are distinct from the right to self-determination under art 1(1) of the ICCPR and supplement the other rights under the ICCPR.<sup>878</sup> While art 27 rights do ‘not prejudice the sovereignty and territorial integrity of a State party’, they may, nonetheless, be ‘closely associated with territory and use of its resources. This may be particularly true of members of indigenous communities constituting a minority.’<sup>879</sup>

Positive actions (e.g. enactment of legislation) may be necessary to protect article 27 rights.<sup>880</sup> Furthermore, although article 27 rights belong to individuals, their protection may depend upon the minority group’s ability to maintain their culture, language, and religion.<sup>881</sup> Consequently, states may be required to take positive measures to protect both minority groups and their members’ rights to culture, language, and religion.<sup>882</sup>

Culture, according to the UN Human Rights Committee (‘Committee’), is expressed in a variety of ways, ‘including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.’<sup>883</sup> As a result, positive measures authorizing, for example, the right to practice traditional activities, such as hunting and fishing, and ‘the right to live in reserves protected by law’ may be required.<sup>884</sup> A state’s positive measures must ‘ensure the effective participation of members of minority communities in decisions which affect them.’<sup>885</sup> The aim of protecting art 27 rights is to ensure ‘the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.’<sup>886</sup>

The Committee has examined the art 27 rights of indigenous peoples in response to a communication submitted on behalf of the Lubicon Lake Band of Canada (‘Band’) under

<sup>876</sup> Office of the United Nations High Commissioner for Human Rights, ‘Status of Ratifications of the Principal International Human Rights Treaties’ (2004) <<http://unhchr.ch/pdf/report.pdf>> at 1 February 2008.

<sup>877</sup> ICCPR art 27.

<sup>878</sup> United Nations Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)* (1994) ¶¶ 1, 3.1, CCPR/C/21/Rev.1/Add.5 (‘HRC, General Comment No. 23’).

<sup>879</sup> HRC, General Comment No. 23, ¶ 3.2 (footnote deleted).

<sup>880</sup> *Ibid* ¶ 6.1.

<sup>881</sup> *Ibid* ¶ 6.2.

<sup>882</sup> *Ibid*.

<sup>883</sup> *Ibid* ¶ 7.

<sup>884</sup> *Ibid* ¶ 7.

<sup>885</sup> *Ibid* ¶ 7.

<sup>886</sup> *Ibid* ¶ 9.

the Optional Protocol to the ICCPR.<sup>887</sup> Although the Committee ultimately determined that Canada had proposed a resolution to address the Band's claims, the Committee concluded that the Band had established an art 27 violation. The Band alleged that, although Canada had recognized the Band's right to continue its traditional way of life, Canada had failed to restrain Alberta from allowing oil and gas exploration on the 10,000 kilometers of land the Band traditionally used for hunting, trapping, and fishing.<sup>888</sup> The Committee noted that art 27 protected indigenous rights 'to engage in economic and social activities which are part of the culture of the community to which they belong.'<sup>889</sup>

One interesting feature of this decision is that, although Canada acknowledged its obligation to set aside land for use by the Band, its proposal was limited to parcels totaling 95 square miles, while the land on which the Band sought to exercise its rights was some 10,000 square kilometers.<sup>890</sup> Thus, the violation appeared to extend to the denial of the Band's rights to hunt, trap, and fish on lands beyond those set aside for its exclusive use.

In another decision, the Committee determined that Finland's authorization of a stone quarry in an area traditionally used by the Saami for reindeer herding did not violate the art 27 rights of the Saami community.<sup>891</sup> The Committee affirmed that art 27 protected the Saami's traditional rights to engage in reindeer husbandry.<sup>892</sup> Nevertheless, because the extraction activities would have limited impact on the Saami community's activities, the Committee found no art 27 violation.<sup>893</sup> Important to the Committee's conclusion was the fact that the state had sought to limit the impact of the quarrying by requiring, as a condition of the permit, that the extraction activities occur primarily outside the time when the Saami used the area for reindeer grazing.<sup>894</sup> The Committee also noted that the Finland had consulted with the Saami community during the permitting process.<sup>895</sup> Furthermore, in response to information that the state was considering issuing additional permits, the Committee suggested that a future violation might occur if the state authorized large scale quarrying.<sup>896</sup> In reaching its conclusions, the Committee assumed the state owned the land, despite a real dispute regarding land ownership,<sup>897</sup> which again suggests that art 27 may protect indigenous rights on lands not owned by the community.

<sup>887</sup> *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 267/1984, Decisions of the UN Human Rights Committee, UN Doc. CCPR/C/38/D/167/1984 (1984) ('*Ominayak*').

<sup>888</sup> *Ominayak*, ¶¶ 2.2, 2.3.

<sup>889</sup> *Ominayak*, ¶ 32.2.

<sup>890</sup> *Ominayak*, ¶¶ 2.2, 21.2.

<sup>891</sup> *Länsman et al v. Finland*, Communication No. 511/1992, Decisions of the UN Human Rights Committee, U.N. Doc. CCPR/C/52/D/511/1992 (1994) ('*Länsman*').

<sup>892</sup> *Länsman*, ¶ 9.2.

<sup>893</sup> *Länsman*, ¶ 9.6.

<sup>894</sup> *Länsman*, ¶ 9.7.

<sup>895</sup> *Länsman*, ¶ 9.6.

<sup>896</sup> *Länsman*, ¶ 9.8.

<sup>897</sup> *Länsman*, ¶ 2.2.

c. ILO Convention No. 169

Like the Declaration and the Committee's interpretation of art 27 of the ICCPR, ILO Convention No. 169 contains protections for indigenous customs and land rights and requirements for indigenous participation in decisions affecting those rights.<sup>898</sup>

i. Customs

Article 4 of ILO Convention No. 169 requires states to adopt measures to secure indigenous peoples' property, institutions, and cultures, consistent with the desires of the community concerned. Article 5 requires that indigenous social, cultural, religious and spiritual values and practices be recognised, protected, and respected in applying the Convention.

