Singapore Journal of Legal Studies
[2020] 341–357

FEDERALISM AND INDIGENOUS PEOPLES IN SARAWAK: THE MALAYSIAN FEDERAL COURT'S JUDGMENTS IN *SANDAH (NO 1) AND (NO 2)*

EDEN HB **CHUA***

Legal recognition of indigenous land rights for the indigenous peoples in the Malaysian state of Sarawak is still in an unfortunate state. Despite being the largest ethnic group of the state and enjoying benefits under the federal system, the fight to hold onto their traditional customs is far from over. The recent Malaysia Federal Court rulings in *Sandah (No 1) and (No 2)* illustrated this point as the court denied their native customary rights on their ancestral land and also their rights to have their case heard by at least one judge with Bornean judicial experience. With no clear law to shed light on the legal existence of their traditional customs as well as the Constitution's silence on the requirement to have at least one judge with Bornean judicial experience, the Federal Court's endeavour to resolve these issues merits attention. This paper thus reviews and comments on the decisions of the Federal Court, with special focus on the implications for the federal system

I. INTRODUCTION

The phenomenon of "land grabbing"[1] that comes with deforestation, logging activity, large-scale oil palm and sago plantation is prevalent in Southeast Asia. The state is the only entity that can issue leases and licenses to companies, punish and rectify any misdeeds caused to the communities affected by plantation projects as well as enforce law and order.[2] When wrongs are left unrectified, the next best course of action is to turn to the courts, as was often pursued by the indigenous peoples in the Malaysian state of Sarawak. The Malaysian Federal Court's refusal to recognise Sarawak's Iban native custom of *pemakai menoa* (territorial domain) and *pulau galau* (reserved forests) in *Director of Forest, Sarawak v TR Sandah ak Tabau*[3] and its review of its decision in *TR Sandah ak Tabau v Director of Forest, Sarawak*[4] have attracted criticism from Sarawak's indigenous communities as well as the legal fraternity. The decisions were regarded as a disappointment in two ways.

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* Lawyer of the Supreme Court of New South Wales, Australia. I am grateful to the counsel in *Sandah (No 2)*, Ms Clarice Chan for her explanation and insight of these two cases.

1 An extensive coverage of land grabs in Sarawak is provided by the Sarawak Report which was founded by Clare Rewcastle Brown. See also Connie Carter & Andrew Harding, *Land Grabs in Asia: What Role for the Law?* (New York: Routledge, 2015) [*Land Grabs in Asia*].

2 On this point, see Daron Acemoglu & James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (New York: Crown, 2012) at 80, 430.

3 [2017] 2 MLJ 281 [*Sandah (No 1)*].

4 [2019] 6 MLJ 141 [*Sandah (No 2)*].

First, indigenous claimants had lost their land, not because their unique legal systems or customs were irrelevant in practice, but because it was deemed to be by the court, signalling that arbitrary taking of land for modern development programs is permissible. Lands are central to their life and are of overwhelming importance for the continuation of their agrarian lifestyle. Large areas of land that could measure for over a thousand hectares are usually separated to create individual plots for cultivation; to plant fruits and vegetables crops for their families; to build longhouses to accommodate new family members; to expand when the community becomes overpopulated; and to set aside as burial grounds. Parts of the land were left uncultivated for foraging, hunting or fishing purposes. To say that security of land tenure is not fundamental to their morale and welfare is a gross understatement.[5] Second, the Malaysian Bar and lawyers from Sarawak disagreed with the ruling that judges hearing the appeal cases from the Bornean states of Sabah and Sarawak could be entirely from Peninsular Malaysia. As this paper seeks to show, the court's decision not only has implications on indigenous land rights in Sarawak but also brings federal-state relations into the spotlight.

