SITUATING NATIVE CUSTOMARY RIGHTS (NCR) TO LAND IN SABAH AND SARAWAK WITHIN THE FEDERAL CONSTITUTION*

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Abstract

True to Malaysia's pluralistic legal system, the natives of Sabah and Sarawak, who constitute a majority in their respective states, enjoy explicit legal recognition of native customary rights (NCR) to lands and resources. However, adequate protection and regard for native land laws and customs continue to be a significant challenge for local native communities. This paper examines the tension between formal NCR and their practical function with reference to constitutional arrangements and safeguards for Sabah and Sarawak in the Federation of Malaysia's formation. Beyond the Federal Constitution, it is also suggested that seeds had been sown for the legal subordination of native land laws and customs through the earlier imposition of English property law concepts in state land legislation and its subsequent perpetuation. This view also finds support in: (i) the 2019 amendment to the Sarawak Land Code 1958 to enhance the recognition of native land customs; and (ii) judicial developments on the subject as expounded in the Federal Court decisions in the TR Sandah case. Notwithstanding its skew towards legal centralism, parity for these laws and customs can be achieved if these matters are prioritised as a matter of policy by the State governments.

Keywords: Native land laws and customs, native customary rights (NCR), constitutional law, natives of Sabah, natives of Sarawak

I. INTRODUCTION

The transplantation of colonial legal systems alongside bodies of local customary and religious law during British colonisation ensured that the post-independence Malaysian legal order could maintain the co-existence of multiple forms of law, that is, legal pluralism. Within this framework, the natives of Sabah and Sarawak, who constitute the majority in their respective states, enjoy explicit statutory recognition of native customary rights ('NCR') to land and resources.

However, local native communities continue to experience significant problems in ensuring that their customary territories, meaning areas traditionally inhabited, used and enjoyed by them in accordance with their native land laws and customs, are legally recognised and protected.[1] State-defined limitations of NCR have facilitated the prioritisation of other land use agendas, including third party resource exploitation and commercial development activities, over the protection of customary territories and the needs of local native communities.[2] This scenario suggests there is tension between formal legal recognition of NCR in Sabah and Sarawak and its practical function. This article argues that formal NCR may not serve as a legal embodiment of native customs but a malleable legal tool that enables the State

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1 For an illustration of the NCR issue, see, eg, Natasha Busst, 'Not enough development funds for East Malaysia, say activists', *Free Malaysia Today* (online, 19 October 2024) <https://www.freemalaysiatoday.com/category/nation/2024/10/19/not-enough-development-funds-for-east-malaysia-say-activists/>; Stephen Then, 'Rights group slams Sarawak government over native land issue', *the Vibes.com* (online, 8 August 2024) <https://www.thevibes.com/articles/news/103054/rights-group-slams-sarawak-government-over-native-land-issue>; Bernama, 'Government to discuss returning Sabah NCR land to its owners Anwar', *Malaysiakini* (online, 12 September 2024) <https://www.malaysiakini.com/news/719075>.

2 See, eg, Human Rights Commission of Malaysia (SUHAKAM), *Report of the National Inquiry into the Land Rights of Indigenous Peoples* (SUHAKAM, 2013); Colin Nicholas, 'Malaysia' in Dwayne Mamo (ed), *The Indigenous World 2023* (IWGIA, 37th ed, 2023) 237, 241–3.

to administer and subordinate native laws. Consequently, the pluralistic legal system in these states may be centralist in orientation, meaning that customary laws require the official legal system's sanction before they are legally enforceable.[3]

This paper examines the constitutional and legal place of native land customs in Sabah and Sarawak with a view to better understand this apparent discord. The legal position of local land customs will be analysed with reference to: (i) the constitutional arrangements and safeguards for Sabah and Sarawak in the Federation of Malaysia's formation; (ii) the influence of English property law concepts in Sabah and Sarawak's formal legal system; (iii) the 2019 amendment to the Sarawak *Land Code 1958* to address legal gaps in the recognition of native land customs, and (iv) judicial and legislative developments, specifically the Federal Court decisions in the *TR Sandah* case,[4] and the *Constitution (Amendment) Act 2022* (Malaysia).

II. CONSTITUTIONAL ARRANGEMENTS; NATIVE LAWS SECONDARY?

Prior to the formation of Malaysia in 1963, the Federation of Malaya, Sabah (previously, North Borneo) and Sarawak were three separate states. The Federation of Malaya gained independence from the British in 1957, while Sabah and Sarawak remained under British rule until the Malaysia Agreement 1963, where Sabah, Sarawak, and the self-governing British colony of Singapore combined with the Federation of Malaya to form the Federation of Malaysia. Singapore left the Federation in 1965.

The constitutional arrangements preceding the formation of Malaysia in 1963 provide the necessary backdrop to the legal position of native laws and customs in Sabah and Sarawak. In this regard, The Report of the Inter-Governmental Committee on the Proposed Federation of Malaysia (IGC)[5] is the main document that sets out the future constitutional arrangements and safeguards for North Borneo (Sabah) and Sarawak. Annex C para 5 of the IGC suggests clear intent on the part of the British and Malayan governments to safeguard the special interests of Sabah and Sarawak in relation to 'such matters as religious freedom… the position of the indigenous races, control of

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3 John Griffiths, 'What is Legal Pluralism?' (1986) 18(24) *Journal of Legal Pluralism* 1, 3; Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present: Local to Global' (2008) 30 *Sydney Law Review* 375, 397.

4 *Director Of Forest, Sarawak v TR Sandah ak Tabau* [2017] 3 CLJ 1 ('*TR Sandah 2017*'); *TR Sandah ak Tabau v Director of Forest* [2019] 6 MLJ 141 ('*TR Sandah 2019*').

