DIRECTOR OF FOREST, SARAWAK & ANOR

v.

TR SANDAH TABAU & ORS AND OTHER APPEALS

Federal Court, Putrajaya
Raus Sharif PCA, Abdull Hamid Embong, Ahmad Maarop, Zainun Ali, A Samah Nordin FCJJ
[Civil Appeals No: 01-27-04-2015(Q), 01-30-04-2015(Q) & 02-42-06-2015(Q)]
20 December 2016

Land Law: *Customary land — Right to — Native customary rights ('NCR') — Whether common law recognised pre-existing NCR to land in Sarawak — Whether such rights could only be removed by clear and unambiguous words in legislation — Whether existing laws and proclamations only prescribed what natives might claim thereunder but did not reject pre-existing NCR to land*

Native Law and Custom: *Land dispute — Customary rights over land — Communal forest reserve land held under Iban native custom of "pulau" set aside within territorial domain of "pemakai menoa" — Land used for deriving food, medicines, wildlife and other forest produce by native respondents — Whether respondents had native customary rights ('NCR') to "pulau" land — Whether NCR extending only to cleared and cultivated "temuda" land*

These are three appeals before the Federal Court. In Civil Appeal No: 01-27-04-2015(Q) (No 27), the appellants as the Director of Forest, Sarawak and the State Government of Sarawak are appealing against the decision of the Court of Appeal dated 21 June 2013, which affirmed the decision of the High Court in Suit No: 21-2-2009 granting the respondents native customary rights ('NCR') over the claimed area of land situated in Kanowit-Ngemah, Sarawak. The respondents claimed NCR over a total area of 5,639 hectares (claimed area) as land over which they and their ancestors have acquired or inherited. They averred that their ancestors had been occupying the claimed area since early 1800s to this day and they have acquired NCR over the claimed area by virtue of their "adat" or custom of the Ibans termed as "pemakai menoa" and "pulau" ("pulau" is a term used to denote land under primary forest maintained under the Iban custom from which they derived food, medicines, wildlife and other forest produce), and also by virtue of the principle of common law. The appellants, during the trial had tendered as evidence a composite aerial photograph taken in 1951 and superimposed map of the area. It showed the land in the area as claimed by the respondents under NCR. Out of the total area of 5,639 hectares that the respondents claimed, the appellants conceded that the respondents have a valid native customary rights to an area of 2,802 hectares comprising cleared and cultivated land. However, the respondents' claim to the balance of the claimed area (the subject matter of this appeal) which was alleged to be "pulau" of the respondents was disputed by the appellants. In Civil Appeal No: 01-30-04-2015(Q) (No 30), the appellants

are the Superintendent of Lands and Survey, Sibu, Sarawak and the State Government of Sarawak, while in Civil Appeal No: 02-42-06-2015(Q) (No 42), the appellant is Rosebay Enterprise Sdn Bhd. The appellants in these appeals are appealing against the decision of the Court of Appeal dated 18 December 2013 affirming the decision of the High Court in Suit No: 21-1-2010, *inter alia*, in granting the respondent and the others that he represented, NCR over the entire lease which the State Government of Sarawak had granted to Rosebay Enterprise Sdn Bhd. In appeals No 30 and No 42, the respondent, an Iban by race, sued on his behalf as well as for all other proprietors, occupiers, holders or claimants of native customary lands, over lands at and around their longhouses, and the lands which were more particularly set up in Map "M" annexed to the statement of claim, covering an area of 11,822.26 hectares. The respondent together with the others he represented, alleged that the provisional lease of state land known as Lot 13 Pelugau Land District that authorities had granted to Rosebay Enterprise Sdn Bhd (3rd appellant) over 4,270 hectares, infringed the NCR which he and others he represented, had acquired since 1800s. In the Statement of Claim, the respondent and the others he represented sought various declarations that they had acquired and/or inherited native titles and a NCR over the area claimed. They also claimed that the State Authority was precluded from impairing or abridging their NCR and that acts of the State Authority in issuing the lease were unlawful, improper, unconstitutional and therefore null and void.

Thus, the central issue in all these appeals is whether the Iban customs of "pemakai menoa" through the establishment of "pulau" enable the respondents in the respective cases to claim a valid NCR over the land they claimed.

Held, (allowing the appeal by majority)

Per Raus Sharif PCA, with Ahmad Maarop FCJ concurring:

(1) The Court of Appeal's reliance on the decision of the Federal Court in *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh* ('*Madeli Salleh*') was an error both on facts and in law. Nowhere did the Federal Court in *Madeli Salleh* decide or even suggest that NCR may extend beyond the area which natives had cleared from virgin jungle and cultivated, to land within the virgin jungles not cleared for cultivation, wherefrom the natives derived for food and jungle produce. In *Madeli Salleh*, the custom that was recognised and determined by the Federal Court corresponds with the native custom known as "temuda", which was the custom of the native in acquiring right to land where the primary forest had been cleared and the land over the cleared area were cultivated and occupied by the natives. This custom has been mentioned and recognised by Statutes and Orders of Proclamation made by the Rajahs and subsequently by the Legislature of Sarawak, namely (a) The Rajah's Order 1875; (b) The Fruit Trees Order 1899; (c) The Land Order 1920; (d) The Land Settlement Ordinance 1933; (e) Secretariat Circular 1939; (f) Tusun Tunggu (Tusun Tunggu is a codification of Iban adat. In its English version, it is known as Sea Dayak (Iban) Fines 1936 (Revised 1952). It was revoked by the coming

into force of the Adat Iban 1993, which contains the Iban customary laws throughout Sarawak, based on the Tusun Tunggu (Revised 1952) and Dayak Adat Law Second Division 1963); and (g) s 5(2) of the Sarawak Land Code ('SLC'). (paras 51, 54 & 62)

(2) The words "having the force of law" in art 160(2) of the Federal Constitution are important as these words qualify the types of customs and usages which could come under the definition of law. These words must be taken to mean that not all customs or usages come within the definition and imply that there are customs and usages which do not have the force of law and hence not within the definition of law. (para 65)

(3) In the present appeals, the courts below should take into account the definition of customary laws under Sarawak State Laws which has been defined to mean "customs which the laws of Sarawak recognise". This must be taken to mean existing customs which have the force of law. There are customs which the Laws of Sarawak does not recognise and hence do not form part of the customary laws of the natives of Sarawak and remain merely as practices or usages of the native. They are not integral to the particular community in question and remain incidental. As such, they do not come within the definition of law under art 160(2) of the Federal Constitution. (para 66)

(4) What is essential as recognised by our courts is the custom of "temuda" which is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites. What the Laws of Sarawak had recognised is the custom or adat of "temuda" which was subsequently incorporated into "Tusun Tunggu". (paras 67-68)

(5) The decision of the Court of Appeal in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* ('*Nor Anak Nyawai*') is the correct statement of law. It is not only consistent with decisions of our courts in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* and *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors,* but also with other Commonwealth countries that native customary law over land are founded upon the concept of native's custom of continuous occupation. The position in *Nor Anak Nyawai* is consistent with the methods of creating customary rights under the SLC vide s 5 of the SLC. The principle propounded in *Nor Anak Nyawai* and *Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors* ('*Bisi Jinggut*') is parallel to the position under s 5(1) of the SLC. Based on subsection 2 of s 5 of the SLC , the underlying basis for the recognition of a particular native customary right to have the force of law is occupation of and its usage according to the customary practices of the community concerned. It was held in *Madeli Salleh* that occupation need not be actual occupation. As long as the natives have control over the land through supervision and continual visitation, it suffices. (paras 70, 71 & 74)

(6) The Court of Appeal had erred in failing to consider the basis of the various Orders of the Rajah that the rights to land could only be established by a native who had cleared the primary jungle for the purpose of farming or cultivation. Although common law recognises unregistered native customs, this is subject to the adherence of all tenets of customary land law. It is a well-established principle that having established that the custom of "pemakai menoa" and "pulau" exists, common law as developed in Malaysia further requires continued occupation and/or maintenance of the land in question. The native customs of "pemakai menoa" through the establishment of "pulau" falls short of the prerequisites as provided for under s 5(2) of the SLC and thus, do not have the force of law as envisaged under art 160 of the Federal Constitution. (paras 75-77)

Per Abu Samah Nordin (supplementary judgment):

(7) The view expressed by the Court of Appeal in *Nor Anak Nyawai*, in agreeing with the decision in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors*, that the claim should not be extended to areas where "they used to forage for their livelihood in accordance with their tradition" must be viewed in the light of what was said in *Sagong Tasi & Ors (supra)*. It must also be noted that although the High Court opined that the proprietary interests of the Orang Asli in their customary and ancestral lands were limited only to the area that formed their settlement and not to the area where they used to roam to forage for their livelihood in accordance with their traditions, the actual decision was based on the evidence that the plaintiffs had "continuously occupied and maintained" the land to the exclusion of others in pursuance of their culture and inherited by them from generation to generation in accordance with their customs. (paras 115-116)

(8) The SLC does not abrogate or extinguish the pre-existing rights of the natives to their NCR which had existed prior to 1 January 1958. Nor does it imposes a total ban for the future creation of NCR. It merely restricts the creation of NCR in future by imposing certain conditions. This is clear from the wording of s 5 of the SLC. The phrase "in accordance with the native customary law" in s 5(1) of the SLC is a clear restatement that the laws of Sarawak recognised the NCR of the natives that had existed prior to 1 January 1958. (paras 124 & 126)

(9) The issue of whether the plaintiffs have acquired NCR under the native custom known as "pulau" is a matter of evidence. The plaintiffs could not stake their claims solely on the mere assertion that the custom of "pulau" is part of their NCR without offering evidence that they had exercised their right by using the area of the disputed land to forage for food or forest produce, fishing or hunting. The burden is on the plaintiffs to prove their case on the balance of probabilities. On the totality of the evidence, there was no sufficient evidence to support the claims by the plaintiff, on the balance of probabilities. (paras 131 & 139)

Per Zainun Ali FCJ (dissenting):

(1) The definition of law under art 160(2) of the Federal Constitution includes "customs and usages having the force of law". This makes customary law an integral part of the legal system in Malaysia. Custom is a source of unwritten law. Customary law is a traditional common law rule or practice that has become an intrinsic part of the accepted and expected conduct in a community. To give validity to a custom, it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. (*Tyson v. Smith (refd)*). A custom must not be against humanity, morality and public policy. Therefore a custom upheld by the court must be reasonable. The court has a duty to examine whether or not a custom is reasonable having regard to the facts and circumstances of each case (*Nagammal v. Suppiah*, *Tyson v. Smith (supra)* and *Mercer v. Denne* (Court of Appeal)). (paras 223, 224, 229 & 230)

(2) Customs are *sui generis* and do not find their roots in statute. Customary rights do not owe their existence to statute. Instead they are recognised as a source of unwritten laws. The existence of NCR requires factual inquiry of the customs and practices of each individual community and not whether the customs appear in the statute book. Customs may be proven or established by calling witnesses acquainted with the native custom to testify on its existence (see *Sat anak Akum & Anor v. Randong anak Charareng* and *Nagammal v. Suppiah (supra)*). Customs will be found to exist if there is proof of the existence of the custom as far back as living witnesses can remember. In support, parties are also entitled to make references to public record and writers of indigenous law. (paras 233, 234, 235 & 270)

(3) Whilst the customary practices of "menoa" and "pulau" do not appear in any codified law under the Rajahs, their existence have been acknowledged in the reports and historical texts. The fact that their existence were not described in the orders of the Rajahs or statutes remains insignificant. By no means could their existence be denied. In the absence of any formal record of a customary practice, the respondents' case is fortified with the oral evidence of the witnesses. Thus, since it does not depend on any legislative, executive or judicial declaration, there is no reason why the absence of any legislative or executive declaration is taken to be fatal upon its status as law, or that it does not qualify having the force of law. (paras 244, 245 & 247)

(4) The pre-existence of rights under native laws and customs which the common law respects includes rights to land in the virgin/primary forests which the natives reserve for food and forest produce. The law in *Adong Kuwau (supra)* is that the common law recognises the rights and interests of the natives to live from the hunting of animals in the jungle and the collection of jungle produce to foraging land. Such rights are not limited to the right of occupation or possession of ancestral lands but may extend to any types of land used by their forefathers in accordance with their customs. (paras 194, 195 & 219)

(5) "Pemakai menoa"/"pulau" continues to exist from time immemorial in the community of Iban. Such custom is certain, reasonable and acceptable by the community of Iban. It must be recognised and upheld by this court. (para 313)

(6) There is no good reason why, as a matter of principle, there is an arbitrary limitation imposed upon the extent of this customs (that limitation being in the form of the need for "occupation"). Conceptually, it does not make sense that for recognition less than occupation, we require a standard of occupation to establish that right. As mentioned in *Delgamuukw v. British Columbia*, "unlike title, they are not a right to the land itself. Rather, they are a right to do certain things in connection with that land". (paras 196 & 198)

(7) The NCR claimed by the respondents in the customary practice of "pulau" is a site specific right to engage in a particular activity. Though they may not be able to demonstrate title to the land, they could show that these interests are those which demonstrate their particular rights in engaging in such activity for their livelihood. Their rights cannot therefore be taken away by the Government without compensation. The State's interest in these lands are subject to the respondents' natives rights over the land. (See the decision of the High Court in *Adong Kuwau (supra)*). (para 215)

(8) On balance, on the strength of the trial judge's determination, the existence of "pemakai menoa"/"pulau" is made out on the evidence. The evidence adduced by the respondents appears sufficient. But whether they have continued to practice this custom is a question of fact. The trial judge has decided upon it, thus the principal question this court should ask itself is whether or not the trial judge had made out such a material error in that regard. (para 218)

(9) The statement of law by the Court of Appeal in *Nor Anak Nyawai* that the rights of the natives is confined to the area where they settled and not where they foraged for food is a misconception. The decision is contrary to the common law recognition of the rights and interests of the natives over their ancestral lands. The Court of Appeal in *Nor Anak Nyawai* has misconstrued the law in *Sagong Tasi (supra)*. Nevertheless, *Nor Anak Nyawai* was correctly decided on its facts. The Court of Appeal in *Nor Anak Nyawai* did not disturb the High Court's finding on the Iban concept of "pemakai menoa" and that NCRs do not owe their existence to statutes. It affirmed the High Court's major legal conclusions that the common law respects the pre-existence of rights under native laws or customs and such rights may only be taken away by clear and unambiguous statutory language. However, the court in *Nor Anak Nyawai* had not considered the real character of native rights in the context of the Iban customary of "pemakai menoa" which comprises the settlement area, "temuda" and "pulau" in which evidence to their existence are required. (paras 308, 309, 311 & 312)

Case(s) referred to:

Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 3 MLRH 95 (refd)

Amodu Tijani v. The Secretary, Southern Nigeria [1921] 2 AC 399 (refd)

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 1 MLRA 12 (refd)

Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors [2013] 4 MLRA 621 (refd)

Calder v. A-G of British Columbia [1973] 34 DLR (3d) 145 (refd)

Jalang Paran & Anor v. Government Of The State Of Sarawak & Anor [2006] 5 MLRH 982 (refd)

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 1 MLRA 170 (refd)

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 1 MLRA 819 (refd)

Mabo & Others v. The State of Queensland [No 2] [1992] 175 CLR 1 (refd)

Mercer v. Denne [1905] 2 Ch 538 (refd)

Nagammal v. Suppiah [1940] 1 MLRH 529 (refd)

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 1 MLRH 304 (refd)

Nyalong v. The Superintendent Of Lands & Surveys Second Division, Simanggang [1967] 1 MLRH 60 (refd)

R v. Secretary of State For Foreign and Commonwealth Affairs; Exparte Indian Association of Alberta [1982] 2 All ER 118 (refd)

R v. Van der Peet [1996] 2 SCR 507 (refd)

Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 1 MLRH 161 (refd)

Sat anak Akum & Anor v. Randong anak Charareng [1958] SCR 104 (refd)

Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 1 MLRA 580 (refd)

Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh [2007] 2 MLRA 390 (refd)

Tyson v. Smith [1838] 112 ER 1265 (refd)

Yebet Saman & Ors v. Foong Kwai Long & Ors [2014] MLRAU 494 (refd)

Legislation referred to:

Aboriginal Peoples Act 1954, ss 6, 7, 10(1)

Adat Iban 1993, s 2

Civil Law Act 1956, ss 3(2), 6

Courts Of Judicature Act 1964, ss 78(1), 96

Federal Constitution, arts 13(1), (2), 160(2)

Land Order 1920, s 3

Sarawak Land Code, ss 5(1), (2)(f), (3), 6

Other(s) referred to:

RM Pringle*, Rajah's and Rebels', The Ibans of Sarawak under Brooke Rule, 1841-1941, Chapter 6, p 244*

Counsel:

For the appellants: JC Foong (Talat Mahmood Abdul Rashid & Mcwillyn Jiok with him); AG's Chambers, Sarawak

For the respondents: Baru Bian (Yogeswaran Subramaniam, Simon Siah SY Jen, Joshua Baru, Chua Kuan Ching & Cindy Chow Li Teen with him); M/s Baru Bian & Co

Watching brief: Paul Anyie Raja, Janting Antalai, Musa Dinggat, John Antau Linggang & Ali Basah Kesing

[For the Court of Appeal judgment, please refer to Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors [2014] 2 MLRA 186]

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This judgment is prepared and delivered pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Abdull Hamid Embong FCJ has since retired. My learned brother Ahmad Maarop FCJ had read this judgment in draft and agreed that this judgment be our judgment.

[2] My learned brother Justice Abu Samah Nordin FCJ had also read the judgment in draft and agreed with the conclusion arrived at and is writing a supporting judgment.

[3] My learned sister Justice Zainun Ali FCJ is dissenting and she is writing a dissenting judgment.

Background Facts

[4] There are three appeals before this court. They are:

(a) Civil Appeal No: 01-27-04-2015(Q) (Appeal No: 27);

(b) Civil Appeal No: 01-30-04-2015(Q) (Appeal No: 30); and

(c) Civil Appeal No: 02-42-06-2015(Q) (Appeal No: 42).

[5] In Appeal No: 27, the appellants are the Director of Forest, Sarawak and the State Government of Sarawak. They are appealing against the decision of the Court of Appeal dated 21 June 2013, which affirmed the decision of the High Court in Suit No: 21-2-2009 granting the respondents, native customary rights over the claimed area of land situated in Kanowit-Ngemah, Sarawak.

The respondents and 22 others they represent are Ibans by race and are natives of Sarawak.

[6] In Appeal No: 30, the appellants are the Superintendent of Lands and Survey, Sibu, Sarawak and the State Government of Sarawak, while in Appeal No: 42, the appellant is Rosebay Enterprise Sdn Bhd. The appellants in these appeals are appealing against the decision of the Court of Appeal dated 18 December 2013 affirming the decision of the High Court in Suit No: 21-1-2010, *inter alia*, in granting the respondent and the others that he represented, native customary rights over the entire lease which the State Government of Sarawak had granted to Rosebay Enterprise Sdn Bhd. The respondent and the others are Ibans and natives of Sarawak.

[7] Leave to appeal was granted by this court to the appellants in the three appeals on 11 March 2015 on identical questions of law, namely:

(a) Whether the pre-existence of rights under native laws and customs which the common law respects include rights to land in the virgin/primary forests which the natives, like the respondents and their ancestors (who are Iban by race), had not felled or cultivated but were forests which they have reserved for food and forest produce? (Question 1)

(b) Whether the High Court and the Court of Appeal are entitled to uphold a claim for Native Customary Rights to land in Sarawak based on a native custom (namely) pemakai menoa and/or pulau where:

(i) there is no proof that such custom was practised amongst the native communities (particularly amongst the Ibans) for the creation of rights to land prior to the arrival of the first Rajah in 1841;

(ii) such a custom was never reflected or recognised as having been practised by the native communities in relation to the creation of rights to land, in any of the Orders made and legislations passed by or during the Brooke era or by the Legislature of Sarawak; and

(iii) such a custom was never part of or recognised in Tusun Tunqqu and the Adat Iban 1993, which declared, pursuant to the Native Customary Laws Ordinance, the customary laws of the Iban community in Sarawak. (Question 2)

(c) Whether the Court of Appeal's decision in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 1 MLRA 580 that the rights of the natives is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and

nature of rights to land claimed under Native Customary Rights in Sarawak. (Question 3)

[8] The three identical questions posed in these three appeals concerned common issues. Therefore, at the commencement of the hearing, it was agreed by all parties that the appeals should be heard jointly.

