INDIGENOUS IDENTITY AND THE LAW: WHO IS A NATIVE?

I. Introduction

Among the many dimensions of a person's multi-faceted identity, his ethnic identity may have the most profound implications. While ethnic identification generally has to do with people's feeling and experience of belonging, the recognized label or identity may depend somewhat on who is speaking: the anthropologist or the sociologist, the government official, the visitor or the member of the group himself; for while normatively neutral, ethnic identity may be deployed or defined with a view to achieving certain aims of society. It is in this context that the question of indigenous identity as it stands in Malaysia is important. Within the ambit of indigenous identity, the issue of 'native' identity is pertinent because of the political and economic implications that flow from it.

This paper is an attempt to discuss the legislative definition of a native as found in the states of Sabah and Sarawak. While the Federal Constitution defines the term native, there are statutes which extend or qualify the entitlement to native status. There is yet another level of identity based on customs and usages of particular communities, which may or may not be caught by the statutory definition.

II. Historical Background

Malaysia is a multi-ethnic and multi-religious country with a population of 17.6 million citizens (1991 census). Malays form the largest ethnic category comprising 50% of the population followed by the Chinese (at 28.1%), and the Indians (7.9%). The Iban, Kadazan and

the other indigenous ethnic groups make up the balance of 14%. While in Peninsula Malaysia the Malays, Chinese and Indians make up the largest ethnic groups, the ethnic distribution in Sarawak and Sabah is quite different. In Sarawak, indigenous groups referred to collectively as 'Dayak'[1] constitute approximately 50% of the population with the Iban at 29.8% constituting the largest ethnic group in the state. In Sabah, the estimated 39 different indigenous ethnic communities, constitute 84.8% of the population of 1.4 million with the Kadazan forming the largest single ethnic group.[2] Reference must also be made to the aborigines or the Orang Asli[3] of Peninsula Malaysia which represent 0.5% of the national population.[4] For official purposes they are

[1]As early as 1842, in a Code of Law which Brooke promulgated on February 2, 1842, clause 275, reference was made to the Dayak and 'Dayak tribes' presumably referring to all the tribes as opposed to the Malay or the Chinese. The 1991 census put the figures in Sarawak as follows: Iban (29.8), Chinese (28%), Malay (21.2%), Bidayuh (8.3%), Melanau (5.7), other indigenous groups (6.1%) which comprise all the other indigenous groups, and others (0.9%). See the Population and Housing Census of Malaysia 1991: General Report of the Population Census, Vol. 1, Department of Statistics, Kuala Lumpur (1995).

[2]According to Lasimbang, J they represent nine linguistic groups within the Eastern Austronesian superstock. The Dusunic stock includes the Dusun, Kadazan, Kimarangang, Coastal Kadazan, Lotud, Kuijau, Tatana, Tengara, Bisaya, Rungus, Dumpas; the Paitanic group include the Tambanua, Sinabu, Lingkabau, Rumanau, Abai; The Murutic group include the Kolod/Okolo, Gana, Kalakaban, Sebangkung, Serudung, Tagal, Sumambu, Baukan, Nabay and Timogun. Lasimbang maintains that the 'lumping' of all the groups as Pribumi made it difficult to determine their population and to categorise the ethnic communities. See Lasimbang, J. "The Indigenous Peoples of Sabah", in Nicholas, C and R Singh (ed) *Indigenous Peoples of Asia, Many Peoples, One Struggle,* Asia Indigenous People's Pact, Bangkok, Thailand, (1996).

[3]Malay term which translates as 'original' peoples or 'first peoples'.

[4]The population of Orang Asli, according to the 1995 report of the Department of Orang Asli Affairs (JHEOA) number 92,529, which represents 0.5% of the national population. It has been pointed out that in all government census since 1970, the Orang Asli population figures are put together in the Malay category. See Means, Gordon P, "The Orang Asli: Aboriginal in Malaysia", (1985-86) *Pacific Affairs* 58 : 638.

classified as Negrito, Senoi (or Semai), and Proto-Malay, although there are known to be about 18 sub-ethnic groups.[5]

Malaysia's diverse ethnic composition is a reflection of its rich and eventful history. Strategically situated Malaysia has seen successive waves of migration from Asia. The earliest evidence of human existence in Malaysia found in the Niah Caves in Sarawak is estimated to be about 35,000 years old. Archaeological records say Sabah was peopled at least 30,000 years ago whereas evidence of the existence of the human race in Peninsula Malaysia dates between 3000 BC and 2000 BC. There is evidence of human migration from southwestern China around the same time. The earliest of these immigrants were the ancestors of the Negritos in North Malaya, the Neo-lithic peoples who lived on the alluvial plains. Subsequent peoples of the Mesolithic culture are said to be the ancestors of the Semai of Central Malaya, the Bataks of Sumatra and the Dayaks of Borneo. The later immigrants were the Proto-Malays whose descendents are found in south Malaya. Just a few hundred years BC, the Deutro Malays are said to have come from Yunnan into Malaya. These were the ancestors of the present day Malays[6] who eventually established themselves as the predominant society in the Malayan Peninsula.

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[5]For definition of aborigine see ss 2 and 3 of the *Aboriginal Peoples Act,* 1954 (Revised - 1974). For accounts of the Malayan Aborigines, see Williams-Hunt, PDR; *An Introduction to Malayan Aborigines.* (Kuala Lumpur, 1952); Benjamin, G; Temiar Social Groupings, *Federation Museums Journal* 11, pp 1-25; Benjamin, G; Temiar Kinship, *Federation Muzeums Journal 12*, p 25; Dentan, RK; *The Semai* (New York, 1968); Dentan, RK; K Endicott; AG, Gomez, and MB, Hooker, *Malaysia and The Original People: A case Study of The Impact of Development on Indigenous Peoples*, (Allyn and Bacon, Massachusetts, 1997). See also Nicholas, C and R Singh (ed), *supra n.* 2.

[6]Numerous historical accounts may be referred to including, Andaya, BW and LY Andaya, *A History of Malaysia*, (Macmillan Press Ltd, London, 1982); Miller, H, Short History Of Malaysia, Praeger, New York (1966); Ryan, NJ, *A History Of Malaysia and Singapore*, (Oxford University Press, 1976); See also Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, (2nd Ed, Dewan Bahasa Dan Pustaka, 1995), Wu Min Aun, *Introduction To The Malaysian Legal System,* (Longmans, 1999).

The immigration of the Chinese and the Indians into Malaya as well as to parts of Borneo during the early part of last century, brought another dimension to the ethnic groupings and to ethnic relations in the area that is now Malaysia.

With this great array of ethnic groups the question of what is and who may claim indigenous identity has become more complex.

III. Towards Defining Indigenous Peoples

The term indigenous is defined in the Oxford dictionary as 'native or belonging naturally to a place'. It carries the notion of a people or population who have lived in a place as the original inhabitants, as opposed to another group or groups who may have subsequently come to settle or to occupy the land. The diverse historical settings and cultural backgrounds of these societies inevitably make it difficult if not impossible to come up with a uniform description, and no single definition could capture the diversity of indigenous peoples worldwide. Indigenous peoples have been referred to by various terms such as hill tribes, cultural minorities, tribal people, aborigines, backward tribes and mountain dwellers. For the purpose of international action however the concept of 'indigenous' by Special Rapporteur Jose Martinez Cobo[7] that has been endorsed by the Working Group on Indigenous Populations/Peoples (WGIP)[8] define Indigenous Population Peoples in the following terms:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial socie-

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[7]See Jose R. Martinez Cobo, "Final Report: Study on The Problem of Discrimination Against Indigenous Populations", Vol V at 29, UN Doc E/CN.4/Sub.2. UN Sales No. E.86.XIV.3 (1986).

[8]The WGIP established in 1982, was proposed by the sub-commission on the Prevention of Discrimination and Protection of Minorities in its Resolution 2 (XXXIV) of September 8, 1981. This resolution was endorsed by the Commission on Human Rights in its Resolution 1982/19, March 10 1982, and authorised by ECOSOC in its resolution 1982/34 of May 1982.

> ties that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems.[9]

The definition in the Martinez Cobo report encompasses elements that characterise distinct features of certain native societies, but the definition may not snugly fit everyone. These may however provide some guidelines for the identification of indigenous peoples.

One of the concepts relied on as a criterion is the 'pre-existence' and establishment of their social systems in the 'pre-colonial' or 'pre-invasion' period. Malaysia had witnessed waves of early immigration during the pre-colonial period resulting in a number of groups having a legitimate claim to indigenous status. On that count the Orang Asli in the Malay Peninsula, the Dayaks of Sarawak, the various ethnic groups in Sabah that include the Dusun (or Kadazan), Bajau, Murut and other groups, the Malays both in Sabah and Sarawak as well as the Peninsula are the indigenous peoples of Malaysia. Some writers feel that considering the massive influx of ancestral Malays into the Peninsula in the second millennium A.D., they can equally well be seen as conquerors or colonisers who gained political control over the indigenous Orang Asli.[10] While it is acknowledged that the Orang Asli were the earlier inhabitants, it is contended that there can be levels of indigenousity in any nation; it need not be a question of mutual exclusion. The Malays have been described as the traditional occupants of the coastal areas of the peninsula and the Orang Asli as the peoples of the interior.[11]

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[9]See WGIP's Report UN Doc.E/CN.4/sub.2/1986/7/Add, para. 379. See also the report by the Chairperson-Rapporteur Madame Erica Daes in her working paper on the concept of indigenous peoples (E/CN.4/Sub.2/AC.4/1996/2).

[10]See Dentan, *et al. supra*, at 21. For further reading and contention against that argument see Mahathir Mohamed, *The Malay Delimma*, (Times Books International, Reprinted 1996).

[11]See *Adong bin Kuwau & Ors v Kerajaan Negeri Johor*, [1997] 1 MLJ 418 per Mohktar Sidin JCA.