5 Inter-Governmental Committee of Malaya, North Borneo, Sarawak and United Kingdom, *Malaysia: Report of Inter-Governmental Committee, 1962* (1963) 2(3) *International Legal Materials* 423 ('IGC').

immigration, citizenship and the State constitutions'.[6] Specifically, the IGC encompasses express protections for the people of Sabah and Sarawak with regard to land (para 22), composition of the apex court (para 26(4)) and native law and customs (Annex A). The IGC also proposes amendments to the prevailing Malayan Constitution to accommodate these interests, and more broadly, to facilitate the legal formation of the Federation of Malaysia.

As far as the realisation of these protections is concerned, article VIII of the subsequent Malaysia Agreement[7] states that the Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 and Annexes A and B of the IGC in so far as they are not implemented by express provision of the Constitution of Malaysia. Consequently, an analysis of the priority given in the document towards native law customs in relation to lands may shed light on their legal status.

In terms of land, para 22 of the IGC contains recommended amendments to the Malayan Constitution that were to maintain Sabahan and Sarawakian governmental autonomy in relation to land, agriculture, and forestry matters, and provides for the reservation or alienation of land to natives of these states. Consequently, concomitant safeguards were incorporated into the Federal Constitution of Malaysia. For instance, article 88 of the *Federal Constitution* confers supplementary rights of consultation on the State governments of Sabah and Sarawak in respect of federal powers for the acquisition of land. Article 95E excludes the states of Sabah and Sarawak from national plans and policies for land utilisation, local government and development (subject to the concurrence of the individual State government). Article 161A(5) of the *Federal Constitution* excludes the application of constitutional ethnic Malay reservation provisions in the states of Sabah or Sarawak and permits the reservation of land for natives of the state or for alienation to them, or for giving them preferential treatment as regards the alienation of land by the State.

Despite these safeguards for land in Sabah and Sarawak, the constitutional power over lands, especially the preferential treatment for natives in respect of such matters, is concentrated in the State governments and not guaranteed as a fundamental *right* for natives under Part II of the *Federal Constitution*. Further, neither para 22 of the IGC nor article 161A(5) of the *Federal Constitution* makes express provision for native *customary* lands or rights. In

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6 Ibid annex C para 5.

7 *Malaysia: Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore* (1963) 2(5) ILM 816.

fact, native law and custom did not merit an express paragraph in the main text of the IGC.

Modifications to the Legislative Lists of the *Federal Constitution* for the Borneo States are contained in Annex A of the IGC. List II of Annex A provides for specific matters within the exclusive constitutional purview of the Sabah and Sarawak State governments. These matters include: (i) native law and custom and native courts, including personal law relating to marriage, divorce, guardianship, maintenance, adoption, family law, gifts or succession, testate or intestate (item 1A); (ii) land (item 2); and (iii) agriculture and forestry (item 3). Similar to land matters, these matters have been incorporated into the *Federal Constitution*. Items 2 and 3 of the general State List[8] of the *Federal Constitution* confer exclusive state jurisdiction over land, and agriculture and forestry matters, respectively. Item 13 of the Supplement to State List for States of Sabah and Sarawak[9] covers native law and custom and is worded as follows:

> *Native law and custom, including the personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate or intestate; registration of adoptions under native law or custom; the determination of matters of native law or custom; the constitution, organization, and procedure of native courts (including the right of audience in such courts), and the jurisdiction and powers of such courts, which shall extend only to the matters included in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law.*

Interestingly, state jurisdiction over land, agriculture and forestry is distinct from native law and custom. Further, item 13 does not expressly cover native customary *land* or related rights and refers more to matters relating to *personal law*. Nonetheless, the use of the word 'including' before 'personal law' in item 13 suggests that 'native law and customs' could extend beyond matters relating to personal law.

However, the language of this provision may suggest that 'authorised' native law and custom lies within the exclusive jurisdiction of the individual State government. The jurisdictional limit of native courts in Item 13 to 'the matters included in this paragraph' is a perpetuation of the earlier native court system recognised by the British in Sabah (*Native Courts Ordinance 1953*) and Sarawak (*Native Courts Ordinance 1955*) that only had jurisdiction over native personal laws and limited criminal matters. Accordingly, early constitutional

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8 *Federal Constitution* (Malaysia), sch 9 List II.

9 Ibid, sch 9 List IIA.

commentary on the *Malaysia Act 1963* describes the customary courts in Borneo to be of 'negligible significance'.[10] In this regard, it is telling that Part IX of the Federal Constitution that encompasses the judiciary of the Federation makes no reference to the native courts.

While there may be little doubt that *adat* or customs have been constitutionalised in Sabah and Sarawak,[11] the constitutional and native judicial framework in both jurisdictions would appear to permit native land customs to be subordinate to state land laws, particularly in matters concerning state or non-native land and resource interests. In other words, the post-colonial constitutional order in Sabah and Sarawak regarding native land laws and customs appears to be centralist or state-centric in inclination. The question of whether this position prevailed prior to the independence of Sabah and Sarawak will be examined in the next section.

III. THE DOMINANCE OF THE ENGLISH-DERIVED LEGAL SYSTEM

Prior to Malaysia's formation in 1963, Sabah and Sarawak were under British rule where English or like laws were imposed on society albeit with some recognition of local laws and customs. It was the intention of the colonial administration of Sarawak to respect native customary rights to land.[12] In *Bisi ak Jinggot v Superintendent of Lands and Surveys Kuching Division*, Malanjum CJSS observed:

> *And when the First Rajah ruled Sarawak the position taken was 'a consistent respect for native customary rights over land (see Anthony Porter— The Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time (1841–1965)). In fact, James Brooke had referred to native customary rights as 'the indefeasible rights of the aborigines' (see John Tempter — The Private Letters of Sir James Brooke, KCB, Rajah of Sarawak). James Brooke*

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10 Harry E Groves, 'The Constitution of Malaysia: The Malaysia Act' (1963) 5(2) *Malaya Law Review* 245, 269. See also Lee Hoong Phun, 'Constitutional Amendments in Malaysia Part I: A Quick Conspectus' (1976) 18(1) *Malaya Law Review* 59, 89.