[9] In Appeal No: 27, the respondents together with 22 others who they represented claimed native customary rights over a total area of 5,639 hectares (claimed area) as land over which they and their ancestors have acquired or inherited. They averred that they were the descendants of two persons, namely Jarop and Anggit Ak Mut, and that their ancestors had been occupying the claimed area since early 1800s to this day. According to them, they have acquired native customary rights over the claimed area by virtue of their "adat" or custom of the Ibans termed as pemakai menoa and pulau and also by virtue of the principle of common law.

[10] The appellants, during the trial had tendered as evidence a composite aerial photograph taken in 1951 and superimposed map of the area. It showed that the land in the area as claimed by the respondents under native customary rights measuring 5,639 hectares of cleared land and cultivated land area and approximately 2,712 hectares of land under primary forest. Thus, of the total area of 5,639 hectares that the respondents' claimed, the appellants conceded that the respondents have a valid native customary rights to an area of 2,802 hectares comprising cleared and cultivated land. However, the respondents' claim to the balance of the claimed area (the subject matter of this appeal) which was alleged to be pulau of the respondents was disputed by the appellants. Pulau is a term used to denote land under primary forest maintained under the Iban custom from which they derived food, medicines, wildlife and other forest produce.

[11] In Appeals No: 30 and No 42, the respondent, an Iban by race, sued on his behalf as well as for all other proprietors, occupiers holders or claimants of native customary lands, over lands at and around their longhouses, and the lands which were more particularly set up in Map "M" annexed to the Statement of Claim, covering an area of 11,822.26 hectares. The respondent together with the others he represented, alleged that the provisional lease of state land known as Lot 13 Pelugau Land District that authorities had granted to Rosebay Enterprise Sdn Bhd (3rd appellant) over 4,270 hectares, infringed the native customary rights which he and others he represented, had acquired since 1800s.

[12] In the Statement of Claim, the respondent and the others he represented sought various declarations that they had acquired and/or inherited native titles and a native customary rights over the area claimed. They also claimed that the State Authority was precluded from impairing or abridging their native customary rights and that acts of the State Authority in issuing the lease were unlawful, improper, unconstitutional and therefore null and void.

At The High Court

[13] Suit No: 21-2-2009 and Suit No: 21-1-2010 were heard separately by the same trial judge. In both cases, the trial judge held that the natives in the respective cases had acquired native customary rights and usufructuary rights over the claimed area through the Iban customs of "pemakai menoa" and "pulau". According to the trial judge, the mere fact that the Iban customs of "pemakai menoa" and "pulau" was not codified, did not mean that such a custom was no longer a custom, unless there were clear unambiguous words to repeal or reject the customs. It is her view that the native's custom of "pemakai menoa" and "pulau" was native customary rights having the recognition of law within the meaning of art 160 of the Federal Constitution.

[14] Accordingly, the trial judge in both cases decided in favour of the respondents by declaring that the respondents in their respective suits have acquired native customary rights over the respective claimed areas.

At The Court Of Appeal

[15] Against the decision in the above-mentioned civil suits, the appellants separately appealed to the Court of Appeal. The appeal against the decision of the High Court Judge in Civil Suit No: 21-2-2009 was heard by a panel comprising Mohd Hishamudin Yunus JCA, Abdul Wahab Patail JCA and Balia Yusoff JCA, while the appeal against the decision of Civil Suit No: 21-1-2010 was heard by another panel comprising Abdul Wahab Patail JCA, Clement Skinner JCA and Hamid Sultan Abu Backer JCA.

[16] The Court of Appeal dismissed the appellants' appeals in both suits albeit on different dates. The written judgment in both appeals were separately written by Abdul Wahab Patail JCA.

> However, we find that the judgment of the Court of Appeal in Appeal No: 27 herein is more germane to the overall issues and therefore forms the crux of the matter with regard to the three appeals before us. The Court of Appeal in Appeal No: 27 held the view that:
>
> (a) In the absence of clear and unambiguous words to repeal or reject pre-existing native customary rights established under pre-existing native custom, the common law applicable in Sarawak recognised native customary rights inherited by the respondents from their ancestors who established their rights in the early 1800s over the 2,715 hectares set aside in their "pemakai menoa" under the native custom of "pulau", and that right could not be taken without compensation.
>
> (b) Recognition of the pre-existing native customary rights of the respondents' ancestors to the land in their "pemakai menoa" was inherent, for although the Brookes assumed sovereignty in 1841, at no time were the natives conquered and their lands

and properties confiscated in war. There was a clear distinction between assumption of sovereignty and title to land. The sovereign right to title within the state was not absolute but subject to unconfiscated pre-existing rights.

(c) The legislative and administrative orders, proclamation and statues set out what natives could claim under those laws. If there was nothing in those laws that recognised native customary rights to land, it was equally true there was nothing in clear and unambiguous language that rejected native customary rights to land as to what was the status of native customary rights acquired before the arrival of the Brookes who held sovereignty between 1841 and 1946 British rule in the State of Sarawak in Malaysia.

(d) There was no reason to hold that the claim over the area of 2712 hectares, as "pulau", was not *bona fide*. It had been conceded by the appellants that the respondents had valid native customary rights to the 2,802 hectares area from occupation by their ancestors in the 1800s. It was thus safe to conclude that the "pulau" area adjoining it was likewise established in the 1800s by their ancestors.

At The Federal Court

Submissions

[17] The learned counsel for the appellants, Dato' JC Fong in his submissions journeyed through history starting with the white Rajah's edicts on native customs and rights over land until the promulgation of the present Land Code and the Adat Iban 1993. According to him, "pemakai menoa" and "pulau" were not practices of the Iban custom that had the sanction of law. His argument is that only "temuda" or land cleared for farming before 1958 without permit would qualify as native customary rights to land.

[18] Arising therefrom, Dato' JC Fong submitted that "pemakai menoa" and "pulau" are practices or usages which the laws of Sarawak had never recognised. It does not have the force of law in Sarawak and hence, could not come within the definition of law under art 160 of the Federal Constitution. He further submitted that the customs of "pemakai menoa" and "pulau" did not appear in the "Tusun Tungsu" or in the Adat Iban Order 1993. On the contrary, the custom of felling or clearing virgin jungles and cultivating the cleared area to create rights over land in accordance with the custom or adat known as "temuda" had been recognised by Statute and Orders or Proclamation made by the Rajah and subsequently by the Legislature of Sarawak. He made reference to the Rajah's Order 1875, The Fruit Trees Order 1899, The Land Order 1920, The Land Settlement Ordinance 1933, Secretariat Circular 1839 and s 5(2) of Land Code.

[19] Dato' JC Foong further submitted that the Court of Appeal's reliance on common law, to sustain the respondents' claim of 2,712 hectares of land within the primary forest which they had not felled or cleared for cultivation, was a grave error of law and a mistaken application of the well-established legal principles enunciated in cases of *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal (supra)* and *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 2 MLRA 390. Dato' JC Foong emphasised that common law cannot be invoked for the protection and enforcement of rights which are not created under native laws or in accordance with customs which the laws of Sarawak have recognised.

[20] The learned counsel representing Rosebay Enterprise Sdn Bhd, the appellant in Appeal No: 42, adopted the submissions advanced by Dato' JC Foong. The learned counsel urged this court to set-aside the decision of the Court of Appeal in declaring that the respondents' claim to have native customary rights over the land that had been leased by the Government of Sarawak to Rosebay Enterprise Sdn Bhd.

[21] The learned counsel for the respondents, Mr Baru Bian submitted a diametrically opposed view. He submitted that the Court of Appeal rightly concluded that the Ibans who are natives of Sarawak are entitled to claim native customary rights to land based on their custom of "pemakai menoa" and "pulau" as there is clear evidence that such rights existed before the arrival of the first Rajah in 1841. He emphasised the fact that the custom of creating and claiming an area referred to as "pemakai menoa" and "pulau" had been in existence and practice by the natives of Sarawak in particular the Ibans since time immemorial. According to him, the terms "communal" rights had been used to denote the concept of "pemakai menoa". In the Sarawak Land Code, the term communal is used but not defined. According to him, the term communal used in the Land Code referred to the same concept of Iban's "pemakai menoa".

[22] Mr Baru Bian further submitted that the natives rights to the foraging area was not only confined to the area the Ibans had cleared and settled. In support, he referred to writings and research papers by eminent writers to highlight the historical aspects of the custom of "pemakai menoa" and "pulau". According to the learned counsel, this adat or custom of the Iban should be accorded recognition under art 160 of the Federal Constitution as "custom or usage having the force of law in the Federation or any part thereof".

[23] Mr Baru Bian's stance was that the customary rights at common law exist independently of those rights under written law but should nonetheless be construed in a complementary manner with written law. He submitted that the Malaysian Courts respect the pre-existing customs and usages relating to land, though such rights may be taken away by clear and unambiguous words contained in the legislation. In support, he referred to us the cases of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 1 MLRA 819, *Kerajaan Negeri*

Johor & Anor v. Adong Kuwau & Ors [1998] 1 MLRA 170 and *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh (supra).*

[24] With regard to the observation of the Court of Appeal in *Nor Anak Nyawai*, Mr Baru Bian's stance was that the said decision was short of sound legal reasoning. He submitted that the Court of Appeal in *Nor Anak Nyawai* failed to appreciate the concept of customary land rights at common law as developed by the Malaysian Courts. He further submitted that the Court of Appeal in *Nor Anak Nyawai* did not provide any legal reasoning for its purported exclusion of customary land rights at common law in respect of roaming and foraging areas except to say that "otherwise it may mean that vast areas of land could be native customary rights simply through assertions by some native and they and their ancestors had roamed or foraged the areas in search offood". He submitted that this justification appeared to border on policy making, on areas principally beyond the realm of the judicial arm of the Government. He also submitted that the purported "floodgates" justification to limit customary claim was unfounded given that mere "assertions" by native that they and their ancestors had roamed and foraged land would be unlikely to form the basis of a successful customary rights claim.

[25] Mr Baru Bian also submitted that "customary rights do not owe their existence to statutes" and the practice and usage of each individual community is a question of fact. Thus, according to him, there is no cogent legal reasoning to arbitrarily exclude hunting and foraging areas from a customary land rights claim unless such hunting and foraging activities do not form part and parcel of the particular indigenous communities' occupation and usage of their customary lands. According to Mr Baru Bian, there is ample evidence of the Iban custom of "pemakai menoa" and "pulau" and the respondent's occupation of the disputed land for this customary purpose.

Findings

[26] As stated earlier, these appeals concern claims by the respondents, who are Ibans by race and are natives of Sarawak, for native rights on land based on the Iban customs of "pemakai menoa" and "pulau". The appellants disputed the claim contending that the Iban customs of "pemakai menoa" and "pulau" are practices or usages which the law of Sarawak had never recognised. What is recognised is the custom of felling and clearing of virgin jungle and cultivation of the cleared area to create rights over land. This custom or adat is known as "temuda".

[27] The terms "temuda", "pemakai menoa", and "pulau" were extensively discussed by the Court of Appeal in Appeal No: 27. What emerged from the discussion is simply this; "temuda" denote the native custom of cultivating an area; "pulau" denote the native custom of setting aside and maintaining an area under primary forest from which they derived food, medicines, wildlife and other forest produce; and "pemakai menoa" denote the native custom of

demarcating an area by the native community, both cultivated area and area set aside.

[28] Thus, the central issue in these appeals is whether the Iban customs of "pemakai menoa" and the establishment of "pulau" enable the respondents in the respective cases to claim a valid native customary rights over the land they claimed.

[29] Claim for native rights over land had been adjudicated by our courts in a number of cases. The first case which decided on this issue is the case of *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors (Adong)*. In *Adong*, 52 plaintiffs were representatives and heads of Orang Asli families living around Sungai Linggui catchment area in the State of Johore. The defendants were the State of Johore and its Director of Lands and Mines. In that case the defendants had acquired a total of 53,273 acres of land for the purpose of constructing a dam to supply water to the State Government of Johore and the Republic of Singapore. The plaintiffs then claimed the compensation that Singapore had paid to the State Government of Johore on the grounds that the lands within the vicinity of Sungei Linggui were their traditional and ancestral lands upon which they depended for their livelihood. They claimed the rights to the lands both under common law and statute, as well as property rights under the Federal Constitution.

[30] The Johore High Court declared that the plaintiffs, their families, and their ancestors were the native inhabitants of the disputed area. This, in combination with their continuing dependence on the produce of the area, gave rise to a common law right to move freely about the land and live off its produce. The High Court held that the characterisation of native title thus did not amount to an interest in the land itself, but rather a usufructuary interest that was held to be "a proprietary right protected by art 13 of the Federal Constitution which mandates that all acquisition of proprietary rights shall be compensated".

[31] The High Court accepted into evidence various historical and judicial documents, which established that the plaintiffs had inhabited or occupied the area since time immemorial. The learned judge surveyed the state of native title law in various common law jurisdictions from North America, Africa and India, and finally adopted the Australian High Court's decision in *Mabo (No 2)* [1992] 175 CLR 1.

[32] In addition to the recognition of common law native title, the Johore High Court also declared that the Orang Asli had a statutory right to the land under the Aboriginal Peoples Act 1954 (the Act). The court declared that the common law and statutory rights enjoyed by the Orang Asli are 'complementary' and should be considered 'conjunctively'. Sections 6 and 7 of the Act provide for the creation of areas for the exclusive use of the Orang Asli. Under s 10(1), the Orang Asli also have the right to 'continue to reside' in a Malay Reservation Land. The High Court was of the opinion that s 10

evinced a legislative intention to "allow the aboriginal people to lead the type of life they have always led".

[33] Accordingly, the High Court held that the plaintiffs being the aboriginal people of this country, were seized of common law rights over land and were entitled, by reason of art 13(1) of the Federal Constitution, to receive a fair and reasonable compensation where such rights were deprived by state action.

[34] The Court of Appeal entirely agreed with the views expressed by the High Court Judge. The Court of Appeal held that:

> "'the aboriginal peoples' right over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial."

[35] In further explanation of the term native title, the Court of Appeal held that although in the general sense, title denotes a document of title, native title consists not of a document of title, but a right acquired in law. The court gave a wide interpretation to proprietary rights under the Federal Constitution, and held that the plaintiffs' rights were proprietary rights protected under art 13. Their right was, however, a right to the produce of, but not a right to the land. Thus, the holders of the title had no right to convey, lease out or rent the land. Nevertheless, deprivation of the rights by the defendants without compensation was unlawful.

[36] The *Adong* case went on appeal to the Federal Court. The court dismissed the appeal. However, no written judgment was released, ostensibly because the court agreed entirely with the reasoning of the High Court and the Court of Appeal.

[37] Another landmark case on the same issue is the case of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors (Sagong)*. The case arose from the construction of the Kuala Lumpur International Airport in Sepang, Selangor. In *Sagong*, the plaintiffs were Orang Asli families of the Temuan tribe evicted from a strip of 38,477 acres of land running through their gazetted aboriginal reserve, as well as other lands they customarily occupied. The land was situated at Kampong Bukit Tampoi, Dengkil, Selangor and was classified as an aboriginal area or aboriginal inhabited place. In March 1996, the said land was acquired for the purpose of the construction of a portion of a highway to the Kuala Lumpur International Airport.

[38] In *Sagong*, the plaintiffs based their claims on their rights under common law, statute and the Federal Constitution. At common law, they claimed native title and usufructuary rights over the land based on customs. According to them, the land was customary and ancestral land occupied by them and their forefather for generations; hence, they had customary and proprietary rights

in and over the land. Under statutory law, they claimed their rights under the Aboriginal Peoples Act 1954 (the Act). Under the Federal Constitution, they claimed proprietary rights on the land and alleged that the State of Selangor, the acquiring body had breached its fiduciary duty.

[39] The High Court in deciding in favour of the plaintiffs, *inter alia* held that:

> "I follow the *Adong* case, and in addition, by reason of the fact of settlement, I am of the opinion that based on my findings of facts in this case, in particular on their culture relating to land and their customs on inheritance, not only do they have the right over the land but also interest in the land.
>
> I am fortified in my view by the leading Privy Council case of *Amodu Tijani v. the Secretary, Southern Nigeria* [1921] 2 AC 399 ('the *Amodu* case'), which was relied on by the High Court in the *Adong* case though the issue of settlement did not arise in the case.
>
> Accordingly, the Privy Council relied upon a report on the character of the tenure of land among the native communities in West Africa which stated that all members of the native community had an equal right to the land although the headman or the head of the family had charge of the land, and in loose mode of speech is sometimes called the owner who held the land for the use of the community or family, and the land remained the property of the community or family. The same can be said of the character of land tenure and use amongst the Temuan people based on the facts as found. Further, the character of proprietary interest of the aboriginal people in their land as an interest in land and not merely an usufructuary right can be gathered from the following features of the native title as decided by the courts:
>
> (a) it is a right acquired in law and not based on any document of title (see the *Calder* case, followed in the *Adong* case at p 428F);
>
> (b) it does not require any conduct by any person to complete it, nor does it depend upon any legislative, executive or judicial declaration (see Brennan CJ in the *Wik Peoples v. The State of Queensland & Ors* [1996] 187 CLR 1 ('the *Wik Peoples* case') at p 84, followed in the Malaysian case of *Nor Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 1 MLRH 304.
>
> (c) native title is a right enforceable by the courts (see Brennan CJ in *Wik Peoples* case at p 84);
>
> (d) native title and interest in aboriginal land is not lost by colonisation, instead the radical title held by the sovereign becomes encumbered with native rights in respect of the aboriginal land (see *Mabo No 2*, headnotes at p 2);
>
> (e) native title can be extinguished by clear and plain legislation or by an executive act authorised by such legislation, but compensation should be paid (see *Mabo No 2*, headnotes at p 3); and
>
> (f) the aboriginal people do not become trespassers in their own lands by the establishment of a colony or sovereignty (see *Ward & Ors (on behalf of*

the Miriuwung and Gajerrong People & Ors v. State of Western Australia & Ors [1998] 159 ALR 483 at p 498, lines 43-45).

> Therefore, in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land. However, this conclusion is limited only to the area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of the settlement and its size, it is a question of fact in each case. In this case, as the land is clearly within their settlement I hold that the plaintiffs' proprietary interest in it is an interest in and to the land."

[40] The decision of the High Court was affirmed by the Court of Appeal and subsequently by the Federal Court.

[41] The above two cases clearly established that our courts respect the natives pre-existing custom and usage to land. In *Adong*, the court granted native rights over the land but not rights to the land. This mean that natives have the right to move about freely on the land without interference and to live from the produce of the land, but could not convey, lease out or rent the land to others. However, in *Sagong*, the court extended native rights to include ownership of the land itself. But the court qualifies it by stating that such proprietary interest is limited only to land within their settlement.

[42] Another case, which discussed the same issue is the Sarawak case of *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal (Nor Anak Nyawai)*. In that case, the disputed area was only a portion of the area of land claimed by the plaintiffs to be under native customary rights. In term of acreage, the total area claimed by the plaintiffs to be under native customary rights was 18,925 acres while the disputed area was 1,725 acres. The balance 17,227 acres was not disputed by the defendants as being under the native customary rights. Over the disputed area, Forest Timber Licence was issued and logging operation were undertaken by the licencees. The plaintiffs took a representative action against the land alienating authority staking their claim on the disputed area that they had acquired native customary rights. The plaintiffs' claim against the licencees was that they had trespassed and damaged their native customary land due to the presence of contractors engaged to clear the area. Aerial photographs of the disputed area were tendered to show that the disputed area was covered with jungle in 1951.