Another criterion endorsed by the working group is the concept of non-dominance. In general, indigenous peoples groups do consider themselves distinct from the dominant society of which they now find themselves a part. They have their own culture, language and customs and often unique mechanisms for dispute resolution and social control. It may be that in many societies the culture of most indigenous groups would be non-dominant. However this may not necessarily be true in some post-independent countries where politically strong indigenous groups have asserted their own culture as the national culture. For instance, the description of the non-dominant indigenous group is not reflected in the Malaysian situation where the political will and the power is in the hands of the dominant Malay majority who are also considered an indigenous people group. Another example may be seen in Fiji, where the native Fijians dominate in many senses over the Fiji Indians and other ethnic groups even when they had been a numerical minority.[12]

The Cobo report also emphasises that a common characteristic that indigenous peoples share is their determination 'to preserve, develop and transmit to future generations their ancestral territories'. Underlying this determination is a special relationship and an umbilical connection with their land. For many of these groups the land is more than just a habitat or a political boundary; it is the basis of their social organization, economic system and cultural identification.[13] Interestingly, this fact was recognized by the Malaysian High Court (Kuala

[12]In the last population census before 1987, indigenous Fijians made up 43.6% of the population, and Fijian Indian descent, 48.7%. The 1990 constitution under Prime Minister Rabuka effectively guaranteeed indigenous Fijians a parliamentary majority and political supremacy. However a constitution review undertaken in 1995 recommended a system of power sharing with all major races represented. It came into force in July 1998. The Indian population in Fiji has since been diminished so that the indigenous Fijian population, growing rapidly has now become the single largest group in Fiji.

[13]See Nicholas, C and R Singh (ed), *supra*. It is not surprising therefore that much of the struggles of indigenous peoples centre around land issues as part of their desire for self-determination and control of their own lives.

Lumpur) in the case of *Kajing Tubek v Ekran Bhd.*[14] The plaintiffs asserted that flowing from this special relationship to the land, their homes and land would be destroyed and their lives uprooted by the Malaysian government's proposed development of a hydroelectric project in Bakun, Sarawak. They claimed that they would suffer more greatly and directly than any other members of the public (being the natives of the area) as their 'land and forest are not just a source of livelihood but constitute life itself, fundamental to their social, cultural and spiritual survival as native peoples'. This was considered by the court as sufficient to justify a declaration of their legal position and indeed, they had a substantial or genuine interest. Similarly, more recently in the case of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*[15] the courts recognized the rights of Orang Asli to their traditional and ancestral land upon which they foraged for their livelihood in accordance with their tradition. The recognition of this very central issue of land ownership is also reflected in specific legislation that provides for land reserves for the indigenous groups.[16]

The emphasis on being indigenous is significant because it forms the rationale for certain basic rights which are founded solely on being the first or the original people in the land.

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[14][1996] 2 MLJ 288; See also the appeal, *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek and other appeals* [1997] 2 MLJ 23.

[15][1997] 1 MLJ 418. The decision of the High Court was affirmed by the Court of Appeal on February 28, 1988.

[16]See for example Article 89 of the Constitution that provides for the creation of Malay Reserve Land. Special provision is made relating to customary land in Negeri Sembilan, and Malay holdings in Trengganu under Article 90 of the Constitution. With the exception of Penang, Malacca, Sabah and Sarawak, all states in Malaysia have laws providing for the reservation of land in favour of Malays. See for example, the *Malay Reservation Enactment* (FMS Cap 142). In Malacca there is no distinction between Malacca customary law and the Malay reservation land of the other states. See the *Customary Tenure Enactment* (FMS Cap 215) and the *National Land Code (Penang and Malacca Titles) Act*, 1963, Part VIII. *The Aboriginal Peoples Act* 1954 makes provisions for the establishment of Orang Asli Areas and Orang Asli Reserves. In Sarawak and Sabah the *Land Code* 1958 (ss 2, 5, 15 and 41) and the *Land Ordinance* (ss 15, 78 and 79) respectively provide for native customary land and Native Area land.

IV. Definition of a Native

A. Statutory definition

Within the general meaning of the term indigenous peoples in Malaysia, the Federal constitution gives a specific meaning to the term 'native', differentiating them from the Orang Asli and the Malays. In Article 160, an Orang Asli is an aborigine of the Malay Peninsula.[17] A Malay means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and (a) was before Merdeka Day born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore, or is on that day domiciled in the Federation in Singapore; or (b) is the issue of such a person.[18] I will seek to show later how a *native* is defined in different ways. To appreciate the varied approach to ethnic identity in the Constitution a brief background information is instructive.

When the Federation of Malaya achieved independence in 1957 whereby the states of the Malay Peninsula had come together to form a single independent nation, a constitutional commission known as the Reid Commission headed by Lord Reid, a Lord of Appeal in Ordinary, was set up to make recommendations for the nation's Constitution. Given the multi-racial population it was imperative to consider the viewpoints of the various races. There was a need to accommodate ethnic claims[19] and specific provisions of ethnic safeguards were included. One of the salient features of the Constitution was the special place and privilege given to the Malays as the indigenous, economically backward and politically dominant group but safeguarding the

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[17]See also the *Aboriginal People's Act* 1954.

[18]For further reading see Nagata, Judith, "What is a Malay? Situational Selection of Ethnic Identity in a Plural Society" 1974, *American Ethnologist* 1(2): 331-350.

[19]In particular between the three communal parties of the Alliance, namely the United Malay Organisation (UMNO), the Malayan Chinese Association (MCA), and the Malayan Indian Congress (MIC).

legitimate interests of other communities.[20] With the incorporation of Sabah and Sarawak in 1963, the new Malaysian Federation had come to contain territories, which in fact gave it the character of an 'ethnic federation'. While the Malays were in essence internally homogeneous, the entry of a new heterogeneous mix of indigenous ethnic groups which have a different sense of identity historically, politically and demographically gave the Federation a new character unlike that of its predecessor.[21] Partly because of their different social characteristics, historical backgrounds and also because of their different identities and varied stages of economic developments these groups negotiated and obtained special terms upon joining the federation.[22] The Cobbold Commission Report[23] emphasised among other things, that the special privileges given to the Malays be given to natives, including the need to safeguard their customary rights and practices. Thus the umbrella provision of Article 153 which was intended to benefit all indigenous peoples was extended to the natives of Sarawak and Sabah. Quite understandably, with the presence of large indigenous groups in the two states which are 'quintessentially Sarawakian and Sabahan'[24] it would have been deemed necessary to lay the definitive foundation as to who is a native, particularly as it involved conferment of special privileges.

In the context of those early political developments under the Second Malaysia Plan in the 1970's the concept of *bumiputera* (or sons of the soil) was used to include all the various indigenous ethnic

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[20] *Report of the Federation of Malaya Constitutional Commission 1957*, London, H.M.S.O., 1957, p. 6.

[21] Dato' Professor Ratnam, KJ, The political dimension of territorial integration, *The Bonding of a Nation: Federalism and Territorial Integration in Malaysia.* The Proceedings of the First ISIS Conference on National Integration held in Kuala Lumpur, October 31 - November 3, 1985 at p 40.

[22] *Ibid*, at p. 39.

[23] Cobbold 1962:2. The Cobbold Commission of Enquiry was set up under Lord Cobbold of England to determine the feelings of Sabah and Sarawak people towards joining Malaysia.

[24] *Loc. cit.*, at p. 40.

communities in Malaysia as opposed to the (later) immigrant population. The first Prime Minister Tunku Abdul Rahman, in a parliamentary debate on the meaning of '*bumiputera*' pointed out that the term referred only to Borneo natives and that "if the term is used by government with reference to the states of Peninsula Malaysia, it should be understood as referring exclusively to Malays and Aborigines of the Peninsula." It is clear that the definition and position of natives is to be considered within the context of the *bumiputera* concept which intrinsically provides a special place for the said groups based on their indigenousity. Article 161A clause 6 of the constitution states:

> (6) In this Article, 'native' means
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> (a) in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in clause (7) as *indigenous*[25] to the State or is of mixed blood deriving exclusively from those races; and
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> (b) in relation to Sabah, a person which is a citizen, is the child or grand child of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.
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> (7) The races to be treated for the purposes of the definition of "natives" in clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Kadayans, Kalabits, Kayans, Kenyahs, (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.

The drafters of the constitution chose to use the term native to refer to the heterogeneous group of indigenous people of Sabah and Sarawak. It would be a fallacy however to infer that the other two indigenous groups would be any less native in the literal sense of the word. One plausible explanation for the choice of the term could be the fact that there were already other statutory provisions that defined or made

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[25] Emphasis added.

references to natives and their rights in both Sarawak and Sabah before joining Malaysia.[26] The question is whether this is an exhaustive definition: When applying a literal interpretation, the phrase 'native' means in clause 6 restricts the rest of the definition. Further, clause (7) which states 'the races to be treated for the purposes of the definition of 'native' in clause (6) are...'[27] does not appear to make allowances for the inclusion of other groups. The effect of the provision would have been different had the word 'include' been used. Then it would have taken into account, the reality of the situation where numerous minor groups exist in Sarawak.

It has been rightly pointed out[28] that there are a number of omissions and incorrect insertions of ethnic groups under the Sarawak natives (sub-clause a). One example is the inclusion of Dusun (who are only predominant in Sabah) where there is no known group of such people in Sarawak. Some minority groups like the Penan and Selakau are not included in the scheduled list of natives.[29] Some names that are used indicate references which had been used by the imperial or colonial governments to refer to those groups perhaps for administrative differentiation, for instance the use of Sea Dayaks for the Ibans (as those Dayaks who live mainly on the coast) and Land Dayaks for the Bidayuh (as people in the interior). Those labels appear to have been used on them and not what they would have used for themselves.[30] Similarly,

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[26] See for instance the *Sabah Interpretation (Definition of Native) Ordinance* 1952; *Sarawak Interpretation and General Clauses Ordinances; Native Courts Ordinance,* (Cap 43).