II. The Context

Although Malaysia is generally understood to be made up of Malay, Chinese and Indian, there is a considerable segment of indigenous communities in Sarawak. While the indigenous population accounts for about 0.6% of the population in Peninsular Malaysia, the Ibans, which represent about 30% of Sarawak's population, together with Bidayuh, Melanau, Orang Ulu and other minor indigenous races form the largest ethnic group in Sarawak.[6]

The special position of indigenous peoples in Sabah and Sarawak is recognised in Article 161A of the *Federal Constitution* ["*Constitution*"]. Clause 6 of Article 161A defines a "native" as belonging to one of the following races:

> the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.

Despite the constitutional guarantee, indigenous peoples in Sarawak are still widely understood to be the most marginalized group in the nation in terms of social and economic inclusion, as are their counterparts in many countries.

Land and matters concomitant to it are within the purview of state governments.[7] Therefore, it is a state responsibility to recognise native land ownership, but it is left open how far this responsibility extends to the recognition of specific customs and traditions, and to the establishment of a completely native land system. In Sarawak, this is achieved through the *Sarawak Land Code 1956* ("*Land Code*"),[8] and thus put the fate of indigenous land rights contingent upon the Land Code. On the creation of

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5 See *Land Grabs in Asia, supra* note 2 at 75.

6 Department of Statistics Malaysia, *The 2010 Population and Housing Census of Malaysia* (Putrajaya: Jabatan Perangkaan Malaysia, 2011).

7 Constitution, Ninth Schedule.

8 Act 56 of 1965.

native customary rights, section 5(1) reads: "Native customary rights may be created in accordance with the native customary law of the community or communities concerned by any methods specified in subsection 2". Subsection (2) specifies five methods by which such rights can be established:

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

Also relevant is section 2(a), which recognises the pre-existing customary rights that existed prior to 1st January 1958. In Peninsular Malaysia and Sabah, the corresponding legislations are the *National Land Code 1965* and the *Sabah Land Ordinance 1930*,[9] respectively. While customary rights are statutorily recognised, the Land Code is silent on customary practices of *pemakai menoa* and *pulau galau*, resulting in "a gap between what national law dictates and what continues to exist on the ground".[10]

Pemakai menoa is a territory in which "the family groups (*bilik*) join together to make a longhouse which, with the surrounding contiguous territory, makes up the *menoa*. It includes, besides farms and gardens, the water that runs through it and the forest around it to the extent of half a day's journey",[11] whereas *pulau galau* denotes communal forest or "[t]he jungle from which the Iban gather forest products".[12] Essentially, it covers the entire territory of an indigenous community.[13]

Prima facie, *Sandah (No 1)* and *(No 2)* are solely concerned with indigenous rights. However, when East Malaysia joined Malaya and Singapore to form the Federation of Malaysia in 1963, one of the concerns at the time was the welfare and status of indigenous peoples.[14] The case thus presented an opportunity to examine the interrelatedness of indigenous rights and the federal arrangements of which indigenous peoples belong to. Due to cultural, demographic and political reasons, federalism is the sensible way of governing multiple conflicting but nevertheless compatible regions in the form of a single national community. It is a system "in which a general government is constituted by a group of two or more constituent governments which have very substantial reserved or protected powers within the common whole".[15] There are thirteen states in Malaysia but the Bornean states of

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9 (Cap 68).

10 Liz A Wily, *Customary Land Tenure in the Modern World—Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa—Brief 1 of 5* (Washington: Rights and Resources Initiative, 2012) at 4.

11 AJN Richards, *Sarawak Land Law and Adat: A Report* (Kuching: Sarawak Government Printing Office, 1961), cited in Dimbab Ngidang, "Deconstruction and Reconstruction of Native Customary Land Tenure in Sarawak" (2005) 43 Southeast Asian Studies at 49.

12 Ramy Bulan & Amy Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak* (Kuala Lumpur: Human Rights Commission of Malaysia, 2008) at 39.

13 See Sahabat Alam Malaysia, *The Land We Lost—Native Customary Rights (NCR) and Monoculture* Plantations *in Sarawak* (Kuala Lumpur: Sahabat Alam Malaysia, 2019) at 24.

14 James Chin & Andrew Harding, *50 Years of Malaysia: Federalism Revisited* (Singapore: Marshall Cavendish International, 2014) at 187 [*Federalism Revisited*].