[43] The High Court Judge found that the plaintiffs have established their native customary rights over the disputed area. Ian Chin J held that the disputed area fell within the boundaries of the longhouse, occupied and accessed by the plaintiffs' ancestors for hunting, fishing and collection of forest produce in exercise of their native customary rights. The learned judge further held that this right was passed down through the generations. Each claimant's rights arose by virtue of being a member of a community in lawful occupation and possession of the claimed lands. The learned trial judge further held that the

customs presently practised were the same customs practised by the plaintiffs' ancestors. Evidence of present occupation was, the court held, proof of past Iban occupation of the said land. The learned trial judge made references to other customary rights of the Iban. Beyond the rights to clear virgin jungle for cultivation, which formed "tanah umai" within the "pemakai menoa", they could access the lands for hunting, fishing and collection of forest produce.

[44] The learned trial judge chronicled the extensive history of the regulation of customary land use and occupation, starting with the Rajah's Orders from 1863, 1875, 1899, 1921, 1931, the subsequent Land Settlement Rules 1934, the Land (Classification) Ordinance 1948 and the Land Code 1958. References were also made to other legislation, including the Native Courts Ordinance of 1955 and its successor in 1992. The learned trial judge concluded that the 'pre-existing rights' had not been extinguished by the legislation.

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

[46] The learned trial judge also held that the 'native customary rights of an Iban to do things associated with the terms "temuda", "pulau" and "pemakai menoa" have not been abolished but survived through the Brooke Orders and Ordinances of the colonial period up to the present.

[47] The decision of learned trial judge was however set-aside by the Court of Appeal. The Court of Appeal noted that the common feature as established in *Adong* and *Sagong* which forms the basis of claim for native customary rights is the continuous occupation of land. Hashim Yusof JCA (as he then was) speaking for the Court of Appeal said it in the following words:

> "Further we are inclined to agree with the view of the learned trial judge in *Sagong Tasi & Ors* that the claim should not be extended to areas where "they used to roam to forage for their livelihood in accordance to their tradition.

> Such view is logical as otherwise it may mean that vast areas of land could be under native customary right simply through assertions by some native that they and their ancestors had roamed or foraged the areas in search of food".

[48] Thus, the question before us is whether the two panels of Court of Appeal in the present appeals was right in extending the native customary rights of the respondents over land to include primary forest where the natives used to roam to forage for their livelihood according to their tradition or custom known as "pulau".

[49] As stated earlier, the Court of Appeal in Appeal No: 27 held that the respondents native custom of "pulau" constituted a valid native customary rights to land. Abdul Wahab Patail JCA said it in the following words:

> "We conclude in the absence of clear and unambiguous words to repeal or reject pre-existing natives customary rights established under pre-existing native custom, common law applicable in Sarawak recognises the native customary rights inherited by the respondents from their ancestors who established the rights in early 1800s over the 2712 hectares as set aside in their pemakai menoa under the native custom of pulau, and that right cannot be taken away without compensation."

[50] In support of the above view, Abdul Wahab Patail JCA referred to the Federal Court's decision of *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh (Madeli Salleh)* where Arifin Zakaria FCJ (as he then was) held:

> "The CA in *Superintendent of Lands & Surveys Bintulu & Ors v. NorAnak Nyawai & Ors and Another Appeal* [2005] 1 MLRA 580, endorsed the view of the learned judge in relation to native customary rights in that the common law respects the pre-existence of rights under native laws and customs though such rights may be taken away by clear and unambiguous words in a legislation. By common law, the Court of Appeal must be referring to the English Common Law as applicable to Sarawak by virtue of s 3(a)(c), Civil Law Act 1956."

[51] With respect, we are of the view that reliance by the Court of Appeal on decision of the Federal Court in *Madeli Salleh* was an error both on facts and in law. The facts and issues decided by the Federal Court in *Madeli Salleh* were totally different from the cases in the present appeals. The facts in *Madeli Salleh* are these. The plaintiff instituted an action seeking declarations, *inter alia*, that the plaintiff was at all material time a licensee under native customary rights of all that parcel of land situated at Miri/Pujut Road, measuring 6.00 acres in area, and forming part of Lot 660 Block 8 Miri Concession Land District. The plaintiff alleged that the defendants' act in declaring the said land as a park and later developing it into a school, constituted a wrongful interference with the plaintiff's enjoyment of his native customary rights. According to the plaintiff, for many years prior to 1 January 1958, his father and later himself had acquired and exercised native customary rights over the said land by clearing, occupying and planting rubber trees and later fruit trees. Thus, the plaintiff's claim was rooted on long and continuous occupation of the said land.

[52] In their defence, the defendants contended, *inter alia*, (a) that the plaintiff had not acquired native customary rights over the said land as the said land was an ex-Shell Concession Area and as such no customary rights is capable of being created thereon; (b) that following from (a), the extinguishment of the plaintiff's customary rights does not arise; (c) that the gazette notification of 24 December 1982 was proof of the fact that the said land being a Government Reserve for the purpose of a park; (d) that the development of the said land into a school was proper and in accordance with law, (e) that the declaration of the said land as a Government Reserve was not in breach of natural justice nor in violation of art 13 of the Federal Constitution; (f) that the 2nd defendant had not lost its rights and title to the said land or such rights and title had not been extinguished by reason of the plaintiff's occupation and/or possession of the said land.

[53] The plaintiff's claim was dismissed by the High Court. The Court of Appeal reversed the findings of the High Court and therefore allowed the plaintiff's claims which was subsequently upheld by the Federal Court.

[54] We have carefully read the judgment of the Federal Court in *Madeli Salleh*, and found that nowhere did the Federal Court decide or even suggest that native customary rights may extend beyond the area which natives had cleared from virgin jungle and cultivated, to land within the virgin jungles not cleared for cultivation, wherefrom the natives derived for food and jungle produce. In fact that was not the issue before the Federal Court. The issue before the court was whether common law respects the pre-existence of rights of the plaintiff under native law and customs of the plaintiff's occupation of the said land. The Federal Court answered the question of law in the affirmative. It was held that these were rights which "pre-existed" before a new sovereign (Raja James Brooke) arrived and assumed sovereignty in the state of Sarawak.

[55] In dealing with the issue, Arifin Zakaria FCJ (as he then was) speaking for the Federal Court explained:

> "And it was held by Brennan J, Mason CJ and McHugh J, concurring, in *Mabo (No 2)* that by **the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land**. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 AC 399, where the Privy Council in an appeal from the Supreme Court of Nigeria held that the radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861;"
>
> [Emphasis Added]

[56] Brennan J in *Mabo (No 2) (supra)* held as follows:

> "In *Calder v. Attorney General (British Columba)* (62) Hall J rejected as "wholly wrong" the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognised by the conqueror or discovery."
>
> The preferred rule, supported by authorities cited, is that a mere change in sovereignty does not extinguish native title to land. The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed **under the traditional laws acknowledged and the traditional customs observed by the indigenous inhabitants**."
>
> [Emphasis Added]

[57] Brennan J added:

> "Native title has its origin in and is given its contents by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. **The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs**."
>
> [Emphasis Added]

[58] It was on the above context that the Federal Court held the view that common law respects the pre-existence of rights under the native law and customs. As to what was the native law and the custom practised by the native of Sarawak at the time of arrival of James Brooke, Arifin Zakaria FCJ explained it in the following:

> "[21] What was then the adat law commonly practice by the native at the time of arrival of James Brooke. This is reflected in the Rajah's Order IX of 1875 which made specific reference to the common practice among native community to make clearings of old jungle and afterwards abandoning them. The said order reads:
>
> > Whereas it is a common practice among the native community to make large clearings of old jungle and afterwards abandon them, I hereby direct that should any clearance of the kind be made in future, and the persons who cleared the ground allow the same go to uncared for, they will lose all claim or title to such land; and should anyone be desirous of making gardens thereon, they will be permitted to become squatters; and notice is hereby given that should the original clearers try by any means to molest any such squatters they will render themselves liable to be fined at the rate of $10 (ten dollars) per hundred fathoms square for all the land they may have cleared, they having destroyed useful jungle produce, such as firewood, rattans etc, for no purpose.
>
> [22] The Order gave warning to clearers that they may 'lose all claim or title to such land' if the persons who cleared the land allowed the land to go uncared for. The order in no uncertain terms speaks of 'claim or title to such land' that had been cleared. This goes to show that as early as 1875 the Rajah had already given due recognition to native rights over land.

[23] This is further reinforced by Rajah's Order No VIII 1920 (Land Order 1920). Section 22 gives recognition to native holdings in accordance with customary laws and where possible such claim to land shall be registered. Section 30 provides for compensation to be paid should the Government resumes possession of any occupied land for any purpose. In s 3 of the Land Order 1920, it is provided that State Land is divided into four classes:

(a) Town Suburban Lands;

(b) Country Lands of 100 acres and over;

(c) Country Lands of under 100 acres;

(d) Native holdings.

[24] Section 22 of the same provides as follows:

(i) Under this part lands may be occupied by Natives free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that where possible claims to fruit groves and farming lands shall be registered. Records of such claims shall be kept by all Native Headman and also in the Land Office in each district.

(ii) A certificate in the form of Schedule A of Notification No of 1920 may be issued to registered land holders under this part."

[59] Arifin Zakaria FCJ also referred to a passage in the book by AF Potter - "*The Development of Land Administration in Sarawak from the Rule of Rajah Brooke to the Present Times* (1841-1965) which read as follows:

"At the time of James Brooke's arrival in Sarawak there had for centuries been in existence in Borneo and throughout the eastern archipelago of system of land tenure originating in and supported by customary law. This body of custom is known by the generic term "Indonesia adat". Within Sarawak the term "adat", without qualification, is used to describe this body of customary rules or laws, the English equivalent is usually "native customary law" or "native customary rights"."

[60] It is clear that in *Madeli Salleh*, the native customary law or the native customary rights that the Federal Court were referring to was with regard to native law and customs in relation to the occupation of land. It spoke of claim of title to such land that had been cleared which the Rajah had given recognition as early as 1875. In that case, the Federal Court accepted the fact that the plaintiff's father and his forefather had been in occupation of the said land prior to his birth in 1922. Even though the plaintiff admitted that he left the said land before the house on the said land was gutted by fire in 1941, but he maintained that he returned to the said land regularly to attend to fruit trees. He claimed he did so, on a monthly basis. The plaintiff's testimony in this regard went unchallenged and his testimony was further fortified by the evidence of the Jabatan Kerja Raya employee (PW3) who visited the said land

as late as 1975 who confirmed that there were fruit trees and rubber trees on the said land.

[61] It was on the above facts and evidence that the Federal Court ruled in favour of the plaintiff. It was on that set of facts that the Federal Court decided that in construing the meaning of "occupation", actual possession is not necessary and there can be occupation without presence on the land provided there exist sufficient measure of control to prevent strangers from interfering. The fact that the plaintiff had ceased to live on the land prior to the fire which gutted the house on the land in 1941 did not mean he had ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period.

[62] Thus, in *Madeli Salleh*, the custom that was recognised and determined by the Federal Court was the custom of the native in acquiring rights to land where the primary forest had been cleared or felled and the land over the cleared or felled area were cultivated and occupied by the native. In this aspect, we find that the description of the custom that was recognised and determined by the Federal Court in *Madeli Salleh* corresponds with the native custom known as "temuda". The custom or adat of "temuda" refers to the custom of felling or clearing virgin jungles and cultivating cleared area to create rights over land. This custom has been mentioned and recognised by Statutes and Orders of Proclamation made by the Rajahs and subsequently by the Legislature of Sarawak, namely:

(a) The Rajah's Order 1875;

(b) The Fruit Trees Order 1899;

(c) The Land Order 1920;

(d) The Land Settlement Ordinance 1933;

(e) Secretariat Circular 1939;

(f) Tusun Tunggu; and

(g) Section 5(2) of the Land Code.

[63] However, the Statutes and Orders of Proclamation made by the Rajah and subsequently by the Legislature of Sarawak, do not appear to have recognised the customs or adat of "pemakai menoa" and "pulau". The terms also do not appear either in "Tusun Tunggu" or in the Adat Iban Order 1993. Despite that, the High Court and the Court of Appeal in the present appeals ruled that the mere fact that the Iban customs of "pemakai menoa" and "pulau" was not codified, did not mean such customs was no longer a custom, unless there were clear and unambiguous words to repeal or reject the customs. The courts below ruled that the practice of "pemakai menoa" and "pulau" did exist and were native customary law having recognition of law within the meaning of art 160(2) of the Federal Constitution.

[64] With respect we disagree. This is not a case where we are called upon to consider whether such a practice exist or otherwise. Rather, what is pertinent here is whether the practice which exist has any force of law. In art 160(2) of the Federal Constitution, "Law" is defined as follows:

> "Law includes written law, the common law in so far it is in operation in the Federation or any part thereof, and any custom or usage having the force of law".

[65] The words "having the force of law" in art 160(2) of the Federal Constitution are highly important as these words qualify the types of customs and usages which could come under the definition of law. These important words "having the force of law" must be taken to mean not all customs or usages come within the definition and implies that there are customs and usages which do not have the force of law and hence not within the definition of law.

[66] In the present appeals, the courts below should take into account the definition of customary laws under Sarawak State Laws which has been defined to mean "customs which the laws of Sarawak recognise". This must be taken to mean existing customs which have the force of law. Put simply, there are customs which the laws of Sarawak does not recognise and hence do not form part of the customary laws of the natives of Sarawak and remain merely as practices or usages of the native. They are not integral to the particular community in question and remain incidental. As such, they do not come within the definition of law under art 160(2) of the Federal Constitution.

[67] We must not lose sight of an important fact that recognition alone that such custom or practice exist is not enough. Clearly, recognition of the existence of such practice had brought with it regulation and restriction. Our position is consistent with the principle as propounded in the case of *Nor Anak Nyawai* wherein it was held that the native customary rights claim over land founded upon the concept of continuous occupation does not extend to the areas of forests where the natives or their ancestors had entered into in search of food, jungle produce etc. What is essential as recognised by our courts is the custom of "temuda" which is cultivation of land for occupation. This custom is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites.

[68] As stated earlier, what the Laws of Sarawak had recognised is the custom or adat of "temuda" which was subsequently incorporated into "Tusun Tunggu. What is stated in "Tusun Tunggu" read as follows:

> "Theoretically all untitled land whether jungle or cleared for padi farming (Temuda) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farms confers on them restricted rights of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes "temuda". It is a recognised custom that "temuda" is for

the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance".

[69] The above declaration in "Tusun Tunggu" has been confirmed by the Federal Court in *Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors* [2013] 4 MLRA 621, where Suriyadi Halim Omar FCJ speaking for the court said:

"[37] From the totality of evidence and authorities referred in the course of the hearing, we are satisfied that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of Tusun Tunggu whereby NCR could be acquired by two mode namely clearing untitled virgin jungle enroute to the creation of what is locally described as temuda and the other by receiving the temuda as a gift or inheritance. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandonment whatever NCR was created or acquired previously over the land would be lost. If the original owner abandons the land without more the community takes over.

[70] The decision of the Court of Appeal in *Nor Anak Nyawai* was strongly criticised by Mr Baru Bian describing it short of sound legal reasoning. With respect, we disagree. We are of the view that the decision of the Court of Appeal in *Nor Anak Nyawai* is the correct statement of law. It is not only consistent with decisions of our courts in *Adong* and *Sagong* but also with other commonwealth countries that native customary law over land are founded upon the concept of native's custom of continuous occupation. For example, in *Sagong*, the proprietary interest of the Orang Asli in their customary and ancestral land was limited only to the area that forms their settlement but not to the jungle at large where they used to roam to forage for their livelihood in accordance with their custom and tradition. As stated in the preceding paragraphs, the position in *Nor Anak Nyawai* is consistent with the methods of creating customary rights under the Sarawak Land Code vide s 5.

[71] The principle propounded in *Nor Anak Nyawai* and *Bisi Jinggut* is parallel to the position under the Sarawak Land Code. Section 5(1) of the Sarawak Land Code provides as follows:

"5(1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to subsection (2), if a permit is obtained under s 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and s 209 shall apply thereto."

[72] Under subsection 2, the methods by which native customary rights may be created are:

> "(2) The methods by which native customary rights may be acquired are:
>
> (a) the felling of virgin jungle and the occupation of the land thereby cleared;
>
> (b) the planting of land with fruit trees;
>
> (c) the occupation or cultivation of land;
>
> (d) the use of land for a burial ground or shrine;
>
> (e) the use of land of any class for rights of way; or
>
> (f) any other lawful method:
>
> Provided that:
>
> (i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and
>
> (ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958."

[73] Notwithstanding the methods prescribed above under subsection 2, a permit can also be obtained from the Minister for the further creation of rights. Rights may also be available under the reserve system mandated by s 6 of the Sarawak Land Code.

[74] Based on subsection 2 of s 5 of the Sarawak Land Code, the underlying basis for the recognition of a particular Native Customary Right to have the force of law is occupation of and its usage according to the customary practices of the community or communities concerned. Insofar as occupation is concerned it was held in *Madeli Salleh* that occupation need not be actual occupation. As long as the natives have control over the land through supervision and continual visitation it suffices.

[75] Thus, we agree with the views adopted by the Court of Appeal in *Nor Anak Nyawai*. We find nothing objectionable in the views expressed by the Court of Appeal in that case. On the contrary, we find that the Court of Appeal in the present appeals had erred in failing to consider that basis on the various Orders of the Rajah that the rights to land could only be established by a native who had cleared the primary jungle for the purpose of farming or cultivation.

[76] Although common law recognises unregistered native customs, this is subject to the adherence of all tenets of customary land law. It is a well-established principle that having established that the custom of "pemakai menoa" and "pulau" exists, at the very least as a matter of fact, common law as developed in Malaysia further requires continued occupation and/or maintenance of the land in question.

[77] Based on what we have discussed above, the native customs of "pemakai menoa" through the establishment of "pulau" falls short of the prerequisites as provided for under s 5(2) of the Sarawak Land Code and thus, do not have the force of law as envisaged under art 160 of the Federal Constitution.

[78] Reverting to the specifics in the present appeals, in Appeal No: 27, in respect of the respondent and the 22 others who they represent, it is beyond doubt that the native customary rights should be limited to the area of 2,802 hectares which had been cleared and cultivated and should not extend to the remaining claimed area of virgin forest maintained under the Iban custom called "pulau". Likewise in Appeals No: 30 and No: 42, the respondent as well as the others that he represent is not entitled to claim native customary rights over the 4,270 hectares of virgin jungle that had been leased by the State Authority to the Rosebay Enterprise Sdn Bhd. The said area had not been cleared and cultivated by the respondent and the others that he represent.

[79] For reasons adumbrated, we would answer the Question 1 in the negative. We find that the pre-existence of rights under native laws and custom which the common law respects does not include rights to land in the primary forest which natives, like the respondents or their ancestors, had not felled or cultivated but were forests which they reserved for food and forest produce.

[80] As to Question 2, our answer is that the High Court and the Court of Appeal are not entitled to uphold a claim for native customary rights to land in Sarawak based on a native custom of "pemakai menoa" and "pulau". What the law of Sarawak had recognised in a claim for native customary rights is the custom or adat of "temuda".

[81] As to the Question 3, we would answer it in the affirmative. The Court of Appeal's decision in *Nor Anak Nyawai* that the rights of the native are confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent of native rights to land claimed under native customary rights in Sarawak.

[82] For the reasons given, we find the judgment of the Court of Appeal as well as the judgment of the High Court are unsustainable. By majority, we allow all the three appeals. We set-aside the orders of the courts below. In the result the respondents' respective claims in High Court Suit No: 21-2-2009 and High Court Suit No: 21-1-2010 are hereby dismissed. In the circumstances of this case, we make an order that each party to bear its own costs. Deposits, if any, to be refunded.

A Samah Nordin FCJ:

[83] There are three appeals before this court, namely:

(i) Civil Appeal No: 1-27-04-2015(Q) (Appeal No: 27);

(ii) Civil Appeal No: 1-30-04-2015(Q) (Appeal No: 30); and

(iii) Civil Appeal No: 02-42-06-2015(Q) (Appeal No: 42).