Article 8(1) requires state parties to have 'due regard' for indigenous customs and customary laws in applying national laws and regulations. Article 8(2) secures the right of indigenous peoples to their customs and institutions. Article 9 requires state parties to respect traditional indigenous procedures for addressing criminal offences.

Article 23(1) requires state parties to recognise the importance of community-based, subsistence economies and traditional activities, such as hunting, fishing, trapping and gathering, in maintaining indigenous culture and economic self-sufficiency and development. State parties must 'ensure that these activities are strengthened and promoted.'

ii. Consultation

Article 6(1)(a) requires state parties to consult with indigenous peoples on legislation or administrative measures that may affect their interests. Consultations with indigenous peoples must be in good faith, in appropriate form, and with the goal of reaching agreement or consent to proposed measures.<sup>899</sup>

iii. Land

Article 13(1) requires state parties to respect the 'special importance for the cultures and spiritual values of the peoples concerned of their relationship with the land or territories . . . which they occupy or otherwise use, and in particular, the collective aspects of this relationship.' Article 14(1) requires states to recognize indigenous peoples' 'rights of ownership and possession' over their traditional lands and, with respect to lands not exclusively occupied, to safeguard rights to use and access those lands. In this regard, '[p]articular attention shall be paid to the situation of nomadic peoples and shifting

<sup>898</sup> Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989 (entered into force 5 September 1991), International Labour Organization, ILOLEX Database of International Labour Standards <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>> at 1 February 2007.

<sup>899</sup> ILO Convention No. 169, art 6(2).



cultivators’.<sup>900</sup> Article 14(2) requires governments to identify the lands traditionally occupied by indigenous peoples and to protect rights of ownership and possession.

Art 15(1) requires safeguards for indigenous peoples’ rights to use, manage, and conserve natural resources associated with their lands and to participate in decisions affecting use and management of the resources. Where states retain rights in lands of indigenous peoples (e.g. ownership of minerals or rights to resources), before a state can develop or permit others to develop resources pursuant to those rights, the state must consult with indigenous peoples to determine the extent that the state’s activity may prejudice indigenous interests.<sup>901</sup> Where possible, indigenous people should participate in benefits of such development and be paid compensation for any damages they sustain as a result of the development.<sup>902</sup>

Article 16 addresses the relocation of indigenous peoples from their lands. States may remove indigenous peoples from their lands only ‘as an exceptional measure’, in which case the consent of the people concerned is required. If possible, the option to return to the lands from which indigenous peoples are removed should be available. If return is impossible, the state should provide substitute lands of a quality and legal status equal to those from which the indigenous people are removed. Compensation should be provided for loss or injury incurred as a result of relocation.

Article 18 requires that penalties punish trespass or unauthorized use of indigenous lands and that states take action ‘to prevent such offences.’

#### D. Conclusion

International human rights law has influenced the development of Malaysian common law on native title. Beyond native title law, Malaysian case law generally recognizes that international human rights principles expressed in the UN Universal Declaration of Human Rights are persuasive, although not binding authority. Furthermore, international customary law is part of Malaysian common law by virtue of sec 3(1) of the *Civil Law Act*. Finally, human rights are recognised as inherent to a democratic society, with the common law serving as one vehicle through which such rights are incorporated into domestic law.

Traditionally, international customary law is formed in the presence of state practice and *opinio juris*. Protections for indigenous rights have developed into international customary law. More particularly, indigenous rights must be accorded equal status under law, states are obligated to protect indigenous rights to traditional lands, to respect indigenous customs, including those associated with land tenure, and to consult with and obtain the consent of indigenous communities prior to taking actions that may affect their rights.

<sup>900</sup> ILO Convention No. 169, art 14(1).

<sup>901</sup> ILO Convention No. 169, art 15(2).

<sup>902</sup> ILO Convention No. 169, art 15(2).



# X

## CONSTITUTIONAL PROTECTION OF NCR

## X. CONSTITUTIONAL PROTECTION OF NCR

Parts VIII and IX, which examined foreign case law and international human rights law addressing indigenous land rights, suggests how Malaysia could develop native title law in a manner that affirms the human rights of natives in Sarawak. This Part X explores protections for native title under the *Federal Constitution* in a human rights framework, informed by both international customary law and native title law as configured by other common law jurisdictions.

### A. Introduction

The *Federal Constitution* protects several fundamental human rights directly relevant to native title and its related economic, social, cultural, and spiritual dimensions. Recent Malaysian cases have examined some of these rights, including the protection of customary laws, the right to equality before the law, the rights to life and property and the fiduciary obligations of the government with respect to native title lands. Beyond these cases, the *Federal Constitution* supports a framework for protecting native title in a manner that affirms the human rights of indigenous peoples, consistent with Malaysia's obligations under international customary law and in parallel with developments under the municipal laws of other common law jurisdictions.

To say that a right is protected by the *Federal Constitution* elevates its status and imposes greater obligations on the government with respect to actions potentially affecting those rights. As the supreme law of the Federation, the Federal Constitution serves as 'a fundamental law of the land, a kind of "higher law", which is used as a yardstick with which to measure the validity of all other laws.'<sup>903</sup> A court may declare *ultra vires* or void laws that are inconsistent with the *Federal Constitution*.<sup>904</sup> Thus, Malaysian native title law must abide by the requirements of the *Federal Constitution*.

Protections for native title must account for the fact that land assumes a special and central role in native communities. The significance of land to native communities, which is described above in Part V.A, must be fully acknowledged and respected. A failure to honor the customs of native communities with regard the occupation and possession of land effectively erodes the rights of the communities.