[27] My own emphasis.

[28] See Kedit, PM, "Ethnicity in a multi-cultural society: Dayak Ethnicity in the context of Malaysian multi-cultural society", *SMJ*, Vol. XL, No. 6 (New series) Dec. 1989.

[29] Phoa, J., states that there are 28 indigenous groups but maintains that there are at least 37 known groups and sub-groups. See J Phoa, The Dayaks and Orang Ulu of Sarawak, *Indigenous peoples of Asia*, Nicholas and Singh (ed) (*supra*).

[30] Tan Chee Beng (1997), Ethnic Groups, Ethnogenesis and Ethnic Identities: Some Examples From Malaysia: Department of Anthropology, The Chinese University of Hongkong, Working Paper no. 5 (1997).

the ethnic group labeled as Muruts in Sarawak refer to themselves as Lun Bawang[31] or the equivalent name of Lun Dayeh in Sabah. Other groups may not be adverse to the 'given' name and in fact use that label to their advantage. The Kelabits for instance were said to have been referred to as 'Kelabits' by an administrator of the Brooke government as a twisted version of the 'Pa'Labid' people, which meant people of the Labid river,[32] a label they quite happily identify themselves by.

A look at the constitutional definition of native in Sabah and Sarawak reveals differences. There is an express provision that a child born to a 'father domiciled in Sabah at the time of birth' is a native of Sabah, whereas in Sarawak clause 161A does not make any distinction between a father or mother but provides that the child should be of indigenous or 'mixed blood deriving exclusively from those races'.[33] In both situations however, no explanation is given of the term indigenous, neither is there any express reference to any other law or laws that define it.

It is interesting to note that the Constitution does not enumerate the various groups that would fall under the definition of 'native' in respect of Sabah especially when Article 161A pertains to the special position of natives in respect of reservation of land or for alienation of land to them or for giving them preferential treatment. It may be noted that by virtue of Article 153(9A) the definition under 161A is used in respect of Article 153 which provides for reservation of quotas in respect of services, permits, etc. for Malays and natives of any of the states of Sabah and Sarawak.

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[31]See Jayl Langub (1987), "Ethnic self-labeling of the Murut or Lun Bawang of Sarawak", *Sojourn* 2(2):282-299; Raki Sia, "The Lun Bawang of Lawas District: Social change and ethnic identity". (1989/90), B.A Academic Exercise, Dept of Anthropology and Sociology, University of Malaya.

[32]Poline Bala, (1995), B.A. Academic Exercise, Dept. of Anthropology and Sociology, University of Malaya.

[33]There is often an assumption that only a child of the native father is a native and not a child of a native mother. The constitution however is gender neutral.

[34]No. 12 of 1952, Cap 64, Laws of North Borneo, 1953.

Under state law in Sabah, the *Interpretation (Definition of Native) Ordinance*[34] amended in 1958[35] provides that whenever the word native occurs in any written law at the commencement or after the commencement of the Ordinance, unless expressly otherwise enacted, a native is defined in s2(1) as either:

> (a) any person both of whose parents are or were members of a people indigenous to the Colony: or
> (b) any person ordinarily resident in the Colony and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof; or
> (c) any person who is ordinarily resident in the Colony, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people or of a people indigenous to the Colony of Sarawak or the State of Brunei, has lived as and been a member of a native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in the Colony is not limited under any of the provisions of the Immigration Ordinance.
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> Provided that if one of such person's parents is or was a member of any such people and either lives or if deceased is buried or reputed to be buried in the Colony, then the qualifying period shall be reduced to two years;
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> (d) any person who is ordinarily resident in the colony, is a member of a people indigenous to Indonesia or the Sulu group of Islands in the Philippine Archipelago or the Federation of Malaya or the Colony of Singapore, has lived as and been a member of a native community for a continuos period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in the colony is not limited under any of the provisions of the Immigration Ordinance.

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[35]No. 20 of 1958.

> No claim by any person to be a native by virtue of the provisions of paragraphs (b), (c), or (d) hereof shall be recognized as valid unless supported by an appropriate declaration made by a Native Court under section 3.[36]

The amended section 3 of the 1952 Ordinance[37] allows any person claiming to be a native to apply to the Native Court for a declaration that:

(a) such a person is recognised by native law and custom as the parent or child, as the case may be, of any other person; or
(b) that such a person is a member of a native community, has lived during any stated period, and while so living has borne a good character; or
(c) that such person is a member of a people named in paragraphs (c) or (d) of subsection (1) of section 2; or
(d) that a parent of such person is or was a member of a people named in paragraph (c) of sub-section 2 and living, or if deceased is buried or reputed to be buried, in the colony.

The effect of these amendments may be summed up thus : under the 1952 Ordinance, the definition referred to 'persons indigenous to the colony' and secondly, to 'persons ordinarily resident', one of whose parents was an indigenous person or one of whose parents was an indigenous person from Brunei, Sarawak, the Straits Settlement, the Federated Malay States, Indonesia or the Sulu Islands. 'Parent' was any person recognised as such according to any native law and custom. This definition was based basically on race as long as they came from one of the named places. The amendment of 1958 (s4) retained the requirement that the applicant must be of good character, he or she must have lived in the community and had been a member of the native community for at least three to five years and that his stay is

[36]The applicant has to fill certain prescribed forms I and II upon which the Native Court will make its decision. See Appendices A & B for examples of forms I & II.

[37]Amended by s 4 of Ordinance No 20 of 1958.

not limited by the *Immigration Ordinance*.[38] For the purpose of proving membership, a native community is defined as any group or body of persons the majority of whom are natives within the meaning of paragraph (a) of s 2(1), and who live under the jurisdiction of a local authority established under the provisions of the *Rural Administration Ordinance* 1951, or a native Chief or headman appointed under the provisions of that Ordinance or of the *Native Court (Labuan) Ordinance*.

The absence of a complete enumeration of groups under both the Federal Constitution and the state legislation in Sabah may just be a problem of nomenclature arising from the uncertainty of the acceptable labels that the groups use for themselves. For instance, the major tribe in Sabah, referred to as Kadazan or Dusun, use these two labels in different areas although there is no real difference between their language and culture. Historically, they were identified as Dusuns by the British because many owned *dusuns* or orchards in the interior. The political leaders who were instrumental in bringing Sabah to join Malaysia coined Kadazan, a name initially rejected by the community leaders in the interior areas of Sabah as being non-reflective of their true identity. Kadazan came from the word *kakadazan* meaning town areas which only describe those living in the districts surrounding the towns like Penampang and Papar.[39]Although official documents may identify them as Kadazan, many preferred Dusun.[40] State politics had often been blamed for accentuating and perpetuating the problem, pur-

[38]This definition is used in s 5 of the *Native Courts Enactment*, in cases of breach of native law and custom. The same definition is used with reference to 'natives' under various other legislation, for instance, the *Land Ordinance* uses the definition to refer to native customary rights. Others include the native *Rice Cultivation Ordinance*, Cap 87 of *Laws of North Borneo*, 1953 (administration of native rice land), the *Small Estates (Distribution) Act* 1955 which deals with 'native estate', namely the distribution of the deceased property by will or otherwise under the *Probate and Administration Act* 1959, thus allowing for the application of native law in distribution proceedings. See s 26A, 26B and 26C; *The Small Estate (Distribution) Act*, 1955.

[39]Joseph Bingkasan, "PDS proposal may point the way out of Kadazan/Dusun Identity crisis." The *New Straits Times*, Monday, August 17, 1998, p2.

[40]*Ibid.*

portedly to get political mileage out of the situation. It appears that the term Kadazan had been widely accepted until the formation of two ethnic based organisations - the Kadazan Cultural Association (KCA) and the United Sabah Dusun Association (USDA), each headed by two leaders who had once belonged to the same political party. When they split, the two associations each claimed to champion the rights of the Kadazans and the Dusuns respectively. When Parti Berjaya took over as ruling party in 1976 it was proposed that all natives in Sabah should be called *Pribumi* which literally means indigenous. This did not get the support of the people and was effectively opposed by the Kadazan and Dusun community. The issue took on another turn in 1985 when Parti Bersatu Sabah (PBS) came into power with the leaders of KCA and USDA becoming partners in politics. Then KCA was renamed Kadazan Dusun Association (KDCA) to accommodate both groups. Another twist came when another political party, the Sabah Democratic Party (PDS) was formed in 1994, which competed with PDS to champion Kadazan/Dusun rights. However, in the wake of the entry into Sabah of the United Malay National Organisation (UMNO), a Malay based party, beginning with 1994 and later the 1999 state elections, it might have been seen expedient to solve this identity crisis by proposing Kadazandusun as an ethnic identity for Malaysians with either Kadazan or Dusun in their birth certificates. In recent months the term Kadazandusun has been used regularly to refer to these two groups. It is a more encompassing term and a clear example of the adoption of a label according to the consensus of the majority. This clearly underpins the fact that statutory definitions cannot be static but would have to eventually reflect the actual situation to be meaningful.

In Sarawak,'native' had been defined through legislation as early as 1920. There, a native was a natural born subject of His Highness the Rajah.[41] This was followed by the *Land Order* of 1933 and the *Land (Classification) Ordinance* 1948[42] which added to the definition 'any race which is now considered indigenous to the state of Sarawak

[41] S 2 of the 1920 Order No. VIII, 1920: *Sarawak Government Gazzette*, Vol. XVIII.

