Proof of Native Customary Title through Evidence of Occupation on the Cultural Landscape

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According to established principles of British colonial and international laws when the Crown acquired sovereignty over a territory, the land rights of local inhabitants under their own system of laws continued and are recognised as pre-existing rights. Their rights exist because they are derived from native laws, governance, practices, customs and traditions. Common law also acknowledges that use and occupation of land by indigenous inhabitants at the time of sovereignty gave rise to real property rights for at common law, every person who is in possession of land is presumed to have a valid title and persons in exclusive occupation of land have title that is good against anyone who cannot show better title. This paper presents a case study of Kelabit occupation, connection and interaction on the lands and territories as evidenced through historical, anthropological and archaeological records as well as oral narratives and cultural traditions passed down through the generations. Against the backdrop of a limited recognition of occupation and cut-off date for creation of NCR under the Land Code 1958, the writer discusses the cultural landscape of the Kelabit Highlands in Sarawak, showing how the burial customs, rich historical activities as evidenced in the megalithic as well as other non-megalithic cultural practices, unique to the Kelabit, mark past and continuous presence and connection to the land. Despite the absence of state demarcated and surveyed boundary, their presence is etched in the landscape of the land that they call their ancestral homeland providing a basis of claim both under their own laws and customs and under common law as well as satisfying the requirements of statute.

I. INTRODUCTION

The Sarawak Land Code 1957, which is the primary legislation governing land in Sarawak have several provisions on native customary rights (NCR) lands. Among the methods stipulated for creation of customary rights on land under section 5(2) of the Land Code

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are felling of virgin jungle, cultivation and occupation of such land, use of land for burial ground or shrine and for right of way. There is also a residual clause (f) "for any other lawful means". This sub-section is however restricted by s 5(1) which states: "As of the 1st day of January 1958, native customary rights may be created in accordance with the native customary law of the community or communities by any of the methods specified under s 5(2) if a permit is obtained under section 10". It goes further to provide that no recognition will be given to any NCR on any land in Sarawak created after 1 January 1958.

The emphasis in the Code is on the creation of rights by cultivation prior to 1958 and continued occupation of those lands. Against the backdrop of this cut-off date, this paper looks at creation of NCR, through customary usage of lands for burial and shrines, and extends it to the related cultural practices in connection to land with a focus on the Kelabit occupation of the Kelabit Highlands. It argues that Kelabit burial customs and traditions on land practised prior to 1958, created NCR on lands which continued to be occupied to this day by later generations of Kelabit. They fall within the purview of s 5(2). More importantly their rights exists because they are derived from native laws, governance, practices, customs and traditions, coupled with recognition of common law based on occupation.

Under early common law, every person who is in possession of land is presumed to have a valid title.[2] To state that possession is proof of ownership raises the critical question of what counts as possession and why it is the basis for a claim to title. Clear acts that are unequivocally 'acts of possession' that proclaim to the universe one's appropriation[3] may include useful labour on the land and sufficient control over the land. The locality and the usages of those who live there are materials in evaluating whether any given acts amount to sufficient occupation. [4]

The Kelabit have occupied the Kelabit Highlands as their ancestral lands since time immemorial. This highland area which spans approximately 2500 km in the interior of Borneo is part of the Northern Highlands of Sarawak in the north-east hinterland close to the border with Kalimantan, Indonesia. The Northern Highlands include the Maligan Highlands and the Kelabit Highlands and is situated at latitudes 2° O′ N - 4° O′ and longitudes 3° 25′ N - 3° 58′ N and longitudes 115° 12′ E - 115° 35′ E. It is the occupation of the Kelabit Highlands that is specifically dealt with here.

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2 See *Whale v Hitchcock* (1876) 34 LTR 136 (Div. C.A.); *Emmerson v Maddison* [1906] AC 569, 575 (PC); *Wheeler v Baldwin* (1934) 52 CLR 609, 621–622; and *Allen v Roughley* (1955) 94 CLR 98, 136–141.

3 Carol M. Rose, "Possession as the Origin of Property", *University of Chicago Law Review,* 1985, Vol. 52, pp. 73- 75; here Rose suggests that one cannot meaningfully ask why possession is a root of title unless one has some idea of what is meant by 'possession'. Two principles for defining possession are: (1) notice to the world through a clear act, and (2) reward for useful labour. The author goes on to suggest that the possession must be translated into clear acts of appropriation which are manifested in texts of cultivation, manufacture and development. This viewpoint, however, takes a narrow 'Western' economic viewpoint and dismisses the indigenous peoples' concept of their relationship with land.

4 Lord O'Hagan in *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, 288. See also *Cadija Umma v S. Don Manis Appu* [1930] AC 136, 141–142.

II. KELABIT DISTINCTIVE CULTURAL EXPERIENCE AND TRADITIONAL KNOWLEDGE CONNECTING THEM TO THE LAND

The Kelabit, one of the smallest native groups in Sarawak, are almost exclusively found in the Kelabit highlands. Prior to becoming Christians in 1940s, Kelabit burial rites involved primary and secondary burials, involving burials in large ceramic jars or stone urns which were later placed in the community burial sites many months later. This was always accompanied by expensive feasts with lots of *burak* (rice wine) drinking, followed by commemoration of the deceased through erection of memorial stones, megaliths, or creation of non- megalithic structures on the land. When they became Christians in mid 1940s, they ceased doing these burial rites that involved expensive feasts and turned to simpler burial rites according to their new found religious faith. Their expensive burial rites and commemoration of the lives of their elders through the erection of stones stopped or changed in form. Nonetheless the presence of those burial sites and those monuments on the physical landscape are proof of connection and occupation of land through customary usage of lands. Evidence of a strong megalithic as well as other non-megalithic cultural practices, unique to the Kelabit are scattered across the highlands. These stone monuments and cultural sites generally have a known history. They stand on traditional community lands or on individual cultivated lands and where the descendants of the creators of the monuments are known. This paper looks at the concept of occupation both at common law and customary laws and show how the cultural traditions contain evidences of customary tenure amounting to ownership of lands, which go beyond the cultivation or even the burial sites that the Land Code refers to. It argues that native laws and customs of the Kelabit people provide a basis of claim to their traditional territories.

Edward Banks and Tom Harrisson, both curators of the Sarawak Museum from the 1930s–1950s[5] wrote extensively on these cultural monuments. Academic writing by local Kelabit writers including Robert Lian,[6] Yahya Talla,[7] and Doris Lian[8] touched on the cultural heritage while this writer considered the juridical status of these sites within the existing law in 2005.[9] Following the ground breaking work of Linda Tuhiwai Smith in

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5 Edward Banks, "The Kelabit Country, an Account of a Recent Visit", *Sarawak Gazette,* 1939*,* Vol. 66, p. 158; see also Edward Banks, "Some Megalithic Remains from the Kelabit Country in Sarawak with Some Notes on the Kelabit Themselves", *Sarawak Museum Journal,* 1937, Vol. 15 Part IV, pp. 411–437; Tom Harrison, "A Living Megalithic in Upland Borneo", *Sarawak Museum Journal,* 1958, Vol. 8, p. 694. See also Guy Arnold, *Longhouse and Jungle, An Expedition to Sarawak*, Donald Moore Publication, 1959, pp. 79- 191.

6 Lian-Saging, Robert, *An Ethno-history of the Kelabit Tribe of Sarawak: A Brief Look at the Kelabit Tribe Before World War II and After,* BA thesis, Department of Arts and Anthropology, University of Malaya, 1976/77; Lian- Saging, Robert and Lucy Bulan, "Kelabit Ethnography: A Brief Report", *Sarawak Museum Journal,* 1989, Vol XL (61), p. 89.

7 Yahya Talla, "The Kelabit of the Kelabit Highlands", Clifford Sather (ed.), *Sarawak Report No 9*, University Sains Malaysia, Pulau Pinang, 1979.

8 Lian, Doris Balla, Batu Lawih, *The Kelabit Heritage,* BA thesis, Department of Arts and Anthropology, University of Malaya, 1988.

9 Ramy Bulan, *Native Title in Malaysia: Kelabit Land Rights in Transition*, Phd Thesis, Australian National University, 2005. Some of this material has been previously published as part of an article in Ramy Bulan "Boundaries, Territorial Domains and Kelabit Customary Practices: Discovering the Hidden Landscape", *Borneo Research Bulletin,* 2003, Vol. 34, pp. 18–61.

Decolonising Methodologies,[10] as a member of the tribe, this writer seeks to articulate the perspective of an insider, based on field research and interviews conducted for a doctoral thesis and further dialogues since then. Like many indigenous groups, the Kelabit have distinct ways of understanding their world, which rests on their history, distinctive cultural experience and traditional knowledge that connects them to their lands and territories. There is a need for articulation of legal theory by indigenous peoples themselves based on the distinct cultural and experiential groundings of indigenous peoples themselves. It is also argued that these ideas speak to the notion of collective voice and will of the community and the normative framework supplied by their cultural world view, which rests on the notion of perspectival truth.[11] Theirs is an inherent and pre-existing right not granted by legislation nor created by common law although recognised by it.[12] It is based on indigenous law, which has been described as a 'chthonic' law' recognised 'by criteria internal to itself as opposed to imposed criteria'.[13] Indigenous knowledge, which contains the indigenous legal traditions have characteristics that require different approach to respecting, accessing, processing, understanding, valuing and applying it.[14]The operation of the law in Malaysia today however requires the interplay of the "western" and indigenous knowledge.