### B. Constitutional protection of customs

One of the primary means for protecting native title is art 160(2) of the *Federal Constitution*, which defines law to include 'custom or usage having the force of law in the Federation or any part thereof'. Providing Constitutional protection for native customs would have a number of consequences for native land rights. Recognition and protection of customs secures the existing native title rights recognized by the common law. But fully respecting native customs would extend the protection of this law to ensure that native communities are treated in an equal and non-discriminatory manner with regard to

<sup>903</sup> Wan Arfah and Bulan, above n 13, 33-34; *Sagong I* [2002] 2 MLJ 591, 617.

<sup>904</sup> *Sagong I* [2002] 2 MLJ 591, 617; Wan Arfah and Bulan, *ibid* 34.

their property rights. The full range of land tenure traditions would be recognized, without limits based on pre-conceived English common law property concepts. Because land tenure customs are designed to maintain and promote the economic, social, cultural and spiritual livelihood of native communities, their protection generally ensures the vitality and continuation of those communities. Finally, recognition of customs as part of Malaysian law guarantees its development in line with other common law jurisdictions and with Malaysia's obligations under international customary law.

#### 1. Customs and native title rights

Malaysian common law directs that the content of the rights embodied in native title be determined by reference to aboriginal and native traditions on land tenure. Thus, courts must apply customs, which are protected under art 160(2) of the *Federal Constitution*, in defining native title law. Because customs vary from one community to the next, the courts must examine the traditions of each community before it can recognize and affirm native land rights.

As explained above, customs are the measure of native title rights because they embody the multi-dimensional role of land in native communities. They support and advance the economic, social, cultural, and spiritual values of the communities. The most effective way to protect the rights implicated in land (i.e. right to property, right to life, right to freedom of movement, right to equality) is by defining the content of the rights with reference to native and aboriginal customs. Limiting the recognition to rights familiar to the English common law would not achieve these purposes.

Recognition of native customs as a means of protecting native rights is also important because it honors the understanding of the terms on which Sarawak entered the Federation of Malaysia. As noted below, the *Federal Constitution* contains numerous references to and protections for customs followed by various communities in Sarawak. By respecting these customs, the unification of Sarawak with the rest of Malaysia ensures that native tradition 'feeds into, nourishes, fuses with and becomes part of the amalgam'<sup>905</sup> of Malaysian law.

The recognition of customs as the key to defining native title is also consistent with developments in other common law jurisdictions. The legal trends outside of Malaysia emphasize the need to include the indigenous perspective in applying law affecting their interests. Early Privy Council and U.S. Supreme Court decisions noted the role of customs in defining native property rights. These decisions acknowledged the full spectrum of those customs, extending property concepts beyond those recognized under the English common law to include the traditions of hunting, fishing, and gathering, as well as the more traditional settlement and agricultural land uses. Contemporary developments in South Africa, Canada and Australia reveal the incorporation of the indigenous perspective as part of the laws governing indigenous land rights. Despite differences in the degree to which indigenous customs find expression, the common denominator is recognition that indigenous values and traditions are critical in defining land rights. These jurisdictions

<sup>905</sup> *Richtersveld Community*, 2003 SACLRL 79, \*44.

have recognized and given effect to the varying forms of occupation according to indigenous customs. Finally, indigenous customs have found full expression under international customary laws. States have committed themselves to recognizing indigenous land rights ‘with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.’<sup>906</sup>

Despite Malaysia’s reliance on customs in defining native title, the *Land Code 1958* fails to protect the full range of customs practiced by native communities in Sarawak. In particular, occupation and possession of land based on hunting, fishing, gathering, and commemorating important events and people has been rejected as impractical or, in the case of the *Land Code 1958*, has been entirely ignored. Furthermore, the denial of land rights based on uses of land that are different from the mainstream violates the principle of equality, which is affirmed in the *Federal Constitution* and is part of international customary law on indigenous land rights.

## 2. Equality and non-discrimination

The last section explained how customs give content to native title rights and aid in legal recognition of the property interests held by natives without forcing them into the mould of English common law concepts. But recognition of customs serves a broader purpose. The full acknowledgment of customs and their relationship to indigenous land rights is consistent with the international trend to eliminate discrimination from legal systems around the world. This purpose is clearly expressed in *Mabo (No 1)* and in the passage in *Mabo (No 2)*, subsequently quoted in *Sagong I*: ‘A common law doctrine [rejecting aboriginal land rights based on purportedly inferior social organization] founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary to both international standards and to the fundamental values of our common law’.<sup>907</sup>

The need to remedy past discrimination against indigenous peoples with respect to their land is clearly illustrated in *Richtersveld Community*. The analysis in that case regarding the manifestation of discrimination in the South African legal system is instructive in light of Sarawak’s failure to implement the administrative infrastructure to protect native title. As noted above, the racial discrimination arose in *Richtersveld Community* because the law failed to provide equal treatment between registered property owners and non-registered native titleholders with regard to the government’s development activities on their lands. The owners of registered property continued to enjoy access to their lands, were allowed to maintain their homes, and participated in the economic benefits of the government’s mining on their lands. In contrast, indigenous owners holding their lands under an unregistered, communal title were denied comparable rights. The owners of the registered lands were primarily white, while the native landowners with unregistered interests were non-white. The court found that the law authorizing the government’s mining activities on native lands resulted in the community’s dispossession of those lands on the basis of racial discrimination.

<sup>906</sup> Declaration, art 26(3).

<sup>907</sup> *Sagong I* [2002] 2 MLJ 591, 615.