11 Andrew J Harding, 'Legal Pluralism and the Constitutional Position of East Malaysia's Indigenous Peoples: The View from the Longhouse' in Gary F Bell (ed), *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of MB Hooker* (ISEAS–Yusof Ishak Institute, 2018) 178, 184.

12 For commentary on judicial recognition of this proposition, see Yogeswaran Subramaniam, 'Legal Pluralism in Malaysia: The case of Iban native customary rights in Malaysia' in Andrew Harding and Dian A H Shah (eds), *Law and Society in Malaysia: Pluralism, Religion and Ethnicity* (Routledge, 2018) 123, 127–29.

> *was 'acutely aware of the prior presence of native communities, whose own laws in relation to ownership and development of land have been consistently honoured' (see Anthony Porter, p 16)'.*[13]

When Sarawak was ceded by the third Rajah to become a British colony in 1946, the Rajahs 'held true to their respect for the natives and customs' as the instrument of cession was explicitly 'subject to existing private rights and native customary rights'.[14] Similarly in Sabah, article 9 of the 1881 Royal Charter granted by the British Crown for the administration of North Borneo obligated the British North Borneo Chartered Company to pay careful regard to the customs and laws of the class or tribe or nation especially with respect to lands.[15]

However, the colonial administration in Sabah and Sarawak instituted a system of legal pluralism in Sabah and Sarawak where selected native customary laws were supported, while those hampering commercial land exploitation were replaced with western legal concepts.[16] As a result, the legal power to recognise native land laws and customs was centralised and could now be determined in accordance with 'State' rather than Indigenous perspectives and priorities.[17] 'State' priorities in this sense would be to create, maintain and preside over an orderly land classification and regulation system that would facilitate commercial expansion and the extraction of natural resources in line with the government's agenda. This system, that imported and unilaterally imposed English property concepts and laws locally, forms the basis of property and resource laws in Sabah and Sarawak today. As will be observed in the following section, the curtailment of enforceable native land customs in both states through state powers to determine and extinguish such rights,[18] is not necessarily a post-Malaysia phenomenon.

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13 [2013] 5 MLJ 149, 158.

14 *Nor Anak Nyawai v Borneo Pulp Plantations Sdn Bhd* [2001] 6 MLJ 241, 279–80.

15 For commentary on the evolution of native land rights in Sabah, see Amity Doolittle, *Property and Politics in Sabah, Malaysia: Native Struggles over Land Rights* (University of Washington Press, 2005), 29-121.

16 Ibid 82; Ramy Bulan, 'Statutory Recognition of Native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place' (2007) 34 *Journal of Malaysian and Comparative Law* 21.

17 See Doolittle (n 15) 17-18, 22, 24-25; SUHAKAM (n 2) 101-104, 124-25; Subramaniam (n 12) 141-42.

18 See Section IIIA below.

A. *Primacy of English Property Law Concepts in State Legislation*

Among the English property law constructs imported into the laws of Sabah and Sarawak, the concept of 'radical title' and the doctrine of extinguishment are significant. These legal constructs legitimise state powers to determine the recognition and extinguishment of native laws and customs respectively.

The concept of 'radical title' refers to the underlying or ultimate title of the Crown to all lands within a state or jurisdiction. Radical title is a feature of the English common law derived from Anglo-Norman feudal doctrines, which was transplanted to most British colonies.[19] In basic terms, it grants the Crown or the State authority the power to alienate others from land and to transfer beneficial ownership of the land to itself or others, but by itself does not grant beneficial ownership.[20] Statutory manifestations of the State's radical title exist in the land laws of Sabah and Sarawak and their predecessors, which came into force prior to the formation of Malaysia. Section 12 of the *Land Code 1958* (Sarawak) states: '[t]he entire property in and control of State land and of all rivers, streams, canals, creeks and water courses and the bed thereof and in the column of airspace above the earth of the land, is and shall be vested solely in the Government'. In Sabah, section 5 of the *Land Ordinance 1930* (Sabah) provides that '[t]he entire property in and control of State land or land reserved for a public purpose is and shall be vested solely in the Government'. As for forest produce, section 39 of the *Forests Ordinance 2015* (Sarawak) states that '[a]ll forest produce situated, lying, growing or having its origin within a permanent forest or State land shall be the property of the State' except where rights to such forest produce have been disposed of in accordance with written law. Additionally, section 12(3) of the *Forest Enactment 1968* (Sabah) provides that lands officially declared to be a forest reserve shall be the property of the State, subject only to rights admitted and privileges conceded by the State.

Notwithstanding that the radical title of the State could be legally burdened by native customary land rights,[21] the vesting of such title and property rights in the State enables the State government to control, categorise and alienate land and resources located in its jurisdiction, including determining native

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19 David V Williams, 'Radical Title of the Crown and Aboriginal Title: North America 1763, New South Wales 1788, and New Zealand 1840' in William Eves et al (eds), *Common Law, Civil Law, and Colonial Law: Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries* (Cambridge University Press, 2021) 260.

20 Richard Bartlett, *Native Title in Australia* (4th ed, LexisNexis Butterworths, 2020) 274–76.

21 *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677, 691–92 ('*Madeli*').

customary land interests.[22] Provisions such as section 5(7) of the *Land Code 1958* (Sarawak), that presume that State land is free and not encumbered by NCR where there exist any disputes, place NCR on an unequal footing to other interests created by the State. This effectively creates a hierarchy where a State-issued lease or title is 'stronger' by default than NCR that have yet to be formally registered.