A survey and mapping initiated by the International Tropical Timber Organization in 2005,[15] and the work done by Hitcher in 2009[16] introduced a good guide as to the locations of this cultural heritage. Further archaeological work done by the Cultured Rainforest Project which started in 2006 reveal a very rich cultural heritage on the land.

The Cultural Rainforest Project which was initiated 'to investigate the long term and present day interaction of people and rainforest in the interior highlands of Central Borneo' has focused on the Kelapang basin in the Southern Highlands where there are many megalithic and non-megalithic sites, illuminating patterns in their landscape setting and contextual association and establishing a tentative relative chronology. Suffice it is to state here that the archeological reports state that radiocarbon dates from secure archaeological contexts stretch back almost 2000 years.[17] Lloyd Smith writes 'it seems

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10 Smith, LT, *Decolonizing Methodologies: Research and Indigenous Peoples*, Zed Books, London and New York, 2012.

11 Gordon Christie, "Indigenous Legal theory: Some Initial Considerations", Richardson B.J et.al. (eds.), *Indigenous peoples and the Law, Comparative and Critical Perspectives*, Hart Publishing, 2009.

12 See *Nor anak Nyawai v Borneo Pulp Plantations* [2001] 6 MLJ 241.

13 HP Glen, *Legal Traditions of the World*, Oxford University Press, 2000, as cited by Christine Zuni Cruz, "Law of the Land- Recognition and Insurgence in Indigenous Law and Justice Systems", Richardson B.J et.al. (eds.), *Indigenous peoples and the Law, Comparative and Critical Perspectives*, Hart Publishing, 2009, p. 316.

14 Christine Zuni Cruz, *Ibid* at p. 312.

15 Survey and mapping was done by Wilhemina Cluny and Paul Chai PK and Report published as "Cultural Sites of the Northern Highlands, Megaliths and Burial Sites", ITTO Project PD 224/03 Rev I (F), *Transboundary Biodiversity Conservation: The Pulong Tau National Park*, ITTO & Forest Department Sarawak, 2007.

16 Sarah Hitchner, *Remaking the Landscape; Kelabit Engagement with Conservation and Development in Sarawak, Malaysia*, PhD Thesis, University of Georgia, Athens, Georgia, 2009. See also Sarah Hitchner, "The Living Kelabit Landscape: Cultural Sites and Landscape Modification, The Kelabit Highlands of Sarawak, Malaysia", *Sarawak Museum Journal,* 2006.

17 Lindsay Lloyd Smith et.al., *The Cultured Rainforest Project: Preliminary Archaeological Results from the First Two Field Seasons in the Kelabit Highlands*, Sarawak, Borneo, 2007, 2008, p. 48.

reasonable to expect that human occupation in the Kelabit Highlands stretches far beyond the Metal Age, the beginning of which is believed to be between c.500 BC and AD 0 in Borneo.

There is also evidence of rice agriculture which consists of 'phytoliths of domesticated rice in the upper segment of a core taken in a palaeochannel in the village of Pa' Dalih associated with a radio carbon date of the last few hundred years'.[18] This knowledge and archaeological reports underscores local understanding of the ancient and longstanding occupation of the highlands of the ancestors of the present inhabitants.

The evidence of occupation is of paramount importance in the context of the present drive by the government to conduct perimeter survey of lands based on aerial photography taken in late 1950s. That does not capture the actual land use consisting of the old longhouse settlements and the many burial grounds that are part of the village territory. This requires a discussion of the kinds of evidence needed to show occupation.

III. ADMISSABLE EVIDENCE ON OCCUPATION

At the heart of any claim to customary title to native ancestral land, is the element of proof of occupation of the land. Evidence of occupation and interaction on the land may be contained in historical records, anthropological, and archaeological documents, as well as oral traditions passed down through the generations. In a historic judgment in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*,[19] Mohd Noor Ahmad J, made a preliminary ruling that oral histories may be accepted as evidence in claims for customary title. Mohd Noor Ahmad J ruled that oral histories of Aboriginal peoples in Peninsula Malaysia relating to their practices on the land be admitted as evidence subject to the terms of s 32(1)(d) and (e) of the Evidence Act 1950. With respect to native customs, traditions, under ss 48 and 49 of the Evidence Act 1950, the opinions of a living person as to general rights and customs, tenets or usages may be accepted. These statements on oral histories must be of public and general interests, and 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 must be made before the controversy as to the right or the customs.[20] Evidence on customary practices would be relevant to explain the significance of certain marks or monuments on the landscape to prove an enduring occupation and connection to the land. The question is what constitutes occupation?

A. Meaning of Occupation in Comparative Common Law Jurisdictions

Occupation is prima facie proof of possession.[21] The term possession is used here in a broad sense to express a conclusion of law arising from a sufficiently close physical relationship between a person and a parcel of land, due to his presence on or control over

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18 *Ibid.* at p. 36.
19 [2002] 2 MLJ 591 at pp. 622–624.
20 Mohd Noor Ahmad J, *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] MLJ 591, p. 623.
21 Blackstone, *Commentaries on the Laws of England,* 1825, Vol 2, 16th ed., pp. 3–9.

it either personally or through his agent or the like. The intention is to hold the land for one's own purposes.[22]

In one of the earliest recognitions of traditional land rights is in *Worcester v State of Georgia*,[23] where Chief Justice Marshall recognised that the Indians to have 'pre-existing rights of its ancient possessors'. Baldwin J in *Mitchell v United States*[24] referred to this as 'their right of occupancy … as sacred as the fee-simple of the whites'. Such possession or occupation was 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 exclusive enjoyment in their own way for their own purposes were as much respected'.

Once present, possession has been established by proof of occupation, the burden of rebutting that presumption shifts to the challenger. As Bracton wrote - 'Everyone who is in possession, though he has no right, has a greater right [than] one who is out of possession and has no right.'[25] Two legal maxims have arisen out of the application of these principles through numerous cases: first, that title is presumed from possession; and second, that possession is title against a challenger who cannot prove that he or she has a better title.[26] It is this that led Hall J to observe in *Calder v British Columbia* that, in enumerating the *indicia* of ownership, 'possession is of itself at common law, proof of ownership' [27] Acknowledging the existence of these common law rules, in *Delgamuukw v British Columbia,* Lamer CJC said that the fact of physical occupation is proof of possession at law, which in turn will ground title to land. [28] This leads to the question, what is necessary to constitute occupation? Kent McNeil in his treatise on *Common Law Aboriginal Title* explains it in this way:

Occupation is a matter of fact involving exclusive physical control of land, coupled with an intention (usually implied)[29] to hold or use it for one's own purposes. The degree of control necessary to establish occupation depends first, on whether the claimant, or no one, or another (in ascending order) is known to have a title, and secondary, on any other relevant circumstances, including the nature, utility, value, and location of the land, and the conditions of life, habits and ideas of people living in the locality.[30]

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22 McNeil, and Kent McNeil, *Common Law Aboriginal Title,* Clarendon Press, 1989, p. 6.

23 31 US 515 (1832).

24 34 US 711 (1835).

25 H de Bracton, *On the Laws and Customs of England,* SE Thorne, Trans, 1968, Vol. 3, p. 134; cited in Kent McNeil, "Onus of Proof of Aboriginal Title", *Osgoode Hall Law Journal,* 1999, Vol. 37, pp. 775 - 783.

26 See McNeil, *Ibid.* at p. 22, pp. 42–43, pp. 46–49, and pp. 56–58. Other leading texts that confirm these rules are W. Blackstone, *Commentaries on the Laws of England,*16th ed., Vol. 2, 1825, p. 196; *Ibid*, Vol. 3, pp. 177 - 180; F. Pollock and R.S Wright, *An Essay on Possession in the Common Law,* 1888, pp. 11–20; R E Megarry and H W R Wade, *The Law of Real Property,* 5th ed., 1984, pp. 102–109, and pp. 1158–1159; E H Burn (ed.), Cheshire and Burn, *Modern Law of Real Property,*15th ed., 1994, pp. 25–29; and *Halsbury's Laws of England,* 4th ed., 1973, Vol. 39(2), p. 267.

27 *Calder* (1973) SCR 313.

28 (1997) 3 SCR 1010, 1101.

29 *Butcher v Butcher* (1827) 7 B & C 399, 402.

30 McNeil, above n 22, 201.

The weight given to acts on the land depends on the land and the purposes for which the land can reasonably be used.[31] When occupation is established as a matter of fact through presence on the land, English law would accord possession in the absence of proof that there are other interests or that it should be given to another. Encapsulating these concepts in a sentence, McNeil says "occupation" is synonymous with "actual possession" or "possession in fact". When proven by evidence, it gives rise to presumption of "possession in law" – a legal concept.'[32]

As McNeil argued, where indigenous people were in occupation of specific lands at the time of acquisition by the British Crown, an actual Crown title by occupancy would be logically impossible. The fiction of original crown ownership cannot be used to support a Crown claim against persons who are in occupation, for the law deems a Crown grant to have been granted in those circumstances.[33]

Applying this principle to the indigenous inhabitants who were in occupation at the time of acquisition of sovereignty by the British Crown, McNeil concluded that the fact of indigenous occupation gave rise to possession that entitled them to a so-called possessory title to land, which he called customary title.[34] This view was accepted by Toohey J in the case of *Mabo (No. 2)*.[35] His Honour called it a 'traditional title' based on the fact of the presence of the indigenous people on acquired lands. His Honour said:[36]

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31 *Curzon v Lomax* (1803) 5 Esp 60. Acts that indicate an intention to hold or use it for one's purpose have been said to include enclosing, mining, building upon, maintaining the land and warning trespassers off the land, as well as cutting of the trees and grass and fishing in tracts of water.