[42] Renamed *Land Ordinance*, (Revised Laws) 1948. This replaced the *Land Order* of 1933.

as set out in the schedule. The converse was, a non-native was any group not specified thereunder. Then the *Interpretation and General Clauses Ordinance*[43], the predecessor to the *Interpretation Ordinance* (Cap 1)[44] defined native as a 'British subject of any race which is now considered to be indigenous to the colony of Sarawak as set out in the schedule'.[45] In the latter, a native is any person who is a citizen of Malaysia and who belongs to any of the races now considered to be indigenous to Sarawak. Apart from those statutes the *Land Code* which took effect in 1958 consolidated the earlier statutes relating to land, incorporating the same definition. Suffice it is at this juncture to say that sections 8 and 9 of the said Code, read together with section 20 of *Native Court Ordinance* 1992 make it possible for a person to claim native status by being identified with a particular native community. Although race remains a predominant factor, other factors include elements of language, culture, association and assimilation.

B. Native personal law system

At the time when it was felt necessary to define 'native' there was increasing formalisation of law which was seen in the importation of principles of the common law of England and the doctrines of Equity subject to local customs and circumstances.[46] In Sabah, the *Civil Law Ordinance* 1938[47] and its successor the *Application of Law Ordinance* of 1951[48] provided for the application of English principles of common law and the rules of equity as administered in England at the date of the commencement of the Ordinance. Similarly in Sarawak, the *Sarawak Application of Laws Ordinance*[49] which repealed the *Laws of Sarawak*

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[43] Cap 2, Repealed by Ordinance No. 6/1953, Cap 1.

[44] Revised Laws of Sarawak 1958.

[45] The races listed are similar to that which are listed in Article 161(A) of the Constitution.

[46] See Hooker, *Native Law in Sabah and Sarawak,* [1979] MLJ xxx.

[47] No.2 of 1938.

[48] No.27 of 1951, later Cap 6, Laws of North Borneo.

Ordinance 1928, re-enacted the provision that the common law of England applied together with the principles of equity and statutes of general application. Such application shall be in force, 'so far only as circumstances of Sarawak and its inhabitants permit and subject to such qualification as local circumstances and native customs render necessary'.

It must be borne in mind that provisions to the same effect existed in other jurisdictions where the common law had been introduced by the British through colonisation. For instance, in the Straits Settlements, the *Royal Charters of Justice* of 1807, 1826 and 1855 all directed that English law was to be applied 'in so far as the religions, manners and custom of the inhabitants would permit'. Provisions to the same effect were made through the *Civil Law Ordinance* 1937, and the *Civil Law (Extension) Ordinance* 1955 in the Protected States of the Federated Malay States and the Unfederated Malay States respectively. In effect though, those Ordinances merely formalised the reception of English law principles which by then had already been accepted and applied by the courts before any provision had been made by statute. The application of English law principles was however subject to modifications to suit local circumstances.[50] The general approach taken by the courts during that period of British influence was reflected in Maxwell R's decision in *Chulas v Kolson*[51] when he said:

> The question of how far the rules of the law of England are applicable to races having religious and social institutions differing from ours is of occasional recurrences in this court...It has been repeatedly laid down as the doctrine of our law that its rules are not applicable to such races, when intolerable injustice and oppression

[49] Formerly Ordinance No.27 of 1949, now Cap 2, Revised Laws of Sarawak, 1958. Amended by G.N.S. 66/60 and F.L.N 179/65.

[50] See for example *Re Yap Kwan Seng's Will* (1924) 4 FMS Rep. 313, per Sproule J at pp 313-318.

[51] (1867) Leic 462.

> would be the consequence of their application...and where our law is wholly unsuited to the condition of the alien race living under it, their own laws and usages must be applied to them on the same principle and with the same limitations as foreign law is applied by our courts to foreigners and foreign transactions.[52]

The recognition of the local 'manners and custom' though not specifically defined, came to mean mainly family law. Judicial decisions led to the recognition of polygamous marriages of Muslim subjects[53] as well as Chinese and Hindu customary marriages on the basis that they were governed by their personal laws. The term personal law here denotes the body of rules applicable only to an individual, or group, with reference to his ethnicity or his religion. And based on the different 'manners and custom' of the communities within the plural society the distribution of property according to the different customary laws were also allowed. It may be surmised that it was this 'benevolent' approach that characterised the introduction of English principles of law in the Borneo states of Sabah and Sarawak as well. It should be noted however that section 3 of the *Application of Law Ordinance* 1951 in Sabah[54] and the *Sarawak Application of Laws Ordinance*[55] section 2, have the added provision that:

> in the exercise of their jurisdiction...all courts shall have regard to the laws and custom of the inhabitants of the state so far as they are not inhumane, unconscionable or contrary to public policy.[56]

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[52]Again in *Chou Choon Neoh v Spottiswood* (1869) 1 Ky 216, Maxwell CJ reiterated the same approach of "modification as are necessary to prevent them from operating unjustly and oppressively...".

[53]See *Ong Cheng Neo v Yap Kwan Seng* (1897) 1 SSLR Supp 1 at p. 3.

[54]No.27 of 1951, later Cap 6, laws of North Borneo.

[55]Formerly Ordinance No.27 of 1949, now Cap 2, revised Laws of Sarawak 1958. Amended by G.N.S. 66/60 and F.C.N 197/165. This Ordinance repealed the 1928 *Laws of Sarawak Ordinance* and re-enacted the same provision.

[56]Emphasis added.

Those provisions resonate the spirit of the repugnancy clauses used in the British colonies in Africa where in substance the courts

> Shall not deprive any person of the benefit of any law or custom existing in the colony or territories subject to its jurisdiction, such laws and customs not being repugnant to natural justice, equity and good conscience.[57]

Quite clearly, the underlying rationale was to render justice in the circumstances without being dictated by any rigidity of imperial law. The fact is that common law, in its 'religion, manners, custom' justification was uniquely able to take in the unwritten customary systems of Africa and Asia.[58] These systems became part of the common law subject to certain limiting clauses. A particular practice could be refused recognition on the grounds of repugnancy or that it was considered inhumane , unjust or offensive to the then prevailing cannons of morality or propriety.[59] The question that always remains in these instances is: who rightly decides the appropriate standard of public morality? Undoubtedly, the standard was one of English judicial morality. Be that as it may, such provisions effectively allowed for the recognition of the laws and customs of the local inhabitants in the form of their personal system of laws. Today, a provision to that effect is found in the *Native Court Ordinance* 1992, which states:

> S 6 (1) Subject to the provisions of this Ordinance, a Native Court shall administer and enforce only-
> (a) The native law and custom prevailing in the area jurisdiction of the court, so far as it is applicable and is not repugnant to natural justice or morality or is not, in principle, in conflict with the provision of any law in force in the state; and

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[57]See for example the *Gold Coast Supreme Court Ordinance* of 1863, Act No. 3 of 1863. See also Marasinghe, L, "Customary Law as an Aspect of Legal Pluralism", *supra.*

[58]Hooker, "Customary law in the Late 20th century: Lessons from the Past", Paper presented at the conference on Legal Pluralism and Indigenous Heritage, Kuching, Sarawak, November 11-12, 1997.

[59]See Empeni Lang, *supra,* for examples of certain practices that were felt offensive to the "proper" public morality.

(b) The provisions of any written law which the court may be authorised to administer or enforce.

Only natives may claim to be subject to native customary law as a personal system of law. The preceding section 5 makes it clear that all parties who are subject to the jurisdiction of the Native Court in cases arising from a breach of native law or custom should be subject to the same native system of personal law, or at least one party is a native. In cases relating to any religious, matrimonial or sexual matter, and where more than one native personal law is involved, the court may leave the parties to such remedies as they may have in other courts. That option is excercised also where it is likely to prejudice good relations between different communities, or lead to a breach of public order. Otherwise, in any criminal case of a minor nature, or *any customary law*[60] by whose custom the court is bound, the Native Court has jurisdiction. This raises the question as to what customary law is.

The term customary law is not a happy one. At the outset this must be differentiated from customary international law which is the foundation stone of the modern law of nations. Although both are often flexible or vague in nature, the latter being derived from what is generally adopted in the practice of states, is capable of constituting binding law. In this paper customary law or *adat* generally refers to accepted practices observed by a particular community to preserve the values or the beliefs of the society, the breach of which would subject a person to sanctions of the community. The same system of law may also be referred to as 'traditional law' or 'tribal law' in some jurisdictions. One salient feature of such systems is that they are for the most part derived from oral traditions and customs. But to what extent and which customs attain the force of law? Undoubtedly the norms that

[60]Emphasis added.

may be considered simply as social courtesies or proper behavior in a community would not be termed customary law. Different communities may have different yardsticks as to what is a serious breach of the communal values. For instance, some groups, notably the Ibans would consider breaches of certain *adat* as detrimental to the society and therefore punishable because the act or acts disrupt the spiritual and environmental equilibrium. It appears to be a subjective standard. What, if any, are the possible determining factors and what judicial criteria could be used for proof of customs? It has been said that under English law, there must be evidence that a custom is, among others, ancient, uninterrupted, uniform, constant, reasonable and acquiesced in.[61] Given the variety and fluidity of the *adat* however, those criteria may not be appropriate. One has also to bear in mind that much of customary law consists of oral tradition, except perhaps for Sarawak where efforts are made to codify the customary laws of the various groups. Perchance this would preserve the beneficial practices that would otherwise go into oblivion while giving them an element of certainty. This would also take the customary law into the realm of legislative and potentially straitjacket definitions.

One finds a glimpse of that desire for certainty and clear definition reflected in the Supreme Court decision in *Haji Laugan Tarki bin Mohd Noor* v *Mahkamah Anak Negeri Penampang*.[62] Hashim Yeop Sani SCJ, commenting on the approach to be adopted by the Native Court said:

> It is unfortunate that what are breaches against native law or customs are not set out clearly in the Ordinance to avoid unnececessary argument on the jurisdiction of the Native Court. The very first question for the Native Court to consider is whether a particular act or conduct amounts to a breach of native law or custom...

Underlying the sentiment expressed above is the need to see some form to the otherwise fluid system to prevent any excess of Native Court jurisdiction. It is undeniable that there is a need for some kind

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[61] Wu Min Aun, *Malaysian Legal System*, (2nd Edition) Longmans, 1999 p176.