The English common law doctrine of extinguishment or delimitation of native customary rights through plain and obvious words in legislation,[23] has been incorporated into domestic written laws. In Sarawak, section 5(1) of the *Land Code 1958* limits the creation of native customary rights after 1 January 1958. Section 5(3) of the *Land Code* provides for the extinguishment of NCR by ministerial direction while the *Forests Ordinance 2015* (Sarawak) contains wide-ranging provisions for the executive extinguishment, regulation and admission of rights and privileges within areas proclaimed to be forest reserves and protected forests. Section 22(6) of the *Forest Enactment 1968* (Sabah) enables the extinguishment of all rights and privileges within an area declared to be a forest reserve. Unilateral executive powers of extinguishment suggest that NCR within forest reserves and indeed, other forms of State-protected areas may be inherently vulnerable. These limited NCR may potentially be unequal compared to other forms of private land interests available under land legislation that are protected by land acquisition legislation.

The statutory adoption of the concepts of radical title and extinguishment before and after the formation of Malaysia has put native land customs in Sabah and Sarawak, developed by local communal norms, in an inferior legal position compared to the centralised state powers over lands and resources.

B. *State Legal Control through Codification*

The process of legal codification involves compilation, conversion, consolidation, and systematisation of unwritten laws into written laws and codes. Conceptualising native customs to land in formalised legal terms carries with it the dilemma of codification: 'if *adat* (custom) is not written down it may die out; but if it is written down its nature is irrevocably altered'.[24] Additionally, laws, once codified, require formal legislative and executive sanction before they are changed.

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22 Ramy Bulan, *The Legal Framework on Indigenous Land Rights in Malaysia: A Study to Contribute to the Suhakam National Inquiry into Indigenous Peoples Land Rights in Malaysia* (SUHAKAM, 2012).

23 See *Madeli* (n 21) 696–7.

24 Harding (n 11) 185.

Consequently, legal codification would curtail the fluidity of native customs to evolve and develop organically according to local native communal arrangements and needs. Furthermore, codified native customary land and resource rights could be expressed in a manner aligned with the dominant land regulation system. As observed in the previous section, the formal land regulation system in Sabah and Sarawak centralises policy, legal, and administrative power within the governmental hierarchy and institutional framework. Centralisation of power effectively erodes the legal significance of local land customs by enabling NCR to be moulded in accordance with state priorities.

Illustrations of how native customary rights have been limited by statutory definition can be seen in both Sabah and Sarawak. In Sabah, section 15 of the *Land Ordinance 1930* defines NCR to include land possessed under 'customary tenure', land planted with 50 or more fruit trees per hectare, isolated fruit trees or plants of economic value proven to be planted or kept as personal property, grazing land stocked with sufficient cattle or horses to control undergrowth, land cultivated or built on within three years, burial grounds and shrines, and usual rights of way for men or animals.[25] 'Customary tenure' under section 65 of the *Land Ordinance* means the lawful possession of land by natives either by continuous occupation or cultivation for more than three years or by native title issued under written law. Customary tenure confers a 'permanent heritable and transferable right of use and occupancy' of native land subject to terms prescribed by the State Collector of Land Revenue, a government officer,[26] who also possesses wide powers to determine native land claims.[27]

These provisions of the *Land Ordinance 1930* and a native 'communal title' issued under section 76 do not explicitly recognise NCR to broader customary territories used for less sedentary activities. Traditionally, the concept of a customary territory can be found in several of the larger Indigenous groups in Sabah, including the *Dusun* and *Murut*.[28] A customary territory for these groups is a specific and naturally defined area that would typically comprise settlements, cleared and cultivated areas, orchards, old settlement and cultivated areas, cemeteries, sacred and ceremonial sites and forested areas for hunting and the collection of produce.[29] Within this area, there would be a combination of individual, communal, and non-exclusive

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25 Mariam N Munang, 'Land grabs in Sabah, Malaysia: Customary Rights as Legal Entitlement for Indigenous Peoples – Real or Illusory?' in Connie Carter and Andrew Harding (eds), *Land Grabs in Asia: What Role for the Law?* (Routledge, 2015),139.

26 See *Land Ordinance 1930* (Sabah) section 66.

27 See *Land Ordinance 1930* (Sabah) sections 14,16, 81 and 82.

28 SUHAKAM (n 2) 20–21.

29 Ibid.

customary interests that are managed by the community in accordance with their customary laws.[30] The statutory definitions of native customary rights in Sabah limit these rights and do not comprise larger communal territories, including forested areas used as reserves for hunting and the collection of produce.

Until 2019, explicit statutory NCR in Sarawak only encompassed customary land activities relating to the felling and occupation of cleared virgin jungle, the planting of fruit trees, occupation or cultivation, use for a burial ground, shrine or rights of way or any 'other lawful method'.[31] Again, these rights focused on sedentary and agricultural activities. They did not expressly recognise broader native customary territories and areas used for hunting, fishing, the collection of forest produce and ceremonial purposes. Like Sabah, the omitted land customs relating to concepts of territoriality are still found in the interior and fringe areas. In particular, these customs are commonly observed among the *Iban*, *Bidayuh* and several other *Orang Ulu* groups that constitute around 40 per cent of Sarawak's population.[32]

In 2019, the *Land Code 1958* (Sarawak) was amended to address the gap in the law in respect of the statutory recognition of rights to broader native customary territories such as the Iban *pemakai menoa* and *pulau galau*. The amendment recognises legal approximates of the *pemakai menoa* and *pulau galau* land customs. Towards that end, a new definition of 'usufructuary rights' was added to section 2 of the *Land Code 1958* to mean:

> *the rights or privileges exercised or enjoyed by a native community over a native territorial domain to:*
> *(a) forage for food, including fishing and hunting;*
> *(b) enjoy such rights or privileges exercisable by a native community in a communal forest constituted under Part III of the Forests Ordinance, 2015 [Cap. 71]; or*
> *(c) carry out such activities which are expressly authorized in the native communal title issued under section 6A(3) or a permit issued under section 10(3) but subject to*
> *the terms and conditions specified therein.*

A new section 6A of the *Land Code 1958* was inserted to permit native communal claims for usufructuary rights within native territorial domains. Successful claims would result in the issuance of a native communal title to be

30 Ibid.

31 See section 5(2) *Land Code 1958* (Sarawak). For the scope and limit of 'any other lawful method', see, eg. Bulan (n 16) 31–32.