International customary law on indigenous property rights explicitly recognize that historical discrimination against indigenous peoples led to denial of their fundamental rights, including property rights.<sup>908</sup> To remedy this past discrimination, international customary law mandates equality of treatment, including respect for indigenous customs and methods of using, occupying, and possessing lands.<sup>909</sup>

The land tenure customs of indigenous people are different than those recognized under the English common law inherited by Malaysia.<sup>910</sup> Native title represents a collective interest in land used according to traditional methods of occupation. As described above in Part V, these methods include the use of lands for longhouse communities, cultivation, hunting, fishing, gathering, recording historical events and commemorating and honoring distinguished community members. Section 5 of the *Land Code 1958*, which limits the means by which natives can establish occupancy for purposes of creating new NCR from 1 January 1958, would be inconsistent with the trend among common law jurisdictions to achieve equality of treatment between indigenous and non-indigenous property owners by recognizing indigenous methods of occupying and possessing land, especially those associated with nomadic people engaged in hunting, fishing, and gathering.

The denial of customs supporting native property rights on the basis that they are different from non-native property holding patterns not only violates art 160(2) by failing to recognize customs as part of Malaysian law, it also violates the right of natives to equality before the law, guaranteed by art 8(1) of the *Federal Constitution*. The failure to provide for registration of native title and to accord indefeasibility to registered interests could similarly violate art 8(1). The amendment requiring the setting up of the Register of Native Titles under s 7A of the *Land Code* is a step in the right direction, when it fails to accord indefeasibility to registered native property interests, it would perpetuate unequal treatment between NCR and other claims based on indefeasible titles.

Finally, the provision in s 5 of the *Land Code 1958* limiting the means by which natives can establish new NCR and Sarawak's failure to accord equal treatment to native and non-native property rights are contrary to the overall thrust of international customary law prohibiting racial discrimination and protecting indigenous land rights and customs.

<sup>908</sup> Declaration, introduction, ¶¶ 4, 6, and 7 (rejecting all forms of discrimination, noting historic injustices against indigenous peoples, including dispossession of lands, and recognizing need to respect rights to political, economic, and social institutions); ILO Convention No. 169, introduction, ¶ 6 (noting that indigenous peoples have not enjoyed fundamental human rights to same degree as others and that their laws, values, customs and perspectives have been eroded) and art 3(1)(guaranteeing human rights and freedoms of indigenous people without discrimination).

<sup>909</sup> Declaration, art 12 (protecting right to practice customs), art 25 (right to maintain distinct spiritual relationship with traditional lands), and art 26(3)(right to legal recognition of lands 'with due respect to' customs and land tenures systems); ILO Convention No. 169, art 8 (mandating respect for customs in applying national laws), art 14 (calling for recognition of rights to land 'traditionally occupied' and directing states to pay '[p]articular attention' to nomadic people and shifting cultivators).

<sup>910</sup> Despite some differences, it is critical to keep in mind that, as noted above in Part III.C.b, in many ways, indigenous peoples occupy and use land in a manner consistent with the methods recognised under the English common law.

### C. Native title as Constitutionally-protected property interest

Native title represents rights in and to the land.<sup>911</sup> These interests, which constitute ‘the customary rights of the natives to use and cultivate land reserved for them’ are property protected by art 13 of the *Federal Constitution*.<sup>912</sup> Article 13(1) prohibits the deprivation of property except according to law and art 13(2) prohibits the compulsory acquisition or use of property without adequate compensation.

The issue of what constitutes adequate compensation for the acquisition of the full beneficial interest in land represented by native title remains unsettled. In *Adong I*, the court awarded compensation on ‘just terms’, but the decision itself does not clearly state the basis for the ultimate award. *Adong I* acknowledges the special relationship between aboriginal communities and their land and suggests that this relationship should be considered in determining appropriate compensation.<sup>913</sup>

#### 1. Adequate compensation under *Adong I*

In determining the proper amount of compensation for the loss of aboriginal rights to land, the High Court in *Adong I* referred to the: (1) market value of land use of neighbouring lands; and (2) twice the value of usufructuary rights in light of the status of aboriginal lands as heritage lands and the fact that the extinguishment of rights to those lands amounted to a deprivation of Temuans’ right of movement, produce of the forest, and future living of individual aboriginals and their families and descendents.<sup>914</sup>

Ultimately, the High Court did not rely on market value, purportedly because what was at issue was loss of land use.<sup>915</sup> The High Court also seemed to ignore the second consideration of twice the value of the usufructuary rights. Instead of basing compensation on those measures, the court settled on an amount ‘that would not only reflect a just figure, but also be a sum which would enable the plaintiffs to put into good use and regenerate’ a formulation that significantly altered the final determination.<sup>916</sup> This ultimate award was RM26.5 million, which the High Court noted was also equal to RM300 per month per person multiplied by 25 years.<sup>917</sup>

It is essential to keep in mind that the High Court in *Adong I* was seeking to compensate ‘not for the land but for what was above the land over which the plaintiff has a right’.<sup>918</sup> In that case, the High Court characterized the property right as a usufructuary right. *Sagong I* and *Sagong II* confirmed that native title reflects a full beneficial interest in and to the land that forms the settlement area of an aboriginal community. Thus, compensation for the deprivation of full beneficial ownership would require a court

<sup>911</sup> *Nor Nyawai II* [2006] 1 MLJ 256, 268 (citing *Sagong II* [2002] 2 MLJ 591).

<sup>912</sup> *Amit* [2005] 7 MLJ 10, 21. See also *Nor Nyawai II* [2006] 1 MLJ 256, 269-70; *Adong I* [1997] 1 MLJ 418, 430; *Adong II* [1998] 2 MLJ 158, 163.

<sup>913</sup> *Adong I* [1997] 1 MLJ 418, 433, 436.

<sup>914</sup> *Adong I* [1997] 1 MLJ 418, 433, 436.

<sup>915</sup> *Adong I* [1997] 1 MLJ 418, 433, 436.

<sup>916</sup> *Adong I* [1997] 1 MLJ 418, 433, 436.

<sup>917</sup> *Adong I* [1997] 1 MLJ 418, 433, 436.