15 Daniel J Elazar, *Federalism: An Overview* (Pretoria: HSRC Publishers, 1995) at 2.

Sabah and Sarawak (collectively known as East Malaysia) enjoy a higher autonomy than the rest of the states.[16] The two states have autonomy in relation to, amongst others, local government, immigration and religion.[17] An individual Bornean state has a status equivalent to all the states combined in Peninsular Malaysia.[18]

Malaysia's shared common law heritage with other Commonwealth countries such as Australia and Canada allows indigenous rights jurisprudence to be developed jointly, albeit with local variations in the extent of the level of protection of customary rights. The Australian High Court decision in the landmark case of *Mabo v State of Queensland (No 2)*[19] had impacted the judicial thinking of Malaysian courts on the recognition of indigenous land rights and guided courts in developing Malaysia's own indigenous jurisprudence. Without iterating the facts of this case, the Australian High Court overturned the doctrine of *terra nullius*: a legal fiction that justified the acquisition of land by colonial settlers if it were established that the land belonged to no one. Thus, pre-existing rights and interests in the land had not been abrogated upon colonization, and while the Crown obtained the radical title of the land, it did not acquire the absolute beneficial ownership of the land.[20] Although the Crown acquires sovereignty over the land, native title survives until it is extinguished by an express exercise of sovereign power with a clear and plain intention to extinguish it.[21] The crux of *Mabo* is arguably embedded in the following statement by Brennan J:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. . . ..though recognized by the common law, is not an institution of the common law and is not alienable by the common law.[22]

In a landmark Sarawakian case of *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd*,[23] the central issue concerned the recognition of *pemakai menoa* and *pulau galau* over the disputed land of 672 hectares. Provisional leases had been granted by the state government to the defendant, Borneo Pulp Plantation Sdn Bhd. At the first instance, Ian Chin J endorsed the Mabo decision:

> [I]t is common ground — arising from the decision in Mabo v State of Queensland. . .the common law respects the pre-existing rights under native law

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16 See Constitution, *supra* note 8, Part XIIA, which provides for additional protections for the states of Sabah and Sarawak. s 95B of ch 8 of Part VI entitles both states to impose sales tax as long as "there shall not in the charging or administration of a State sales tax be any discrimination between goods of the same description according to the place in which they originate". ss 95D and 95E respectively prohibit the Parliament to pass laws in relation to land, local government and promulgate national plans for land utilization, local government or development affecting both states. Both states are also entitled to special grants under art 112C, ss 1 and 2(1) of Part IV of the Tenth Schedule of the Constitution.

17 The matters where both states retain their autonomy are specified in the 18-point Agreement which was contained in the Proclamation of Malaysia 1963.

18 On 9th April 2019, the federal government intended to pass the Federal Constitution (Amendment) Bill 2019 to restore the position of Sabah and Sarawak as equal partners to Peninsular Malaysia but the amendment was short of the two-third votes required for an amendment to the Constitution.

19 (1992) 107 ALR 1 [*Mabo*].

20 *Ibid* at 38.

21 *Ibid* at 46.

22 *Ibid* at 42.

23 [2001] 6 MLJ 241 (HC) [*Nor Anak Nyawai*].

> or custom though such rights may be taken away by clear and unambiguous words in a legislation. I am of the view that is true also of the position in Sarawak.[24]

Further, drawing from the principles of *Mabo*, it was decided that native title is independent of any positive act of "any legislation, executive or judicial declaration".[25] Its existence cannot be questioned in any way as its sole source of legitimacy derives from indigenous communities who observe it. The High Court's detailed judgment also chronicled the history of native customary rights in Sarawak and thereafter, justified the proposition that those rights were practised before James Brooke's arrival in Sarawak and were respected since the reign of James Brooke in the 19th century.[26] In particular, the court referenced the following observation by A F Porter:

> At the time of James Brooke's arrival in Sarawak there had been for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian 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'.[27]

Significantly, Ian Chin J cited with approval a passage from Porter's work which recorded James Brooke's following observation of indigenous use of land, which showed proof of indigenous peoples' reliance on communal forests for the gathering of jungle produce for their consumption and survival.