[62] [1988] 2 MLJ 85.

of guideline. The emphasis must not however be to have a form that eventually distorts the essence.

An attempt at legislative definition in Sarawak as embodied in section 2 of the *Native Courts Ordinance* 1992 merely defines customary law as 'custom or a body of customs to which the law of Sarawak gives effect'. Given that Sarawak has had a long history of statutory recognition of personal law, section 2 of the Ordinance also defines a system of personal laws as 'the system of personal law recognised by the general laws of Sarawak as being applicable to members of such community, and includes any rules or customary laws and any such system which may refer the determination of any matter to another system of personal law'. Further, native system of personal law means the 'customary law applying to any community, being a community forming the whole or part of a native race specified in the First Schedule to the *Interpretation Ordinance*'. And while community means 'a group of persons subject to the same system of personal law', it is provided that 'if a customary law applies to different groups with divergences in customary law, each group shall constitute a separate community'.

Under the *Native Customary Law Ordinance* 1955 (now repealed), all customary laws gazetted therein became legal documents, thus crystalising what may have been mere customs, giving them legal status and inadvertently subjecting them to the same rules of precedent as that of common law. A code that is published is conclusive as to the customs of the native race in respect of which it was compiled . It is not suprising therefore to find that the said Ordinance also empowered the Governor in Council to amend any native system of personal law after consultation with the native chiefs. Today, this power to amend is retained in the *Native Customs (Declaration) Ordinance,* 1996. A code of native customs may be amended by the *Majlis Adat Istiadat Sarawak* (Council For Preservation of Customs) with the approval of the *Majlis Mesyuarat Kerajaan Negri* (the State Cabinet), where it appears that there have been errors in the code or its translation, or inadvertent omissions of any recognised custom in any code; or after consultation with the chiefs and headmen of the native community concerned, where such custom is considered obsolete and no longer

practised. In the foregoing circumstances, the *Majlis Adat Istiadat* may by order in the *Gazette* rectify an error, remove a custom that has since become obsolete or has been abolished, or include a custom that has been inadvertently omitted. Such a provision recognises that customary law is intrinsically fluid and when there is a need to, it must accommodate the changing realities in modern society. Once compiled and published however, 'its correctness shall not be questioned in any court of law whatsoever'.[63] Yet, ironically the same Ordinance goes further to provide that if any provision of the code should be repugnant to or is inconsistent with any written law, the latter prevails.[64] These seemingly conflicting provisions reveal the tension between the formalising process and the resulting crystalization of customary law and its preservation as a living, dynamic and fluid set of rules derived primarily from oral traditions. Nonetheless the question remains as to what factors would determine whether someone falls under the native personal law system.

In Sabah, the prerequisites appear to be quite specific. On the other hand, in Sarawak, there appears to be more room for determination by a particular community whom it considers 'qualified'. Apart from the general laws of Sarawak, determining factors for identification include customary rules. The Native Court is empowered to determine the question under section 20(1)(b) of the *Native Courts Ordinance*. Whether a person (whether native or otherwise) has become subject to a different personal law or has ceased to be subject to that personal law may be determined by conduct, or mode of life or by subsequent events. The implication is that it is possible to 'opt in and out' of a system of personal law by taking particular courses of conduct. It is possible for a person to become identified with a particular native community and be subject to that native system of personal law. This is significant in relation to inheritance matters, and especially relating to the capacity to hold native land. Only a native or one who is deemed to be a native, who is identified with a native community may hold or acquire rights or privileges over certain classes

[63] S7(1) *Native Customs (Declaration) Ordinance* 1996.

[64] S 9, *ibid.*

of land including native land.[65] The relevant sections of the *Land Code* to that effect state:

> 8. Save as provided in section 9-
>
> (a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land:
> (b) any agreement, purporting to transfer or confer any such right or privileges or which would result in such person enjoying any such right...shall be deemed to have been entered into for an illegal consideration...
>
> Section 9 states
>
> (1) Section 8 shall not be deemed to prohibit the acquisition by any non-native of any land to which the provisions of that section apply,...-
> (a) ...
> (b) ...
> (c) ...
> (d) where such non-native has been deemed to be a native, by the Majlis Mesyuarat Kerajaan Negeri, by notification in the Gazette, in respect of any category of dealing over Native Area Land as stipulated in the notification.

Notwithstanding the prohibition, if a person has become identified with a particular native community and is subject to the native system of personal law of such community, as provided under s 20(1) of the *Native Court Ordinance* 1992[66], he may acquire rights over native land. That section states:

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[65] An equivalent provision is found in s 17 of the Sabah *Land Ordinance*. Only a native is allowed to hold native customary land. There is however no specific provision that allows for identification with a native community for that purpose. A claimant has to fall back m S 2 of the *Sabah Interpretation (Detinition of Native) Ordinance*.

[66] *Supra*.

20. (1) A District Native Court, subject to section 28, shall have power to hear and determine –

(a) for the purpose of section 9 of the Land Code, the question whether any non-native has become identified with a particular native community and subject to the native system of personal law of such community;
(b) the question whether a person who is subject to a particular system of personal law (whether native or otherwise) has become or became, by virtue of subsequent events, or by conduct or mode of life, subject to a different personal law;
(c) the question whether a person subject to the personal law of a particular native community ceased or has ceased to be so subject.

(2) In determining any question under subsection (1) thereof –

(a) a District Native Court shall be entitled to take into consideration public opinion in the community which the person has become so identified, even where it conflicts with a strict application of the system of personal law of such community, and, unless such community is an Islamic community, may disregard the fact that the person in question was or is a Christian and that some modification of the system of personal law of such community is, was or may be required on that account;
(b) the testimony of responsible persons in the community, and the opinion of the assessors who are members of the community or of the Tuai Rumah assisting a District Native Court shall be acceptable evidence as to the public opinion of such community; and
(c) no person who is not a Muslim may be declared to have become identified with or to subject to the personal law of a native Islamic community.

(3) The jurisdiction conferred by this section may be exercised on the application of any person who is able to satisfy the Court that he has a pecuniary interest in the determination of any question which the Court is authorized to determine ... ,

To determine this question of 'being identified with the community' the factors that are to be taken into consideration include the public opinion of the community,[67] the testimony of responsible persons in the community, and the opinion of the community leaders. The emphasis on public opinion appears to be a clear determining factor when one considers s 20(2) which provides that such opinion of the community would be considered even when it conflicts with the strict application of a system of personal law of such a community. Although not expressly stated perhaps the requiremant of good conduct could be implied and indeed woven in under this limb.

Another question that arises is how much accepted customary practices would make a difference to the definition of a native. What level of identification with the community is required? Take for instance, the Kelabit customary practice of name change of the parents of a firstborn child. Parenthood changes the status of a couple and by custom they are to take on a common name or a new family name by which they would be known and addressed until the birth of a grandchild when they would yet again change their names to another name of their choice.[68] Each name change is done at a feast in which the whole community participates. It is by far the most expensive event to be undertaken by one single family. The community considers this to be the hallmark of a Kelabit which differs from any practice of the other ethnic groups. In cases of intermarriage with spouses from other communities, the couple is expected to go through the name change ceremony, thereby subjecting themselves to the custom of the community and to be identified with it. This would be part of the assimilation process that an outsider would go through and the community leaders would readily consider such an individual to be part of the community.

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[67] See *Native Court Ordinance* 1992, s. 20(2)(1).

[68] They discard their given names and take on a new family name, for eg, Dayang Meteri who married Agan Tadun now change their names to Tama (Father) Ngadtang Balang and Sina (Mother) Ngadtang Balang. For a detailed account, see Lucy Bulan and Robert Saging, A Kelabit Ethnography, *Sarawak Museum Journal*, (special edn), 1989.

While the fulfilment of such practice or customs may be considered as 'identification', without more, it is doubtful that it would entitle such a person to native rights under s 20 of the *Native Court Ordinance*. Such a provision should however make it possible for children of mixed marriages to claim an entitlement to native status where they can claim to be identified with the community. Be that as it may, since the implication of this section seems to be that an applicant would have to be living within the community it may pose difficulty for such children or issues who by virtue of being away from the physical community would find it difficult to have leaders of the community testify on their behalf as to their standing in the community.

C. Judicial interpretation of the term native

In Sabah and Sarawak, the jurisdiction to preside over matters of native customary laws rest in the Native Courts. It must be noted that before 1977 in Sabah and 1978 in Sarawak, Islamic law was administered together, and Malay customary law was administerd as part of the native customs.[69] With the establishment of the Syariah courts to deal with Muslim law matters, the Native Courts no longer have jurisdiction over parties who are Muslims as their personal law is no longer native customary law but Islamic law. Against that backdrop the judiciary in general has played an important and complementary role in the development of personal laws in Malaysia by bringing into play the concepts of natural justice and in some instances bringing in principles of private international law.

One of the earliest cases on this matter was *Liew Siew Yin & District Officer, Jesselton*.[70] In that case, the appellant applied for a certificate from the Native court to rank as a native. His father was Chinese and his mother Dusun. The issue was whether he had brought

[69] See the *Sabah Administration of Muslim Law Ordinance* 1977; *Sarawak Majlis Islam (Incorporation) Ordinance* 1954, as amended by the *Majlis Islam (Incorporated) Ordinance* 1978.

[70] N.C.A. No. 2 of 1959, see 1973: 4.

his case within s 2(1)(b) of the *Interpretation (Definition of a Native) Ordinance*. He had to satisfy the court that he was a person ordinarily resident in the colony; being and living as a member of a native community, and at least one of his parents was a native. The court felt he had satisfied two of the requirements of the sub-section, but had failed to justify a claim of being and living as a member of a native community. It was pointed out that he married according to Chinese custom, he had given his children Chinese names, and he had never paid poll tax. However, having noted that he had subjected himself to Chinese custom, the court proceeded to say that the main reason for his failure in this case was his residence in an area, which was not predominantly native. The presiding District officer went on to 'suggest' that if he should elect to take up residence in a predominantly native community and renewed his application, he might receive a favourable consideration. The legislation required him to fulfil the requirement of 'being and living as a native', meaning that he had to prove residence as well as assimilation into a native community. The court appeared to emphasize the issue of residence as the determining factor almost as if other factors were a matter of course, notably even after admitting evidence that he appeared to lean towards Chinese customs in organising the affairs of his life.