<sup>918</sup> *Adong I* [1997] 1 MLJ 418, 433, 436.

account for different factors. The courts have yet to settle on the proper measure of adequate compensation for the extinguishment of native title, although it is hoped that this issue will be clarified at the Federal Court as part of the government's appeal of the decision in *Sagong II*.

## 2. Case and statutory law in Sarawak on compensation

In Sarawak, case law prior to 1998 reflects differing approaches to compensating natives for the extinguishment of NCR. For example, in one decision, the High Court focused on the market value of similar property, while in another case, the court relied on income that could be generated through cultivation of the land.<sup>919</sup>

In 1998, the *Land Code 1958* was amended to address the procedure for the Sarawak Government's resumption of NCR and other lands and to establish a uniform method for determining compensation for the Government's acquisition of occupied land. Section 60(1) of the *Land Code 1958* lists several factors relevant in determining compensation, including market value, increase in value of other land of the owner, damages incurred as a result of the land loss, including injury to the owner's earnings, expenses incurred as a result of having to change residence or business, the value of certain improvements made to the land, and, with respect to NCL, costs of resettlement or relocation.

The factors listed in s 60(1) may not be sufficient for purposes of determining compensation on 'just terms' as described by the court in *Adong I*. Those factors fail to consider the unique interests of native communities in their lands, including their status as part of the heritage of the community. Further missing from s 60(1) is consideration of the land's central role in the livelihood of the community, which, as explained in the next section, is also afforded protection under the Federal Constitution.

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<sup>919</sup> *The Minister for Land and Mineral Resources v Bilam Anak Chandai, Land Cases (1969-1987)*, Land and Survey Department, Sarawak Kuching-High Court (Civil Application No. 2 of 1971)(obiter stating that, among other things, in determining the value of the land, *bona fide* selling prices of neighbouring property held under title at the material time and subject to same condition and use could be considered); *Ansi Rengan v Hoe Hung Sawmill Ltd*, Kuching High Court Civil Suit No. K 4 of 1965 dated 2 May 1968 (unreported) in Land and Survey Department, Sarawak Kuching-High Court (Civil Application No. 2 of 1971) (compensation awarded based on 'the return which the plaintiff might be likely to get from the land if he had exercised his right to cultivate it').

#### D. Native title as a constitutionally-protected right to life

Article 5 of the *Federal Constitution* protects the right to life. The courts have recognised that rights protected by native title include access to lands and resources that are integral to the individual and communal lives of natives, play an essential role in economic livelihood, and are central to the social, cultural, spiritual, and political existence of native communities. Furthermore, in formulating the compensation for property taken pursuant to art 13 of the *Federal Constitution*, courts have considered the special relationship between aborigines and land must be taken into account, including its prominence in providing aborigines with a means of livelihood.<sup>920</sup>

The deprivation of the right to livelihood raises an important question: Whether monetary compensation is ever adequate to compensate for the interests of native communities in their lands.<sup>921</sup> As described above in Part IX,<sup>922</sup> the recognition in *Adong I* of the special relationship between the Orang Asli and their land is echoed in international human rights law:

This profound relationship has various social, cultural, spiritual, economic, and political dimensions and responsibilities. It has a significant collective dimension. The intergenerational aspect of such a relationship is crucial to indigenous peoples' identity, survival and cultural viability. As is true for many of these groups, certain non-market values including traditional and customary lifestyles, ecological vitality of natural ecosystems, maintenance of a natural nature or equilibrium within the community and promotion of bio-diversity are of great importance.<sup>923</sup>

In light of these values, where deprivation is found, the power of Malaysian courts to craft a remedy that addresses an injury to native livelihood should extend beyond compensation to include reinstatement of property rights or declaratory relief prohibiting damage to land or injury to property rights.<sup>924</sup> Such remedies are consistent with Malaysia's obligations under international customary law. As noted earlier, the Declaration requires state parties to provide 'just, fair and equitable compensation' which must take the form of replacement lands of equal value and legal status where traditional lands are taken.<sup>925</sup> Monetary compensation for the taking of traditional lands is satisfactory only if consistent with the wishes of the indigenous community.

<sup>920</sup> Ramy Bulan, 'Native Title as a Proprietary Right Under the Constitution in Peninsula Malaysia: A Step in the Right Direction?' [2001] 9 *Asia Pacific Law Review* 83, 88-89 ('Native Title as a Proprietary Right'); *Nor Nyawai I* [2001] 6 MLJ 241, 266-67; *Adong I* [1997] 1 MLJ 418, 433, 436 (referring to the Plaintiffs' un rebutted assertion 'that the forest was a source of their livelihood' and that compensation should account for deprivations of 'heritage land', 'freedom of inhabitation of movement under art 9(2)' of the *Federal Constitution*, forest produce, 'future living for himself and his immediate family', and 'future living for his descendants').

<sup>921</sup> Bulan, Native Title as a Proprietary Right, above n 920, 99.

<sup>922</sup> See Part VIII.C.3.a.iii (Declaration, art 25), Part VIII.C.3.b (ICCPR, art 27, HRC General Comment No. 23, ¶ 7), and VIII.C.3.c (ILO Convention No. 169, art 13(1)).

<sup>923</sup> Bulan, Native Title as a Proprietary Right, above n 920, 89 (footnotes omitted).

<sup>924</sup> Bulan, *ibid* 93. For a recent report on the concept of land as life, see Wee AP, Wong MC, Thomas Jalong, 'Land is Life, Land Rights and Oil Palm Development in Sarawak' (Forest Peoples Programme and Perkumpulan Sawit Watch (2007)).

<sup>925</sup> Declaration, art 28(1). See also ILO Convention No. 169, art 16(4)(requiring replacement land as compensation for relocation from traditional lands).