> The fruit trees about the Kampong, and as far as the jungle round, are private property, and all other trees which are in any way useful, such as the bamboo, various kinds for making bark-cloth, the bitter kony . . . and many others. Land, likewise, is individual property, and descends from father to son; so, likewise, is the fishing of particular rivers, and indeed most other things.. . . [28]

The High Court's decision was eventually reversed on appeal on evidential grounds, but its legal principles were not disturbed. In another significant Sarawakian case of *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh*,[29] the state Attorney General of Sarawak contended before the federal court that *Nor Anak Nyawai* should not be followed as it was based on *Mabo*. The argument was that the Australian common law ought not to be followed by the court in charting its own

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24 *Ibid* at 245.

25 *Ibid* at 269.

26 In return for James Brooke's help in ending domestic and external insurgencies in Brunei, the Sultan of Brunei assigned its rule in Sarawak to Brooke, announcing the start of Brooke's reign on 24th November 1841. See Steven Runciman, *The White Rajah: A History of Sarawak from 1841 to 1946* (Cambridge: Cambridge University Press, 1960) at 67.

27 See *Nor Anak Nyawai*, *supra* note 22 at 252, citing AF Porter, The Development of Land Administration in Sarawak from the Rule of Rajah Brooke to the Present Time (1841–1965) (Kuching: Sarawak Government Printing Office, 1967) at 18.

28 *Ibid* at 259, citing James Brooke & Rodney Mundy, *Narrative of Events in Borneo and Celebes, Down to the Occupation of Labuan*, *Vol 1* (London: J Murray, 1848) at 210.

29 [2008] 2 MLJ 677.

course of developing a native title jurisprudence that befits local norms and traditions. However, the court disagreed, and once again recognised the common law position throughout the Commonwealth that the fact that the state holds a radical title to the land does not entitle it to abrogate any pre-existing customary rights or interests in the land unless there was an express declaration to do so.[30] It can be concluded from a brief discussion above that the common law rejection of *terra nullius* precipitated an upward trend in the proportion of customary land being established in the state. Nevertheless, the ambiguity surrounding the recognition of *pemakai menoa* and *pulau galau* has yet been resolved. This recognition was critical in backing the claim that the land was not a no-man's land, which was the primary contention for the indigenous claimants in *Sandah (No 1)*.

III. The First Federal Court Challenge: *Sandah (No 1)*

In *Sandah (No 1),* a group of Ibans claimed customary rights over 5639 hectares of land under which 2802 hectares were cleared and cultivated, whereas the remaining 2712 hectares were unfelled. The latter was regarded by them as their communal forest which they sought for recognition based on their traditions of *pemakai menoa* and *pulau galau* which were practised by their ancestors since the 1800s. Their contention was that their communal forest, *ie pulau galau* was within their territorial domain which encompassed the entire land area, *ie pemakai menoa*. At the High Court and the Court of Appeal, they succeeded. On further appeal, the Federal Court had to resolve the following questions of law:

1. Whether pre-existing native laws or customs extend to communal forests from which food and forest produce are obtained.
2. Whether *pemakai menoa* and *pulau galau* should be recognised by the courts notwithstanding the fact that there was no proof of such customs being practised or recognised in any of the orders made and legislations of the state.
3. Whether the Court of Appeal's decision in *Nor Anak Nyawai* was correct in its ruling that customary rights are confined to the area where they settled and not where they foraged for food (The Court of Appeal, in fact, did not expressly hold that customary rights are confined to settled area).[31]

The nub of these questions was whether the laws of Sarawak recognises *pemakai menoa*. The Federal Court by a majority of 3:1 (with Zainun FCJ dissenting) ruled in favour of the state government. Of the three judges in the majority (Raus PCA, Ahmad Maarop FCJ and Nordin FCJ), Raus PCA and Ahmad Maarop FCJ refused to recognise *pemakai menoa* and *pulau galau* as having the force of law, whereas Nordin FCJ appeared to recognise such customs only to differ from the minority on evidential grounds.