[84] They are heard together. The appellants in Civil Appeal No: 27 are the Director of Forests, Sarawak and the State Government of Sarawak. They were the 2nd and 3rd defendants in the Sibu High Court Civil Suit No: 21-2-2009. The 1st defendant in that Civil Suit was Konawit Timber Sdn Bhd, which is not a party in this appeal. Appeal No: 27 originated from Civil Suit No: 21-2-2009. For convenience, the appellants are referred to as the defendants in this judgment.

[85] The appellants in Appeal No: 30 are the Superintendent of Lands and Surveys, Sibu Division and the Government of the State of Sarawak. They were the 2nd and 3rd defendants in the Sibu High Court Civil Suit No: 21-1-2010. Again, for convenience they are referred to as the defendants in this judgment. The appellant in Appeal No: 42 is Rosebay Enterprise Sdn Bhd, who was the 1st defendant in the Sibu High Court Civil Suit No: 21-1-2010. Appeals No: 30 and 42 originated from Civil Suit No: 21-1-2010.

Civil Suit No: 21-2-2009 (Appeal No: 27)

[86] The plaintiffs in Civil Suit No: 21-2-2009 are Ibans by race and are natives of Sarawak. They claimed that they have acquired and/or inherited native customary rights (NCR) and/or native title and/or usufructuary rights over an area of 5,639 hectares of land in Ulu Machan Kanowit, Sarawak (marked 'M' in the statement of claim) from their ancestors who had occupied the land since the beginning of 1800s by virtue of their adat or customs and under common law. Their ancestors have acquired NCR by settling, cultivating and/or occupying the land, since time immemorial. They are the 5th and/or 6th generations since their ancestors first occupied the said land ("NCR land").

[87] The plaintiffs claimed that these NCR over the NCR land were therefore acquired prior to 1 January 1958 and recognised by Sarawak Land Code (Cap 81) and/or its predecessors.

[88] The defendants have conceded that the plaintiffs had legitimate NCR over 2802 hectares, which their ancestors had cleared from virgin/primary forests, cultivated and occupied. The defendants however disputed the plaintiffs' claims for NCR over the remaining 2,712 hectares of land ('the disputed land').

[89] The plaintiffs, in their statement of claim alleged that on or about 20 December 2008 they discovered that Kanowit Timber Sdn Bhd (the 1st defendant) had trespassed onto their NCR Land.

[90] Kanowit Timber Sdn Bhd denied the allegation, claiming that it was a contractor for Balleh Sawmill Company Bhd which had been granted a Timber Licence No T/0378 by the Director of Forests, Sarawak to fell, harvest and extract timbers in the forest area in the Kanowit-Ngemah Stateland Forest, in Kanowit. The area covered by the licence was not part of the NCR land claimed by the plaintiffs. The licence area is part of Majau Forest Reserve and part of Entimau Wildlife Sanctuary where no claim for NCR could be made.

[91] The plaintiffs' claims against the defendants and Kanowit Timber Sdn Bhd are, amongst others, for the following reliefs:

(i) a declaration that they had acquired and/or inherited native title and/or native customary rights over the said area;

(ii) a declaration that Kanowit Timber Sdn Bhd had trespassed onto their land;

(iii) the timber licence issued to the licensee by the 2nd defendant and/or 3rd defendant was subject to native title and or NCR and/or usufructuary rights of the plaintiffs and is unlawful, unconstitutional and therefore null and void;

(iv) damages to be assessed by the Registrar;

(v) exemplary damages, alternatively aggravated damages.

Civil Suit No: 21-1-2010 (Appeal No: 30 and 42)

[92] The plaintiffs in Civil Suit No: 21-1-2010 are also Ibans by race and are natives of Sarawak.

[93] They claimed that they have acquired individual and communal native customary rights over an area of 11,822.26 hectares of land (marked 'M' in the statement of claim), which the 2nd and/or 3rd defendants have issued a provisional lease, identified as Lot 13, Pelugan Land District, to Rosebay Enterprise Sdn Bhd (the 1st defendant). The plaintiffs claimed that they had acquired NCR over the land (NCR land) by the following methods:

(i) customs, laws, traditional practices of the Iban community;

(ii) by occupation;

(iii) by felling, clearing, using and cultivation of the land;

(iv) by all the methods under the Sarawak Land Code (Cap 81).

From the said NCR land, ("the disputed land") the plaintiffs claimed that they derived food, valuable medicines, wildlife other produce for their livelihood and sustenance. They also cultivated padi, fruit trees, rubber and other essential trees and crops.

[94] They alleged that the provisional lease ("Lot 13") issued to Rosebay Enterprise Sdn Bhd (the 1st defendant) by the Superintendent of Lands and Surveys, Sibu and/or the State Government of Sarawak encroached onto their NCR land.

[95] Their claims against the defendants are, amongst others, for the following reliefs:

(i) a declaration that they had acquired and/or inherited native title and/or native customary rights (NCR) over the area marked 'M' in their statement of claim;

(ii) a declaration that the provisional lease known as Lot 13 Pelugau District issued by the Superintendent of Lands and Surveys and/or the Government of the State of Sarawak is unlawful, improper, unconstitutional and therefore null and void;

(iii) damages;

(iv) exemplary damages, alternatively, aggravated damages.

[96] The High Court, after full trial, allowed the plaintiffs' claims in both civil suits and granted among others, the following orders:

(a) Civil Suit No: 21-2-2009

(i) A declaration that the plaintiffs have acquired native customary rights and/or usufructuary rights over the lands, marked 'M' in their statement of claim;

(ii) A declaration that Kanowit Timber Sdn Bhd had trespassed upon their native customary rights land;

(iii) That timber licence No T/0378 be rectified to exclude the plaintiffs' native customary land;

(iv) That plaintiffs be given forthwith vacant possession of their native customary land;

(v) damages to be assessed by the Deputy or Senior Assistant Registrar.

(b) Civil Suit No: 21-1-2010

Initially there were four plaintiffs before the High Court. The High Court dismissed the claim by the 1st plaintiff. No specific orders were made against the 2nd and 3rd plaintiffs. The High Court allowed the claim by the 4th plaintiff, among others, as follows:

(i) A declaration that the plaintiff had acquired native title and/or native customary rights and/or usufructuary rights over the entire area of the provisional lease, that is, Lot 13;

(ii) A declaration that the Rosebay Enterprise Sdn Bhd (1st defendant) had trespassed upon the plaintiff native customary land;

(iii) That the plaintiff be given forthwith vacant possession of the native customary land; and

(iv) Damages to be assessed by the Deputy or Senior Assistant Registrar;

The word "plaintiff" referred to in this judgment in respect of Civil Suit No: 21-1-2010 means the 4th plaintiff. The other plaintiffs are not parties to this appeal."

[97] The defendants, being aggrieved by the decisions of the High Court appealed to the Court of Appeal.

[98] The issues before the Court of Appeal in respect of Appeal No: 27 (High Court Civil Suit No: 21-2-2009) were:

(a) Whether the custom of pemakai menoa and pulau falls within the definition of "law" under art 160(2) of the Federal Constitution; or

(b) Whether the term "native customary law" as defined in the Land Code of Sarawak and the Native Courts Ordinance (Cap 43 which came into force on 1 September 1955 recognises the said customs of pemakai menoa and pulau in relation to the creation or acquisition of "rights over land" in Sarawak;

(c) Alternatively, is native customary rights over land confined to "temuda" land; or

(d) Has the custom of pemakai menoa been given effect to by the law of Sarawak.

[99] The Court of Appeal held that the definition of "law" in art 160(2) of the Federal Constitution which "includes written law, the common law insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof" means that the common law applies in the state of Sarawak. It went on to hold that the common law applicable in Sarawak recognised the customary rights of the plaintiffs known as pemakai menoa and pulau. They had long existed and had been recognised since 1800s and had not been expressly repealed by subsequent legislation (See *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 1 MLRA 580 and *SSuperintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 2 MLRA 390.

[100] The Court of Appeal accordingly dismissed the defendants' appeal and affirmed the decision of the High Court.

[101] The appeal by the defendants in respect of Appeals No: 30 and 42 (Civil Suit No: 21-1-2010) revolved substantially on question of facts. The Court of Appeal noted that Rumah Siew, the longhouse of the plaintif are outside Lot 13. The distance of Rumah Siew to the nearest border of Lot 13 is about 2.5 km and the farthest is about 16.5 km. Lot 13 remained under forest cover until leased to Rosebay Enterprise Sdn Bhd. This was the area claimed by the plaintif under the custom of 'pulau'.

[102] The Court of Appeal held that the plaintif had proved his case on the balance of probabilities and dismissed the appeal by the defendants. It relied heavily on the evidence of the witness statement of the plaintiff (PW2) where in para 4 therein PW2 said:

> "Our ancestors had settled, cultivated and/or occupied all the areas within the said NCR land since time immemorial. We claim NCR over the said NCR land by virtue of our adat or customs as Ibans of Sarawak, which is the felling of virgin jungles, the farming of the same thereafter and the occupation of it to this day. We never abandon our NCR over the said NCR land".

[103] At para 39 of its judgment, the Court of Appeal said:

> "There is no evidence adduced ... by the appellants that the respondents did not exercise any rights under the custom of 'pulau galau' or that any right they exercised there on was not inextricably wrapped and tied up with the land.
>
> (Note: The "appellants" and "respondents" above refer to defendants and plaintiffs respectively").

[104] On 11 March 2015, leave to appeal to this court was granted to the appellants on the following questions of law:

(a) Whether the pre-existence of rights under native laws and customs which the common law respects include rights to land in the virgin/primary forests which the natives, like the respondents and their ancestors (who are Iban by race), had not felled or cultivated but were forests which they have reserved for food and forest produce? (Question 1)

(b) Whether the High Court and the Court of Appeal are entitled to uphold a claim for Native Customary Rights to land in Sarawak based on a native custom (namely) pemakai menoa and/or pulau where:

  (i) there is no proof that such custom was practiced amongst the native communities (particularly amongst the Ibans) for the creation of rights to land prior to the arrival of the first Rajah in 1841;

  (ii) such a custom was never reflected or recognised as having been practiced by the native communities in relation to the

creation of rights to land, in any of the Orders made and legislations passed by or during the Brooke era or by the Legislature of Sarawak; and

(iii) such a custom was never part of or recognised in Tusun Tunggu and the Adat Iban 1993, which declared, pursuant to the Native Customary Laws Ordinance the customary laws of the Iban community in Sarawak. (Question 2)

(c) Whether the Court of Appeal's decision in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 1 MLRA 580 that the rights of the natives is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and nature of rights to land claimed under Native Customary Rights in Sarawak. (Question 3)

[105] I have the benefit of reading the judgment of Justice Raus Sharif PCA. The plaintiffs' claims to the disputed land are based on the native customary rights known as pemakai menoa and pulau. The central issue is whether the native customary rights known to the Iban community as pemakai menoa and pulau are recognised by the laws of Sarawak. If they are recognised by the laws of Sarawak, the next question is whether, the plaintiffs have established their claims to the disputed land based on the native custom of pemakai menoa or pulau. This is a question of facts to be decided based on the evidence available before the court.

[106] On the facts of the case, I agree with Justice Raus Sharif PCA that the appeals by the appellants be allowed and that the orders of the courts below be set aside. After studying the records of appeal, reading the written submissions by the learned counsel for both sides and hearing their oral submissions, I come to the conclusion that the plaintiffs have not established their claims to the disputed land on the balance of probabilities, for reasons which I will advert to later.

[107] First, I propose to deal with the submissions by the parties with respect to native customary rights, in particular on the native customary rights known among the Iban community as pemakai menoa, temuda and pulau. Dato JC Foong, the learned counsel for the appellants submitted that the only custom or practices recognised by the Laws of Sarawak is temuda. The custom of pemakai menoa and pulau are not recognised and do not have the force of law in Sarawak. They did not come within the definition of 'Law' under art 160(2) of the Federal Constitution. There was no expert evidence called by the plaintiffs to testify on the adat or custom that was practiced by the Iban community with respect to creating of rights to land when James Brooke became the Rajah of Sarawak, The description of adat at the time of the arrival of the Brooke corresponds with the term temuda which was subsequently incorporated into the Tusun Tunggu. In Tusun Tunggu, the only way Dayaks can acquired land

is by way of the custom known as temuda or by gift or inheritance. See also *Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors* [2013] 4 MLRA 621.

[108] The learned counsel for the plaintiffs submitted otherwise. He relied, amongst others, on the case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 1 MLRH 304 and numerous articles written by several writers.

[109] My view and understanding of the native customary rights, ie pemakai menoa, temuda and pulau, is no different from what had been expounded by the High Court in the case of *Nor Anak Nyawai (supra)* which views on NCR was endorsed by the Court of Appeal in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 1 MLRA 580, although the decision of the High Court was overturned on the facts of the case for lack of evidence.

[110] The terms pemakai menoa, temuda and pulau had been eloquently explained in the case of *Nor Anak Nyawai (supra)* by Ian Chin J. At pp 307-308 the learned judge said:

> "What Is A "Temuda", And "Pemakai Menoa"?
>
> A pemakai menoa (also spelt pemakai menua), is an Iban term that refers to "a territorial domain of a longhouse community where customary rights to land resource was created by pioneering ancestors" (Dr Dimbab Ngidang on *Ethical Values of Sarawak Ethnic Groups*, p 33). Another description on it is in these words: "The family groups (bilek) join together to make a longhouse which, with the surrounding contiguous territory, make up the menoa. It includes besides farms and gardens, the water that runs through it and the forest round about it to the extent of half a day's journey" (AJN Richards on *The Land Law and Adat*, p 24). Such a territory is chosen because of the presence of arable land, of rivers and forests from which life sustaining resources like water, fish, animals and forest products (Including timber, wild vegetables, edible ferns, palm shoots, rattans, herbs or medicinal plants, fruit trees and bamboo) can be obtained. The evidence of the plaintiffs supports this and I need not go into them since that is not disputed. The pioneers of a longhouse community are usually relatives who banded together in search of a new territory and when this is found, the pioneers would build a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the families. The longhouse will just expand with new families. It is within this territory, called the pemakai menoa, that each longhouse community has access to land for farming, called the temuda, to rivers for fishing and to jungles, called the galau or pulau galau, for the gathering of forest produce. It has boundary separating it from that of another longhouse. The boundary is reckoned by reference to mountains, ridges and rivers or other permanent features on the earth. There are similar descriptions of these native customary rights by other authors, *viz*:
>
> > Theoretically, all land whether jungle or cleared for paddy farming, is the property of the State, but the mere act of clearing a portion of virgin jungle

confers on the labourer a restricted right of proprietorship over the land thus reclaimed and once this land has been farmed and so become temuda it is recognised as a reserved for the use of the original worker and his heirs and descendants. The rights of the State recognised in the fact that land reserved for farming cannot be sold by anyone, and that it is necessary to obtain permission of a Magistrate before any transfer of land can take place ...

There are no restrictions on any one felling jungle provided he does not destroy valuable trees such as gutta, and vegetable tallow (engkabang or ketio), but it is a generally understood right that the owner of temuda has first claim to jungle land bordering on his clearing, and no one would fell such jungle without his permission.

(Richards on *Dayak Adat Law* in the Second Division (p 107)

...

The basic principle is as follows:

Rights to land are established by the person who clears it of primary jungle, and from him they pass to all descendants, male or female.

The group of living descendants who thus share land cleared by their common ancestor is known as a turun. We shall call it a "descent group".

There are, of course, as many descent groups as there are persons recognised to have cleared jungle land ...

(Dr Geddes on the *Land Dayaks*, p 59)

The more recent definition of a pemakai menoa, and which I accept to be equally accurate as those of the authors I have just referred to can be found in a paper presented at a seminar (called Seminar Pembangunan Tanah Pusaka Bumiputera on 29 September to 3 October 1994) by Tan Sri Datuk Gerunsin Lembat. He was the former president of the Majlis Adat Istiadat Sarawak and in the paper he said:

Pemakai menoa is an area of land held by a distinct longhouse or village community, and includes farms, gardens, fruit groves, cemetery, water and forest within a defined boundary (garis menoa)."

[111] At pp 309-310, the learned judge added:

"Since the rights of an Iban came about because he is a member of a community that occupies a longhouse it means an Iban at birth enjoys what his parents are enjoying. Therefore, the rights to a pemakai menoa that had not been lost can be passed down to the future generation of the longhouse community. Within a pemakai menoa, various parts of the land bear different descriptions. You have tanah umai which is land that had been cultivated with paddy or cash crops and this can be owned by the individual family of a longhouse that had cultivated the same and can be passed onto the family members. It can be lost to the whole community of the longhouse if the family pindah (moved) from the longhouse and it can be lost totally where the whole community

had pindah. Then there is temuda which is farm land and including land left deliberately fallow (see Lembat) for varying period of time to allow for the soil to regain its fertility and for the regeneration of forest produce. Some land are left fallow for upward of 25 years to allow for trees to grow (see Lembat). Thus during the course of time, secondary jungle would appear and for the reason the description of temuda as secondary jungle in *TR Nasat Ak Chapi v. TR Mandi Ak Genging* (cases of Native Customary Law in Sarawak, p 97) is also correct. Since such temuda gives rise to a right of the natives to access it, so the description of temuda being "customary land" was used in *Abang v. Saripah* (Cases of Native Customary Law in Sarawak, p 163). The fallow phase of temuda would give rise to "young wild growth" and temuda was described as such by Richards in *Report of the Government of Sarawak*, p 38). Therefore the varied descriptions of temuda are correct depending on which period in the life span of the temuda that is being referred to. Tembawai is a term for the old site of a longhouse (Lembat). Finally we have pulau which is a term for primary forest preserved to ensure a steady supply of natural resources like rattan and timber and for water catchment, to enable hunting for animals to be carried out and to honour distinguished persons (Lembat). Utong Anak Sigan, a witness called by the defendants, and who is a judge of the Chiefs Court and the penghulu of Sebauh sub-district testified to the custom of maintaining such a pulau and of its vital importance to the Iban community. These ares his words:

> Yes, we preserve the jungle, a jungle so preserved is called a pulau galau. "Galau" means preserve. Purpose of preserving a virgin jungle is to enable the collection of timber for building boat, house, to collect ratan, to collect dau biro for building farms huts. To collect damar (resin) for sealing boat and for hunting wild animals ... Preservation of pulau galau is important for the survival of the Iban community."

[112] The learned counsel for the defendants forcefully submitted that pemakai menoa and pulau have never been recognised as having the force of law by the laws of Sarawak (see *Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors (supra)*). The learned counsel for the plaintiffs contended otherwise. The learned judge in the case of *Nor Anak Nyawai* held the firm view that pemakai menoa and pulau were part of the NCR of the Iban community and recognised by the laws of Sarawak and had not been expressly extinguished by subsequent legislation.

[113] The decision of the Court of Appeal in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* was based on evidence. The Court of Appeal held, in overturning the decision of the High Court, that there was no evidence to indicate that the disputed area was within the territorial domain of the longhouses. There was "no evidence of temuda or pulau or pemakai menoa having being credibly established" (p 597). The Court of Appeal did not however rule that 'pulau' was not recognised as a native customary right. This is what it said:

> "Having said that we must hasten to add that this case should not necessarily be a precedent for other potential claims where proof may be readily available" (p 597)".

[114] The Court of Appeal in the case of *Nor Anak Nyawai* agreed with the views of Ian Chin J on the NCR. At p 593, it said:

> "In respect of the other expositions of the law by the learned judge in relation to native customary rights we are inclined to endorse them. And briefly they are as follows:
>
> a. that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;
>
> b. that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished;
>
> c. that the Sarawak Land Code 'does not abrogate whatever native customary rights that exist before the passing of that legislation'. However natives are no longer able to claim new territory without a permit under s 10 of that legislation from the Superintendent of Lands & Surveys'; and
>
> d. that although the natives may not hold any title to the land and may be termed licensees, such licence 'cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation'."