32 Kent McNeil, *Emerging Justice* (2003) 141 fn 23. Elsewhere, McNeil, *Supra* n 25, p. 77, explains title that goes with possession. This is cited by J Y Henderson et.al., *Aboriginal Tenure in the Constitution of Canada,* 2000, p. 41 thus: "While in possession, a mere possessor has the *title that goes with possession* [as against other trespassers and adverse claimants who cannot show better title]. In addition he has a *presumptive title* [under English law from competing people who have better title or entitling conditions], provided his possession has not been shown wrongful by proof of a *jus tertii*. If he remains in possession for long enough he will also acquire a title by limitation [or time against the world], due to which he will no longer be a mere possessor because his possession will then be supported by a known right. If he loses possession, he will lose the title that goes with possession but retain the *presumptive title and title by limitation* (if acquired). If ousted he will also have a prima facie title by being wrongfully dispossessed. Any one of these last three titles, if unrebutted, will enable him to recover possession in ejectment or, as it has been known since 1875, an action for the recovery of land, against a defendant who cannot show a better title in himself."

33 *Ibid*. at pp. 216–217.

34 Kent McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals", *Monash University Law Review,* 1990, Vol. 16, p. 91.

35 (1992) 175 CLR 1, 178.

36 Per Toohey J, *Mabo No. 2* (1992) 175 CLR 1, 188 footnote 9 & 10; citing R Bartlett, 'Aboriginal Land Claims at Common Law', *University of Western Australia Law Review,* 1983, Vol. 15, p. 293, p. 313, p. 311, and pp. 319–320. Both McNeil and Toohey J assumed that the possessory title were separate concepts and separate bases of claim for indigenous people, thus separating customary title from aboriginal title and traditional title from native title. Noel Pearson, in 'Land is Susceptible of Ownership' takes this point but, instead of making a differentiation between possessory title and native title, argues that the common law on possession applies to native title. Pearson makes the point that it is not a question of choosing between Aboriginal occupation or aboriginal laws as the source of indigenous title – both are relevant. It is 'the right to occupy and possess the land under the authority of, and in accordance with, the traditional laws and customs of the indigenous peoples'. The distinction he says, 'is subtle but crucial'. www.capeyorkpartnerships.com .Site accessed on April 2014.

The crucial fact in proving native title is physical presence on the land: for that is what precludes the crown from having exclusive property rights in the land. It is not enough for the presence to be coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life. And the use of the land must be meaningful – although 'meaningful' is to be understood from the point of view of the members of the indigenous society.

United States and Canadian court decisions have looked for occupancy in the context of demands of the land and the society in question and examined the way of life, habits and customs of the indigenous people who occupy and use the land. It is clear that the foundational cases on native title in the common law world, arise from the fact of occupation of their [Indian] homelands since time immemorial.

To amount to occupancy, presence on the land must have been established 'long prior' to the time of inquiry, or 'a time in the indefinite past'[37] in an exclusive occupation of land. 'Exclusivity' does not mean that two or more indigenous communities could not be co-owners, as long as they were not disputing occupation.[38] Toohey J noted, that a number of groups could each have title, comprising the right to shared use of land in accordance with traditional usage.[39]A nomadic lifestyle is not necessarily inconsistent with occupancy, since the physical environment may dictate sparse and wide-ranging occupation. [40]

The question of occupation was more recently and concisely dealt with by the Canadian Supreme Court in the case of *Tsilhqot'in Nation v British Columbia.*[41] It seems clear that there must be sufficient, continuous and exclusive occupation, but what constitutes sufficient occupation to ground a customary title? What level of continuity is required? And what is meant by occupation exclusive to the group? These questions must be addressed both by the common law perspective as well as the native community's perspective.[42] For common law, the notion of possession is the basis for title whereas the latter focuses on laws, practices, customs and traditions of the group, where the groups' size, manner of life, material resources and the character of the lands claimed as customary lands would be material.[43] Dealing with the matter of sufficient occupation Chief Justice MacLachlin, delivering the unanimous decision of the Supreme Court held that:

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37 *Milirrpum v Naballco Pty Ltd* (Gove Land Rights Case) (1971) 17 FLR 141.

38 In the United States, it has been held that the two or more Indian groups who jointly and amicably occupied the same lands to the exclusion of others would have original Indian title: see *Turtle Mountain Band v United States* (1974) 490 F 2d 935, 944; *United States v Pueblo of San Ildefonso* (1975) 513 F 2d 1383, 1394–1395.

39 For example, one group may be entitled to come onto the land for ceremonial purposes, with another group having other rights in the land. Or native title could be held by a larger 'society' comprising all the rightful occupiers. In any case, occupation is a question of fact. *Mabo (No. 2)* (1992) 175 CLR 1, 189–190.

40 *Ibid*. *Mabo (No.2)* at p. 178.

41 (2014) SCC 44; This important case concluded a 30-year legal dispute, and now represents the latest and most comprehensive statement of the law of Aboriginal title in Canada. It is also the first successful Aboriginal title claim. By recognising and affirming the Tsilqot' in Nation's title to over 1700 square kilometers of territory, the SCC has given full effect to the words of section 35 of the *Constitution Act 1982 to recognise 'existing rights' of Aboriginal people.*

42 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para 147; see also *R v Van der Peet* (1996) CanLII 216 (SCC), [1996] 2 SCR 507.

43 Slattery B, "Understanding Aboriginal Rights", *Canadian Bar Review*, 1987, Vol. 66, p.727.

> [To] sufficiently occupy the land for purposes of title, [the group] in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group and the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land.[44]

The Supreme Court made it clear that what is required is a culturally sensitive approach to sufficiency of occupation. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the native group which, depending on its size and manner of living, might conceive of possession of land.

What about exclusive occupation and overlapping claims? The Canadian Supreme Court put this succinctly in *Tsilhqot'in Nation v British Columbia* where Chief Justice MacLachlin said:

> The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.[45]

Exclusivity of occupation should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had they chosen to do so.[46]As to continuity, this does not require indigenous groups to provide evidence of an unbroken chain of continuity

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[44] At para 38, writing for a unanimous court, McLachlin CJC affirmed and developed the framework laid in the case of *Delgamuukw v British Columbia* [1997] 3 SCR 1010 by explicitly setting out what each element of the test contemplates and requires. As the central issue in the appeal, the element of sufficiency was given the most treatment and developed extensively.

[45] *Tsilqot'in v British Columbia* (2014) SCC 44, para 48.

[46] *Marshall and Bernard*, para 65.

between their current practices, customs and traditions, and those which existed prior to contact.[47]

In Sarawak, the courts had the opportunity to deal at length with the question of occupation in *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*[48]. The existing occupation by the Iban plaintiffs and their practice of the same customs as practiced by their ancestors was relied upon as historical proof of occupation pre sovereignty. It was a question for the trier of fact. The Federal Court had the occasion to deal with the question of rights based on occupation in *Superintendent of Lands & Surveys Miri Division & Anor v Madeli bin Salleh*[49] The land in question had been subject of a concession to a third party, and after the concession ended and the owner resumed control, there was question of whether the plaintiff could be said to be in continuous occupation? The court adopted the meaning assigned to the word occupation by Lord Denning in *Newcastle City Council v Royal Newcastle Hospital* where His Lordship said:

> Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: See *Pollock and Wright on Possession*, pp 12 and 13. There must be something actually done on the land, not necessarily on the whole but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as 'occupied' by anyone, but anyone would say that a farmer occupies the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another.[50]

As with sufficiency of occupation, exclusive occupation must also be considered from common law as well as from the perspectives of the occupying native community's legal traditions. It is in this context that the cultural landscape and evidence of occupation of the Kelabit in the highlands is discussed. Their land based cultural practices and megalithic stone culture, established an unmistakable connection with the land that they inhabit.

IV. KELABIT LAND BASED CULTURAL PRACTICES: THE MEGALITHS

Kelabit stone monuments and other sites of cultural significance on the landscape mark it with unique character of Kelabit habitation. Apart from their *rumaq ma'un* or their ancient settlement sites and evidence of *amug*, or previously cultivated lands, among the most distinctive marks of Kelabit occupation of the land are their unique megalithic stone constructions scattered throughout the highlands which were often, though not always associated with burial rites and inheritance.

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47 *R v Van der Peet* 1996 CanLII 216 (SCC); [1996] 2 SCR 50 at para.65.
48 [2001] 6 MLJ 241; [2001] 2 CLJ 769.
49 [2008] 2 MLJ 677.
50 [1959] 1 All ER 734, p. 736, PC.

Megaliths are monuments of stones or rocks that are deliberately placed or worked by man.[51] They are incised, carved, shaped, hollowed out or balanced.[52] The megalithic period in Southeast Asia is roughly estimated to have occurred within the Metal and Bronze Ages between 3000 BC and 500 BC, which have emerged later than megalithic age in Europe , for example in France (before 4000 BC), and England and Denmark (3000 BC). Megaliths are also found in other countries in Europe like Spain, Portugal, Ireland and Sweden as well as Tibet, Korea, Indonesia and Melanesia. Similar features have been found in Naga country in Assam.[53] According to Phelan[54] megalithic culture in Borneo were discovered in only two regions of Borneo, and practised by the Murut and Dusun in the plains near Kota Kinabalu in Sabah and among the Kelabit and Lun Bawang in the northern highlands in Sarawak. Top and Eghenter have noted that the Saban, Lengliu and a small group of Punan in Kerayan, Kalimanatan, Indonesia, also had a megalithic culture.[55]

In the Kelabit highlands these megaliths take the form of *batuh narit* (rock art or carved stones), *batu sinuped* (menhirs or standing stones), *batu nangan* (dolmens or slab built structures), and *batu perupun* (stone mounds), and often accompanied by *batu nawi* (hollowed cylindrical stones). *Lepo batuh* (rock shelters) are also part of the culture associated with rocks and stones around which oral histories and mythology are woven. In many cases the erection of these stones were associated with burial rites or were themselves burial sites. In the latter, stone jars and earthenware vessels, porcelain bowls and other items like iron blades, copper alloy rings are also found.[56] Non megalithic cultural markers are found scattered in the highlands in the form of *nabang* (ditch cuttings) which is sometimes associated with *taka* (ox-bow lake), *kawang* (canopy cutting along mountain ridges), *bakut* (trenches), *kawang ebpaq* (canals) and other significant cultural sites such as *lubang main* (salt springs), *patun batuh* (stonewalls and enclosures in water) and fish traps.