The majority focused on Article 160(2) of the Constitution which reads: "'Law' includes written law, the common law in so far as it is in operation in the

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[30] *Ibid* at para 19.

[31] *Sandah (No 1), supra* note 4 at para 7.

Federation. . ., and any custom or usage having the force of law in the Federation". Raus PCA, in reading Article 160(2) and section 5(2) of the Land Code together, answered the first and second question in the negative.[32] As section 5(2) of the Land Code had not provided for the establishment of customary rights by way of exercising foraging rights in unfelled forests, Raus PCA thus opined that *pemakai menoa* and *pulau galau* have no force of law under Article 160(2) of the Constitution.[33] Consequently, indigenous communities have no rights in their ancestral territorial domain. However, it is pertinent to note that Raus PCA had not denied the existence of their customs. Regardless, this reasoning effectively denied indigenous peoples' rights of collecting jungle produce and severely limited their mobility, *ie* their freedom of activities within their territory as well as their ability to progress in the social stratum from which many of them are unfamiliar with.

Raus PCA further observed that the Court of Appeal in *Nor Anak Nyawai* was correct in confining customary rights to the area where they settled and not where they foraged for food,[34] and discounted the views of Ian Chin J of the High Court. But as the Court of Appeal in *Sandah (No 1)*[35] and Nordin FCJ in the present case observed[36], the High Court's views there had in fact been endorsed on appeal. It was the failure to adduce evidence in support of the claim which led to the reversal of the decision. Nordin FCJ chose not to answer those questions of law directly while concurring with the majority judgment on the ground that there was no sufficient evidence on the use of the disputed land. Nordin FCJ's interpretation of the Land Code differed from Raus PCA in advancing the proposition that it does not abrogate or extinguish any pre-existing rights which had existed before 1 January 1958.[37] Although Nordin FCJ did not elaborate further on this, by implication, *pemakai menoa* and *pulau galau* which existed prior to that date still subsist, and if not, a contrary intention must be found from the provision. Furthermore, he dismissed the argument that those customs were not part of the common law, and subscribed to the view of Ian Chin J that native title does not owe its existence to statutes.[38] Thus, it is quite clear that Nordin FCJ took the view that the common law recognises the customary tenure of *pemakai menoa* despite whatever ambiguities there may be in his judgment.

In dissent, Zainun FCJ disagreed with the majority's approach of referring to statutes in interpreting native customary rights.[39] Instead, he opined that the correct way of interpretation is to understand such rights as they exist under the unwritten laws and traditions of indigenous communities.[40] Its unwritten nature means that it is *sui generis* or unique.[41] It is suggested that this is the preferable approach as it is impossible to prescribe with clarity what kind of rights fall into what acceptable categories in the context where the common law and indigenous law each possess

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32 *Ibid* at paras 77-80.
33 *Ibid* at paras 63-64.
34 *Ibid* at para 75.
35 [2014] 2 CLJ 175 at 228.
36 *Sandah (No 1), supra* note 4 at paras 281 and 285.
37 *Ibid* at paras 296-298.
38 *Ibid* at para 286.
39 *Ibid* at paras 170 and 211.
40 *Ibid* at paras 138, 168 and 177-179.
41 *Ibid* at para 211.

distinct concepts and histories. Identity is traced back to tradition, and tradition is to be identified from history proven by the accumulation of past and present practices. Thus, the correct determination involved "factual inquiry of the customs and practices. . ..and not whether the customs appear in the statute book".[42] In other words, "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".[43]