[115] Thus, the view expressed by the Court of Appeal, in agreeing with the decision in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 1 MLRH 161, that the claim should not be extended to areas where 'they used to forage for their livelihood in accordance with their tradition' must be viewed in the light of what is said above.

[116] In *Sagong Tasi & Ors, (supra)*, it must also be noted that although the High Court opined that the proprietary interests of the Orang Asli in their customary and ancestral lands were limited only to the area that formed their settlement and not to the area where they used to roam to forage for their livelihood in accordance with their traditions, the actual decision was based on the evidence that the plaintiffs had "continuously occupied and maintained" the land to the exclusion of others in pursuance of their culture and inherited them from generation to generation in accordance with their customs.

[117] The High Court in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 MLRH 95, was confronted with the claims by the plaintiffs for a substantial area of the land including the catchment area. There the plaintiffs, representing a group of aboriginal people living around the Sungai Linggiu catchment area, whose lands had been acquired for the purpose of constructing the Sungai Linggiu Dam near Kota Tinggi, Johor sought a declaration that:

(1) all the lands acquired by the defendants for the purpose of constructing the Sungai Linggui Dam near Kota Tinggi, Johor was aboriginal area or aboriginal reserves.

[118] The High Court accepted the plaintiffs' evidence by way of affidavit that they depended on the produce of the jungle in the Linggui valley and its surrounding areas for their livelihood. The jungle produce are the fauna, flora, fruits and the animals which include land animals and water animals, like fish, crab etc. The defendants did not deny the plaintiffs' claim that the Linggui valley was the source of their livelihood. The High Court allowed their claims. Mokhtar Sidin JCA, sitting as a High Court Judge, at p 430 said:

> "My view is that, and I get support from the decision of *Calder*'s case and *Mabo*'s case, the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial".

[119] The Court of Appeal affirmed the said decision. Leave to appeal to this court was refused. The Court of Appeal, in another case, *Yebet Saman & Ors v. Foong Kwai Long & Ors* [2014] MLRAU 494 subscribed to the views expressed by the Court of Appeal in the *Adong* case.

[120] Datuk JC Fong, the State Attorney General who appeared for the appellant in *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 2 MLRA 390 submitted forcefully before the Federal Court that the decisions in the *Adong* case and the *Nor Anak Nyawai* case should not be followed because they were decisions rooted upon the Australian case of *Mabo (No 2)* and the Canadian case of *Calder v. AG of British Columbia*.

[121] The Federal Court disagreed and held the view that the propositions of law as enunciated in those two cases reflected the common law position with regard to native titles throughout the Commonwealth.

[122] The fifth question of law posed to the Federal Court in the *Madeli Salleh* case manifested an attempt to minimise the impact of the decisions in the *Adong* case and the *Nor Anak Nyawai* case. It was crafted in this way:

> "5. Whether having regard to the provisions of ss 3(1) and 6 of the Civil Law Act 1956 (Act 67), and the relevant Federal, State and customary laws in Malaysian and particularly in Sarawak, which regulate the creation, exercise, loss, abandonment and extinguishment of native rights over land; the Court of Appeal in this instant case, and indeed, the courts in Malaysia generally, could rely on:
>
> (i) *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 MLRH 95
>
> (ii) *Nor Anak Nyawai & Others v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 1 MLRH 304

which were decisions based upon:

(i) the Australian case of *Mabo (No 2)* which is "an authority for the proposition that the common law of Australia recognises a form of native titles"; and

(ii) the Canadian case of *Calder v. AV of British Columbia* which held that "common law categorically recognised native rights over land."

[123] The Federal Court held that, "As for the fifth question our answer is that we wholly agree with the view expressed in *Adong bin Kuwau* and *Nor ak Nyawai* that the common law respects the pre-existence of rights under the native laws or customs".

[124] In my view, the Sarawak Land Code 1958 does not abrogate or extinguish the pre-existing rights of the natives to their NCR which had existed prior to 1 January 1958. Nor does it imposes a total ban for the future creation of NCR. It merely restricts the creation of NCR in future by imposing certain conditions. This is clear from the wording of s 5 of the Land Code 1958.

[125] Section 5(1) of the Land Code states:

"5(1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to subsection (2), if a permit is obtained under s 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and s 209 shall apply thereto.

(2) The methods by which native customary rights may be acquired are:

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method:

Provided that:

(i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the

Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958."

[126] The phrase "in accordance with the native customary law" in s 5(1) of the Sarawak Land Code is a clear restatement that the laws of Sarawak recognised the NCR of the natives that had existed prior to 1 January 1958.

[127] This court in *Bisi Jinggot v. Supt of Lands and Surveys Kuching Division & Ors, supra* at p 631 stressed that although the Sarawak Land Code 1958 brought major changes, it ensured the continued existence of native customary land, "leaving the NCR unscathed".

[128] The plaintiffs' claim to the disputed land, based on the custom of pulau was in respect of land which they contended had been inherited from their ancestors in the 1800s, that is before the arrival of James Brooke. Any apprehension that allowing the claim to the land, where they reserved the virgin or primary forests for food and forest produce as means of livelihood would open the floodgates for other potential claims would be quite remote, if not unfounded. The size of the area is a matter of evidence. In any event such claim would not affect any NCR claim from 1 January 1958 onwards in view s 5(1) of the Sarawak Land Code. Again, any NCR created after 1 January 1958 may be extinguished, subject to payment of compensation as provided by s 5(3) of the Sarawak Land Code.

[129] With respect to Tusun Tunggu, it was held by the learned judge in the case of *Nor Anak Nyawai* that it was not a comprehensive codification of Adat Iban. The statement on Tusun Tunggu by Suriyadi Halim Omar FCJ as authority for the proposition that NCR could only be acquired by two modes: one by clearance of the untitled land or jungle by a native followed by uninterrupted occupation of the cleared land and the other, by way of gift or inheritance appeared to be orbiter. The issue in that case was not on the custom of pulau. Richard Malanjum CJSS seemed to hold a different view. At para 47 of his judgment in the same case he referred to the various terminologies under NCL which includes pemakai menoa, temuda and pulau. And at paras 63 and 67 of his judgment, he held that "the recognition of NCL should no longer be an issue". NCL do not stand on the same footing as titled land alienated under the Sarawak Land Code. Recognition of NCL and the rights and interests arising therefrom are premised on common law principle.

[130] It was submitted by Dato JC Foong for the appellants that the custom of pemakai menoa and pulau was not part of the common law which is recognised in Sarawak. It does not come within the definition of "law" in art 160(2) of the Federal Constitution. The word "Law" in the Federal Constitution is defined as including "written law, the common law insofar as it is in operation in the

Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof". Ian Chin J in the *Nor Anak Nyawai* case held that the common law as recognised in Sarawak came within the definition of 'Law' in art 160(2) of the Federal Constitution and in my view, correctly.

[131] The issue whether the plaintiffs have acquired NCR under the native custom known as pulau is a matter of evidence. The plaintiffs could not stake their claims solely on the mere assertion that the custom of pulau is part of their NCR without offering evidence that they had exercised their right by using the area of the disputed land to forage for food or forest produce, fishing or hunting. The burden is on the plaintiffs to prove their case on the balance of probabilities. The learned counsel for the appellant in Appeal No: 42 adopted the submission of the learned counsel for the appellants in Appeals No: 27 and 30.

[132] Let us examine the evidence in these cases:

(i) Civil Suit No: 21-2-2009 (Appeal No: 27)

(a) The plaintiffs relied on the expert evidence of Nicholas Bawin ak Anggat (PW1), PW2 and PW3. PW1 is a neutral witness. He merely testified on what is NCR and NCL. He explained the various terminologies, including pemakai menoa, temuda and pulau. He did not know as a matter of fact whether there was any human activities in the disputed land such as fishing, hunting or harvesting of any forest produce. He did not know whether the plaintiffs made use of the trees in the jungle for the purpose of building boats or longhouses.

(b) PW2, (Sandah ak Tabau) the first plaintiff, testified that there were rubber trees and fruit trees on the disputed land. The disputed land was also used for padi planting. Clearly, that part of the land used for cultivation cannot be pulau. He further claimed that the disputed land was the area where the plaintiffs used for hunting, fishing or harvesting of forest produce for their livelihood.

[133] PW3 was a teacher but did not reside at the longhouse. He testified that the disputed land was used for planting of rubber trees. His evidence therefore did not support the claim based on the custom of pulau.

[134] DW3, an officer from the Department of Lands, and Surveys testified that the disputed land (about 2,712 hectares) which is being claimed by the plaintiffs is in fact 'primary forest'. The aerial photographs in 1963 showed that about 2,525 hectares of the lands in question remained as 'primary forest'. There was no evidence that the primary forest had been cleared for cultivation or farming. Nor was there any evidence of human activities. The High Court at paragraph of its judgment said:

> "In my judgment, when all the above evidence are considered together, the plaintiffs have amply shown that the encroached area falls outside the area of the timber licence No T/0378."

That being so, the area covered by the timber license could not be the area known as pulau under the native customary law.

(ii) Civil Suit No: 21-1-2010 (Appeals No: 30 and 42)

(a) Four witnesses testified for the plaintiffs. PW1, was the same expert witness who testified in Civil Suit No: 21-2-2009. His evidence was similar to what he had testified in Civil Suit No: 21-1-2009.

PW2 (4th plaintiff) and PW3 (1st plaintiff) testified that the disputed land had been cleared. The lands were used for building of longhouses, farming, fishing, hunting or harvesting of forest produce.

(b) PW2 gave evidence on his behalf and on behalf the residents of his longhouses only and not for the other plaintiffs or on behalf of the residents of the other longhouses.

(c) The High Court dismissed the claims by the 1st plaintiff.

[135] The defendants disputed the plaintiff's claim. The learned trial judge, at paras 55, 56 and 67 of Her Ladyship's judgment made the following findings:

> "55. Based on Appendix A which was taken in year 1951, there was cleared area covering 2,322 hectares approximately. This area lies outside Lot 13. The primary forest covered 8,822 hectares approximately.
>
> 56. Based on Appendix B taken in year 1963, the cleared area covered 3,439 hectares approximately and primary forest is 8,522 hectares approximately.
>
> 67. In my judgment, the cleared area reflected in Appendix A shows there were extensive human activities in clearing the primary forest for settlement and farming within the area claimed by the plaintiffs prior to 1 January 1958. Additionally, the decrease of primary forest of 300 hectares from 8,822 in 1951 to 8,522 hectares in 1963 clearly suggests continuing human activities in the area claimed by the plaintiffs."

[136] The plaintiffs' case was that the disputed land had been cleared. This was contrary to the maps in Appendix A and B which showed that substantial area of the land was still under primary forest in 1951 and 1953.

[137] DW2, who was the Senior Plantation Manager for Rosebay Enterprise Sdn Bhd (1st defendant), in his witness statement said that Lot 13 was virgin forest. PW2 claimed that RH Siew (longhouse) was on Lot 3, Pelugau. But DW3, the Superintendent of Lands and Surveys explained that Lot 3, which was originally given to Rosebay Enterprise Sdn Bhd had been revoked and

replaced with Lot 13. Lot 13 only covered a part of Lot 3. The whole of Lot 13 was a protected forest.

[138] PW2, when cross-examined and asked whether his longhouse was on Lot 13, replied, "I don't know". (See volume 7 p 93).

[139] It is obvious that PW2 himself was uncertain and unable to confirm whether the longhouse was on Lot 3 or Lot 13. On the totality of the evidence, I am of the view that there was no sufficient evidence to support the claims by the plaintiff, on the balance of probabilities. There was no proper judicial appreciation of evidence (*Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 1 MLRA 12). Whilst an appellate court would be slow in interfering with the findings of the trial judge and would only do so in the rarest of cases, it would do so, as in the circumstances of these cases, where there was manifest error in judicial appreciation of the evidence.

[140] Thus, on the facts of the case, the appeals ought to be allowed and that the orders of the courts below should be set aside. In the result, I do not find it necessary to answer the questions posed to this court. As to costs, each party to bear its own costs.

Zainun Ali FCJ:

[141] My learned brother Justice Raus Sharif PCA has comprehensively set out the introduction, background facts, the questions of law and decision of the High Court and Court of Appeal in his judgment which I gratefully adopt (paras 4 to 16).

[142] However, before discussing the issues raised in these appeals I shall highlight some points of importance in the submissions which both parties had put forward before this court.

At The Federal Court

[143] Datuk JC Fong, the learned counsel for the appellants sketched a brief background and historical perspective of native customary law. According to him, only 'temuda' or land which has been cleared before 1958 without permit would qualify as native customary rights to land.

[144] In outlining the legislative history of the relevant provision of native customary law, Datuk JC Fong began with the White Rajah's edicts on native customs and rights over land until the promulgation of the current Land Code and the Adat Iban 1993.

> "He submitted *inter alia* that:
>
> As to what was the custom on customary law of the natives in terms of acquiring rights to land this had been spelt out in Secretariat Circular no 12 of 1933 and repeated in Secretariat Circular no 12 of 1939 which are found at pp 565 to 567 of the Record of Appeal. These circulars are set out in the Judgment of the Court of Appeal as follows:

(g) Secretariat Circular no 12/1933

(i) The right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle. This right must be exercised in accordance with a cycle compatible with the presentation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle is in your eyes, not a matter for rule of thumb but for expert native opinion.

(h) Secretariat Circular no 12/1939 dated 21 November 1939 by the Chief Secretary:

3. All native of Sarawak follow Indonesian adat to a greater or lesser degree and that adat, as regards the customary tenure of land, is briefly as follows:

(i) The right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle. This right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community ... cycle is, in their eyes, not a matter for rule of thumb but for expert native opinion.

(ii) Where inconsistent with the above, the existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary right of user.

(iii) Individual ownership is limited by the customary right of the community to say in the matter of disposal to anyone outside the community.

(iv) No community or individual may hold up land in excess of requirements and, the extreme case, removal to another district, automatically extinguished all rights of user."

[145] The net effect is that Datuk JC Fong took the view that the term pulau and pemakai menoa are not recognised in any of the said Orders or Ordinance as custom for the creation of rights to land. He said that the above terms do not appear in the Tusun Tunggu which became the Adat Iban Order 1993. Instead, he said that the custom of felling or clearing virgin jungles and cultivating the cleared area to create rights over land in accordance with the custom or adat known as temuda had been recognised by Statute and Orders or Proclamation made by the Rajahs and subsequently by the Legislation of Sarawak. He referred to the Rajah's Order 1875, the Fruit Trees Order 1899, The Land Order 1920, The Land Settlement Ordinance 1933, Secretariat Circular 1839 and s 5(2) of the Land Code.

[146] Thus, Datuk JC Fong's view is that since the terms pemakai menoa and pulau are not found in the Adat Iban 1933 which he said "codified all the Iban customs and made under the Native Customary Law Ordinance," thus these native custom, usages or practices are not recognised and do not have the force

of law in Sarawak; and that they could not therefore come within the definition of "law" in the Federal Constitution.

[147] Datuk JC Fong also took the view that since there was no evidence led by the respondents that the adat of the Iban community at the time of James Brooke's arrival had changed, been discarded or differed from the adat at the time when their action was filed in the High Court and in view of the findings of the Federal Court in *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 2 MLRA 390) ('*Madeli Salleh*'), the courts ought to have held the pre-existence of rights which the common law respects were rights to land created in accordance with the adat practised by the natives at the time of the arrival of Rajah Brooke. That Adat as determined by the Federal Court in *Madeli Salleh (supra)* is that to acquire rights to land, virgin/primary forests had to be cleared or felled and the land over the felled/cleared area, cultivated and occupied by the natives. In other words, only cleared or felled area of land (temuda) is recognised as being part of native customary law. Thus the custom of pemakai menoa and pulau are out of the equation. That, in effect, is the essence of Datuk JC Fong's submission.

[148] For the respondents, a contrary view was taken through their counsel, Mr Baru Bian. Mr Baru Bian's contention was that the Ibans being natives of Sarawak, are entitled to claim their native customary rights to land based on their custom of pemakai menoa and pulau. He said that the uncontroverted evidence as such are manifested in both oral histories and written works; that these rights existed long before the arrival of the first Rajah in 1841.

[149] He submitted that the custom of creating and claiming an area referred to as pemakai menoa and pulau had been around and practiced by the natives since time immemorial; that the term pemakai menoa reflects the Iban's "communal" rights as is also reflected by the use of the term 'communal' in the Land Code.

[150] Mr Baru Bian contended that the natives' rights to forage are not confined to the area that the Ibans had cleared and settled but that they extend to the primary forest preserved by them to supply forest products, (water catchment and for hunting etc, which is referred to as the pulau).

[151] Mr Baru Bian further submitted that the customary rights at common law are complementary to written law, as they exist independently of those rights under written law. He went on to submit that the adat or custom of the Iban should be accorded recognition under art 160 of the Federal Constitution of "custom or usage having the force of law in the Federation or any part thereof".

[152] Mr Baru Bian's view that "customary rights do not owe their existence to statutes" appear to be in stark contrast to the position taken by Datuk JC Fong. Mr Baru Brian went on to submit that the practice and usage of each individual community is a question of fact and that in view of this, there is

an overwhelming evidence of the existence of this Iban custom (of pemakai menoa and pulau) and their occupation of the disputed land for this customary purpose. Thus, he said, there is no good reason to arbitrarily exclude hunting and foraging in the area from a customary land rights claim, unless such rights do not form part and parcel of the particular indigenous communities' occupation and usage of their customary lands.

[153] These then, are the basic contentions of parties.

Antecedent

[154] As the concept of native custom, native customary rights (NCR), native customary land and native title can be perplexing given their varying dimensions, it would be useful if their antecedent is narrated.

[155] A good starting point is to examine the content and scope of that right which illustrates the unique customs and tradition of each native community.

> For example, the Iban community dictates that land is held communally, with individual members acquiring rights to use land and resources by being the first to clear and cultivate virgin jungle or by seeking permission from the community. Typically, the Iban territory is comprised within the pemakai menoa. It begins with an initiation ceremony known as "panggul menoa" performed by the pioneer settler before clearing the jungle for settlement. Thereafter, the community established its right to the felled area and the forest within the general area as their pemakai menoa or communal land. Thus encompassed within the pemakai menoa there is a distinct longhouse or village community which includes a farm, garden, fruit groves, cemetery, water and forest with a defined boundary (garis menoa). Pemakai menoa includes temuda (cultivated land that have been left and fallow), tembawai (old longhouse sites) and pulau (patches of virgin forest that have been left uncultivated to provide the community with forest resources for domestic use, where pioneering a village occupies a general area, and boundaries (garis menoa) drawn between villages, following streams, watersheds, ridges and permanent landmark.

[156] The Iban community follows the tradition of utilising forest resources which is reflective of their hunter-gatherer tradition.

[157] According to a 2010 census, Sarawak has a population of approximately 2.4 million people, including a good number of natives: 693,000 Iban, 192,000 Bidayuh; 119,000 Melanau and 152,000 others (Prof Tang Hang Wu, Professor School of Law, Singapore Management University - "*The Fiduciary Doctrine as a New Pathway*: An Alternative Approach to Analysis Native Customary Rights in Sarawak" - paper). This gives a general idea of the demographics that we are looking at.

Reception Of English Principles Of Common Law And Equity In Sarawak

[158] English law was introduced to Sarawak by Order L-4 (Laws of Sarawak Ordinance) 1928, subject to the Rajah's modification, native custom and local conditions. It culminated in the introduction of the Civil Law Act 1956 (Act 67) (CLA) which reproduced similar provisions under our s 3.

[159] Thus in the absence of written law, Malaysian Courts may apply common law and rules of equity existing in England according to the following dates:

6 April 1956 for West Malaya

1 December 1951 for Sabah

12 December 1949 for Sarawak

[160] In the absence of any specific local legislation, s 3(2) of the CLA allows the application of English statutes of general application to Sarawak.

[161] A crucial provision is s 6 of the CLA. This section precludes the application in Malaysia of "any part of the law of England relating to tenure or conveyance of assurance of a succession to any immovable property or any estate, right or interest therein. (Dr Ramy Bulan & Locklear *Legal Respective an Native Customary Land Rights in Sarawak*)."