Early anthropological writings indicated that the highlands formed the core of 'megazone of megalithic activity'[57] and that the numerous megalithic remains and stone

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51 Peter Phelan, *Traditional Stone and Wood Monuments of Sabah*, Pusat Kajian Borneo, Sabah, 1997; Ipoi Datan, "Cultural Sites and Features in the Highlands", Paper presented at the Highlanders Convention, 3-4 March 2001, Mega Hotel, Miri, Sarawak.

52 *Ibid.*

53 Edward Banks, "The Kelabit Country, an Account of a Recent Visit", *Supra* n 5, at p. 158.

54 *Supra* n 51.

55 L. Top and Christina Eghenter, "Kayan Mentarang National Park: In the Heart of Borneo", WWF Denmark & WWF Indonesia.

56 Lindsay Lloyd Smith, et.al., "The Cultured Rainforest Project: Preliminary Archaeological Results from the First Two Field Seasons in the Kelabit Highlands, Sarawak, Borneo", 2007, 2008, p. 43. Available online at http://www.arch.cam.ac.uk/research/projects/cultured-rainforest/crp-files/2013-lloyd-smith-et-al-crf-preliminary.pdf accessed on 28 September 2015.

57 Tom Harrison, "More Megaliths for Inner Borneo", *Sarawak Museum Journal*, 1959, Vol. IX No. 13-14, pp. 14–20.

carvings found in the Kelabit Highlands were definitely of Kelabit origin.[58]Cluny and Chai also reported that a mass collection of 42 megaliths are rare and unique and found nowhere else in Sarawak.[59] Stone works found in other areas of Borneo take the form of pole-like monuments[60] or sculpture of human figures,[61] but these were not found in the highlands. When Tom Harrisson mounted an expedition to Mt Batu Lawi (6,600 ft) in 1946, he noted that the only signs of previous human life and habitation were the megaliths by the Tabun River, which he took to be an indication that the Kelabit had once inhabited the area. JC Moulton also wrote of the presence of burial urns in the Tabun River similar to those used by the Kelabit in the rest of the highlands.[62]

Harrisson[63] compared what was known of the megaliths in the Kelabit Uplands with those found in Malacca and Negeri Sembilan and concluded that 'they could quite well have been erected as a similar integral part of a similar general culture',[64] but with its own peculiarities.[65] On the island of Borneo, no other known megalithic culture in the ancient or recent past is identical to that of the Kelabit, except by the people of the same stock, the Lun Kerayan and Berian in Kalimantan and closely related groups in Sabah, where rock carvings discovered in Ulu Tomani, Sabah[66] (1971), had features

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58 Edward Banks, "The Kelabit Country, an Account of a Recent Visit", *Supra* n 5; HG Keith complements the comments made by Banks in HG Keith 'Megalithic Remains in North Borneo' (1947) 20(1) *Journal of Malayan Branch of Royal Asiatic Society* 153–155. Edward Banks, curator of the Sarawak Museum, wrote in 1936 how he witnessed a burial ceremony where, among other rituals, scores of these stones, monuments, jars, both old and recent, and stone 'urns' were used in the ceremony. He also reported seeing a number of crude human carvings cut on stones, often in relief, which his informants said had been created by their ancestors. He opined that the stone objects in the Kelabit country are of recent and present Kelabit origin, and not Chinese. He noted that some identical carvings and numerous stone urns for reception of bones were found in the Naga Country of Assam, similar possibly because the people lived in similar climatic conditions, but concluded, however, that 'in Sarawak, at any rate, they are to be found mainly among the Kelabit, occasionally among the Murut, but among no other people'. Although we know now that there are similar burial practices in other areas, to the extent that the same practices were confined to people of the same stock, Banks was right.

59 Wilhemina Cluny and Paul Chai PK, (2007) Cultural Sites of the Northern Highlands, Megaliths and Burial Sites, ITTO Project PD 224/03 Rev I (F) – Transboundary Biodiversity Conservation: The Pulong Tau National Park, ITTO & Forest Department Sarawak.

60 George Jamuh 'Jerunei', *Sarawak Museum Journal*, 1950-1, Vol. 5, pp. 62–68.

61 See Walter Unjah, "The Stone of Demong", *Sarawak Museum Journal*, 1954, Vol. 6(12), pp. 61–64, for a legend about the only megalith so far attributed to the Iban.

62 J. C. Moulton, "An Expedition to Mount Batu Lawi", *Journal of the Straits Branch of the Royal Asiatic Society*, 1972, Vol. 62, pp. 1–7.

63 Tom Harrisson, "Megaliths of Central Borneo and Western Malaya Compared", *Sarawak Museum Journal*, 1962, Vol. 10, pp. 376–383. It must be noted that up until the early 1970s most of the writings on Kelabit was by Harrison, who as the curator of the Sarawak Museum and the government ethnologist kept other researchers out of the Kelabit territory. From the mid-1970s Kelabit themselves started to write their own stories.

64 There are archaeological and ethnographic examples of stone monuments from Assam to Luzon and out into eastern Indonesia, and there are some uncertain parallels with the stone culture in Java and West Sumatra. Harrisson took two Kelabits to see the megaliths in West Malaysia, and both were reported to have said that they are the work of the same people who originated in the Kelabit highlands. The Borneo stories of Tokid Rini (half human-half spirit figures) who could leap and fly 'leaving stones such as these as signs, was proved truer than they had thought'. *Ibid.* Tom Harrison, Megaliths of Central Borneo and Western Malaya, Compared".

65 *Ibid*. Tom Harrisson, citing R Heine-Geldern, *Prehistoric Research in the Netherlands Indies* (1945).

66 In Tom Harrisson, Barbara Harrisson *The Pre-History of Sabah,* Sabah Society, Sabah, Malaysia*,* 1971.

that closely matched the stone carvings found in the Kelabit country at Pa' Dalih and at Long Lellang in the Akah. Since no tradition of megalithic activity had been recorded among the present Tomani or the Tagal, nor are there any carved or cut rocks even in the megalithic area of the Kadazandusun peoples further north, Harrisson posited that this could be "one of the many lost signs that the upland Kelabit people … once spread continuously much further north and south until they were decimated by the introduced epidemics after the arrival of western civilisation on the coast'. Such a thesis perhaps supported RS Douglas' statement that the Kelabit are practically the same race of people as those known as Murut in the Trusan and Padas districts of Sabah.[67] Phelan's later documentation of some of these megaliths in Sabah reveals that they are done by Murut and Dusun but only in an area close to Kota Kinabalu. On a field visit to the area, this writer found a number of the standing stones similar to the ones in the highlands which were said to commemorate covenants or oaths between people, and were called oath stones.[68] Whatever may be the exact reasons, memorializing events in the community's history or the lives of individuals are connected to the stone culture. These erections of stone monuments may also be closely connected with burial rites.

V. STONE MONUMENTS, URNS AND JARS, AND BURIAL RITES

As a mark of respect, upper-class families threw huge feasts to honour parents or loved ones. This might happen while the individuals were alive,[69] but it was primarily done posthumously. On such occasions an individual or household erected or carved rocks, monoliths, stone 'tables', 'seats', dolmens or stone bridges to commemorate the life or the memory of the dead. They also constructed slab graves, 'forts' and deep stone burial urns in which the bones of the dead were placed.[70] Many of these sites were recorded by Cluny and Chai as part of an International Tropical Timber Organisation project on Transboundary Biodiversity Conservation to mark cultural heritage sites important to the local communities and to prevent destruction or damage by looting, vandalism and logging activities.[71] To appreciate the significance of these stone monuments, some knowledge of the burial rites is useful.

The Kelabit practised a form of primary and secondary burial not found among their neighbours. During the primary burial, an earthen jar would be used as a coffin.

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67 RS Douglas, "A Journey into the Interior of Borneo to Visit the Kalabit Tribes", *Journal of the Straits Branch of the Royal Asiatic Society,* 1907, Vol. 49, p. 53.

68 Interestingly, when Sabah became a partner in the formation of Malaysia together with Sarawak and Malaya, an oath stone was erected to commemorate the event.

69 This is called to 'nunang' or to honour a loved one, especially a parent.

70 T. Harrison, "Outside Influences on the Kelabits", *Sarawak Museum Journal* (Old series), 1954, Vol.19, pp. 104–125; see also Harrisson, "A Dying Megalithic in North Borneo", *Sarawak Museum Journal*, 1962, Vol. 10, p. 286.

71 Wilhemina Cluny and Paul Chai PK, *Cultural Sites of the Northern Highlands, Sarawak, Malaysia; Megaliths and Burial Sites*, International Tropical Timber Organisation, Project PD224/03 REV 1 (F), Transboundary Biodiversity Conservation, Pulung Tau National Parks.