In addition, the fiduciary obligation of government officials, described in the next section, should inform the determination of the appropriate remedy for a deprivation of livelihood based on extinguishment of native land rights.<sup>926</sup> In certain circumstances, the combination of the constitutional protections, i.e. rights to property and life and the fiduciary obligations of the government, may impose on government officials additional requirements before they can extinguish native title.<sup>927</sup>

#### E. Fiduciary obligations of public officials

##### 1. Sagong II

The fiduciary obligations of government officials dealing with native title were elaborated in *Sagong II*. In that case, the Court of Appeal affirmed the High Court's construction of the fiduciary responsibilities of the Governments of Selangor and Malaysia with regard to the property rights of the Temuans. The High Court identified several sources for the fiduciary obligation, including art 8(5)(c) of the *Federal Constitution*, a provision that excepts from the general equality requirement of art 8, provisions 'for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land)'. The Court of Appeal explained that

it is a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs. In *Mabo No 2* . . . it was said that the obligation on the Crown was to ensure that the traditional title was not impaired or destroyed without the consent of or otherwise contrary to the interests of title holders. . . . The remedy, where the government as trustee or fiduciary has breached its duties, is in the usual form of legal remedies available, namely by declaration of rights, injunctions or a claim in damages and compensation.<sup>928</sup>

The Court of Appeal also found support for the fiduciary obligation in Malaysia's status as a Parliamentary democracy, in which the Parliament represented the people, who in turn donated power to the Parliament, the Minister of the Crown, or other public authorities.<sup>929</sup> The public body held its power in trust for the people or in some instances, for a particular part of the general public, such as aborigines.<sup>930</sup> If this power was abused, the courts had a constitutional duty to intervene.<sup>931</sup> This duty involved a review of whether the public body had exercised its authority in trust for the people, in a proper way according to the purposes for which that power was conferred by the Parliament.<sup>932</sup>

In addition to art 8(5) of the *Federal Constitution*, sch 9 item 16 empowers the Federal government to enact laws to promote the welfare of aborigines. The exercise of governmental powers under this provision must be solely for the benefit and welfare of aboriginal people. Furthermore, the legislative history to the *Aboriginal Peoples Act 1954*,

<sup>926</sup> Bulan, Native Title as a Proprietary Right, above n 920, 95.

<sup>927</sup> Ibid 99.

<sup>928</sup> *Sagong II* [2005] 6 MLJ 289, 312 (quoting *Sagong I* [2002] 2 MLJ 591).

<sup>929</sup> *Sagong II* [2005] 6 MLJ 289, 312.

<sup>930</sup> *Sagong II* [2005] 6 MLJ 289, 312.

<sup>931</sup> *Sagong II* [2005] 6 MLJ 289, 312.

<sup>932</sup> *Sagong II* [2005] 6 MLJ 289, 312.

as revised in 1972, reflects the Federal government's intent to protect aborigines from 'unscrupulous exploitation and to safeguard their organization and way of life.'<sup>933</sup> Finally, the court in *Sagong I* referred to a policy statement of the government, which imposed on the Department of Aboriginal Affairs the responsibility to protect the aborigines.<sup>934</sup> These authorities established the fiduciary obligation of the government to the aborigines in Peninsula Malaysia. The conclusions of the courts in *Sagong I* and *Sagong II* regarding fiduciary obligations owed to the aborigines of Peninsula Malaysia apply equally to the natives of Sarawak.

## 2. Fiduciary obligations of Sarawak

### a. Introduction

As described above in Part VIII.D.2, the highest courts in the United States, Canada, and to some extent, Australia, have acknowledged the fiduciary relationship between the government and indigenous people. Such relationship may be based on legislative instrument, Constitution, treaty, or equity. In general, the courts have found a fiduciary obligation owed to indigenous people based on their peculiar vulnerability *vis-à-vis* special government decision making, thus justifying preferential treatment.<sup>935</sup> This vulnerability is not the result of weakness, but rather, arises because the government can exercise authority over matters and interests that benefit or disadvantage indigenous people.

Sarawak has significant authority over the interests of natives in their lands. Sarawak can terminate NCR over land. Furthermore, the status of native title as inalienable means that natives have but one choice in disposing of their land: they can surrender it to the government.<sup>936</sup> The manner in which the Government of Sarawak decides to exercise its powers in relation to native interests in land fundamentally impacts the future of native communities. This extraordinary power over natives is held in check by Sarawak's fiduciary obligation to protect and safeguard the special position of natives as provided in the *Federal Constitution*.

### b. Federal Constitution

Article 153(1) of the *Federal Constitution* requires the King 'to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak'. Section 39 of the *Sarawak Constitution* imposes a comparable duty on the Governor with regard to promoting natives in the public service.

<sup>933</sup> *Sagong I* [2002] 2 MLJ 591, 619.

<sup>934</sup> *Sagong I* [2002] 2 MLJ 591, 619.

<sup>935</sup> This is consistent with the concept of fiduciary obligation at common law, which requires one party to act selflessly in the interest of another, based on the second party's vulnerability or disadvantage, which causes the second party to rely on the first. See Bulan, PhD Thesis, above n 2, 307.

<sup>936</sup> As noted earlier, some native customs allow individual natives to alienate land to other community members, subject to community approval.



Art 153 is a unique and important element of the *Federal Constitution*.<sup>937</sup> The provision requires the King to safeguard both the interests of the Malays and the natives of Sarawak and Sabah, putting them on par in relation to special privileges. Thus, the privileges accorded Malays must also be extended to the natives of Sarawak.<sup>938</sup> Art 153 has been described as an affirmative action or positive discrimination provision designed to achieve social and economic equality among the races.<sup>939</sup> Because they are placed within the same class with Malays, this intent to achieve equality is relevant to and must inform the manner in which government officials address the interests of natives of Sarawak.