Viewing Zainun FCJ and the majority's interpretation in juxtaposition, there are two approaches which have been influential in judicial interpretation of Malaysian law. The most common is the strict legalist approach which generally does not look beyond the statutes and the Constitution. Raus CJ, for instance, had also referred to several orders such as the Rajah's Order 1875, the Fruit Trees Order 1899, The Land Order 1920, The Land Settlement Ordinance 1933 and Secretariat Circular 1839 and found that those orders did not mention the term *pemakai menoa* and *pulau galau*.[44] The other goes beyond purely textual considerations, envisaging a broader role for the common law in developing laws based on the demands and needs of the society rather than offering merely guidance for statutory interpretation.[45]

To sum up, the decision is clearly inconsistent with the wishes of the indigenous people who are well-represented in the state's demographic composition. In what was supposed to be an unsurprising decision became a surprising one when the federal court ultimately overruled both decisions of the lower courts, to rule in favour of the state where there had been a clear trend towards the increasing acceptance of indigenous land rights.

IV. The Second Federal Court Challenge: *Sandah (No 2)*

The Federal Court's denial of their customary rights in *pemakai menoa* and *pulau galau* questioned the continued relevance of those customs, and had given rise to conceptual disagreements over definitions that only serve to perpetuate the cycle of arguing over what and how customs should be dropped to integrate into the mainstream society and be maintained to retain their indigeneity. In response to public dissatisfaction with the decision, the state government had set up a *Pemakai Menoa* and *Pulau Galau* Committee, but the committee had not included many relevant stakeholders including a prominent lawyer, Baru Bian who represented the communities in *Sandah (No 1)*.[46] While the committee was in place, the state government ironically continued to pursue Native Customary Rights cases in courts, and when indigenous communities applied to review the decision in *Sandah (No 1)*, continued to contest the claim.

Leave was granted by the Federal Court to hear an application to review its decision in *Sandah (No 1)*, in a bid to make a second attempt to ask again whether *pemakai*

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42 *Ibid* at para 177.

43 *Ibid* at para 149.

44 *Ibid* at paras 62-63.

45 Anthony Mason, "The Judge as Law-Maker" (1996) 3 James Cook U L Rev 1 at 5.

46 See also SUARAM, *Malaysia Human Rights Report 2017: Civil and Political Rights* (Petaling Jaya: Suara Insiatif Sdn Bhd, 2017) at 111.

menoa and *pulau galau* have the force of law in Sarawak. Counsel for the applicants argued that: (1) the decision of the Federal Court was evenly divided as Nordin J's judgment was, in fact, supportive of the applicant's claim; (2) the composition of the Federal Court that heard the appeals from Sarawak, specifically, *Sandah (No 1)* must have a judge with Bornean judicial experience in accordance with paragraph 26(4) of the Inter-Governmental Committee ["IGC"] Report 1962 read with Article Vlll of Malaysia Agreement 1963; and (3) the majority judgment had erred in law, in failing to recognise the pre-existence of rights to land under native customs, which the common law respects, in unfelled jungles they reserved for food and jungle produce.[47]

A brief introduction of the IGC Report may be useful to understand the reason for raising it in this case. An IGC was set up in August 1962 after Sabah and Sarawak decided to form a Federation with Malaya and Singapore by 31st August 1963.[48] Its purpose was to work out a new constitutional arrangement for the new federation in a way that would safeguard the special interests of the Bornean states. However, constitutionally or legally, it has no binding force, and due to its non-binding nature, the Constitution has not fully implemented all the proposals of the IGC. The IGC made possible the formation of Malaysia and the Constitution, without which there would be simply no guidance concerning what the special rights of Bornean states comprised of or how they were to be defined. Directly relevant to this case is paragraph 26(4) of the IGC Report which reads:

> Normally, at least one of the judges of the Supreme Court should be a judge with Bornean experience when the court is hearing a case arising in a Bornean state; and it should normally sit in a Borneo state to hear appeals in cases arising in that state.

The intention was to safeguard the interests of the Bornean states. The 1963 Malaysia Agreement[49] is likewise non-binding as it is an international agreement between the United Kingdom, Malaya, Sabah, Sarawak and Singapore. It contains 18 points of assurances by the signatories that the interests of Bornean states would be protected. Article VIII of MA63 reads:

> The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to, the Report of the Inter-Governmental Committee signed on 27*th* February, 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia.