32 SUHAKAM (n 2) 23–28.

held in trust for the native community. However, the proviso to section 6A(2) limits the size of these claims to 1000 hectares. It also enables the State executive (through either the Superintendent of Land and Surveys who determines claims for such areas not exceeding 500 hectares or the relevant Minister, with the approval of the state executive, who can allow claims up to 1000 hectares) to decide native claims. If the claim is approved, a native communal title would be issued describing the area as a 'native territorial domain' used for agricultural purposes or any such other purpose or conditions imposed by the state.[33]

Despite the recognition of certain larger native customary territories, the amendment appears to have once again regulated and limited native land customs in a manner that subordinates them to written law. The ceiling of 1,000 hectares for native communities arbitrarily limits legally recognisable native customary rights as there are many situations where a native community's *pemakai menoa* or *pulau galau* exceeds 1,000 hectares.[34] Additionally, the limit disregards the reality that native customary territories are spatially defined in accordance with local customs and usages. For example, the amendment does not *expressly* recognise land tenure systems and territoriality of nomadic or semi-nomadic groups like the *Penan* and native communities with coastal or sea territories.[35] When combined with the Sarawak State government's radical title in and over land (section 12 of the *Land Code 1958* (Sarawak)), the spatial cap in the 2019 amendment ensures that it is the State (rather than local native communities) which possesses the legal power to govern and deal with traditional native customary areas outside the 1,000-hectare limit. In other words, the limit exacerbates power imbalances between the State and local native communities by reducing customary areas under 'legal' community control.

Executive control over the claims process and conditions relating to the native communal title reinforces existing State-NCR power disparities between the State and native customary claimants. In the absence of robust oversight, the State executive could tailor the recognition of claims to further its own land-use objectives. Finally, the government's blanket use of the common law term 'usufructuary rights' in section 2 of the Land Code to define the rights to wider native customary territories suggests that native land laws and customs continue to be judged from the standpoint of the dominant legal system.

Legal regulation of NCR to lands and natural resources through the process of codification has also enabled the government (rather than the local

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33 See *Land Code 1958* (Sarawak) section 6A(3).

34 Colin Nicholas, 'Malaysia' in David N Berger (ed), *The Indigenous World 2019* (33rd ed, IWGIA, 2019) 278.

35 SUHAKAM (n 2) 25–28, 124.

native community) to dictate the exercise of such rights. For example, section 76(1) of the *Land Ordinance 1930* (Sabah) provides for the creation of native communal titles. The term 'title' in this context is arguably a misnomer, as the native community is not the registered proprietor. Section 76, an illustration of British paternalism towards the natives, provides for the native land concerned to be registered in the name of the Collector of Land Revenue 'as trustee for the natives concerned but without the power of sale'. Section 77 empowers the Collector to sanction the subdivision of the communal title and assign and transfer the sub-divided native titles to individual owners. Further control can also be seen in forest legislation. In both Sabah and Sarawak, the exercise of any rights admitted and privileges conceded within any forest reserve and protected forest is subject to the control of State forestry officers rather than the local native community.[36] While these provisions could be justified to ensure adequate governmental supervision and protection of these areas, the lack of equitable rights for the local native community over their own communal land functions to concentrate power in the government.

C. *Perpetuation of the System?*

Through the colonial and post-colonial governments' centralised legal powers, the contemporary land and resource regulation system in Sabah and Sarawak has recognised and modified selected native customs to land. Concurrently, native *adat* has, through State legal processes such as legislation and codification, been relegated to being a part of the dominant English-derived legal system rather than a distinct system of law, as originally intended by the British.[37] On the whole, this position has persisted to the present day. That said, it would be naive to attribute the current situation solely to the British colonial administration as such an outcome would have been unlikely without the co-option and cooperation of Indigenous elites. This group, whose authority had been officially recognised and reinforced over time, became 'increasingly independent of, unaccountable to, and detached from, the community members over whom they had authority and whose interests they were expected to represent.'[38] Based on the current state of the law impacting upon native land laws and customs, post-colonial governments in Sabah and Sarawak appear to

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36 See section 21 of the *Forests Ordinance 2015* (Sarawak) and section 12(4)(b) of the *Forest Enactment 1968* (Sabah).

37 M B Hooker, 'An Outline History of the Administration of the Native Law in Sarawak' in Lee Hun Hoe (ed), *Cases on Native Law in Sarawak* (Government Printer, 1980), xi-xxv.

38 Marcus Colchester, 'Divers Paths to Justice: legal pluralism and the rights of indigenous peoples in Southeast Asia – an introduction' in Marcus Colchester and Sophie Chao (eds), *Divers Paths To Justice: Legal Pluralism and the Rights of Indigenous Peoples in Southeast Asia* (Forest Peoples Programme and Asia Indigenous Peoples Pact, 2011) 26.

have adopted and expanded upon these colonial methods to subordinate NCR within the broader land and resource law framework.