The jar was broken off at about three quarters of its height, below the neck, and the corpse was placed in the jar in a foetal-like sitting position with hands clasped on the chest. The jar was then covered with the broken-off top quarter and secured with rattan strips. Where the corpse was too large or too long for the earthen jar, a *kelimeng* (special basket made from tree bark) was used to extend the height of the jar before placing the broken-off top quarter of the jar back on top and this was securely fastened. This jar was kept in the compound of the longhouse. A hole was pierced in the bottom of the jar and connected to a giant bamboo which was put into the ground to drain the liquids from the decomposing body. Some aristocratic families also used a *lungun* (elaborately crafted wooden coffin), sometimes carved with designs, which was mounted on poles. In the olden days, this *lungun* was kept in the family apartment within the longhouse, but in the late 1930s and early 1940s, after ten days, it was removed some distance away to a separate, specially constructed hut, but within the compound of the longhouse. While this was a demonstration of grief, a probable reason for keeping the body for a long time was to give time to accumulate sufficient rice and *burak* (rice wine) to feed the whole community in an elaborate *burak atey* (death wine-feast).

After a year or so, a secondary burial was held when the bones were laid in the communal *binatuh*, the permanent burial place[72] during the said feast. The removal might be accompanied by the erection of a stone monument, in loving memory and as a tribute to the dead, but no less a demonstration of the family's social status. Lasting for about four or five days with as many as 500 invited guests, the only manifest and organised activity was the removal of the bones from the jar-coffin into either a vat, or large jar, often of a dragon design, for the permanent burial. The internment of bones extended to the repatriation of bones of a deceased family member who had died outside his natal *bawang or* village.[73] Great significance was placed on a person's remains being buried in his birth place.

In the days of tribal hostilities and fear of enemy raids, the skull was separated from the body and 'buried' in caves elsewhere so that no enemy would raid the cemetery for skull trophies. It was also to prevent bears from marauding the site.[74] Once the jars with the bones were put in their final resting place, the members of the *bawang* would return home. They would place behind them, on the path or bridge, pieces of bamboo intertwined in the shape of an X to signal to the spirit of the dead to remain at the resting place and not to come back to the village to disturb the living.

As the Kelabit straddled the era of Christian conversion, the practice of keeping the bodies for many days gave way to simpler burials,[75] as much for hygienic reasons

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72 See Peter Metcalf *A Borneo Journey into Death: Berawan Eschatology from Its Ritual* (1981). Another group that practised secondary burial of the dead, but without a megalithic component, was the Berawan, a group related to the Kelabit.

73 Interviews with Sina Bulan, Kuala Lumpur, June 2002 and Galih Balang, Pa' Lungan, October 2002.

74 The writer's aunt Sina Balang Imat told a humourous story about one village that kept the heads in a particular cavern that had with a hole, a rock acted as security against enemy raids. One day the villagers were horrified to find that the hole in the ground led to an underground tunnel and a stream that had taken the skulls into the main river. From then on, the heads were properly buried in the cemetery.

75 This writer's maternal grandfather was one of the last individuals to be given a traditional primary and secondary burial. He died in 1946. The eldest son and daughter honoured his request to be so buried even though they had newly converted to Christianity.

as a separation from the old spiritual beliefs about life and death. The grandiose and ostentatious sacrifices of labour and wealth expended on these feasts underpin their importance.[76] As they required intensive cooperative human labor, only the wealthy could afford them. In a way these feasts functioned as a cultural mechanism for redistributing wealth while reinforcing kinship ties.[77]

Every *bawang* had its own *binatuh* (burial grounds), often located on raised ground or knoll or in a cave or in *lubang batuh* (hole in stone). *Guy Arnold*'s description of one of the sites in 1958 is illuminating:

> Between Pa' Dalih and the next village of Pa' Mada was a great burial stone in the middle of the jungle. We spent the morning there uncovering and excavating while Miri told the writer how the Kelabits used to perform a double burial ceremony. After a man had died and been buried, his bones, beads and other possessions were later dug up from the first grave and carried to a memorial stone where they were placed around it. The face of the stone was twenty feet high and ten broad, and three deep coffin niches had been cut in it where we found beads and other things that had been placed there long ago with the dead man's bones. Not far from Pa' Mada we excavated a longhouse site and near it, sunk flush with turf, was a large stone carved with many figures, deep-cut but worn, telling the story of the great leader who was buried underneath. The face of a woman, probably his wife, was carved on one corner, and there were dogs or other animals, some patterns whose meaning we did not understand, and fifteen diamonds along one edge representing the heads he had taken in battle.[78]

Kelabit *binatuh* (burial grounds) are spread out in the highlands, each historicising the settlement of people in the area. Most new settlements would not be too far from the old, so that the old burial sites would still be accessible. Hitchner lists at least 63 burial sites,[79] some of which are stone graves. People speak of the existence of *binatuh*, with reference to the location along a river, or *raan* (ridge top terrace) or *elung* (the confluence of rivers). Information on *binatuh* in caves or rock that people have personally shared with this writer include: *Binatuh Rayeh* used by the villages at Pa' Umur and Pa' Lungan at the confluence of Pa' Umur, Long Perurupan and Pa' Lulayan; *Lubang Batuh* (burial cave) at Punang Umur along Pa' Debpur; *Binatuh Pa' Mada* and *Pa' Bengar* at the confluence of Arur Kenangan, Long Bengar and Pa' Pa'it; *Binatuh Ramudu* at Pa' Daan; *Binatuh Pa' Tik* at Pa' Ngalah; and *Binatuh Batu Patung* at Pa' Di'it. Many more burial sites are on knolls or valleys such as *Binatuh Bario Lem Baaq* at Pa' Ramapuh and Arur Ketayan;

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[76] For a brief account of secondary burial, see Edward Banks, "Some Megalithic Remains from the Kelabit Country in Sarawak with Some Notes on the Kelabit Themselves", *Supra* n 5 at p. 429.

[77] Tom Harrisson, 'Megalithic Evidence in East Malaysia: An Introductory Summary' (1973) Vol VLVI (Part 1) *Journal of the Malaysian Branch, Royal Asiatic Society* 123–140.

[78] Guy Arnold, *Supra* n. 5, at p. 191. Details of this site were also told to this writer by Penghulu Henry Jalla, who spoke of his family's connection with the burial site (personal communication) Kuching, September 2003.

[79] Sarah Hitchner, *Remaking the Landscape: Kelabit Engagements with Conservation and Development in Sarawak, Malaysia,* 2009, pp. 184-200.

Binatuh Kubaan at Pa' Manau, *Binatuh Long Lellang* at Long Dati, and Long Sebuloh, *Binatuh Pa'Terap* at Ra'an Mekang. This is by no means an exhaustive list.

Recently, the Cultured Rainforest project has excavated a number of megalithic and burial sites, among them, the burial site at Long Diit, described as Menatoh[80] Long Diit. Lloyd-Smith's description is a valuable picture of what can be found in such a site. He wrote:

> Menatoh Long Diit is located on a lower terrace c.200 m South of the confluence of the Kelapang with the Di'it rivers. Approximately 60 m to the South lies a Dragon Jar cemetery also referred to by the same name. The megalithic site consists of a group of fourteen stone jars (average dimensions: 1.6 m high by 0.6 m wide) and seven slab structures (average dimensions: 1.5 m long, 0.7 m wide, and 0.7m high). Five of the jars stand upright, the other nine partially or completely fallen (Fig 5.1). All of the jars are carved form a grey/white, coarse crystalline quartzite sandstone that glitters in sunlight. All of the slab built structures were disturbed but appear to have a common architecture, with thicker (20-25 cm wide) uprights supports set lengthways in the ground and thinner (10-15 cm thick) slabs laid on top. One structure appeared to have a re-used stone jar fragment as an upright.
>
> Excavation was made at the base of one of the standing stone jars to investigate the nature of activity and to expose its foundations to retrieve datable material. Numerous clusters of artifacts were unearthed both on top of and beneath a large collapsed stone jar fragment artifacts' included 11 small ovoid earthenware vessels, one tubular earthenware vessel, and 20 small earthenware cylinder-shaped objects, probably earlobe stoppers. Fragments of two stone ware vessels were found, one Thai Sawankhalok bowl dating to the 14th or 15 th century AD (Chin 1988: 101,fig 101, fig 117,) and two blue and white porcelain bowls dating to the late Ming periods (16th century AD). Smaller items included whetstones, iron blades, copper alloy rings of the type traditionally hung from distended earlobes, small copper alloy bells, and over 400 glass beads. These artefacts are thought to have been placed in association with burials place at the site up until the conversion of local people to Christianity in the 1930s. A quantity (45 g) of cremated human bone and teeth were also found. As cremation burial has not been practised by the Kelabit in living memory (T Harrison 1962:10-2), these remains may represent an earlier use of the sites, perhaps the original burial remains in stone jars.
>
> The base of the stone jar stood in a shallow cut 25 cm deep. River- rolled packing stones were placed on side of the stone jar. Whilst the antiquity of the stone jars and slab cists structures is still to be established (C dates pending), the site was certainly used for burial up until 1950s, the dead therefore being placed where previous dead were known to rest. Burial was said to be in wooden coffins but also reputedly inside the stone jars or within slab structures. The reason for separation

[80] Menatoh is the southern Kelabit word which is the same word for binatuh in the northern part of the highlands.