Article VIII thus requires the IGC Report's recommendations to be implemented through the Constitution. Another provision being considered was section 74(1) of

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47 *Sandah (No 2), supra* note 5 at para 33.

48 Ooi Keat Gin, *Southeast Asia: A Historical Encyclopaedia, from Angkor Wat to East Timor* (Santa Barbara: ABC-CLIO, 2004) at 845.

49 *Malaysia Act 1963* (Cap 35) [MA63].

the *Courts of Judicature Act 1964*[50] which reads: "every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine."

By a 4:1 majority, the Federal Court dismissed the applicant's review application. On the first ground that the decision was erred in law, the majority opined that it was unable to review its previous decision based on Rule 137 of the *Rules of Federal Court*. A review is only permitted if a case "falls within the limited grounds" and is under "very exceptional circumstances".[51] On the second ground, the majority held that the panel of the Federal Court need not have a judge of Bornean judicial experience in accordance with paragraph 26(4) of the IGC Report as it "was never implemented by an express provision in the Constitution nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak".[52] On the third ground that *Sandah (No 1)* decision was wrong, the majority's decision was mainly framed in terms of judicial finality. Describing the review application as "the proverbial second bite of the cherry",[53] the Court refused to review the case even if the previous decision was wrong on the basis of certainty and finality in the law.

The sole dissenting judge, Wong CJ, having answered the first question by finding that there had been no majority judgement since Nordin J agreed with Zainun J that *pemakai menoa* and *pulau galau* did have the force of law, proceeded to address the second question: whether the panel hearing the case must have at least one judge of Bornean judicial experience. Domestically, the MA63 does not hold much legal significance due to its status as an international instrument, but Wong CJ opined that a statute must be interpreted in conformity with international law if its language permits.[54] He took the view that Parliament does not intend for the MA63 to be infringed and thus concluded that section 7 of CJA should be read alongside the IGC Report and the MA63. Furthermore, the historical importance of the MA63 must not be overlooked. In this regard, he stated:

> [I]t is clear that the object and purpose of the Malaysia Agreement 1963 was towards the formation of Malaysia. Central to this ideology was to preserve and protect certain rights fundamental to the people of the Borneo States. . . without the Malaysia Agreement, we would not have the Federation of Malaysia, much less the Federal Constitution as it exists in its present form.[55]

Going further, Wong CJ held that the concept of public confidence in the judiciary requires judges who possess judicial experience in the Bornean states to hear cases emanating from both states.[56] As for the exact meaning of "Bornean Judicial Experience", he explained: "a judge is truly said to have Bornean judicial experience when

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50 (Act No 7 of 1964) [CJA]

51 *Sandah (No 2)*, *supra* note 5 at para 17, citing *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1.

52 *Ibid* at para 26, citing *Keruntum Sdn Bhd v The Director of Forests* [2018] 4 CLJ 145.

53 *Ibid* at para 29.

54 *Ibid* at para 101, citing *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 128 ALR 353).

55 *Ibid* at para 134.

56 *Ibid* at paras 144, 145 and 150.

he or she has served in the High Court in Sabah and Sarawak. It to me, meets the appropriate safeguards".[57]

V. Commentary

A. *The Erosion of the Federal Design*

Since the formation of the Federation of Malaysia in 1963, there has been a continuous record of the extension of the reach of federal powers in the Bornean states with scant regard for the MA63. The federal government had at different periods aggressively pursued fiscal and administrative centralisation[58] and intervened in local politics.[59] However, the recent rise of regional nationalism, along with the rising attention to the MA63 and the IGC Report spurred the dynamism of the federal system as more parties in both states began to demand for better protection of their rights.