In addition to art 153, art 74(2), sch 9, List II, item 2(b) and sch 9, List II.A, item 13 provide Sarawak with jurisdiction over, among other things, native reservations and native law and customs. Article 150(5) provides that in an emergency, the Federal Parliament may legislate on any matter, subject to exceptions for certain matters, a category that includes native law or customs in Sarawak.<sup>940</sup> Art 161A(5) preserves the independence of Sarawak with regard to the alienation of land belonging to natives. Finally, Art 76(1) authorizes Federal Parliament to make laws related to matters on sch 9, List II, but only for certain limited purposes, including implementation of international treaties or to provide uniformity between state laws. The power of the Federal Parliament under art 76(1), however, does not extend to native laws and customs in Sarawak.<sup>941</sup> The historical background on these provisions fortifies the view that the framers intended to safeguard native interests and to impose fiduciary obligations on government officials with regard to them.

c. Background to constitutional provisions

At the time Sarawak joined the Federation of Malaysia, native law and custom was a matter of special concern to Sabah and Sarawak.<sup>942</sup> The natives indicated a need to safeguard their customary rights to land.<sup>943</sup> There was fear that Sarawak would be overwhelmed and exploited by the peoples of Peninsula Malaysia and Singapore, which, at the time, were relatively more developed politically and economically than Sarawak.<sup>944</sup> The Constitutional provisions described above (i.e. arts 74(2), 150(6A), 153 and 161A(5)) were designed to meet these concerns by preserving the *status quo* of land laws in Sarawak, native law and customs, and the land rights embodied therein.<sup>945</sup> Much of these continued protections were a legacy of the Brooke administration.

d. Brooke's legacy of trust over native lands and interests

The philosophy that Sarawak held lands subject to NCR in a manner akin to a fiduciary of native interests dates back to the time of the Brooke government, which consistently

<sup>937</sup> Bulan, PhD Thesis, above n 2, 317.

<sup>938</sup> Ibid.

<sup>939</sup> Ibid.

<sup>940</sup> *Federal Constitution*, art 150(6A).

<sup>941</sup> *Federal Constitution*, art 76(2).

<sup>942</sup> Bulan, PhD Thesis, above n 2, 318.

<sup>943</sup> Ibid.

<sup>944</sup> Ibid.

<sup>945</sup> Ibid 318-19.

expressed the belief that land in Sarawak was the heritage and lifeblood of its people.<sup>946</sup> The Brooke government viewed itself as the trustee of the people and adopted policies for the protection of native interests against exploitation.<sup>947</sup> This underlying obligation of trust is reflected in the instrument of cession of Sarawak to Britain in 1946, which transferred the Rajah's rights subject to existing native customary rights, and in James Brooke's writings, in which he stated that Sarawak belongs to the Malays and natives, and "not to us. It is for them that we labour; not ourselves."<sup>948</sup> Furthermore, the *Constitution Order No C-21* (Constitution) 1941 contained key 'Cardinal Principles', which were subsequently incorporated into the *Sarawak Constitution* and expressly stated the government's obligation as trustee of Sarawak:

- 1) That Sarawak is the heritage of our subjects and is held in trust by ourselves for them;
- 2) That never shall any person or persons be granted rights inconsistent with those of the people of this country or be in any way permitted to exploit Our Subject or those who have sought Our protection and care.<sup>949</sup>

The economic practices and land policies of the Brooke government were designed to protect against land speculation by unscrupulous traders and settlers and against alienation of land that would affect native interests.<sup>950</sup> Charles Brooke pointedly stated his concern that natives should not alienate their land, which he described as their "flesh and blood . . . the source of their self existence, their *harta pesaka* [heritage] which if once lost no amount of money could ever recover."<sup>951</sup>

The Brooke government policies reflect a fiduciary obligation to protect native lands. More particularly, the obligation sought to protect against third parties not beneficiaries of this special obligation. In an effort to preserve the heritage and lands of natives, Brooke imposed limitations on alienation and implemented policies requiring the screening would-be concessionaries.<sup>952</sup>

#### e. Land Code 1958

As explained above in Part IX's summaries of relevant case law from foreign jurisdictions, these two features of native title (i.e. inalienability and the power of the government to extinguish it) are the basis for the government's fiduciary duty to protect indigenous interests consistent with their rights.

The inalienability of native customary rights was reflected as early as 1899 in an order of Rajah Brooke prohibiting Iban from selling or transferring lands to non-natives.<sup>953</sup> Section 9 of the *Land Code 1958* speaks to the inalienability of native title by prohibiting non-natives from acquiring rights over certain native lands. Although native title is

<sup>946</sup> Ibid 319.

<sup>947</sup> Ibid 319-20.

<sup>948</sup> Ibid 320.

<sup>949</sup> Ibid.

<sup>950</sup> Ibid 321.

<sup>951</sup> Ibid.

<sup>952</sup> Ibid.

<sup>953</sup> Ibid 325.

inalienable unless surrendered to the government, the government has the power to extinguish native title if it does so through clear and unambiguous legislation. The *Land Code 1958* empowers the Government of Sarawak to extinguish NCR under s 5(3) and to accept surrender of lands subject to such rights. Section 15 of the *Land Code 1987* sets out a detailed procedure for natives to surrender NCR to the State, including a right to object to the surrender. One example of a mechanism for natives to surrender their rights is the joint venture concept ('JVC'), which developed in 1997. Through the JVC, native communities surrender their lands to a pool to attract investment by private entrepreneurs.<sup>954</sup> The government then enters into a joint venture agreement with the private corporation to develop the land.<sup>955</sup> The State has an obligation to protect native rights it receives through this process of surrender.

f. Requirements of the fiduciary obligation

The fiduciary obligation of government officials with regard to native title is still not clearly defined. Nevertheless, at a minimum, the case law from Australia and Canada indicate that prior to taking action, governments have an obligation to consider how their activities may affect native title and associated rights and to consult with the community whose interests may be impaired. The early U.S. case law and Toohey's decision in *Mabo (No 2)* would require governments to obtain consent prior to impairing or extinguishing native or aboriginal title. Toohey's formulation would require that the fiduciary act for the beneficiary's benefit, avoid acting for its own or a third party's benefit, refrain from delegating its discretion, obtain the consent of the beneficiary, and consider the impact of the fiduciary's actions on the beneficiary's interests.