The case of *Ong Seng Kee v District Officer, Inanam*[71] involved another Sino-Kadazan. In that case the claimant lived in a Chinese-style house near Kampung Kapak and some of the claimant's children attended Chinese schools. The Native Court at Inanam accepted the evidence of the Orang Tua of Inanam that the appellant had interested himself and sometimes took part in native festivities and ceremonies in the village. The fact that he lived in a predominantly native area was an important determining factor.[72] Assimilation would appear to

[71]N.C.A. No. 28 of 1959, see 1973: 20.

[72]For the entertainment of such an application, the applicant has to fill the relevant forms I and II which are provided for that purpose. See Appendices A and B. The information that he has to furnish, include (i) his name and his father's name; (ii) the village and the district where he resided; (iii) the location of the native court; (iv) the name of his parents or ancestor and his/her residence or place of burial of such ancestor; and (v) documents relating to the Immigration Act that permit his residence, eg. Entry permit etc.

be seen as a matter of course with residence in a predominantly native area.

The case of *Datuk Syed Kechik bin Syed Mohd v Government of Malaysia & Anor*[73] was an interesting Federal Court case that considered the determination of native status. There, the court considered the provisions of the *Immigration Act* 1959/63 in relation to the *Interpretation (Definition of Native) Ordinance*, ss 2(1)(d) and 3(1)(b).

The applicant was a Malaysian citizen by operation of law. He was assigned to Sabah in 1965 as a political secretary, first in the Federal Ministry of Information and Broadcasting and later as secretary to Tun Mustapha, who became the Federal Minister of Sabah Affairs and subsequently, Chief Minister of Sabah. From the time of his entry into Sabah, he was continuously resident there. He applied for and was granted an Entry permit in 1967 to stay permanently in Sabah under s 10 of the *Immigration Ordinance*.[74] He was then admitted to the State Bar, practised law in Sabah and for all intent and purposes made Kota Kinabalu, the state capital his permanent place of abode.

He applied to the Native Court of Kota Kinabalu for a declaration of status as 'Anak Negeri'[75] or native of Sabah within the meaning of the *Interpretation (Definition of Native) Ordinance*. He was duly declared and admitted as an 'Anak Negeri' under s 2(1)(d) and s 3(1)(b) of the Ordinance on the basis that he was ordinarily resident in Sabah; he lived as and had been a member of a native community for a continuous period of five years immediately preceding his claim to be a native, was of good character, and was not limited by the

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[73] [1979] 2 MLJ 101.

[74] Now section 10 of *Immigration Act* 1959/63.

[75] Translates as 'son of the state'.

Immigration Ordinance.[76] He continued to live in Sabah, acquired property there, and was in fact appointed a Senator representing Sabah affairs. He had been issued a Sabah identity card in place of his old Peninsula Malaysia identity card.

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[76]The question of immigration was explained succinctly by Lee Hun Hoe CJ (Borneo) at p 106:

Article 9 of the Federal Constitution which provides that every citizen has a right to move freely throughout the federation and to reside in any part of the federation, is, however, subject to the special provisions of the immigration laws relating to the two Borneo States. Insofar as immigration is concerned, the Borneo States have full control. This arrangement was agreed before Malaysia and embodied in the Report of the Inter-Governmental Committee, 1962. Subject to certain exceptions, admission to the Borneo States whether from within or without Malaysia cannot be granted to any person without the approval of the State concerned. The report also makes clear that no person who resides temporarily in the State on account of his official duty as a federal officer shall be allowed to belong to the State or to be a citizen of Malaysia on account of connections with the State. The Immigration Act, 1963 which gives each of the Borneo States wide powers to control entry into and residence in the State can only as to those provisions, be changed with the concurrence of the State concerned. (See Article 161E). The Constitution permits the Borneo States through Federal law which has been entrenched, so that each State's concurrence is required for any change, to control entry into either State of citizens from elsewhere in Malaysia. Part VII of the Act covering sections 62 to 74 contains the special provisions for the Borneo States. We are concerned with some of these special provisions.

The Borneo States are, with certain exceptions, permitted to treat an ordinary Malaysian from Peninsular Malaysia seeking entry into either State as if he were a non-citizen. The exception laid down in Sections 66 to 68 are as follows:

1. He belongs to the State;
2. He is a member of the Federal Government, or of the Executive Council or Legislative Assembly of the State;
3. He is a Judge of the Federal Court or of the High Court;
4. He is a member of any public service of the Federation or of the public service of the State or of a joint public service serving in the State;
5. Wife and children under 18 of the above four categories or persons;
6. He enters the State for sole purpose of engaging in legitimate political activity;
7. He is one whose entry into the State is temporarily required by Federal Government in order to enable that Government to carry out its constitutional and administrative responsibilities.

Except for (7) the burden of proof that he is entitled to enter the State is on him.

When it came to his knowledge that he might be expelled from the State, he applied to the court for a declaration under s 66(1)(a) read with s 71(1)(a) of the *Immigration Act* 1959/63 that he was a person belonging to Sabah, a permanent resident and that by virtue of s 10 of the Act, he could not be deprived of that right by any authority, neither should his Entry Permit be lawfully cancelled under s 14 of the Act.[77]

Suffian LP, (whose decision was read by Lee Hun Hoe CJ, Borneo), held that he was entitled to the declaration that he sought, that he was a permanent resident in Sabah,[78] and his right to remain subsisted in the form of the Entry Permit issued to him. The Federal Court however said that the Entry Permit may lawfully be cancelled under s 14 of the Act. In his judgment, Suffian LP (as he then was) said:

> My conclusion that the applicant belongs to Sabah is reinforced by the declaration of the Native Court that he is a native of Sabah.
>
> Section 66(1)(a) of the Act does not use the expression "a native of Sabah", it uses the expression "belongs to [Sabah]". Does a native of Sabah necessarily, "belong" to Sabah for immigration purposes? The word "belong" is not defined by the Act, so its dictionary meaning applies, which is, according to the Concise Oxford Dictionary, to "be rightly a member of a club, coterie, household, grade of society, etc; be resident in, connected with". In my judgment, the applicant, having been declared by a Native Court of competent jurisdiction a Native of Sabah, is rightly a member of, resident in and connected with the State of Sabah, and thus "belongs" to Sabah. Who could belong to Sabah more than a Native of Sabah? To hold otherwise would be absurd.

---

[77] Note that section 71(2) provides:

> ... a person shall not be treated for the purposes of this section
>
> (a) as becoming a permanent resident in [Sabah] after not being one, until he has in a period not exceeding five years been resident in the State for periods amounting to three years; or
>
> (b) as being a permanent resident in [Sabah] at any time when under federal law he requires permission to reside there and has not got permission to do so granted without limit of time.

[78] By virtue of s 71(1)(b).

> The declaration that he was a native of Sabah was made following a proper application to a Native Court which, under subsection (2) of section 3 of Sabah Cap. 64, has exclusive jurisdiction to entertain and determine the application. By subsection (3) of the same section, the declaration may be appealed as if it were a proceeding or order of the court, and there is no suggestion that such an appeal was ever lodged and that the declaration had been quashed on appeal. Subsection (1) of section 2 provides that wherever the word "native", as a substantive, occurs in any written law in force at the commencement of the Ordinance - subject to exceptions that are not material - or in any written law coming into force after the commencement of the Ordinance, it shall mean four categories of persons, into one of which falls the applicant as declared by the Native Court. Finally - and this in my judgment is decisive - subsection (4) of section 3 of the Ordinance provides that the final decision on any application made under subsection (1) of section 4 "shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates". The decision of the Native Court declaring the applicant a native of Sabah is a final decision (it cannot now be reversed) and is thus conclusive evidence for the purpose of the Immigration law that he is a native of Borneo.

Lee Hun Hoe CJ (Borneo) in his decision also recognised and gave great weight to the Native Court's declaration of the applicant as a native. His Lordship said at p 108:

> I cannot in the circumstances refrain from alluding to the facts that the appellant has spent a great part of his life in Sabah, made a name for himself and contributed his service to the State. The significance of the declaration made by the Native Court that the appellant is an "anak negeri" of Sabah should not be overlooked. Such a declaration would only be made if the appellant was able to satisfy the court of his being a member of a people indigenous in Malaysia, his residence in Sabah, his living as a member of a native community for a continuous period of five years immediately prior to his claim and of his good character. Furthermore, another consideration was that his stay was not limited under the Immigration Ordinance. See section 2(1)(d) of the *Interpretation (Definition of Native) Ordinance* (Cap. 64). Section 3(2) of the Ordinance makes clear that the native Court shall have exclusive jurisdiction to entertain and determine

such application and to make such declaration. Section 3(3) of the Ordinance provides that there may be an appeal against such declaration as if it were a proceeding or order of the court. Any appeal against such decision would be governed by the provisions of the Native Courts Ordinance (Cap. 86).

As there has been no appeal the declaration is binding for section 3(4) of Cap. 64 states that such declaration made shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates. The implication is that appellant is considered a native in Sabah and is entitled to be treated as such under the immigration law. As a native he belongs to Sabah.

I would like to go back to the entry permit. As stated, the validity of the entry permit is not in issue. This means that the appellant's right to remain in Sabah is still subsisting. There is no doubt that the Director has power to cancel the permit in the circumstances set out earlier. Whether the circumstances exist depend not only on existing facts but also on facts which may come to light subsequently. However, the appellant's right to enter and reside in Sabah does not depend solely on the entry permit. Even if the entry permit were cancelled he can still claim to belong to Sabah by virtue of the Native Court declaration. I am not aware of any law which permits the State Government to expel a native belonging to the State or to extinguish his status which has been acquired according to law. Having regard to the law applicable, my conclusion is, on the undisputed facts, that the appellant belongs to Sabah.