[162] Textbook writers and commentators as well as an emerging body of judicial authorities have, time and again, reaffirmed and recognised the rights of natives to their customs, where their land tenure customs form an integral part of their existence. Their customs in fact underpin their native occupation of the lands, their territorial domain and inevitably of course, their connection to their ancestral lands.

[163] As illustrated by high authority (as apparent in the trilogy of leading cases - *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 MLRH 95 (*Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 1 MLRA 170), *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 1 MLRH 161, (*Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 1 MLRA 819) and *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 1 MLRH 304 (*Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 1 MLRA 580) and the celebrated case of *Madeli Salleh (Madeli Salleh) (supra)* (FC) the native customs have evolved through the years and have existed in Sarawak long before it came under the sovereignty of the Sultanate of Brunei. (*Prof Tang Hang Wu (supra)*)

[164] In the period before the Sultan of Brunei's transfer of sovereignty over Sarawak to James Brooke, issues of land rights in Sarawak were defined by their native customary law. (Dato' Peter Mooney - '*Land Law in Sarawak*', in J Sihombing and Ahmad Ibrahim (eds), The Centenary of the Torrens System in Malaysia (1989) 239. AJN Richards, Sarawak Land Law and Adat; A report

(1961) 1011). The Sultan recognised and respected the pre-existing land rights of natives.

[165] When the Sultan then transferred the Government of Sarawak together with the dependencies, its revenues and all its future responsibility to James Brooke in 1841, it was made "subject to the respect of the laws and customs of the Malays of Sarawak. (*Dato' Peter Mooney (supra)*)".

[166] After 1846, the Sultan issued an outright grant of Sarawak to Brooke. A succession of Rajahs followed; James Brooke was the First Rajah, followed by Charles Brooke as the Second Rajah and Vyner Brooke as the Third Rajah. They governed Sarawak from 1841 till May 1946. During this period, the Rajahs issued numerous orders and laws relating to land rights in Sarawak. See *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 1 MLRH 304.

[167] It was by virtue of these authorities that the Rajahs recognised and affirmed the titles of the native people of Sarawak. These are the self-same title and other associated rights which, before and during the Sultan's reign were exercised pursuant to and governed by customary law. (*Dr Ramy Bulan & Locklear (supra)*).

[168] In 1946, when the Third Rajah ceded Sarawak to the British Crown, it did so by including all its lands "subject to existing private rights and native customary. (*Dr Ramy Bulan & Locklear (supra)*)":

> The reception of English Law in the Borneo states was formalised by the Sarawak Application of Law Ordinance 1949, and the North Borneo Application of Law Ordinance 1951. These provide that the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of the Ordinance, shall be the law in force in Sarawak or North Borneo (as the case may be) with the proviso that the said common law, doctrines of equity and statutes of general application shall be in force so far only as the circumstances of Sarawak or North Borneo and its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary. (Ahmad Ibrahim '*Towards A History of law in Malaysia and Singapore*' (Dewan Bahasa & Pustaka 2015)).

[169] The Torrens System of land registration was then introduced, which recognised native customary rights. However, there came a process of limiting native customary rights through formal law. This reached a turning point with the introduction of the Sarawak Land Code 1958.

[170] The significance of this 1958 code lies in its provision of a cut-off period for the creation of native customary rights. Native customary land is defined to mean land in which native customary rights, be it communal or otherwise, have lawfully been created prior to 1 January 1958 and still subsist as such. It would be instructive to now see what is contained in the Sarawak Land Code 1958.

[171] Before 2000, s 5(2) of the Sarawak Land Code 1958 provided for six methods in which native customary land may be created ie:

(a) the felling by virgin jungle and the occupation of the land thereby created;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrines;

(e) the use of land of any class of rights of way; or

(f) any other lawful method.

[172] It has been argued that s 5(2)(f) imports adat or customary law into the interpretation of the Sarawak Land Code. However s 5(2)(f) has been deleted by the Land Code (Amendment) Ordinance 2000. After 1 January 1958, a permit must be obtained from the Minister for the further creation of native customary land.

Pre-existing Native Customary Rights (NCR)

[173] The Land Code 1958 therefore recognises NCR created prior to 1 January 1958. But the question of whether a native or native community has acquired or lost NCR prior to 1 January 1958 is determined under the law in effect on 31 December 1957. (Land Code 1958 s 5(2)(ii))

[174] The law in existence prior to 1 January 1958 NCR is the Land (Classification) (Amendment) Ordinance 1955. The 1955 Ordinance has the first prohibition on the creation of new NCR but because it has no retrospective effect, it did not affect existing NCR and any pre-existing rights of the natives prior to that date. In fact prior to 16 April 1955, statutory law consistently reaffirmed but did not otherwise limit native title. (*Dr Ramy Bulan & Locklear (supra)*).

[175] As manifested in case law too, in *Nor Anak Nyawai (supra)*, the Court of Appeal expressly held that the Sarawak Land Code "does not abrogate whatever native customary rights that exist before the passing of that legislation".

[176] However now, natives are unable to claim new territory without a permit under s 10 of the Sarawak Land Code 1958.

[177] It stands to reason therefore that NCR based on native law and custom and in existence prior to 16 April 1955 are recognised under the common law.

[178] Hence, the significance of these appeals before us.

[179] It is worth reiterating that the land tenure customs of indigenous people are different than those recognised under the English Common Law as inherited

in Malaysia. As has been described in case laws and text books and articles, native title represents a collective interest in land use according to traditional methods of occupation.

[180] In any case, throughout Sarawak's history, the pre-existing native titles and rights and associated land rights have been consistently recognised and upheld by various judicial pronouncements, (see *Nyalong v. The Superintendent Of Lands & Surveys Second Division, Simanggang* [1967] 1 MLRH 60, *Jalang Paran & Anor v. Government Of The State Of Sarawak & Anor* [2006] 5 MLRH 982 and *Madeli Salleh (supra).*

[181] Thus in view of the almost consistent chain of recognition of pre-existing native title and customary laws from which the title and associated rights emerge, one wonders why those rights seem to elude the respondents in these appeals.

Findings

[182] I agree with my learned brother Justice Raus Sharif PCA that the central issue in these appeals is whether the Iban customs of pemakai menoa and the establishment of pulau enable the respondents in the respective cases to claim a valid native customary rights (NCR) over the land they claimed.

[183] The position in respect of native customary land rights of the Ibans in Sarawak in particular and the aboriginal people in Malaysia in general may now be considered as settled, to the extent that the principles have been established by case law authorities, as reflected in the trilogy of authorities beginning with the seminal decision of *Adong Kuwau (supra)* and *Sagong Tasi (supra).*

[184] One other authority which has ironed out some of the awkwardness found in the celebrated case of *Nor Anak Nyawai (supra)*(CA) is the case of *Madeli Salleh (supra)* (FC).

[185] Let us look again at the first question:

> "Question 1
>
> Whether the pre-existence of rights under native laws and customs which the common law respects include rights to land in the virgin/primary forests which natives, like the respondents or their ancestors (who are Iban by race), had not felled nor cultivated but were forests which they reserved for food and forest produce?"

[186] Native customary land rights of the natives in respect of settlement and cultivated areas of the natives may now be considered as settled law. The customary rights over land is recognised as a form of proprietary rights within the scope of art 13 of the Federal Constitution. Therefore, the natives whose lands have been taken away are entitled to adequate compensation under the constitutional safeguard of art 13.

(Refer to the decision of the Federal Court in *Madeli Salleh (supra)* and the decisions of the Court of Appeal and the High Courts in *Adong bin Kuwau (supra)*, *Sagong bin Tasi (supra)* and *Nor Anak Nyawai (supra)*)

[187] The position in Sarawak is clear, in view of the statutory provision in s 5 of the Sarawak Land Code 1958. It states that land cultivated by the natives or which is known as "temuda" under the Iban Adat may be recognised as NCR. Section 5(3) of the Sarawak Land Code provides for compensation to be paid when there is an extinguishment of NCR.

[188] It is axiomatic that a claim for native "title" in respect of customary land is significantly dependent on the requirement of "occupation". The issue is whether the natives occupy and maintain a traditional connection with the customary land in accordance with their customs and usages. The test of establishing occupation has been enunciated by Arifin Zakaria FCJ (as His Lordship then was) in *Madeli Salleh (supra)*. There must exist a sufficient measure of control to the land. His Lordship held that:

"On the issue of what is meant by "occupation", we agree with the view of the Court of Appeal that actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering ..."

Claim For Native Customary Rights To Land In The Virgin/Primary Forests

[189] To reiterate, Datuk JC Fong, submitted that common law only recognises the claim of customary lands to areas which form their settlement and not the area where they used to roam and forage in the jungle. He relied on the decision of the courts in *Sagong Tasi (supra)* and *Nor Anak Nyawai* (Court of Appeal) *(supra)*. He submitted that in the present case, the trial judge and the Court of Appeal erred in law and fact in allowing the respondents' claim over the disputed land for roaming and foraging.

[190] With respect, I do not agree with the above submission. The law in *Adong Kuwau (supra)* is clear, in that the common law recognises the rights and interests of the natives to live from the hunting of animals in the jungle and the collection of jungle produce to foraging land. The decision of the High Court in *Adong Kuwau* was affirmed by the Court of Appeal.

[191] In *Adong Kuwau*, the plaintiffs are heads of families representing a group of aboriginal people (Jakun) living around the Sungai Linggiu catchment area which also includes the tributary Tebak ('the Linggiu valley'). They claimed that the lands within the vicinity of Sungai Linggiu were their traditional and ancestral lands and upon which they depended to forage for their livelihood in accordance with their tradition. The defendants had alienated the lands to the State Corporation.

[192] The trial judge in *Adong Kuwau* held that common law recognises the rights and interests of the aboriginal people (Jakun) living around the Linggiu valley to live from the hunting of animals in the jungle and the collection of jungle produce to foraging land. The learned trial judge allowed the plaintiffs' claim for native customary rights over the land and awarded them the sum of RM26.5m as compensation.

[193] Mokhtar Sidin JCA in his judgment held that:

> "My view is that, and I get support from the decision of *Calder*'s case (*Calder v. A-G of British Columbia* [1973] 34 DLR (3d) 145) and *Mabo's* case (*Mabo & Ors v. State of Queensland & Anor* [1986] 64 ALR 1), **the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself**, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in *Calder*'s case at p 156 where His Lordship said the rights and which rights include '... **the right to live on their land as their forefathers had lived** and that right has not been lawfully extinguished ...'. I would agree with this ratio and rule that in Malaysia the aborigines' common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers."
>
> [My Emphasis]

[194] In *Adong Kuwau*, the rights and interests of the natives to live from the hunting of animals in the jungle and the collection of jungle produce to foraging land have been defined as the right "to live on their land as their forefathers had lived". The above principle was taken from the judgment of Judson J in *Calder v. A-G of British Columbia* [1973] 34 DLR (3d) 145.

[195] By the term "to live as their forefather had lived", such rights are not limited to the right of occupation or possession of ancestral lands but may extend to any types of land used by their forefathers in accordance with their customs. In this regard, the rights must be understood by examining and considering indigenous patterns of land usage. As highlighted by Gopal Sri Ram JCA (as he then was) in *Sagong Tasi (supra)*, the decision of the Privy Council in *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 AC 399 imposes on the court the need to study the "real character of the native title to the land" rather than importing the preconceived notions of property rights under the common law.

[196] In this, I wish to stress the importance of correctly characterising the extent of the right obtained by the respondents. At this juncture, I wish to bring to attention that the submission of the appellants is completely at odds with

principle. If, as *Amodu Tijani* and *Mabo & Others v. The State of Queensland [No 2]* [1992] 175 CLR 1 (at p 57) and various other cases have established — that the question of what the Native Rights are, is a question of fact to be determined in the terms of the tradition and customs of the native people, then there is no good reason why, as a matter of principle, there is an arbitrary limitation imposed upon the extent of native customs that can be protected under the common law (that limitation being in the form of the need for "occupation").

[197] In my view, the idea that only settled land can be claimed ONLY MAKES SENSE if WHAT is being claimed is TITLE (whether a right of occupation or possession of the land, or anything amounting to freehold of the land).

[198] We have to first reiterate that rights to land can be understood as a bundle, with freehold being the largest bundle which contains all the rights. But lesser bundles can exist. An easement, or a right of way, or a right to forage, is simply a lesser bundle. I posit that it is a smaller bundle than that of "occupation". So, if a right to occupation (or greater) was claimed, then it makes sense that in order to recognise that "pre-existing native customary right," then some form of occupation must exist. But in the present case, if all we are according to the natives is the right to forage in that land (and that any interference with that right must be adequately compensated), we are not according occupational title to the natives. Conceptually, it does not make sense that for recognition less than occupation, we require a standard of occupation to establish that right.

[199] What needs to be established is the proper use of the land in the terms described as amounting to native title. You can call it "occupation" but it has to be understood in the context of the right claimed. The proper "occupation" of a right to forage, is the actual 'foraging' itself.

[200] Mr Baru Bian rightly pointed out (at p 38 of Supplemental submissions) that in *Delgamuukw v. British Columbia* [1997] 3 SCR 1010, the Canadian Supreme Court found that "physical occupation" may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed." However, it must be noted that the claim filed by the Wet'suwet'en people and the Gitksan Houses in Delgamuukw, was for ownership of their ancestral lands in British Columbia. The proof of title must, in this respect, mirror the content of the right. Therefore, the above submission may not be fully applicable to the present question which involves foraging rights. Nevertheless in *Delgamuukw*, Lamer CJ had this to say:

> "I should also reiterate that if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike

> title, they are not a right to the land itself. Rather, as I have suggested, they are a right to do certain things in connection with that land. If, for example, it were established that the lands near those subject to a title claim were used for hunting by a number of bands, those shared lands would not be subject to a claim for aboriginal title, as they lack the crucial element of exclusivity. However, they may be subject to site-specific aboriginal rights by all of the bands who used it. This does not entitle anyone to the land itself, but it may entitle all of the bands who hunted on the land to hunting rights.

[201] Thus in no case can the rights of pulau/pemakai menoa in this case give rise to anything akin to the freehold of the area. It is conceptually necessary that the rights which are protected/recognised by the common law, grants what is akin to a usufructuary right over the area or the right to forage and gather; that is the extent of the right that should be granted. The doctrinal underpinning of the recognition of native customary rights is simply that: recognition which amounts to enforcement within the common law; it does not improve upon the right. This point has not been made sufficiently clear in the judgments of the lower courts. In those circumstances, there may be the (mis)understanding: that just because they foraged in the area, they now have full control on the land which they can freely dispose of as they wish. That could not be further from the truth.

[202] Thus to say that occupation is the only form of NCR that can be established is at odds with principle. If, for instance, what we want to establish in this case is a usufructuary right where the natives go in once a week to forage from the land, gathering medicines and wood and the like, demand that they show some form of indicia of exclusive control is going above and beyond the content of the rights that they are claiming. The kind of "occupation" that is necessary to obtain full title is necessarily different from the kind of "occupation" that is necessary to obtain a right of way. The former requires settlement/cultivation, the latter requires use or some impermanent structure of feature, for example a well trodden path or marker. To assume that only the former type of "occupation" qualifies is therefore untrue. If it is true that the natives were in the past (at the creation of the NCR) carrying out the activities of foraging, then that should be sufficient. The right to forage etc is a sub-set of a fuller title and so it does not make sense that the same sort of occupation is necessary to establish it. In fact, this approach is alluded to in the *Mabo (No 2)* decision.

[203] Thus, a claim for native customary title or interest in land is subjective. It can be in the form of usufuctuary rights, communal title, individual title and any forms of interest in the land. As succinctly expressed by Mokhtar Sidin JCA in *Adong Kuwau (supra)*:

> "... what I would describe 'native title' to be, and it is the right of the native to continue to live on their land as their forefathers had done. **Although in the general sense title denotes a document, the term 'native title' does not denote any documents but only a right acquired in law**."
>
> [My Emphasis]

[204] Arifin Zakaria FCJ (as His Lordship then was) in *Madeli Salleh (supra)* by way of obiter acknowledged the concept of communal native title to land. In the circumstances, the State's interest in land is subject to any native rights over the land. The learned judge held that:

> "And it was held by Brennan J, Mason CJ and McHugh J, concurring, in *Mabo (No 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land. **The Crown's right or interest is subject to any native rights over such land** ...
>
> We are conscious of the fact that in this case we are dealing with individual right not communal right, but in our view the principle applicable is the same."
>
> [My Emphasis]

[205] In *Delgamuukw v. British Columbia (supra)*, the Supreme Court of Canada held that native rights to their ancestral land has a broad range. This is to say that the form of rights of the natives to their lands varies in each case, having regard to the degree of connection with the land.

Lamer CJ and Cory, McLachlin and Major JJ held that:

> "Constitutionally recognised aboriginal rights fall along a spectrum with respect to their **degree of connection with the land**. At the one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land. In the middle are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. **Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity**. At the other end of the spectrum is aboriginal title itself which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess **aboriginal rights** that are recognized and affirmed by s 35(1), including site-specific rights to engage in particular activities."
>
> [My Emphasis]

[206] Thus the nature and types of rights the natives are entitled to are embodied in their customary practices. A claim for native title of the land is to acquire ownership of the land. However, there exist circumstances where proprietorship of the lands are not the real issue but the right to engage in specific activities on the land which are critical components of their customary practices. Such rights are inextricably tied up with the land.

[207] Whether common law recognises the rights of the natives to lands used for roaming, hunting and foraging is a fact to be proven by the natives in each case. The claim can be upheld by the court if it has been proven that the customs and activities of the community is to include foraging. In other words, such foraging activities must form the real character of the customary practices of the natives. Thus the issue boils down to proof of customary practices.

[208] In the present case, what is the real character of the NCR claimed by the respondents in their customary practices of pemakai menoa and pulau?

[209] Under Iban custom, each longhouse has a territory over which a community exercises control. The term pemakai menoa refers to an area of land held by a distinct longhouse or village community exercised within a garis menoa (territorial boundaries between villages marked by rivers, hills or clumps of trees and other natural features).

[210] PW1, Nicholas Bawin ak Anggat, is an expert on Iban adat and customs on the creation of NCR, in particular the creation of pemakai menoa and pulau. PW1 is ethnic Iban and had served as Deputy Head of the Majlis Adat Istiadat Sarawak from 12 August 1992 to 28 February 2005. His knowledge of Iban custom and tradition was from his personal experience and observation. He was born and brought up in his longhouse and had done research and study on adat Iban through well documented materials and records by well known authors such as D Freeman, Kedit, Dr Dimbab Ngidang and Benedict Sandin.

[211] PW1 in his evidence, explained the concept of pemakai menoa and pulau to be the customary practices of Iban:

> "In the past, when pioneering families of Iban opened a virgin forest area, they would perform an important ritual known as panggul menua, it was only after the ceremony was performed that the first cutting of virgin forest for settlement and farming could commence. From then onward, the community can establish its rights to the felled area and forest within the general area, as their pemakai menoa (also spelt as menoa) or communal land.
>
> Pemakai menoa encompasses an area of land held by a distinct longhouse or village community, and includes farms, garde, fruit groves, cemetery, water and forest within a defined boundary (garis menua). Pemakai menoa also includes temuda (cultivated land that have been left to fallow); tembawai (old longhouse sites), and pulau (patches of virgin forest that have been left uncultivated to provide the community with forest resources for domestic use)."

[212] PW2 in his evidence said that the physical ground marking of the claimed area was by "tinting" ie by following the mountain ridge or rivers. As highlighted by the trial judge, the practice of marking boundary by following the natural boundary is also reflected in the Secretariat Circular no 12/1939 which states:

> "12. Administrative Officers will arrange to hold meetings to hear the report of each Village Council on the extent and limits of the land claimed by communities. In some cases the area claim will be out of proportion to the requirements of the community and pruning or extension will be necessary. Room for normal expansion must be provided and suitable boundaries adopted. **Where possible natural boundaries should be followed, but in congested areas artificial boundaries will be necessary**."
>
> [My Emphasis]

[213] Thus as a matter of theory and principle, it is possible for a native customary system to dictate, as the factual evidence in the present appeal has, that certain areas of land are designated for certain uses by certain people (to the exclusion of other people). That in itself describes a usufructuary right. My view is that we should not be too myopic about the "title'. In fact, Arifin Zakaria FCJ (as His Lordship then was) in *Madeli Salleh (supra)* recognises that in the *Amodu Tijani* case *(supra)*, a "full usufructuary title" vests in the Chief.