Although *Delgamuukw* suggests a more sophisticated and flexible test, the essential point is to ensure native interests are accounted for in government decision-making. *Delgamuukw* also notes the importance of accommodating native interests in meeting the fiduciary obligation. This formulation requires that governments minimize infringement and courts assess the extent to which governments accommodate native interests in balancing competing claims to resources. This accommodation may require that native people share in benefits associated with government actions resulting in the development of traditional native lands. Compensation for infringements on aboriginal title must also reflect the 'nature and severity' of the infringement.

These same obligations arise under international customary law. The Declaration, ILO Convention No. 169, and the Committee's interpretation of art 27 of the ICCPR all point to an international consensus that governments have an obligation to consult with indigenous people before taking actions that impact their interests in land. The Declaration and the ILO Convention No. 169 also require that indigenous people participate in benefits derived from developments on their lands.

<sup>954</sup> Bulan, Native Customary Land, above n 216, 51.

<sup>955</sup> Ibid 52-53.

F. Quasi-constitutional status of statutes protecting interests of aboriginal peoples and natives

In addition to providing the basis for the fiduciary obligation, art 153 plays a role in the interpretation of statutes on native rights. The Malaysian courts have interpreted art 8(5)(c) as requiring a liberal reading of statutes designed to protect the interests of the aborigines.<sup>956</sup> This rule is based in part on the characterization of statutes protecting aboriginal rights as human rights legislation with ‘quasi-constitutional status giving it pre-eminence over ordinary legislation’.<sup>957</sup> It also allows the courts to exercise crucial judicial review of powers of governments and public authorities in relation to those rights. As noted earlier, art 153 serves a purpose similar to art 8(5)(c) by requiring safeguards and protections for the interests of Malays and natives in Sabah and Sarawak. Consistent with the treatment of statutes affecting aboriginal peoples in Peninsular Malaysia, courts should interpret statutes affecting natives in Sarawak in accordance with their quasi-constitutional status and consistent with the intent of art 153 of the *Federal Constitution* to safeguard and protect native interests.

G. Conclusion

The *Federal Constitution* protects rights critical to maintaining the special relationship between native communities and their lands. This relationship underlies the spiritual, cultural, economic, and social existence of native communities. The right to property, livelihood, and equality before the law, safeguards for native interests, the fiduciary obligation of government officials, and application of customary law all play a role in the recognition and protection of native title.

Native title arises out of native customs. These customs, which define the content of native title, are part of the law of Malaysia and are protected under the *Federal Constitution*. Because they embody and protect the special relationship between natives and their land, the application of customs in recognising native title ensures the continuation of native communities. The implementation of customs is also consistent with the common law, which directs courts to define native title with reference to native customs.

The constitutional protection for equality before the law requires recognition of native customs on an equal basis with non-native property rights.<sup>958</sup> The principle of equality

<sup>956</sup> *Sagong II* [2005] 6 MLJ 289, 311. See *Jalang Paran* [2006] 1 MLJ 412, 428 (reading into s 15 of the *Land Code 1958* a requirement that the Minister disclose the public purpose for which land is needed based on the ‘right of every citizen to be informed of the reason whenever their rights are being affected by any public body’, but not directly addressing plaintiffs’ claim that Minister, based on his fiduciary obligations to natives, had a duty to consult natives and give reasons for his action in extinguishing NCR).

<sup>957</sup> *Sagong II* [2005] 6 MLJ 289, 304. Gopal Sri Ram JCA referred to Canadian authorities that have established this, namely, *Insurance Corporation of British Columbia v Heerspink* [1982] 12 SCR 145; *Canadian National Railway Co v Canadian Human Rights Commission* [1987] 1 SCR 1114; *Dickason v University of Alberta* [1992] 2 SCR 1103.

<sup>958</sup> It could be argued that protecting native title perpetuates discrimination by recognizing rights not enjoyed by non-native Malaysians. Wilson J’s opinion in *Mabo (No 1)* [1988] 166 CLR 186, 206 suggests one response to this argument, namely that substantive equality between natives and non-native will not be

also requires that, once recognized, native title be afforded the same protections provided to non-native property interests. This means that methods for registering and protecting native title must be implemented on a basis of equality with non-native property interests. In sum, in terms of property rights, equality between natives and non-natives will be achieved only when comparable protections under law and customs take their rightful place alongside the other sources of law in Malaysia. Anything short of full recognition for these customs would perpetuate discrimination lead to erosion of their fundamental human rights.

In addition to its role as a vehicle for implementing native land tenure customs, native title is a property right provided constitutional protection. It is a right that cannot be taken except in accordance with law and upon payment of just compensation. Recognition and protection for native title is also required as part of the constitutional right to livelihood, which guarantees native title based on the essential role of land in the economies and cultural identity of native communities. In determining adequate compensation for deprivation of native title, the role of land in the livelihood of native communities is a relevant factor. In addition, damages other than money compensation may be necessary in cases where the deprivation of property also constitutes a deprivation of livelihood.

Sarawak government officials are charged with a fiduciary obligation. This fiduciary obligation is based on the legacy of the Brooke government, provisions in the *Federal Constitution* calling for special protections for the natives of Sarawak, and the unique nature of native title as inalienable and subject to extinguishment. To meet the fiduciary obligation, government officials must not take actions that are inconsistent with the interests of its beneficiary and may not delegate its discretionary power to a third party. Furthermore, the fiduciary obligation requires that government officials consult with and obtain the consent of native communities prior to taking action that may infringe or extinguish their native title rights.

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achieved until natives are provided special protections for their property rights, as authorized under art 153 of the *Federal Constitution*.

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