IV. JUDICIAL CURTAILMENT: *TR SANDAH* (2017) AND *TR SANDAH* (2019)

Having examined the constitutional and statutory position of enforceable native land laws and customs (NCR) in Sabah and Sarawak, it would be prudent to consider the views of the judicial arm of the government on the subject. In this respect, the apex court's opinions in the landmark *TR Sandah* case may be instructive. The Court there determined, amongst other matters: (i) the enforceability of native land customs in Sarawak (*Director Of Forest, Sarawak v TR Sandah ak Tabau* ('*TR Sandah 2017*')); [39] and (ii) the broader intent of the IGC, particularly in respect of Bornean judicial participation in appeals arising in a Bornean state (*TR Sandah ak Tabau v Director of Forest* ('*TR Sandah 2019*')).[40]

Prior to *TR Sandah 2017*, the legal position on the enforceability of native law land customs in Sarawak was governed by the 2007 Federal Court decision in *Madeli*.[41] The Court in *Madeli* had unanimously pronounced that the Malaysian common law recognises and protects the pre-existing customary rights of natives to their customary lands and resources *without the need for executive or legislative sanction*. In doing so, the Court applied common law jurisprudence for this proposition from across the Commonwealth, including the seminal Australian case of *Mabo [No 2],*[42] and the Canadian case of *Calder*.[43] The panel in *Madeli* also held that the common law formed part of the substantive law in Malaysia and that the recognition of such Indigenous rights accorded with the *Civil Law Act 1956* (Malaysia), the relevant legislation enabling the domestic application of the common law.[44]

According to *Madeli*, the source of the recognition of Indigenous rights to lands and resources at common law in Malaysia lay in its application of the 'general statement of the common law', enunciated 'throughout the Commonwealth' in *Mabo [No 2]*, *Calder* and other colonial decisions of the Privy Council, that 'the courts will assume that the Crown intends that rights of property of the *(native)* inhabitants are to be fully respected' and that '[t]he

39 See *TR Sandah 2017* (n 4).
40 *TR Sandah* 2019 (n 4).
41 *Madeli* (n 21).
42 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
43 *Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145.
44 *Madeli* (n 21) 689, 698.

Crown's right or interest is subject to any native rights over such land'.[45] The domestic applicability of the doctrine of judicial precedent meant that *Madeli* would be binding upon all lower courts in subsequent similar cases.

For the best part of the next decade, the Malaysian superior courts developed their own jurisprudence on common law native or aboriginal customary rights in the three distinct Malaysian land jurisdictions, namely, Sarawak, Sabah and Peninsular Malaysia.[46] Although foundational principles of this doctrine may be common across all three areas, their foundations have been based on different legal histories and local circumstances. As *TR Sandah 2017* is a Sarawakian case, the characteristics of the common law described below will focus on that jurisdiction.

The basis of the common law recognition of native customary land rights is that the radical title held by the State is subject to any pre-existing rights held by Indigenous people.[47] Common law native customary rights are established by way of prior and continuous occupation of the claimed areas, and oral histories of the claimants relating to their customs, traditions, and connections with these areas.[48] 'Occupation' does not require physical presence on the area claimed but evidence of the continued exercise of control over it.[49] Customary rights at common law are enforceable through the courts.[50] These common law land rights can be taken away through legal extinguishment by the state by way of plain and unambiguous words in legislation,[51] or an executive act authorised by such legislation.[52] If these rights are extinguished, just compensation is due to the successful claimant.[53] Between 2007 and 2016, common law customary land rights constituted the intersection between the law and native customs in Sarawak where native land customs that had not been codified could gain legal recognition and enforceability through the courts if established by evidence. In practice, natives litigated such claims to some degree of success.

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45 *Madeli* (n 22) 691–92. For observations on the application of Canadian and Australian jurisprudence by the Malaysian courts and a comparative analysis, see, eg, Yogeswaran Subramaniam, 'Orang Asli Land Rights by UNDRIP Standards in Peninsular Malaysia; An Evaluation and Possible Reform' (PhD thesis, University of New South Wales, 2012) 195–317.

46 For commentary on the common law customary land rights in Malaysia, see, eg, SUHAKAM (n 2) 67-80; Subramaniam (n 45) 195–317.

47 See *Madeli* (n 21) 692.

48 *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai* [2006] 1 MLJ 256, 269 ('*Nor Nyawai CA*').

49 *Madeli* (n 21) 694–95.

50 *Nor Nyawai CA* (n 48) 269–70.

51 *Madeli* (n 21) 696–97.

52 *Madeli* (n 21) 689, 698.

53 *Nor Nyawai CA* (n 48) 270; *Madeli* (n 21) 691–92.

From this wave of legal cases, the Federal Court in *TR Sandah 2017* had to determine, amongst other matters, whether the common law recognition of NCR in Sarawak extended beyond settled and cleared areas (*temuda*) to the broader customary territory of the *Iban* native claimants (*pemakai menoa*) used for hunting, fishing, collection of forest produce and other traditional and spiritual purposes including forested areas (*pulau galau* or *pulau*). As the latter customs of *pemakai menoa* and *pulau galau* were not explicitly recognised by the prevailing written laws of Sarawak, the Appellants argued that the native Respondents' common law native customary rights should be limited to settled and cleared areas (*temuda*) only. The approximate of the *temuda* custom had been recognised in written laws such as section 5(2) of the *Land Code 1958* (Sarawak) while the broader customary areas of *pemakai menoa*/*pulau galau* had only been recognised through the courts applying common law principles.

In its deliberations, the Court considered whether the *pemakai menoa*/*pulau galau* was 'a custom or usage *having the force of law* in the Federation or any part thereof' within the meaning of, among other legal provisions, article 160(2) of the *Federal Constitution*. Article 160(2) of the *Federal Constitution* defines 'law' to include: 'written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof'.