> between these burials and those associated with the Dragon jars 60 m away is unclear, and will be the focus of further investigations.[81]

Further investigation of the cemeteries, which the writers referred to as Dragon Jar Cemeteries, on the eastern side of the Kelapang River found fragments of 13 broken jars extended over a 40 m by 15 m area but appeared that the site could be larger. The archaeologists reported that:

> [M]any of the jars were set in the ground up to their shoulder or neck, (Fig 4.4) Where upper portions of the jars were visible, they had been deliberately removed at the shoulder, most likely during the burial rites of primary and then possibly second internment. At least seven different jar types were observed and can be dated between the 18th and 19th centuries AD based upon published comparisons in B Harrison (1990) and Adhayatman and Ridho (1984).[82]

Other burial jars are found elsewhere for example in Pa'Lungan at the site of the Belanai Singkulub a line of twelve burial jars are lined in a row on top of the ridge between Pa' Lungan and Long Rebpun. A few jar tops are protruding but many are buried.[83]

These burial sites show clear evidences of habitation and settlements in the area. Beyond the actual internment of bones of the dead through secondary burials at the established cemeteries, as was mentioned earlier, the Kelabit also erected megalithic and non-megalithic monuments which were accompanied by elaborate feasts that would last for days.

A. Megaliths: Monoliths, Menhirs, Memorial Stones and Rock Art

Megaliths took the form of *batu sinuped, perupun* and *batuh nangan.* A *batuh sinuped* may be a conical or rectangular standing stone, stone slab or menhir often with tapered or triangular tops. Most *batuh sinuped* occur singly but occasionally they may be clustered in a group of two or more.[84] *Batuh perupun* consists of stone slabs laid horizontally on the ground or multiple stone slabs laid on top of each other as a table-like structure, or river rolled stone mounds, with stones mounted on top of each other to a height of over two meters and diameter reaching up to 30 meters.[85]

The megaliths may also take the form of *batuh nangan,* a slab built structure, or capstones mounted on stone legs which are table like or chair like, in which case they are more appropriately called *batuh pelukung* (meaning supported stone) or dolmens.[86] These

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81 Lindsay Lloyd Smith, et. al., p 44.

82 *Ibid*. at p. 47.

83 Sarah Hitchner, *Supra* n 79, at p. 163.

84 The batuh sinuped in Arur Tang Barat in Pa'Berang has a cluster of five standing stones and some small ones.

85 There is a *perupun* (slab grave) at Arur Pegelawat about half an hour's walk from the present site of Pa' Ukat longhouse.

86 Sina Bulan and her adopted brother Tama Pasan erected a *batu pelukung* (dolmen) at Long Nipat in memory of their father Tapan Tepun.

structures may be small but can also be gigantic like the Batuh Ritong in Pa' Lungan. Stone slabs may also be laid horizontally into the ground as a bridge. The stones and slabs were often quarried elsewhere, perhaps from the nearest river, and carried a few kilometres overland and erected at the chosen spot. Sometimes the stones were carved and decorated in situ, in sunken relief, and the designs incised into the stone. These are called *batuh narit, or batuh nawi* (carved stones or rock art).

Carved stones are a common feature of the Kelabit megalithic landscape. *Arit* in Kelabit is a design, so a *batuh narit* is a stone that has been designed or carved.

Many old stone carvings are incision on stones or rocks so that the design stands out from the rest of the stone. It is generally agreed that the carvings are made with metal tools, thus they could have been made as early as 500 AD.[87] Carvings may be in the form of animals, like the Batuh Narit Kelabat – the figure of a gibbon found in the village of Batuh Patung. A more common design is that of spread eagled human figure, outstretched arms and legs and showing elongated earlobes. Such a figure was clearly seen between the new and old and longhouse in Akah River in Long Lellang, drawn on a large rock of about 10 ft high and approximately same width.[88] The discovery of that rock boulder in Long Lellang was described thus:

> A great wonder happened in the headwaters of the Akah, on the border of Kelabit country, recently. The river changed its course on its own. In the middle of the new river bed was a human figure complete with headdress, extended ear lobes, other ancient ones; but instead of being executed in high relief is incised into stone surface. It differs also in having feet that swirl into fin shaped; the hands show ordinary fingers, though only four.[89]

The rock carving had distinct similarities to other monuments, most notably the rock carvings near Ramudu, the most southerly point of the Kelabit Highlands, many days travel from Long Lellang. A similar design is carved on a stone at Batuh Narit Long Derung in Pa' Main. The creators of these old etchings and carvings are unknown. Others, whose creators are unknown, are said to have been erected by the legendary Seluyah or Tokid [Tuked] Rini[90] just like the monumental *Batu Ritung*, at Pa' Lungan. A number of carvings either on huge rock boulders or rock outcrops are visible today in Pa' Umur,[91] Pa' Dalih[92] and Ramudu.[93] Since there is no clear evidence of any other group having

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87 Tom Harrisson, "Megalithic Evidence in East Malaysia: An Introductory Summary", *Journal of the Malaysian Branch, Royal Asiatic Society,* 1973, Vol. VLVI (Part 1), pp. 123–140.

88 This writer visited this site in 2003. It is impossible to climb this huge rock boulder without assistance. My guide had to cut two small trees which were used as a bridge to get on to the boulder.

89 Hudson C. Southwell cited this in *Uncharted Waters*, Astana Publishing, Alberta, Canada, 1999, p. 289, and concluded that it was evidence that the Kelabit had lived on the upperside of the Meriggong gorge for centuries.

90 Lian Labang, "An Upland Stone Stor", *Sarawak Museum Journal*, 1958, Vol. 8, pp. 402–404. This rock is found in Ramudu.

91 At Arur Bilit, in Bala Pelaba's farm near the present Pa' Umur longhouse.

92 Also Batu Penagan, (chopping stone). See Arnold's description,. In *Longhouse and Jungle: An Expedition to Sarawak* p 191 (1959

93 Batuh Long Badang.

occupied the area for generations and practising the same culture, the probability is that these were also created by the Kelabit,

There are stones which were carved in 1940s, like Batu Narit Aren Tuan or Peripadan Tepun, said to be carved in honour of Raja Umong @ Penghulu Miri. There is a round stone, about a metre tall displaying several carvings, the face of a man, a standing figure of a man in loin cloth with a stick in hand probably to herd buffalo? This *arit* differs from the traditional patterns which portrayed animals, real or mythological.[94] At an old settlement in Long Dati there is a more recent carving on a boulder by the Akah river to commemorate the building of the first primary school. The year 1950, when the school was established is carved clearly on the rock following an ancient tradition of rock art among the Kelabit.

B. The Purpose of Megaliths

As previously indicated, megaliths were erected prior to 1958[95] but their significance as a mark of occupation of lands and territories continue into the present. The connection between megaliths, burial rites, and memorial to a deceased relative is clear, though on rare occasions they commemorated the lives of parents who were still living. This writer's mother, Sina Bulan and her older brother Pun Dukung erected a *batuh pelukung, or* dolmen in honour of their deceased father. Many other families would have done the same to honour their parents or loved ones, and the megalith would be named after the person who erected the stone, as in Batuh Pelukung Pun Dukung in Pa'Umur, Batuh Sinuped Udan Turun in Pa'Lungan, Batuh Sinuped Negeri Besar in Pa' Main.

Batuh sinuped and especially *perupun* were sometimes used as the spot to bury heirlooms of a deceased who died without an heir, thus preventing any ensuing quarrels between next of kin.[96] The Batu Ritung in Pa' Lungan is an example of this. This is a huge flat stone mounted on four huge cut stones. The creator of this monument is unknown, but it is clear that this was also a Kelabit burial site as evidenced from the beads that were excavated from the site.[97]

Megaliths were also erected to accentuate the upper class status of the family, to show personal strength as in Batuh Sinuped Along Tigan or a rite of passage into manhood as in Batuh Sinuped Tepu Lu'ui of Pa' Main. (Along Tigan and Tepu Lu'ui being the personalities). Boundaries between villages were also marked by erection of *batu sinuped as* boundary stones. For instance two *batuh sinuped* at Ra'an Berangad marks the traditional boundary between Pa' Umur and Pa' Main. They could also be raised as part of a name changing ceremony especially when located very near the longhouse site.[98]

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94 Perhaps because it featured a more recent creation; see Sarah Hitchner, *Supra* n 79, at p. 154.

95 The year 1958 is significant because of the arbitrary cut-off date.

96 Bala Pelaba and Galih Balang talked of the legend of a young lady called Liyuq who died in Patar Lem Liyuq',. Since she died without an heir, her property was buried with her in a huge mound of stones which may be still seen today.

97 Tom Harrison excavated this site in 1949.

98 Batuh Nangan Pa Pereh.

Apart from created forms, natural stone features were important part of Kelabit life, and mythology. Kelabit oral narratives tell of natural stone outcrops being used as shelters. For instance along the Depur River a Lepo Batuh or rock shelter was said to be the home of the ancestors of people from Pa' Terap and Pa' Umor for a time, before they split into two village communities. Certain rock structures were and are treated as rock shelters for hunters. At Lepo Batuh (rock shelter) in Pa'Dalih, earthenware, metal objects, glass fragments as well as bone and mollusc fragments were excavated indicating that the site may have been used as an overnight camp repeatedly.[99]Local stories connect Lepo Batuh to the pre-Christian forest spirit and giant Pun Tumid, who because of an accident of rock falling on his heel (tumid), and with a twisted heel could no longer hunt animals and in shame, hid in the forest to be a 'hunter of the hairless' while his sibling would hunt the wild. [100] These are among stone structures that feature in Kelabit narratives and mythology.