The Native Court would exercise its jurisdiction to entertain and determine such application and the Federal Court would uphold the decision of the Native Court as regards the status of a native. This is clearly in line with the provisions of the Constitution, which gives a separate jurisdiction for both the Syariah and the Native Courts.[79] Datuk Syed Kechik's case represents a very special case. It is doubtful that such a decision may be passed by the courts in the ordinary course

[79]See Article 121A Federal Constitution and ss 5-10, *Native Court Ordinance*, 1953. For jurisdiction of the native courts, see also the cases of *Ongkong Anak Salleh v David Panggau Sandin & Anor* [1983] 1 MLJ 419; *Abdul Latif Avarathar v Lily Muda* [1982] 1 MLJ 72; also *Haji Laungan Turki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85.

of events. His relationship with the government of the day and the political setting of the time cannot be understated in making it possible for him to apply for the status of a Sabahan. Be that as it may, it does reveal the possibility of 'opening up' the native status under s 2 of the *Interpretation (Definition of Native) Ordinance.*

With effect from 1.1.1984, s 3(2) has been substituted. While the Native Court shall have exclusive jurisdiction to entertain and determine any such application and make a declaration as the case required, such a declaration may be subject to review and scrutiny by an appeal to the District Officer or a Board of Officers appointed by the Yang DiPertua Negeri[80] for the purpose.

In recent times there has been a tightening of the immigration rules in Sabah making it more difficult to claim resident status. Persons from West Malaysia as well as the neighbouring state of Sarawak have to apply for work permits before the immigration department would grant them a period of stay.[81] By implication the stringent control on entry requirements under the immigration laws would affect the possibility of a native status claim under s 2(1)(d) and s 3 of the Ordinance.

In Sarawak, the High Court in Kuching had the occassion to decide on this issue in the case of *Law Tanggie v Untong ak Gantang*[82]. The plaintiff was born of a Chinese father and Iban mother. The facts were[83] that the plaintiff alleged that he bought a piece of land which was held under native title. It was transferred into the name of his uncle the first defendant (who was Iban) as his nominee, until he attained or acquired a native status. No consideration was given for the transfer of the land. The plaintiff applied on the same day to be declared a native, by statutory declaration.[84] When he finally attained

---

[80] Previously Governor.

[81] *The Star*, February 1998.

[82] [1993] 2 MLJ 537.

[83] There were conflicting versions of what actually transpired between the plaintiff and defendant.

[84] See Appendix C - as an example of a statutory declaration that is required. The counsel for the defendant also argued on the point of the illegality of the arrangement.

the native status, he brought an action for the return of the land. The counsel for the defendant argued that it was an illegal transaction because it purported to deal with native land which was prohibited by existing law. The court decided *inter alia*, that where an arrangement or an attempt to deal in native land was made subject to compliance with the provisions of the *Land Code*, it was not null and void if such arrangement was not contrary to the provisions of the Code. It was, the court felt, subject to the plaintiff attaining majority and attaining native status. Therefore the defendant held the land on a resulting trust or on constructive trust for the plaintiff.

Richard Malanjum, JC recognised the fact that the plaintiff was identified as a native of Sarawak on 20 June 1979 although he executed his statutory declaration as early as November 1961, which was also signed by the first defendant and one Atok (the vendor of the land). He has thus complied with s 9(1)(b) of the Code. On the defendant's counsel's argument that the crucial period was 1961 when the arrangement between the parties took place, and at that point he had not satisfied s 9(1)(b) of the Code, the judge held that s 8 of the Code is not an absolute prohibition but a qualified one. In respect of the determination of native status, the High Court took the statutory declaration and the decision of the Native Court as conclusive. The factors that went in to determine the native status as they appeared in the statutory declaration of the plaintiff and the witnesses were: that while the father was Chinese, he had taken on a native name, was accepted as a member of the Sea Dayak (Iban) Community, lived as a Dayak, paid door tax as a Dayak, was buried in a Dayak cemetery and his children had carried on as Dayaks. The plaintiff's application claiming to be identified with the Iban community was approved by the District Officer[85] under the then s 13 (1) of the *Native Courts Ordinance* and s 9 of the *Land Code*.

It may be observed that unlike in Sabah there is no specific requirement or proof of good conduct as a prerequisite for qualification in Sarawak. It is also interesting to note that while the *Federal Constitution* stipulates that a person is a native who is "...of mixed blood

[85] See Appendix D.

deriving exclusively from those (indigenous) races", clearly the application of the relevant local statutes allow for a wider interpretation.

It is unclear whether at the time of the drafting the possibility of a wider interpretation being given to the provision was envisaged. It is food for thought to what extent other statutes should be allowed to place artificial or additional conditions and modify the constitutional definition. It may perhaps be justified if it is to confer a benefit rather than to withdraw or to extinguish a right.

D. Status of a Muslim Native

Under Article 161A of the Constitution, Malays in Sarawak are included under the term native. However since a Malay by legal definition is a Muslim, he would be governed by Islamic law as his personal law. An illustration of that is the case of *Matusin v Kawang*.[86]

There, a Malay man came from Brunei and had resided with the native Bajau community in Sabah for forty years. For all intents and purposes he was part of the community but was not considered a native for the purpose of the inheritance of his estate. It was held that the 'racial law' of Brunei was Muslim law, thus his estate was governed by Muslim law.[87] On the other hand, religion alone does not appear to be a criterion in the determination of native status. Thus a Chinese who had converted to Islam, and had discarded his Chinese name, was not entitled to claim native status solely on that ground.[88] Similarly, conversion to another religion by a native of Sabah and Sarawak does not affect his status as a native. The same applies to an Orang Asli person who changes his religion to say, Christianity.[89] It is pertinent to note however that although in general, a native may still choose to get married or divorced under native customary law or civil law, that option is not open to one who has embraced Islam for

[86] [1953] SCR 106, Lee 1973:1.

[87] S14 *North Borneo Procedure Ordinance* (No.1/1926).

[88] *Haji Mohd Nasaruddin bin Abdullah*, Case No.173/175, Kota Kinabalu Native Court.

[89] See *Aboriginal Peoples Act* 1954, s3(2).

he is automatically governed by Islamic law as his personal law. The relevant provision of the *Law Reform (Marriage and Divorce) Act* 1976 provides:

> S.3(3) This Act shall not apply to a Muslim or to any person who is married under Muslim Law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act,...
> (4) This Act shall not apply to any native of Sabah or Sarawak or any aborigine of West Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom unless-
> (a) he elects to marry under this Act:
> (b) he contracted his marriage under the Christian Marriage Ordinance; or
> (c) he contracted his marriage under the Church and Civil Marriage Ordinance.

Since the personal law of a Muslim native as regards marriage and divorce is Islamic law, it puts him under the jurisdiction of the Syariah[90] courts in that respect.

In a limited number of matters however, a Muslim native may still. fall under the jurisdiction of the Native Court as expressed under S 5 of the *Native Courts Ordinance* 1992. There, any breaches of native law or custom that fall under the *Ordinan Undang-undang Keluarga Islam* 1991 (Islamic Family Law Ordinance), together with rules and regulation made thereunder, or fall under the *Malay Custom of Sarawak* are excluded. An exception may however be found under sub-section 3 which provides that cases concerning disputes involving *land to which there is no title*[91] issued by the Land Office, and in which all parties are subject to the same native system of personal law shall be heard at the first instance before a chief's court, excercising jurisdiction in the area in which the land is situated. Such a case may

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[90]Clause (1A) of Article 121 of the Constitution which was introduced by the *Constitution (Amendment) Act* 1988 provided that offences under Islamic law are now solely the purview of the Syariah courts. See also *Sabah Administration of Islamic Law Enactment* 1977 (No 15/77); and s 5(1)(c) of the *Native Courts Ordinance* 1992.

[91]Emphasis added.

include muslim natives. Similarly, the jurisdiction of the Native Court under s.20 of the Ordinance, covers a muslim native, provided that no person who is not a muslim may be declared to have been identified with, or to be subject to the personal law of a native Islamic community.

V. Native status and territorial change

The cases and the various amendments in the legislation, clearly indicate that meanings and implications of ethnic identities may change in response to social, economic, and political situations. The concept of ethnic identity does not have to do purely with being born with an ethnic identity. In some instances, it could be learned, cultivated and embraced over a period of time. The clause under s 20 of the *Native Courts Ordinance* could allow for that by way of identification and assimilation, importing an element of choice by fulfilling all the required ingredients. Fiddler[92] suggests that people play or display an ethnic status to the hilt when it enhances survival and success, but when perceived as counter productive, the distinctions are minimised and other social identities more conducive to the attainment of survival and perpetuation are maximised.

Tan Chee Beng[93] has aptly described ethnic identity as being in many ways situational. When one uses the factors of 'living and being in the community or being identified with the community', or residence of a number of years as the prerequisites to a claim to native status whether under the *Sabah Interpretation (Definition of a Native Ordinance)* or the *Sarawak Native Courts Ordinance* 1992, how does an applicant who has since moved to an urban area identify with the community, unless he 'creates' a community around him? A stark example of the limitation of a rigid definition following those requirements occurred recently in the case of an Iban man who had resided in the state of Malacca, in Peninsula Malaysia. When he attempted to buy a *bumiputera-quota* shophouse as a term investment, the State

[92]See Fiddler, R. "Ethnic Identity in Multi-ethnic Societies"; *The Sarawak Museum Journal*, Vol. xl. No. 61 (New Series) Special Issue No. 4, Part I, 1989, pp. 21-25.