[214] Similarly, the Court of Appeal in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 1 MLRA 819 says that:

> "a very useful form of native title is that of a usufructuary right which is a mere qualification of a burden on the radical or final title of the Sovereign where it exists. In such cases the title of the sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates ... Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment ... To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case ..."

I might add that if is suggested in the Court of Appeal in *Sagong Tasi* [2005] at p 822 where it says that "the precise nature of such a customary title depends on the practices and usages of each individual community."

[215] It is also said that pulau is the virgin forest surrounding a longhouse that can be covered by a half-day foot journey (refer to the decision of Ian Chin J in *Nor Anak Nyawai (supra)* and AJN Richards on *The Land Law and Adat*, p 24) 76. It is my finding that in view of the explanation given by PW1 with respect to the term pemakai menoa and pulau, the plausibility of this test to menoa requires corroboration, which PW2 appeared to have done.

[216] The NCR claimed by the respondents in the customary practice of pulau is a site specific right to engage in a particular activity. Though they may not be able to demonstrate title to the land, they can show that these interests are those which demonstrate their particular rights in engaging in such activity for their livelihood. Their rights cannot therefore be taken away by the Government without compensation. The State's interest in these lands are subject to the respondents' natives rights over the land. (See the decision of the High Court in *Adong Kuwau (supra)*).

[217] In any case, the first question posed in this appeal with regard to pre-existence has not been clearly framed. There appears to be an unnecessary dispute as to a question of fact ie whether or not this customary practice existed. On the basis of legislation during the Brooke era, Datuk JC Fong alleges it has not, whereas Mr Baru Bian includes a wealth of evidence that it did. The Court of Appeal in its paragraph has noted multitudinous references to the phrase and idea of pemakai menoa. So if this is truly a factual question I am not sure really why we are considering it in this court since we were not privileged to hear the testimony of witnesses (though a lot of it is documentary).

[218] In this connection, regard must be had to the questions of law posed in these appeals. Leave was allowed based on the said question. But nowhere was there any hint or indication as to there being any dispute as to questions of fact – which rightly would not come within the jurisdictional context of this court. Section 96 CJA is of course quite clear.

> "Thus the remarks made *in extenso* in the majority/ supplemental judgment on the facts remains obiter."

[219] As far as the concept of the rights is concerned, the evidence adduced by the respondent appears sufficient. But whether they have continued to practice this custom is a question of fact. The trial judge has decided upon it, thus the principal question this court should ask itself is whether or not the trial judge had made out such a material error in that regard. On balance, on the strength of the trial judge's determination, I find that the existence of pemakai menoa/ pulau is made out on the evidence.

[220] Thus in view of the above, my answer to Question 1 in this appeal is in the affirmative. The pre-existence of rights under native laws and customs which the common law respects includes rights to land in the virgin/primary forests which the natives reserve for food and forest produce.

[221] Question no 2 in this appeal is:

> "Whether the High Court and the Court of Appeal are entitled to uphold a claim for native customary rights to land in Sarawak based on a native custom (namely pemakai menoa and/or pulau) where:
>
> a. there is no proof that such custom was practised amongst the native communities (particularly amongst the Ibans) for the creation of rights to land prior to the arrival of the first Rajah in 1841;
>
> b. such a custom was never reflected or recognised as having been practiced by the native communities in relation to the creation of rights to land, in any of the Orders made and legislations passed by or during the Brooke era or by the Legislature of Sarawak; and
>
> c. such a custom was never part of or recognised in the Tusun Tunggu and the Adat Iban 1993, which declared, pursuant to the Native Customary Laws Ordinance, the customary laws of the Iban community in Sarawak."

Customary Land Rights Of The Natives Are *Sui Generis*

[222] In the present appeals, the existence of the customary practices of pemakai menoa and pulau is not disputed. The primary thrust of the appellants' appeals is that such customary practices do not have the force of law. Whilst it is true that 'not all customs have the force of law', it is critical for us to now discover what customs actually have the force of law.

[223] Article 160(2) of the Federal Constitution reads:

> "Law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;

[224] The definition of law under art 160(2) of the Federal Constitution includes 'customs and usages having the force of law'. This makes customary law an integral part of the legal system in Malaysia.

[225] Custom is a source of unwritten law. It must be emphasised that customary law is a traditional common law rule or practice that has become an intrinsic part of the accepted and expected conduct in a community. In, *Mabo (No 2)* the High Court of Australia held that:

> "The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants."

[226] As explained by Lord Denning in the case of *R v. Secretary of State For Foreign and Commonwealth Affairs; Exparte Indian Association of Alberta* [1982] 2 All ER 118:

> "The Indian peoples of Canada have been there from the beginning of time. So they are called the "aboriginal peoples". In the distant past there were many different tribes scattered across the vast territories of Canada. Each tribe had its own tract of land, mountain, river or lake. They got their food by hunting and fishing: and their clothing by trapping for fur. So far as we know they did not till the land. They had their chiefs and headmen to regulate their simple society and to enforce their customs. I say "to enforce their customs", because in early societies custom is the basis of law. Once a custom is established it gives rise to rights and obligations which the chiefs and headmen will enforce. These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community.
>
> In England we still have laws which are derived from customs from time immemorial."

[227] Native customary rights to land are *sui generis*. The nature and kind of rights of the natives are embodied in their customary practices. As highlighted by the High Court of Australia in *Mabo [No 2] (supra)*:

> "Native law has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. **The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs**."
>
> [My Emphasis]

[228] Thus, in the present appeals, I agree with the view expressed by Abdul Wahab Patail JCA when he held that:

> "Unlike law imposed from above by coercive authority such as a king or a Legislature, native customary law develops from the ground as customs and practices evolve from and in response to changing circumstances and gain general acceptance. In a sense it is direct democracy. These native customary laws traversed a broad range of subjects of communal interest, as the later Adat Iban Order 1993 itself demonstrates. Not all but some of which relate to interest in land."

[229] A question then arises, How can a native customary practice attain the force of law? In *Tyson v. Smith* [1838] 112 ER 1265 Tindal CJ held that:

> "It is an acknowledged principle that, to give validity to a custom, – which has been well described to be an usage, which obtains the force of law, and is, in truth, the binding law, within a particular district or at a particular place, of the persons and things which it concerns (see Davy's Reports, 31, 32), – **it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption**."
>
> [My Emphasis]

[230] In general, for a custom to be regarded as conferring legally enforceable rights, it is essential that such customs be immemorial, certain, reasonable and acceptable by the locality. It has to be consistent and continues to exist from time immemorial in a given community (see also *Halsbury's Laws of England,* 4th edn, (1975 – vol 12).

[231] A custom must not be against humanity, morality and public policy. Therefore a custom upheld by the court must be reasonable. The court has a duty to examine whether or not a custom is reasonable having regard to the facts and circumstances of each case (*Nagammal v. Suppiah* [1940] 1 MLRH 529, *Tyson v. Smith (supra)* and *Mercer v. Denne* [1905] 2 Ch 538 (Court of Appeal). As expressed by Tindal CJ in *Tyson v. Smith (supra)*:

> "The question, what customs are reasonable and what are not, is one upon which the books are not altogether silent. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for "*consuetudo ex certa causa rationabili usitata privat communem legem*" (Co Litt 113 a), as the custom of gavelkind and borough English, which are directly contrary to the law of descent, or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of

husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation.

But, on the other hand, **a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement** ..."

[My Emphasis]

[232] Now, referring to Question 2 in the present appeals, it posits that the rights of the natives to the virgin forest can only be upheld by the court if they satisfy the following conditions:

a. The customary practice of pemakai menoa/pulau has been practised by the Iban prior to the arrival of the first Rajah in 1841.

b. The customary practice of pemakai menoa/pulau has received recognition in any of the Orders made and legislations passed by or during the Brooke era or by the Legislature of Sarawak.

c. The customary practice of pemakai menoa/pulau must have been incorporated in the Tusun Tunggu and the Adat Iban 1993.

[233] Datuk JC Fong submitted that the pre-existence of rights which the common law respects, were rights to land created in accordance with the adat practised by the natives **at the time of the arrival of Rajah Brooke**. He said that, that adat is as was determined by the Federal Court in ***Madeli Salleh*** *(supra)*, ie the felling of trees and clearance of the virgin jungle for cultivation and occupation. The description of the adat which has been recognised by the Secretariat Secular No 12/133, Secretariat Secular No 12/139 and Rajah's Order IX of 1875 corresponds with the term "temuda" which was subsequently incorporated into the Tusun Tunggu, applicable to the respondents who are Ibans from the old Third Division. (My Emphasis).

Is this interpretation by the appellants' counsel correct? We shall see.

Native Customary Rights Do Not Owe Their Existence To Statute

[234] At the risk of repetition, it is my view that the existence of native customary rights requires factual inquiry of the customs and practices of each individual community and not whether the customs appear in the statute book.

[235] Customs may be proven or established by calling witnesses acquainted with the native custom to testify on its existence (see *Sat anak Akum & Anor v. Randong anak Charareng* [1958] SCR 104 and *Nagammal v. Suppiah (supra)*). Customs will be found to exist if there is proof of the existence of the custom as far back as living witnesses can remember. In support, parties are also entitled to make references to public record and writers of indigenous law.

[236] It is axiomatic that customary rights do not owe their existence to statute. Instead they are recognised as a source of unwritten laws.

[237] Hence, in the present appeal, the trial judge was correct when she held that not only is the common law of England applicable to Sarawak, native law and customs of the natives of Sarawak are also respected, applied and deemed the law of Sarawak.

[238] As explained by Brennan J in *Mabo (No 2)*, because native title is *sui generis* in character, legislative or executive recognition by the sovereign is not required, and thereby "native title, though recognised by the common law is not an institution of the common law".

[239] With respect, I find that the appellants' counsel's view that temuda is the only legitimate custom misconceived. This is because it addresses only one type of right and not the other.

[240] Ultimately, the cultivation rights and foraging rights are very different. Besides, even if we take the "Two turtle egg" case which Datuk JC Fong sent over later on, those cases were decided upon the basis that since the area had been gazetted as a nature reserve, the customary right to collect eggs had been extinguished. That, I believe is the type of express primary or secondary legislation necessary to extinguish a right.

[241] Ultimately, the appellant takes a rather positivist approach in saying that customs are not law unless expressly pronounced to be so. Whereas the more nuanced view of" respecting the pre-existence of customs" assumes that customs are *sui generis* and will continue to exist and take effect unless there is good reason not to (eg as being against public policy, for example, headhunting – as Datuk JC Fong regularly cites).

[242] In the present case, the counsel for the respondents referred to a compilation of Sarawak Dayak Adat Law in the Second Division Land Law and Adat by AJN Richards under the order of the Chief Secretary in 1963. The term "menoa" is included in the said compilation. It is defined as follows:

> "the countryside, the area held and used by a longhouse and its precincts, the farms and gardens, fallow land, pulau left for timber or fruit, old house sites and fruit groves, cemeteries, the water and the surrounding forest to a distance of a day's journey, together with the memory pf physical effort and the consciousness of a spiritual state and balance of everything seen and unseen within it attained by practice of religion."

The term pulau is defined as "island, copse of trees left uncleared in a farm or between farms".

[243] The counsel for the respondents also referred to a report prepared by AJN Richards on Sarawak Land Law and Adat. The term "menoa" is mentioned a few times in the report in the paragraphs dealing with the rights of the Iban

community. Paragraph 45 of the report provides an explanation on the term "pulau":

> "A pulau (island) may be owned by an individual family or by a group, in which latter case the community has a say in its disposal ..."

[244] The discussion on "pulau" is also contained in the book 'Rajah's and Rebels', The Ibans of Sarawak under Brooke Rule, 1841-1941. The book was written by a researcher, Robert Maxwell Pringle in the 1960s. In chapter 6 at p 244 of his book, Pringle related a story of a rival claim to a pulau between two groups in the Iban community. He explained that pulau refers "to any isolated, unfelled patch of jungle".

[245] It could be observed that whilst the customary practices of menoa and pulau do not appear in any codified law under the Rajahs, their existence have been acknowledged in the reports and historical texts.

[246] However, the fact that their existence were not described in the orders of the Rajahs or statutes remains insignificant. By no means can their existence be denied. It must be reiterated that in the absence of any formal record of a customary practice the respondents' case is fortified with the oral evidence of the witnesses.

[247] Thus for it to be said that 'statutes or Orders of Proclamation made by the Rajah and subsequently by the Legislative of Sarawak, do not appear to have recognised the customs or adat of pemakai menoa and pulau is odd. This is because it merely says that they have not been enshrined in law, not that they do not exist and not that the common law does not recognise them.

[248] In fact, this is very much at odds with *Nor Anak Nyawai*. See p 592 of *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 1 MLRA 580. In summarising the law on NCR, the judge in *Sagong Tasi* (HC) makes the following points:

> "Native customary rights
>
> (a) it is a right acquired in law and not based on any document of title.
>
> (b) it does not require any conduct by any person to complete it, nor does it depend upon any legislative, executive or judicial declaration ..."

That being the case, since it does not depend on any legislative, executive or judicial declaration, there is no reason why the absence of any legislative or executive declaration is taken to be fatal upon its status as law, or that it does not qualify having the force of law.

[249] It is an established principle of law that the invalidity or non-recognition of a customary practice can only take place by the express words of the statute. (*Madeli Salleh (FC) (supra)*, *Sagong Tasi (supra)* and *Nor Anak Nyawai (supra)*.

Clearly, there is an assumption in the appellant's submission. It is assumed that the only way something can have the force of law is if it has been recognised by statute or ordinance. That is plainly untrue. It is possible for something to have the force of law if it is recognised by the common law as well — that, in fact, is the cornerstone of judge-made law in the entire common law world. The effect of the common law is equal in merit to that of legislation (even if the latter can override the former).

[250] In this regard, I subscribe to the view expressed by Ian Chin, J in *Nor Anak Nyawai (supra)*, where he held that:

> "The matters of temuda, pulau and pemakai menoa were already recognised by their being mentioned in the various orders and reference which I have earlier referred to and therefore the law of Colony has indirectly given effect to them. Native customary law before its codification was not in any legal written form but a matter of proof. Native customary law existed and operated side by side with the orders and other legislation of the Rajah until they were abolished by the Rajah (see *Professor Douglas Sanders; Calder; Adong bin Kuwau, Mabo*). Therefore, even assuming that those rights of temuda, pulau and pemakai menoa were not expressly mentioned by any written law, it does not mean that they could not exist as native customary law. They exist, and in this regard I have already adverted to the evidence and found them to exist, until abolished by orders or other legislation for which also I have concluded that they had not abolished those native customary rights which are also equated as native customary laws."

[251] In similar vein, I also agree with the conclusion reached by the Court of Appeal in the present appeal. Upon a perusal of the legislative and administrative orders in relation to native customary lands, the Court of Appeal held that:

> "More precisely, these laws set out what natives may claim under those laws. If there is nothing in the law that recognises the native customary rights to land, it is equally true there is nothing in clear and unambiguous language rejecting native customary rights to land."

[252] So, there you have it. The position is crystal clear in that despite the increasingly comprehensive regulatory legislation, customary rights associated with the practice of pulau under the concept of pemakai menoa, have not been abolished by the Sarawak Land Code or any other statute but that they remained unscathed and survived through the Brooke orders and Ordinances of the Colonial period up to the present.

The Codification Of The Adat Iban In Tusun Tunggu

[253] I now move on to the issue of codification of the Iban's adat. The issue is when customs are codified, should the statutes be the only source of customs that are admissible as evidence? Datuk JC Fong for the appellants would have us believe this to be the position.

[254] The learned State Attorney General of Sarawak also averred that based on the Tusun Tunggu, there are only two modes of acquiring customary rights over land — one is felling a virgin jungle and planting crops thereon to create the 'temuda' and the other is by gift or inheritance. Both modes were approved or endorsed by the Federal Court in *Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors* [2013] 4 MLRA 621. It was held that:

> "[76] From the totality of evidence and authorities referred in the course of the hearing, we are satisfied that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of Tusun Tunggu whereby NCR could be acquired by two modes namely clearing untitled virgin jungle enroute to the creation of what is locally described as temuda and the other by receiving the temuda as a gift or inheritance. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandoned whatever NCR was created or acquired previously over that land would be lost. If the original owner abandons the land without more the community takes over."

It must be emphasised that *Bisi Jinggot* concerned the transfer of native customary land by way of sale to a third party. The issue before the court was whether the custom that individual native customary rights (temuda) are not transferable by sale or otherwise for value ceased to exist. Suriyadi Halim Omar FCJ held that individual customary rights are not transferable by sale or otherwise for value and it was in this context that he arrived at the above statement of law. Richard Malanjum (CJSS) in his supporting judgment held that since there was no custom on transfer of native customary land by way of sale, the question of extinguishment does not arise.

[255] What is stated in Tusun Tunggu is as follows:

> "Theoretically, all untitled land whether jungle or cleared for padi farming (Temuda) is the property of the crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farms confers on them restricted rights of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes "temuda". It is a recognised custom that "temuda" is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance".

[256] A question then arises, what is Tusun Tunggu? The question which follows is whether Tusun Tunggu is a comprehensive codification of adat Iban?

[257] Tusun Tunggu is a codification of Iban adat. It was drawn up in consultation with the elders in the community. Tusun Tunggu in its English version is known as Sea Dayak (Iban) Fines 1936 (Revised 1952). It had been revoked by the coming into force of the Adat Iban 1993, which contains the Iban customary laws throughout Sarawak, based on the Tusun Tunggu (Revised 1952) and Dayak Adat Law Second Division 1963 compiled by AJN Richards.

[258] The definition of the word "Tunggu" appears in s 2 of the Adat Iban 1993:

> "'Tunggu' means a form of restitution. Restitution covers two important ingredients of the term 'tunggu': first, it covers the idea of providing a settlement between individuals; second it covers the idea of appeasement, atonement or restoration of the physical and spiritual wellbeing of the community. There is no element of punishment."

[259] Thus "Tunggu" is basically a restitution for breaches against customs and taboos. A perusal of the provisions of Tusun Tunggu reveals that it contains rules of social behaviour that apply in the Iban community and also the correct compensation to be meted out should these rules be transgressed. For examples, in terms of settlement, the offender shall provide "tunggu" in the form of "mungkul" (a small jar used in olden days for settling disputes) and one mungkul is now equivalent to RM1.00. In terms of "appeasement, atonement or restoration", the offender shall provide "genselan" (a ritual offering to appease gods for any disturbances caused and to restore harmonious relation among members of the community), pelasi menua (a ritual offering to avert the evil forces that would have been brought through the commission of major crimes such as incest) and pati nyawa (compensation paid to the family of the deceased by the offender who have caused the death of the deceased by negligence or accident).

[260] The concept of "tunggu" is intertwined with the rules of social conduct in the Iban community so as to preserve peace and harmony in the community. As explained by Tan Sri Datuk Gerunsin Lembat, Ketua Majlis Adat Istiadat Sarawak, in his "General Explanation" in respect of Adat Iban 1993:

> "The prime functions of the Adat Iban is to ensure harmonious relationship among community members and to preserve the spiritual well-being of the whole longhouse. Conduct in accordance with the Adat is believed to maintain a community in a state of balance or ritual well-being with the gods and spirits. Any breach of the customary laws may threaten this relationship. Therefore, remedial action is to be taken immediately by providing or offering proper ritual propiation."

[261] It is also pertinent to note that the relevant paragraph quoted by the appellants from Tusun Tunggu on "temuda" appears under the chapter of "Distribution of property following a divorce case of and type stated above". The subject matter of discussion under this chapter is on the rules of inheritance of "real property". It was on this basis that the concept of temuda was explained in Tusun Tunggu.