The Federal Court found against the natives and allowed the appeals of the State and other appellants by a majority decision of 3 to 1. Of the five judges on the panel (one judge had retired before the decision was handed down), Raus Sharif PCA (with Ahmad Maarop FCJ concurring) held that common law NCR were limited to the *temuda* custom and did not encompass *pemakai menoa/pulau galau* customs because these rights had not been recognised by the written laws of Sarawak.[54] In arriving at this finding, Raus PCA confined himself to construing the written laws, edicts, and executive orders of Sarawak because in his Lordship's view, 'customs which the laws of Sarawak recognise' were limited to written laws which had been given the force of law[55] by the legislature and executive and not those recognised through the common law by the courts.

In a lengthy dissenting judgment, Zainun Ali FCJ held that the fact that the *pemakai menoa* and *pulau galau* customs were not contained in the written law of Sarawak did not preclude the recognition of those rights under the common law. Her Ladyship observed in the following terms:

> …the repeated reliance on the fact that these customs have never received legislative recognition misses the heart of the appeal in this

54 *TR Sandah 2017* (n 4) 36.

55 Ibid 33.

case.

> [214] With respect, the submission of the appellant thus far, does not seem to add up. In other words, the wrong weight has been given to legislation – it should not and has never been completely determinative/fatal to recognition in the common law. The two are separate questions. And that the lack of regulation does not mean that there is no existence – there is no logical link between the two, merely a descriptive one (what we could, perhaps call a correlation). Customs are sui generis and do not find their roots in statute, hence they are called customs.[56]

The reasoning of Abu Samah FCJ was more ambivalent. His Lordship found that common law recognition of native customary rights such as the *pemakai menoa/pulau galau* could exist outside the strict letter of the written law as this was '*a question of evidence*' rather than law.[57] Remarkably however, Abu Samah FCJ declined to explicitly answer this important legal question and other questions posed to the court despite his Lordship's potential partial dissent from the majority on these questions. His Lordship's refusal was based on his opinion that the natives had failed to prove their claims evidentially.[58] Abu Samah FCJ then went on to examine the evidence and found against the natives on the basis that the natives had failed to establish their claims *evidentially*.[59] If his Lordship had clearly 'supported' the majority on the unenforceability of *pemakai menoa/pulau galau* as a matter of *law*, there would have been no reason to determine whether the natives had proven these customs as a matter of *evidence*. The determination could have been made by merely construing whether such customs were contained in written laws, as done by the majority.

The natives reviewed the decision in *TR Sandah 2017* on the grounds that the Federal Court was: (i) effectively split 2:2 on the question of the enforceability of the *pemakai menoa/pulau galau* customs; and (ii) there was no judge with Bornean experience who heard the appeal.[60] The latter ground was based on para 26(4) of the IGC that states 'at least one of the Judges of the Supreme Court should be a Judge with Bornean judicial experience when the Court is

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56 Ibid 63.

57 Ibid 84–85.

58 Ibid 85–87. For commentary on *TR Sandah 2017*, see, eg, Eden HB Chua, 'Federalism and Indigenous Peoples in Sarawak' [2020] *Singapore Journal of Legal Studies* 34; Subramaniam (n 12).

59 Ibid 87.

60 *TR Sandah 2019* (n 4).

hearing a case arising in a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State'. Furthermore, article VIII of the *Malaysia Agreement* 1963 was invoked by the natives to argue that the judiciary, as an arm of the government, was obliged to take action to implement the assurances, undertakings and recommendations contained in the IGC in so far as they were not implemented by express provision of the Constitution of Malaysia.

The natives lost the review in *TR Sandah 2019* by a majority of 4 to 1.[61] The first ground was dismissed on the basis that *TR Sandah 2017* was decided by a majority of 3 to 1 because three judges had ultimately found against the natives and that in any event, there was still a 2:1 majority on the question of the enforceability of the customs in question (as Abu Samah Nordin FCJ had expressly declined to answer the question).[62] Further, there needed to be finality in litigation and the review was basically a 'proverbial second bite at the cherry'.[63] In respect of the second ground, the majority applied the earlier case of *Keruntum*,[64] holding that para 26(4) of the IGC on the inclusion of a judge with Bornean experience 'was never implemented by an express provision in the Constitution nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak'.[65]

The effect of the majority's refusal to review *TR Sandah 2017* is problematic for the judicial development of native laws and customs in Sabah and Sarawak. While *TR Sandah 2017* is a Sarawakian case, the outlook for common law NCR in Sabah is equally unpromising. Sabahan decisions have taken a more restrictive view of common law NCR compared to previous rulings that written land laws in Sabah do not extinguish such rights but 'serve to affirm their existence'.[66] In 2015, the Court of Appeal held that the seasonal collection of turtle eggs by Sabah natives was 'not a native customary right' as it was outside the scope of NCR in section 15 of the *Land Ordinance* 1930 (Sabah).[67] In 2016, the Court of Appeal ruled that any native customary claims should be dealt with under the Sabah Land Ordinance rather than the common law.[68]

In respect of Bornean judicial participation in appeals arising from those

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61 Ibid.

62 Ibid [21]–[23].

63 Ibid 12]–[13], [29], Cf [61], [73], [78], [183]–[184] (David Wong CJSS (dissenting)).

64 See *Keruntum Sdn Bhd v The Director of Forests* [2018] 4 CLJ 145.

65 Ibid para [26]. Cf [96], [100], [105], [135], [142]–[143] (David Wong CJSS (dissenting)).

66 *Rambilin binti Ambit v Assistant Collector for Land Revenues Pitas* (Kota Kinabalu High Court, Judicial Review K 25-02-2002, 9 July 2007) 7.

67 *The State Government Of Sabah v Ab Rauf Mahajud* [2016] 9 CLJ 493, 505–6.