[93]Tan, *supra* n.30

Registrar of Land Titles rejected the memorandum of transfer and charge presented for registration on the grounds that he was not a *bumiputera*, although a native in Sarawak.[94] He submitted a statutory declaration that he was an Iban and that he has been investing in Amanah Saham Bumiputera or Bumiputera Unit Trusts which is reserved for *bumiputeras*. A clarification by the state legal adviser to the Melaka Tengah Land Office stated that the bumiputera status accorded to him in Sarawak need not necessarily be recognised in Malacca. It is submitted that such an interpretation would be contrary to the spirit of the Art 161A of the constitution. The constitutional definition of a native and *a fortiori* a *bumiputera* is not a territorial matter. Even if one subjected the instant case to a strict interpretation of Article 161A, or the 'mixed blood test' there was no question of 'mixed blood' or any disqualifying factors. To allow for different states to give their own arbitrary interpretations would give rise to confusion and raises a number of questions. Would a definition as laid down by the *Interpretation (Definition of the Natives) Ordinance*, or the *Land Code* ss 8 and 9 read together with s 20(1)(b) of the *Native Courts Ordinance* meet the need of the 'diaspora' natives or their children who have moved from the physical community which by and large would be in the rural interior? What of those children or issues who find themselves emotionally 'native' at heart, or who are aware of their cultural roots but are unable to prove all the ingredients required under the statutes by reason of employment circumstances which do not allow them to be with the community? It would be especially difficult for the children from mixed marriages to satisfy the prerequisites for the simple reason that many of them cannot and will not have the opportunity to live within the community. While it is true that the right to claim native customary land is subject to 'territorial' residence[95] and abandonment may extinguish such a claim, that does not deprive him of his general status as a native. He should not be deprived of the other incidences of that status in Sarawak or any other states of Malaysia. One recourse may be, for the Governor-in-Council to amend and widen the qualification for 'personal laws' to take into account these changes.

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[94] "Iban not seen as bumi in Malacca", *The Star*, Wednesday, May 21, 1997, p 10.

[95] See Francis Johen Adam, "Native Customary Land in Sarawak", *ante*.

While this may allow for an expansion of the definition to suit the realities of the times, great care should be taken so as not to jeopardize the position of those who may lay claim to native status.

VI. Conclusion

It is apparent that each definition of 'native' takes a different approach, with different levels of specificity. Perhaps it underscores the point that there is no stereotyped standard to define identity.

In the final analysis, it submitted that it is only proper that the people themselves should determine who they are. In line with that the United Nations' Cobo study[96], in defining the concept 'indigenous' had concluded that the indigenous peoples must be consulted about criteria such as ancestry, culture, and language that they consider valid, because it is their right to determine who is indigenous and who is not. To this extent, it is heartening to note that the provisions of the constitution as well as the various statutes are in keeping with the sentiment underlying that study.

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University of Malaya

[96] *Supra* n. 7.

* I am very grateful for the encouragement and very constructive comments given by my colleagues, Prof M P Jain and Associate Professor Peter Crook in the early drafts of this article. Any error or omission made are solely mine.

Appendix (A)

BORANG 1

PERMINTAAN KEPADA MAHKAMAH ANAK NEGERI OLEH ORANG YANG MENUNTUT AKAN MENJADI ANAK NEGERI

Saya, 1 .....
pada masa ini tinggal di 2 .....
dalam Daerah 3 .....
minta kepada Mahkamah Anak Negeri di 4 .....
untuk diumumkan mengikut peraturan di bawah Undang-undang Penerangan (Pengertian) Anak Negeri, bab No. 3(1)(a), (b), (c) dan (d).*

2. Maka saya menuntut-

*(a) bahawa 5 .....
adalah diakui oleh Undang-undang dan Adat Anak Negeri sebagai bapa/ibu saya 6 ..... anak

*(b) bahawa saya adalah seorang daripada kaum anak Negeri dan berkediaman sedemikian itu di 7 .....
(dan saya sudah duduk berkediaman sedemikian itu selama 8 ..... dan dalam masa itu kelakuan saya adalah baik)*

*(c) bahawa saya adalah seorang daripada orang

Suluk
Kagayan
Simonol
Sibuto
Ubian*

Orang-orang daripada bumiputera .....
Iaitulah seorang .....

(d) bahawa 9 .....adalah / telah menjadi seorang daripada kaum orang

Suluk
Kagayan
Simonol
Sibuto
Ubian*

Orang-orang daripada bumiputera Negeri Sarawak/Negeri Brunei,*yang tinggal/telah tinggal* di 10 .... (dan yang diketahui atau yang amnya telah diketahui telah dikebumikan (dikubur) di 11 .....)* di dalam Negeri ini;

(e) bahawa saya ada mempunyai 12.....
No.....haribulan .....
dikeluarkan di .....

.....
Tandatangan.

*Matikan mana-mana perkataan yang tidak berkenaan.

1. Nama dirinya dan nama bapanya.
2. Nama kampung dan tempatnya.
3. Nama daerah.
4. Tempat, di mana duduknya Mahkamah Anak Negeri.
5. Nama bapa atau ibu.
6. Nama nenek moyang.
7. Penerangan dan tempat berhubung dengan kaum Anak Negeri yang berkenaan.
8. Berapa lama masanya.
9. Nama bapa atau ibu.
10. Nama kampung, tempat dan daerah.
11. Nama kampung, tempat dan daerah di mana kuburnya berada.
12. Surat yang dikeluarkan kepadanya di bawah Undang-undang Kemasukan Orang-orang Asing (Immigration Ordinance).

Appendix B

BORANG II

PENGUMUMAN YANG DIBUAT OLEH MAHKAMAH ANAK NEGERI

Berhubung dengan Bab No. 3 daripada Undang-undang Penerangan (Pengertian) Anak Negeri, Cap. 64, dan berhubung dengan permintaan yang di-buat oleh .....untuk menjadi se-orang Anak Negeri.

Dalam Mahkamah Negeri di .....

Bahawasa-nya Mahkamah telah memereksa darihal permintaan yang di-buat oleh 1 ..... untuk diumumkan menurut Bab. 3 (2) daripada Undang-undang Penerangan (Pengertian) Anak Negeri dan telah didapati dengan jelasnya bahawa keterangan yang tersebut dibawah adalah benar:-

MAKA DENGAN INI MAHKAMAH MENERANGKAN

(a) bahawa 2 ..... adalah diakui oleh undang-undang dan Adat Anak Negeri sebagai anak Negeri sebagai anak .....

(b) bahawa 3..... ada, dan sedang berkediaman sebagai seorang daripada kaum Anak Negeri di 4 ..... (dan telah berkediaman dalam masa ..... dan dalam masa itu telah berkelakuan baik)*;

(c) bahawa 5 ..... adalah diakui sebagai seorang daripada kaum orang-orang

Suluk
Kagayan
Simonol
Sibuto
Ubian*

Orang-orang daripada bumi putera iaitulah seorang .....

(d) bahawa 6 ..... di akui/sudah di akui* sebagai seorang daripada orang

Suluk
Kagayan
Simonol
Sibuto
Ubian*

Orang-orang daripada bumiputera Negeri Sarawak / Negeri Brunei* yang tinggal / sudah tinggal* di-7.....
(yang diketahui atau yang am-nya diketahui telah dikebumikan di- 8 ..... dalam negeri ini.

Di-terbitkan di Mahkamah Anak Negeri di ....
pada ..... haribulan, tahun, 19 .....

Tanda tangan Ahli-ahli .....
Mahkamah Anak Negeri .....

Di-pereka dan didapati betul .....
Pegawai Daerah

.....(Haribulan)

*Matikan mana-mana perkataan yang tidak berkenaan

PENERANGAN

Appendix C

STATUTORY DECLARATION

I, Law Tanggie, aged 16 years, of Rh. Buren, Sg. Tapang, follow the occupation of student, hereby solemnly affirm that:-

(1) I was born of a Chinese father, Law Long Chuan, and a Sea Dayak mother, Lanchun anak Layun.

(2) My father, Law Long Chuan, was and to all intents and purposes a Sea Dayak and took the name of Mat.

(3) He was accepted as a member of the Sea Dayak Community of the area.

(4) I am no longer known as Law Tanggie anak Law Long Chuan, but as TANGGIE ANAK MAT.

(5) I wish that my name which appeared in my birth certificate No. A 19421 and my Identity Card No. S. 516342, can now be altered to TANGGIE ANAK MAT.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Act, 1835.

Declared by the said Law Tanggie at)-
Kuching this day of November,)
1961)

.....
Law Tanggie

Before me,

Magistrate of the Class,
Kuching, Sarawak

We, T.R. Untong ak Gantang and Atok anak Menyet, Sea Dayaks of Rh. Buren, Sg. Tapang, do hereby solemnly and sincerely declare jointly as follows:-

(1) Law Long Chuan became to all intents and purposes a Sea Dayak and lived as a Sea Dayak in the Sea Dayak village at Sg. Pungka and paid door tax as a sea Dayak and was known to the Dayaks as Mat. When he died he was still living as a Dayak and was buried in a Dayak Cemetary and his children carried on as Dayaks.

(2) the declaration made by Law Tanggie is true.

And we make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Acts, 1835.

Declared jointly by the said T.R. Untong ak Gantang and Atok anak Menyat at Kuching this day of November, 1961.

Appendix D

PEJABAT DAERAH,
.....
.....

Date : .....

Encik Law Tanggie @
Tanggie ak. Mat
Police Motor Transport Workship
Batu Kawa
Kuching

Tuan

I am pleased to convey the decision of the Native Chief's Court, Kuching Case No. 5/CON/NC/79 which approved your application claiming to be identified as Native of Sarawak subject to the native system of personal Law of the Iban Community under Section 13(1) (a) of the Native Courts Ordinance (Cap. 43, 1958) and under Section 9 of the Land Code (Cap. 81).

"HIDUP SELALU BERKHIDMAT".

Yours faithfully

For District Officer
Case Docket No.

Case Docket No. 5/CON/NC/79