[262] In view of the above, native customary practices or adat of Ibans described in Tusun Tunggu are not exhaustive. In *Nor Anak Nyawai (supra)*, Ian Chin HCJ observed that:

> "This Code deals with offences relating to custom and fines, the various jurisdiction of a **tuai rumah**, of a **penghulu** and of a District Native court. It

> has a guide for judges, Magistrates relating to adoption and the acquisition and disposition of property. It does not contain any provision that adversely affect the rights of the plaintiffs. Neither was it intended to be an exhaustive statement as to all aspects of the native customary rights of the Ibans."
>
> [My Emphasis]

[263] More importantly, this principle is supported by a Supreme Court authority in the case of *Sat Akum & Anor v. Randong anak Chararenq* [1958] SCR 104. In dealing with an appeal against the decision of Bodley J in the High Court at Saratok as to whether a Dayak can make a written will, the Court of Appeal as per Lascelles J, held that:

> "The Tusun Tunggu which applies to the Dayaks of the third, fourth and fifth Division is the result of an attempt to codify the adat which prevails among the Dayaks of these Divisions. **It is well understood however that it is by no means exhaustive**; I myself have come across points of adat which are not even mentioned in the Code ..."
>
> [My Emphasis]

The position as regards customs as embodied in the Tusun Tunggu is therefore cannot be any clearer than those as had been held by a court of law in the above case.

This case *Sat anak Akum (supra)* is also authority for the proposition that courts can rely on the opinion or evidence of experts in adat law as was done in these appeals – taking the testimony of PW1 and PW2, amongst others. The learned judge in *Sat anak Akum (supra)*, *inter alia*, said that:

> "... Many native leaders have been consulted on this matter and various opinions are held ..."

[264] Thus Tusun Tunggu regulates matters such as community living, religion, marriage and inheritance and it does not govern all matters relating to customary tenure and customary practices on land. It contains rule of social behaviours and family laws of the Ibans and therefore the concept of pemakai menoa and pulau which relates to territorial domain of the community are nowhere to be found. The above view is also supported by the Secretariat Circular no 12/1939. In Appendix A, it is stated at para 1 that:

> "The Land Orders recognise native customary rights to land, but give little guidance on the subject, the law of customary tenure is wrapped up with that of inheritance and neither has yet been adequately codified."

[265] Based on para 4 of the Circular, a village or longhouse is assumed to constitute a community. By para 16 of the Circular, recognition is given to the "communal rights" of the natives in the following fashion:

> "Communities, particularly in localities where old jungle is becoming scarce, should be encouraged to define and maintain forest areas of reasonable size,

not for commercial purposes and not for potential farming land, but to provide for their needs in the form of jungle produce."

[266] My view is that the above provisions taken from the State Circular do not negate the existence of the communal rights of the natives in Sarawak to native customary land. On the contrary, the Circular in fact confirms that such rights exist.

[267] The custom of pulau is a native custom so inextricably tied up with the virgin forest within the pemakai menoa. Like temuda, pulau is part of menoa. In fact, if the appellant recognises the existence of temuda then it should, *a fortiori*, also accord the same regard for pemakai menoa and pulau. Contextually, temuda exists BECAUSE it is part of pemakai menoa. To disembody pemakai menoa and pulau from temuda makes little sense, because if the concept of the Iban territorial domain is properly understood, one would at once acknowledge the relationship of the various land rights in its context. Therefore, in the absence of a clear provision in a statute which rejects the custom of pulau, the existence of pulau is recognised by common law.

[268] This needs to be said. I find it peculiar that the answer to the question of whether there can be recognition of customary rights at common law is a no, simply because **statute has not recognised it** or "**only if it has been recognised by statute**." This cannot be the answer to the question. Besides, it is at odds with the principles since established, namely, that native customary rights are a *sui generis* form of law which is not part of the common law but that the common law respects and provides protection for those particular rights which are established. To turn the question back to whether or not it has previously been recognised by statute is puzzling. This can be proven by a simple question: would it still be necessary for common law recognition if the NCR was already recognised or enshrined in statute? The answer is a simple, no. Because then they would be able to rely upon statutory rights to establish their claim. The thing is this: common law works in tandem with and as an alternative to that. Thus the answer cannot then be satisfying. [My Emphasis].

[269] What is crucial in my view, is that the argument for the appellant suggests that we should take into account the definition of customary laws under Sarawak State Laws which has been defined to mean customs which the laws of Sarawak recognise. Again, there is this assumption that "laws of Sarawak must mean 'legislation of Sarawak' rather than '**legislation and the common law of Sarawak**' or some other more expansive definition. The implication is that the lack of recognition under Sarawak's 'laws' (read: legislation) means that they are merely practices. [My Emphasis].

[270] This completely misses the nuance that art 160(2) must be talking, about legislation, secondary legislation, state ordinances and enactments, as well as the common law. There are aspects of our law that are only found in case law and I see no reason why they should be excluded from any understanding of what 'law' is. To fit usufructuary NCR into the picture, they would fit either as

an aspect of "common law" or 'customs' that are recognised by the common law' and thus have the 'force of law'.

Thus the repeated reliance on the fact that these customs have never received legislative recognition misses the heart of the appeal in this case.

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

[272] In view of the above discussion, I find Question 2 to be at odds with principles and if at all, need not be answered, given the position taken in the foregoing.

The Decision Of The Court Of Appeal In *Nor Anak Nyawai*

[273] Question 3

Whether the Court of Appeal's decision in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 1 MLRA 580; that the rights of the natives is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak.

The principle contentions that were raised by the appellants were to the effect that established authority in the Court of Appeal's decision in *Nor Anak Nyawai* necessarily limits the areas that formed their settlement and not to the 'jungles at large where they used to roam to forage for their livelihood in accordance with their tradition'.

[274] Referring to Question no 3 in the appeal, the learned State Attorney General submitted that the decision of the Court of Appeal in *Nor Anak Nyawai (supra)* represents the position of law in respect of rights of the natives in Sarawak.

[275] In *Nor Anak Nyawai*, the plaintiffs claimed that they have acquired native customary rights, described in the Iban language as temuda, pulau and pemakai menoa, over certain parts of the lands. The plaintiffs were the residents of two longhouses located along the Sekabai river in Bintulu, Sarawak. A provisional lease to the disputed lands was issued to the 1st defendant, Borneo Pulp Plantations Sdn Bhd, who sublet the land to the 2nd defendant, Borneo Pulp & Paper Sdn Bhd, as contractors to clear the land for a tree plantation. The Bintulu Superintendent of Lands and Survey who issued the titles was the 3rd defendant.

[276] The plaintiffs claimed that the defendants had trespassed and damaged their ancestral lands and asked for an injunction to prevent the defendants from entering the disputed area and for damages.

[277] The High Court Judge found that the plaintiffs had established their native customary rights over the disputed areas. The Court of Appeal however dismissed the trial judge's finding and held that there was insufficient evidence to support a finding that the defendants had 'occupied' the disputed lands since there was no evidence of settlement, burial grounds or 'pulau' in the area. After referring to the relevant paragraphs in the judgment of *Adong Kuwau (supra)* and *Sagong Tasi (supra)*, the Court of Appeal went on to conclude that:

> "From the above two cases, we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land. Further, **we are inclined to agree with the view of the learned trial judge in *Sagong Tasi & Ors* that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'**. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food. We note that even Mr Baru in his submission hinged the claim of the respondents over the disputed area on the assertion that they 'had been in continuous occupation and by express provisions of the law at the relevant time, been lawfully occupying the disputed area'. It is thus a matter of evidence adduced whether his submission can be sustained."
>
> [My Emphasis]

[278] It is apparent therefore that the Court of Appeal in ***Nor Anak Nyawai*** *(supra)* held that native customary rights over land can only be founded upon the concept of continuous occupation; that these rights **do not extend** to the areas of forests where the natives or their ancestors used to roam in search of food and jungle produce to the areas where they roam and forage. The question is : Is this proposition of law correct? [My Emphasis].

[279] In this context, a discussion on *Adong Kuwau (supra)* and *Sagong Tasi (supra)* thus becomes necessary. As discussed earlier, the issue in *Adong Kuwau (supra)* is in respect of the deprivation of vast areas of traditional and ancestral lands on which the claimants foraged for their livelihood.

[280] The dicta of the High Court in *Adong Kuwau* is clear, in that common law recognises the right of the aboriginals to live from the hunting of animals in the jungle and the collection of jungle produce to foraging land.

[281] *Adong Kuwau* is the first case in our country involving a claim for native customary rights. The decision was followed by the High Court in *Sagong Tasi (supra)*.

[282] However in **Sagong Tasi**, the aborigines of the Temuan tribe brought a representative action for unlawful eviction from their areas of settlement

following the acquisition of 38,477 acres of their land for the purposes of construction of the highway to the Kuala Lumpur International Airport. The plaintiffs' claim was for recognition of their proprietary right to the land and compensation for breach of art 13 of the Federal Constitution and for trespass. [My Emphasis].

[283] The High Court held that the native title to the settled areas of the land taken, was a proprietary interest "in and to the land". On the issue of compensation, it was held that the Orang Asli had proprietary rights which fell within the ambit of art 13(2) of the Federal Constitution.

[284] The trial judge in *Sagong Tasi (supra)* had concluded that:

> "Therefore, in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the **proprietary interest** of the orang asli in their customary and ancestral lands is an interest in and to the land. However, this conclusion **is limited only to the area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition**. As to the area of the settlement and its size, it is a question of fact in each case. In this case, as the land is clearly within their settlement, I hold that the plaintiffs' proprietary interest in it is an interest in and to the land."
>
> [My Emphasis]

Thus in keeping within the ambit of the claim itself, the trial judge in *Sagong Tasi* confined the recognition of the proprietary interest of the natives only to "the area that forms their settlement. That was why the court expressed that this right does not extend "to the jungles at large..."

It was in this context that *Sagong Tasi* was decided. This has to be clearly distinguished from the facts in *Nor Anak Nyawai*.

[285] At this juncture, it is pertinent to note that the term "proprietary interest" stated in the above paragraph refers specifically to "ownership" of the customary land. It bears emphasis that the facts in ***Sagong Tasi*** *(supra)* involved the area of **settlement** of the aboriginals which had been taken away by the government for the purpose of the construction of the KLIA. Thus the learned judge's finding is predicated on this fact. [My Emphasis].

[286] The fact that the term "proprietary interest" in the above paragraph does not describe proprietary interest in land in its general sense is supported by the explanation given by the trial judge in *Sagong Tasi (supra)* in the preceding paragraph:

> "The *Adong* case is concerned with the deprivation of vast areas of the aborigines' traditional and ancestral land on which they did not stay, but depended on to forage for their livelihood in accordance with their tradition. However, in the case before me, the acquisition is in respect of a small portion of their traditional and customary or ancestral land where they resided, that is

to say, their settlement. **I follow the *Adong* case, and in addition, by reason of the fact of settlement, I am of the opinion that based on my findings of facts in this case**, in particular on their culture relating to land and their customs on inheritance, not only do they have the right over the land but also an interest in the land. I am fortified in my view by the leading Privy Council case of *Amodu Tijani v. the Secretary, Southern Nigeria* [1921] 2 AC 399 ('the *Amodu* case'), which was relied on by the High Court in the *Adong* case though the issue of settlement did not arise in the case. The issue in the Amodu case was whether the native people whose land was taken for a public purpose ought to be compensated on the basis of ownership of the land or merely on the basis of having a right of control and management of the land."

[My Emphasis]

[287] It is pertinent to note that in saying that "by reason of the fact of settlement, I am of the opinion that based on my findings of facts in this case" in the above paragraph, the learned judge made it quite clear that his finding was **peculiar** to the facts in *Sagong Tasi* which involved settlement areas. This finding should not therefore, bear upon the decision in *Adong Kuwau* on rights of livelihood or rights to the virgin jungle where the aboriginals used to roam to forage for their livelihood. [My Emphasis].

[288] It was on this basis that the learned judge made an incidental remark in *Sagong Tasi* that the proprietary interest of the aboriginals does not extend to "the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition". Thus, such statement can only amount to an obiter.

Unfortunately, this statement of the law ("... this conclusion is limited only to the area that form their settlement, but not to jungles at large where they used to roam to forage for their livelihood in accordance with their tradition") was quoted by the Court of Appeal in *Nor Anak Nyawai* as the law on this subject. With respect, that was clearly erroneous. And it is based on this incorrect reasoning that the appellants now finds itself on the wrong foot.

[289] As stated earlier, *Adong Kuwau (supra)* is the first case in the country which recognises the rights of natives to their ancestral lands. It is observed that in upholding the principles of law in *Adong Kuwau* that common law recognises native land rights, the learned trial judge in *Sagong Tasi* however highlighted the distinct character of customary lands claimed by the Temuan in *Sagong Tasi*. Emphasis was given that the disputed land involved their ancestral lands used for settlement and therefore "interest in the land" encompasses a legal right to occupy and possess the land.

[290] It is observed that the decision of *Sagong Tasi* is to complement the statement of law in *Adong Kuwau* that common law recognises the rights of the natives to their ancestral lands and such rights can vary with respect to their degree of connection with the land. Interest in the land encompasses a legal right to occupy and possess the land. This is evident from the following paragraph in the judgment:

"Although the *Adong* case purported to follow *Mabo No 2*, it did not consider that an essential character of aboriginal titles to the land as described by the High Court of Australia was a proprietary interest in the land itself. Brennan J (as he then was) explained it as follows:

> Whether nor not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of 'property' which require alienability under the municipal laws of our society (39), to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in the people: land is susceptible of ownership, and there are no other owners ..."

[291] His Lordship went on to explain that although an aboriginal title was a community title belonging to the community as a whole, individuals within the community could, by its laws and customs, possess proprietary individual rights over their respective parcels of land, as follows:

"Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be **difficulties of proof of boundaries** or of membership of the community or of representatives of the community which was in exclusive possession, **but those difficulties afford no reason for denying the existence of a proprietary community title** capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws, and customs and are dependent on the community title. *A fortiori*, there can be no impediment to the recognition of individual proprietary rights.

[My Emphasis]

[292] By the above paragraph, the trial judge has established that aboriginal rights have more than rights to enjoyment and occupancy of native lands. Customary lands are susceptible of ownership.

[293] A claim for native customary rights to land shall "fall along a spectrum with respect to their degree of connection with land". At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinct aboriginal culture of the group claiming the right. At the other end of the spectrum there is aboriginal title itself. (*Delgamuukw (supra)*).

[294] In view of the above discussion, the law in *Adong Kuwau* is explicit. It gives recognition to the rights of the aboriginals to hunt and forage for food in the jungle.

[295] Nevertheless, the issue seems to be unsettled with the statement of law given by the Court of Appeal in *Nor Anak Nyawai (supra)* that 'the claim should not be extended to areas where they used to roam to forage for their livelihood

in accordance with their tradition'. The rejection of a claim for native rights to lands used by the natives to forage for their livelihood is borne out by the statement that "otherwise, it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed and foraged the areas in search of food".

[296] This argument has no conceptual basis. It appears to be judicial policy-making, where normatively the judges are unable to accept that it is good policy that land be tied up for use by the natives instead of being able to be disposed for commercial use by the governments/companies.

[297] The reasoning by the Court of Appeal in *Nor Anak Nyawai* that there is this danger that vast areas of land could be under NCR simply through assertions by some natives that they and their ancestors had foraged the area and whether or not they really do — is largely an evidential question. What the court ought to do in order to properly address the issue is to ask what kind of evidence is necessary to prove that their ancestors had foraged for food, and the standards to which it must be shown. With respect, it is my view that an evidentiary difficulty is not a justification for a complete departure or manipulation of principles.

There is then a mismatch between what is claimed and what is required to be proven. If occupation is required (by way of settlement or cultivation), that far exceeds a mere usufructuary right, then there is no coherent way of explaining why claiming a lesser right requires such a high degree of possession and exclusive control. Therefore, it does not follow why *Sagong Tasi* (in the HC) and *Nor Anak Nyawai*, in reliance upon those principles which the appellants cite, can come to the conclusion that occupation is necessary.

[298] Consequently, by no means are "vast of areas of land subjected to native customary rights simply through assertions by some natives that they and their ancestors had roamed and foraged for food." Such a view is misconceived.

[299] It must be stated that the Court of Appeal in *Nor Anak Nyawai* has misconstrued the law in *Sagong Tasi (supra)*. Nevertheless, *Nor Anak Nyawai* was correctly decided on its facts.

[300] It needs emphasis that the Court of Appeal in *Nor Ang* on the Iban concept of pemakai menoa and that NCRs do not owe their existence to statutes. It affirmed the High Court's major legal conclusions that the common law respects the pre-existence of rights under native laws or customs and such rights may only be taken away by clear and unambiguous statutory language. The court had given recognition to adat Iban on pemakai menoa and had examined all the evidence presented before the trial judge in order to justify a claim for pemakai menoa.

[301] In *Nor Anak Nyawai (supra)*, the claimed area was said to be the appellants' temuda, pulau and pemakai menoa. The Court of Appeal set aside the finding

of the trial judge that the respondents had acquired NCR over the claimed area. It was held that there was no evidence to show the existence of the respondents' longhouses and temuda in the claimed area. There was also no evidence which indicated that there was pulau in the area or that the area was considered as pulau by the respondents or their ancestors.

[302] It appears that the court in *Nor Anak Nyawai* had not considered the real character of native rights in the context of the Iban customary of pemakai menoa which comprises the settlement area, temuda and pulau in which evidence to their existence are required.

[303] In view of the above, Question no 3 is to be answered in the negative. The statement of law by the Court of Appeal in *Nor Anak Nyawai* that the rights of the natives is confined to the area where they settled and not where they foraged for food is a misconception. The decision is contrary to the common law recognition of the rights and interests of the natives over their ancestral lands.

Conclusion

[304] It cannot be disputed that pemakai menoa/pulau continues to exist from time immemorial in the community of Iban. Such custom is certain, reasonable and acceptable by the community of Iban. It must be recognised and upheld by this court.

[305] A claim for NCR is enforceable if it satisfies the *sui generis* nature of the custom. The *sui generis* nature of native rights requires that the content of native titles must not be explained by reference to common law. The challenge lies in the understanding of the nature of such rights as to how the natives who practice those rights perceive them.

[306] The law that governs a claim for NCR in respect of pemakai menoa/pulau has been established. The matter now turns on the facts of the case.

[307] In Appeal No: 27, PW2, Tuai Rumah Sandah described the boundary of the claimed area or pemakai menoa as follows:

> "The said NCR land is located within the river valleys of Sungei Machan starting at a point called Ng Sebatu, which marks the border down river with the Ibans of Rumah Sumbang, running from thereon covering both banks of Sungeu Machan to its very source."

[308] The trial judge was satisfied that the respondents live from the hunting of animals in the jungle and the collection of jungle produce as the source of their livelihood. Such activities form the real character of the customary practices of the respondents. They depend on the virgin jungle in the vicinity of their longhouses and within their communal boundary.

[309] The trial judge was satisfied that the respondents had proved their claim for NCR on a balance of probabilities. It must be appreciated that in dealing with a claim for NCR, the court must accord due weight to the perspective of the natives (see *Delgamuukw (supra)*). In *R v. Van der Peet* [1996] 2 SCR 507 the Supreme Court of Canada held that:

> "In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."

[310] The issues raised in the appellants' appeals merely involved questions of law on the Iban's custom of pemakai menoa and pulau. The findings of facts made by the trial judge are not under challenge. In the circumstance, such findings should be disturbed only in the rarest of cases (*Sagong Tasi (supra)* (CA)). Insofar as the above is concerned my view in Appeal No: 27 applies equally to Appeals No: 30 and 42.

[311] In the circumstances I find that the judgment of the High Court and the Court of Appeal are sustainable and I therefore dismiss all three appeals before this court. I hereby affirm the orders of the courts below. Correspondingly, the respondents' claims in High Court Suit No: 21-2-2009 and High Court Suit No: 21-1-2010 are allowed. I order that each party bear its own costs.