68 *Assistant Collector of Land Revenues v Alfeus Yahsu* [2016] 7 CLJ 848, 859.

states, the Federal Court's limited construction of para 26(4) of the IGC and article VIII of the Malaysia Agreement 1963 in *TR Sandah 2019* carries adverse implications for the equal legal treatment of native laws and customs. As Harding suggests, 'as with the sharia courts, the final authority should have been judges familiar with the legal tradition in question'.[69] Further, Chua observes that the argument to have at least one judge of 'Bornean judicial experience' in *TR Sandah 2019* was an attempt to underscore the existence of two separate political communities having different cultural, religious and historical roots.[70] The majority's refusal to accept native arguments in *TR Sandah 2019* has narrowed options available to them to claim their customary rights, and perhaps more importantly, undermined the decentralised and pluralistic factor in the recognition of such rights, including differences in livelihood or local context.[71] The participation of judges from the Bornean state adheres to the power-sharing feature of federalism and the dismissal of the argument for having a judge with Bornean experience in *TR Sandah 2019* suggests that centralised judicial governance may be occurring at the federal level,[72] outside the reach of the Sabah and Sarawak State governments.

Notwithstanding the finality of the Federal Court ruling in *TR Sandah 2019*, there have been subsequent constitutional changes to the position of the Malaysia Agreement. In early 2022, the *Federal Constitution* was amended to clarify the position and autonomy of Sabah and Sarawak within the Federation of Malaysia.[73] Broadly, the changes consisted of: (i) restoring, with modifications, the distinct status of Sabah and Sarawak during the formation of Malaysia in 1963 (article 1(2)); (ii) adding a formal definition of 'Malaysia Day' as the date on which Sabah and Sarawak joined the Federation of Malaya; (iii) including the Malaysia Agreement in the definition of 'the Federation' (art 160(2)); and (iv) repealing article 161A(7) thereby providing for state legislative and jurisdictional autonomy over races to be considered indigenous to Sarawak.[74]Among these amendments, the inclusion of the Malaysia Agreement in the definition of 'the Federation' was stated to be 'in accordance with the spirit' of the former.[75]

With the embedding of the Malaysia Agreement directly into the constitutional definition of 'the Federation', the agreement is no longer a historical or extrinsic treaty but a constitutive element of the

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69 Harding (n 11) 189.

70 Chua (n 58) 353.

71 Ibid.

72 Ibid 352.

73 See *Constitution (Amendment) Act 2022* (Malaysia).

74 Ibid.

75 Ibid 'Explanatory Statement', para 4.

Federation. Accordingly, the Federal Court would be constitutionally required to interpret the powers of the Federation through the lens of the specific terms agreed upon in 1963. Subsequent liberal observations by the Court on Sabah's constitutional revenue entitlements[76] suggest that there could be a progressive move from the 'standardised' approach to constitutional interpretation when it comes to Sabah and Sarawak. Considering centralised State government control over NCR in Malaysian Borneo, it would be interesting to observe how the Federal Court will harmonise native land laws and customs with the elevated constitutional status of the Malaysia Agreement and its explicit reference to the IGC.

The 2022 constitutional amendment suggests, amongst other things, that the Malaysian Federal government has become more receptive to enhanced Bornean control over their own affairs. Furthermore, it offers the possibility of a progressive judicial interpretation of these matters in accordance with the intent of the Malaysia Agreement and the IGC that explicitly covers native laws and customs. While this development is positive for governmental autonomy in Sabah and Sarawak, doubts remain as to whether the amendment itself would necessarily translate to greater legal recognition of native land laws and customs in view of the State governments' management of the issue thus far.

V. CONCLUSION

Both Sabah and Sarawak maintain a plural legal system that recognises NCR. However, the centralised English-derived legal system in these states has functioned to subordinate the status of native land laws and customs to a source of law that requires the system's sanction or 'authorisation'. Native governance after independence from the British has not alleviated native land laws and customs to an equal position in the domestic legal system. For the time being, the judiciary, and particularly, the Federal Court, has refused to consider the diversity of culture, customs and context in Borneo as a justiciable factor in respect of native customary rights to land.

The formal legal system appears to be convenient for the governments of Sabah and Sarawak as it enables them to determine their own agenda for land and resource regulation. However, the wide constitutional powers wielded by both governments could equally be used to develop a land and resource policy framework that translates to a more egalitarian recognition of NCR. For example, these states could domestically incorporate principles pertaining to Indigenous lands, territories and resources contained in the *United Nations Declaration on the Rights of Indigenous Peoples 2007* ('*UNDRIP*'), a

[76] *Attorney General of Malaysia v Sabah Law Society* [2025] 1 CLJ 1.

document supported by the Malaysian government. Indeed, the extensive powers vested in the State governments suggest that the existing legal system may well have the capacity to accommodate native land laws and customs in the manner envisaged in the *UNDRIP*. In this regard, the *Constitution (Amendment) Act 2022* appears to encourage both states to chart their own destinies and potentially accommodate liberal, Borneo-centric judicial interpretations of the Malaysia Agreement and the IGC, including those provisions relating to native land customs. Conversely, the decentralisation of power from the Federal government may also function to reinforce the centralist tendencies previously demonstrated by both governments in respect of NCR to land.

Nevertheless, it may be that the ethos and priorities in Sabah and Sarawak have moved away from such matters. Beyond the law, the recognition of native laws and customs in the Bornean states is undermined by the socio-economic processes of development and the Indigenous peoples' ability to maintain their legal traditions in practice.[77] Globally, this binary view of development continues to be divisive. That said, must economic progress for Sabah and Sarawak necessarily come at the expense of native lands and their traditional inhabitants and custodians?

77 Harding (n 11) 197–98.