Batuh baliu (transformed rock) are rock features believed to have been a building or house that has been cursed and turned into stone because of breach of *adat* or taboo. Cruelty to animals and laughing at animals like cats, dogs and especially frogs was believed to cause one to be *masab,* bringing about a curse, hailstorms and could result in petrification of buildings and even people into stones. These narratives are alive through generational storytelling and songs representing the stories that connect people to the land.

VI. NON-MEGALITHS: CARVING AND MODIFICATION OF THE LANDSCAPE AND TERRITORY

Cultural markings on the land also take the form of non-megalithic structures that are just as significant, namely the *kawang* (canopy cutting), *nabang* (ditch cutting), *lega* (wooden platform), *bakut* (trench) or *kawang ebpaq* (canal). These are discussed in turn.

A. Kawang (Canopy Cutting on the Mountain Ridge)

Memorialisation of a loved one, a husband or an elderly person might take the form of cutting a *kawang.* This is 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'.[101] The *kawang* like other structures created by leading families was one of the most labour intensive. With only simple implements for the task, like parangs, or adge, clearing a *kawang* was not easy, and took time. During that period the host family would feed the guests and kindred who had come to help.

There is evidence of *kawang* all over the highlands except in Long Lellang. The mountain ridges surrounding the plains of Bario Lem Baaq were said to have at least 24 *kawang.* In Pa' Lungan, there were at least five kawang along the mountain range of Buduk Kaber.[102] Named after their creators, they are called Kawang Balang Tepun,

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[99] Lindsay Lloyd Smith, et. al., p 39.

[100] Monica Janowski, makes reference to these stories in her book *Tuked Rini, Cosmic Traveller, Life and Legend in the Heart of Borneo*, 2014, NIAS Press.

[101] Guy Arnold *Supra* n 5, p. 191.

[102] Sarah Hitchner, *Supra* n 79, at p. 172.

Kawang Sinah Batang Riwat, Kawang Agan Urud, Kawang Usan Turin and Kawang Udan Tuna. All of the creators have living descendants in Pa' Lungan or Bario. Four *kawang* are reportedly found on Mount Murud,[103] the highest peak in Sarawak and there are others in Pa' Dalih,[104] Pa' Bengar,[105] Batuh Patong,[106] Pa'Umor[107] and Pa'Mein. Although many of these are now overgrown, it is possible to identify the secondary jungle from the old virgin jungle.

In 2000, a *kawang* called the Millenium Kawang was cleared in Bario to commemorate and to herald the millennium. This was a renewal of an old *kawang* site, which was done in the old tradition of commemorating important events on the landscape. With today's implements, like a chainsaw, it would be much easier and would need less labour to create these structures. At the time of writing , there are talks of clearing and recreating some of the old kawang, perpetuating the age old Kelabit custom.

B. Nabang (Ditch Cuttings)

A memorial in honour of a deceased person may involve the construction of a *nabang*.[108] Constructed at great expense, and a *burak* feast, this involved the cutting of a ditch in the ground, or across a ridge tract, either to divert the course of a river or to reclaim a large meander for arable land or to flood an area for growing rice. Such ditch cutting often resulted in the formation of a *taka* or an oxbow lake, which would be named either after its creator or the person in whose honour it was created[109]. Examples of such lakes along the Depur river are Taka Kara'eq', in honour of Pun Kara'eq,'[110] Taka Pun Ratu, after Pun Ratu. Similar *taka* (oxbow lakes) are found in Pa' Lungan known as Taka Udung Buluh, Taka Rawir, Taka Gia Ulang and others in Pa'Main, including Taka Tama'al. These *taka* were intentionally created, unlike others that occur naturally through the force of the river currents over time, as in Taka Bulan in Pa'Mada and Taka Lem Sa'ug in Pa' Dalih.

Today, ditches are still constructed for the purpose of flooding an area or draining an area for planting of padi.[111] These are simply called *abang* (ditches) differentiating them from *nabang* which were done ceremonially. This writer's informant, Galih Balang talked of a time when a great number of *nabang* were cut across the meandering rivers in Pa' Lungan and Pa'Umur. One elder cautioned, '*Tuen ngabang neh epbaq dih ngabi, anun meneh kuh tanaq inan anak katu kedidah mulun*', meaning, if all the rivers are cut

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103 Kawang Udan Tuna, Kawang Aren Tuan, Kawang Akun, kawang Pun Erang. All the creators were from the nearby village of Pa'Lungan.

104 Kawang Raja Umung and Kawang Liri@Langit Nubung.

105 Kawang Bayo.

106 Kawang Tama' Lian, Apad Bawang Runan

107 A series of *kawang* called *kawang mulaq* (many *kawangs*) on the ridge between Pa'Umur and Pa'Main.

108 Edward Banks, witnessed the elaborate burial rites which included the creation of a *naban*g. See Edward Banks, "The Kelabit Country, an Account of a Recent Visit", *Supra* n 5, at p. 158.

109 A *nabang* was also named after the man who created it, for instance Nabang Utung Ratu at Pa' Perey a tributary of the Pa' Umur river.

110 The writer has visited the site of Taka Kara'e' which has now become an oxbow lake frequented by fishing enthusiasts; it is about two hours by boat downriver from Bario. The lake is filled up when the river floods and the rest of the time remains an enclave for fish.

111 Examples in Pa'Lungan, nabang Karasan , nabang Pun Maradaq, and Nabang Balang Tepun.

(with ditches) what land would be left for the common folks to live on? The implication of this was that those who cut nabang on the land had first right to claim the land.

The connection with notions of life after death or increasing human fertility as suggested by Heine-Geldern and Fleming[112] for other megalithic complexes do not seem to feature prominently in Kelabit narratives, although there could have been some spiritual aspects. [113]. Even if that postulation was right, it was not the primary purpose of the *nabang.* Most *nabang* were straight ditches but with exceptional circular ones like the Nabang Pa' Libuh (*libuh* means round). It is uncertain why the exceptional shape was chosen except perhaps as a statement of personal preference or a non- conformist individual.

C. Lega (Platform for Ceremonial Slaughter of Animals)

Towards the west of the highlands, in Long Lellang, the local practice was the creation of a *lega,* a large wooden platform built specifically for the slaughter of animals to feed guests at a death feast ceremony. All transactions had to be performed on that *lega*. Although it did not leave a permanent landmark, the *lega* served the same purpose as the other monuments. Interestingly, despite the availability of plenty of rocks and boulders in rivers in Long Lellang, there are few if any *batu sinuped* in the locality. There is however a big *perupun* in Long Sebuloh, near Long Dati and a most distinctive rock carving of a man on a huge rock in the Akah River. There is evidence of *nabang* created by individuals who had come from the northern region to marry in Long Lellang including one at Long Dati and several along the banks of the Akah River towards the old longhouse site.[114]

D. Bakut and Kawang Ebpa' (Trenches): Adaptation and Cultural Reinvention

Lavish death feasts and burial rites remained a feature of Kelabit life until they turned to Christianity in the mid-1940s. Instead of abandoning their culture, they transformed the practice of creating *nabang* into creating *bakut* (a broad pathway) which involved the digging of trenches to create wide laterite roads for public use. A *bakut* was no less prestigious than other forms of commemoration. A number of these are clearly visible in the plains of Pa' Umur and its tributaries. Perhaps it was no less influenced by the

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[112] Mary E Fleming, "Observations on the Megalithic Problem in Eastern Asia", *Bulletin of the Institute of Ethnology*, 1963, Vol. 15, pp. 153–162.

[113] Harrisson attempted to explain the intent of these expressions as a reassurance to the spirit that everyone back in the highlands was right behind her or him, or that a 'path' or 'ditch' be interpreted as a path of spirit egress. T Harrisson, "A Living Megalithic in Upland Borneo", *Sarawak Museum Journal*, 1958, Vol. 8, p. 698 and p. 701.

[114] The writer and co-researcher spent three days in the area in 2003, with the most gentle, knowledgeable guide and informant in one Uncle Akan Sakai. Walking along the Akah river and through jungle paths, visiting the old longhouse, including the main burial sites, being shown the sites and getting a feel of the cultural landscape, was a walkabout outdoor tutorial which was a rare treat and absolute privilege. The pristine beauty of the forest along the river could only be described as breathtaking, seen by boat to Penan settlement Long Benali with stops at various *amug* along the river.

exposure of certain Kelabit to '*dalan rayeh'* (wide road) as they travelled out of the highlands to the nearest town.

Kelabit *lun merar* (leaders) like Aren Tuan of Pa' Lungan and others in the Kelapang suggested that all further efforts in the creation of landmarks on the land ought to be of public benefit. Diverting and straightening of the meandering rivers would be more beneficial, so that the rivers would be more navigable by boat. These were called *kawang ebpaq* (canals). In the late 1940s and early 1950s, this form of memorialisation was employed by the community. Villages would boast that they had the 'most straight rivers' implying that they had the most and best *kawang ebpaq*.[115]

Today, families do not wait to honour their loved ones posthumously. Many families throw lavish dinners either in the traditional longhouse or in posh hotels, inviting the whole community in that place, to *nunang* or honour their parents or loved ones. In a new form of memorialisation, these gatherings are primarily a time of thanksgiving and celebration of the parents' lives, a reinvention of an ancient tradition, providing continuity with the past.

VII. STONE MONUMENTS AS SYMBOLS OF HONOUR AND RIGHTS OF INHERITANCE

It is clear that the various forms of memorials are interconnected with no rigid rule with regard to their creation. Instead of elevating an upright menhir, or piling up of slabs or round stones, a flat cut stone could be used as a bridge across a *nabang* or across a natural valley or any of those combinations. At a site in Pa' Berang,[116] a group of eight menhirs stand on a knoll near the Debpur river. Four monoliths are between six and almost eight feet high, another four small ones are about two to three feet high and yet another four cut slab stones about six feet long serve as bridges over man-made ditches (*nabang*) close by. Most living Kelabit of this writer's parent's generation talk about a time when some Kelabit moved from valley of Patar Lem Liyuq to live at Pa' Berang but were forced to move into the higher plains of Pa' Debpur because frequent floods brought fish that ate the stems of their padi plants, ruining their crops.

Apart from filial piety, a wife could also hold a feast in memory of a deceased husband. Sina Balang Imat,[117] (deceased) who was 82 years old at the time of interview said that in her lifetime she had undertaken these ceremonial feasts seven times. The first was the creation of a *nabang* in memory of her deceased first husband, Akun, followed by the creation of a *nabang* in memory of her first husband's mother. After she remarried, she and her husband, Balang Imat (also known as Tapan Ulun) held a number of other feasts. They cut another *nabang* in honour of her mother, Pun Uwad Aren who was still living at that time, an occasion no less significant than a death feast. They threw another feast in honour of her husband's deceased mother, Pun Buraq, an then another, in memory of Laba Ayu, her husband's deceased father. In each of those occasions, a *nabang* ditch

[115] Galih Balang, Personal communication, Pa'Lungan, June 2003.
[116] This writer visited this significant site in November 2002.
[117] The writer's aunt, also known as Kareb Ayu' is from Pa' Umur.

was created. Her last feast in honour of Belaan Iyu, her own deceased father, a single *batu sinuped* (menhir) an upright stone of about seven feet high was erected. That was an upright stone found in the plains at Long Nipat whose creator was an unknown person. It was uprooted and re-erected at the present site at Rumaq Ma'un Long Main not far from the boundary between Pa' Umor and Pa' Main.

The commemoration of the life or death of someone without an heir by a close relative was a common way of inheriting and keeping the property within the family. For instance, Sina Balang Imat and her husband also erected a single menhir in honour of her husband's paternal uncle, who had no issue or heir. By that act, Balang Imat inherited the valuable ancient jar that belonged to his uncle which he passed down to his eldest daughter, Ruran Imat also known as Sinah Tulu Ayuq who at the time of writing is in her 70s. In another example, one Semeraq Langit (SM), had four daughters. His brother Tadem Ribuh (TR) had no surviving children. SM threw a lavish feast and created a *kawang* on the Arur Tegkang ridge in Bario Lem Baaq' in honour of TR. This entitled SM to inherit the family *belanai ma'un* (ancient jar) that TR had inherited as the eldest son. Since SM's eldest daughter had already inherited SM's *belanai* (jar), in fair distribution, TR's jar was inherited by SM's second daughter, Sina Kapong Raja.[118]

In another case, Tama Balan (TB) also called Tapan Tepun, had adopted Balan, the son of his deceased eldest brother. TB's other brother Liteh Bala (LB) had no son or heir. At Liteh Bala's death, TB threw a lavish feast in honour of his brother LB, thereby entitling his son Balan to the ancient jar that had been in LB's possession. These are examples of the complex indigenous legal traditions that sustain social cohesion, governing distribution and management of property and practices that are intertwined with attachment to the land.

VIII. CONCLUSION

The foregoing discussion shows cultural markings on the landscape bear specific meanings to the native inhabitants connecting them to the land. Although the forms have changed, many of the megaliths or non-megalith structures like the *nabang* or *kawang* that exist today have a known history. Their creators are known and their descendants still living. In the various forms, they embodied a permanent 'registering of death upon the landscape', and signified the celebration of life. Remnants of *kawang* may be seen along the mountain ridges in Bario Lem Baaq, and the neighbouring villages today. People are able to tell the exact ridges where they or their ancestors created a *perupun*, *kawang*, *batu sinuped, nabang* or *bakut.* A descendant would say 'my father lies there' or 'my ancestor is on that ridge', or 'that kawang marks our territory'. [119] Families lay territorial claims to burial sites where their ancestors have been laid. These cultural landmarks and stone burial monuments are revisited as indicators and proof of the occupation of the

[118] Sinah Balang Imat or Kareb Ayu' of Pa' Umur, personal communication, Miri, October 2002. This was confirmed by Sina Robert also known as Adteh Kediah Aran, Semeraq Langit's youngest daughter, a personal communication, Kuching, November 2002.

[119] Belaan Ayuq, personal conversation, Bario 2002.

highlands by the Kelabit.[120] Other stone features whose creators are unknown, are said to have been erected by the legendary Seluyah or Tuked Rini,[121] the half spirit men in Kelabit mythology.[122] Numerous carvings either on huge rock boulders or rock outcrops are visible today in Pa' Umur,[123] Pa' Ukat,[124] Long Lellang,[125] Pa' Dalih,[126] Ramudu[127] and Long Peluan. These rocks carry oral narratives that are very much part of the Kelabit story and history, evidencing their enduring occupation.

This paper has attempted to articulate a legal view of rights by an indigenous community based on its own distinct cultural and experiential groundings. As the paper has illustrated, the first source of Kelabit rights to their lands is their own customary law systems. As the Federal Constitution has clearly defined law to include 'custom and usages having the force of law' it is maintained that their customary practices have conferred that right. As a people, they have lived and occupied the highlands, and have continued to do so for generations practicing their own customs and legal traditions. Common law itself also acknowledges that persons in exclusive occupation of land have title that is good against anyone who cannot show better title.

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120 There have been megalithic activities discovered in other locations in Borneo, but it was argued that the Kelabit Highlands stonework has unique features of its own. See, for instance, T Harrisson and S O'Connors "Gold-foil Burial Amulets on Bali, the Philippines and Borneo", *Journal of the Malaysian Branch of the Royal Asiatic Society,* 1971, Vol. 44, pp. 71–77. Other examples are found in: Tom Harrisson, "Megalithic Evidence in East Malaysia: An Introductory Summary", *Journal of the Malaysian Branch of the Royal Asiatic Society* , 1973, Vol. 46, p. 123 on stonework by the Kadazan in coastal Sabah (on Pulau Usukan and other offshore islets in northwestern Sabah). See also Tom Harrisson, "A Dying Megalithic of North Borneo", *Sarawak Museum Journal*, 1962, Vol. 10, p. 386. In Tom Harrisson, Barbara *Harrisson The Pre-History of Sabah* (1971), they reported that the rock carvings discovered in Ulu Tomani, Sabah, in April 1971, had features that closely matched the stone carvings found in the Kelabit country at Pa' Dalih and at Long Lellang in the Akah. Since there is no tradition or record of any megalithic activity among the present Tomani inhabitants, the Tagal, nor are any carved or cut rocks known even in the megalithic area of the Kadazandusun peoples further north, Harrisson posited that 'it seems likely that this is one of the many lost signs that the upland Kelabit people … once spread continuously much further north and south until they were decimated by the introduced epidemics after the arrival of western civilisation on the coast'. Such a thesis perhaps supports RS Douglas's statement that the Kelabit are practically the same race of people as are those known as Murut in the Trusan and Padas districts of Sabah. See Douglas, *Blackstone*'s *Commentaries on the Laws of England,* 1990, Vol. 2, 16th ed., p. 1825.

121 Lian Labang, "An Upland Stone Story", *Sarawak Museum Journal*, 1958, Vol. 8, pp. 402–404.

122 Monica Janovski, encapsulated some of this mythology and the feat of Tokid Rini in her book, Supra n 100.

123 One batuh narit is located at Arur Bilit, in Bala Pelaba's farm a short walking distance from the present Pa' Umur longhouse.

124 Batu Narit Pa'Ukat shows a side profile of a hornbill along the broad, flat face of the rock with several heart shaped designs above the hornbill's head while on the back of the rock are carved three hundred horizontal notches.

125 The carving on a large boulder of almost ten feet high may be seen on the way from Long Lellang to the old longhouse site in Long Dati. Harrisson, (1958), p. 113, described the discovery of a rock boulder in Long Lellang, which . Southwell cited in *Uncharted Waters* (1999) 289. The rock carving had distinct similarities to other monuments, most notably the rock carvings near Ramudu, the most southerly point of the Kelabit Highlands, many days travel from Long Lellang.

126 See Guy Arnold's description, *Supra* n 5, p. 102 and 191.

127 Batu Narit Tuked Rini at Long Tenarit, a large and flat stone which used to extend perpendicular to the

Regardless of the nature of rights under their own indigenous legal system,[128] and despite the absence of a surveyed and well-delineated boundary, their presence and occupation is etched in the landscape of the land that they call Kelabit ancestral homeland. Kelabit rights are also conferred by statute. As the Sarawak Land Code s 5 (2) requires cultivation and occupation of land prior to 1958, it is argued that the evidence of their burial grounds, the megalith and other cultural monuments, bear distinctive marks of Kelabit presence on the land that would satisfy the requirements of s 5(2) of the Land Code. It is not a question of whether the exact form of the custom remains but whether the community that practiced those customs continues to exist and occupy the land. The vitality and dynamism of customary laws means that the forms could be changed through the exercise of decision making vested in the community and their leaders. Whichever approach they may choose to use, they may still prove their rights to their ancestral lands in the Kelabit Highlands.

[128] Kent McNeil, "Judicial Treatment of Indigenous Land Rights in the Common law World", Richardson B.J, Imai, S and McNeil, K (eds.) *Indigenous Peoples and the Law, Comparative and Critical Perspectives*, Osgoode Readers, Hart Publishing, Oxford and Portland Oregon, 2009.