The demand for judges with "Bornean judicial experiences" is one of the promises stipulated in the IGC Report and which concerns for a fair distribution of powers in federal-state relations. This and other promises underlie the case for fuller state autonomy. It was first raised in *Keruntum Sdn Bhd v The Director of Forests*[60] where the Federal Court held that it could not be enforced as it has not been implemented by any legislative and executive action. This was affirmed in *Sandah (No 2)*. The majority did not go further from its finding to hold that there is no ambiguity in Article 122 of the Constitution, since there is no mention on the qualification of having "Bornean judicial experience". It is suggested that the majority's determination did not subscribe to a harmonised view of federalism which intends to avoid imbalances in the division of powers as conceived by the MA63, the IGC Report and the Constitution. On the other hand, Wong CJ opined that Article 122 is ambiguous, since the manner in which the composition of the panel is to be determined is not stipulated. Thus, it is necessary to refer to possible sources for the answer. Although the Constitution has not implemented the MA63 and the IGC Report, the historical circumstances in which it was created may inform us about the intent of the founding generation. In the Australian case of *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic,*[61] the High Court of Australia was called upon to rule on the constitutional validity of the Commonwealth Conciliation and Arbitration Act 1904, which purported to bring together industrial disputes of all states to a Commonwealth Court of Conciliation and Arbitration, which would then be entitled to interfere directly or indirectly in matters between a State and its railway employees. On the principle of the construction of the Constitution, the court stated:

> The Constitution Act is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian Colonies which formed

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57 *Ibid* at para 167.

58 Kai Ostwald, "Federalism without Decentralization: Power Consolidation in Malaysia" (2017) 34 Journal of Southeast Asian Economies.

59 *Federalism Revisited*, *supra* note 13 at 164.

60 [2018] 4 CLJ 145.

61 (1906) 4 CLR 488 [*Federated Amalgamated*].

> the Commonwealth. This is recited in the preamble to the Act itself. The rules, therefore, that in construing a Statute regard must be had to the existing laws which are modified by it, and that in construing a contract regard must be had to the facts and circumstances existing at the date of the contract, are applicable in an especial degree to the construction of such a Constitution[62]

To this end, the court considered historical facts to which it concluded that state railway is "a very large and important part of State administration".[63] As a result, the court held that although state instrumentalities were not immune from the exercise of the Commonwealth Parliament to regulate interstate trade and commerce, it became unconstitutional if it was "held to have so wide an ambit as to embrace matters the effect of which upon that commerce is not direct, substantial and proximate".[64]

It is not suggested that, as a matter of construction, references to historical circumstances are necessary as one should be aware that it is not the solution to all kinds of situations.[65] However, the court's supposition of the irrelevance of the IGC Report was a disappointment for the communities in Sarawak as in hearing cases of the Bornean states, the panel would not accurately reflect the configuration of political communities in the federation in which each is a constituent part of the federal system. A necessary condition to ensure the smooth functioning of the system is the practice of sensitivities towards independencies and interdependencies of states' functions, powers and responsibilities. According to Elazar, a central feature of federalism is the sharing of the "common involvement in policymaking, financing and administration of governmental activities".[66] Taking this principle seriously, it follows that no political community or entity is to be excluded from the sharing of powers to make collective decisions in any branches of government. The participation of judges from the Bornean states is thus not unreasonable but in fact, adheres to the spirit of federalism. The Federal Court's controversial decision has had a consequential effect on how the federation is understood and governed. It is suggested that based on this decision the court is more likely to favour the federal government in cases of federal-state conflicts, which are mainly political in nature. At the very least, *Sandah (No 1)* and *(No 2)* had created a heightening sense of concern and awareness over the interests of the Bornean states as well as the importance of safeguarding the federal design.

B. *Indigenous Land Rights under Federalism*

Constitutional guarantees, the IGC Report and the MA63 are supposed to provide sufficient space for the legal existence of indigenous land rights. However, *Sandah (No 1)* and *(No 2)* presents yet another instance of the ongoing, unpredictable and dynamic relationship between the federal, state and indigenous communities, which

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62 *Ibid* at 534.

63 *Ibid.*

64 *Ibid* at 545.

65 Charles JG Sampford & Kim Preston, *Interpreting Constitutions: Theories, Principles and Institutions* (Sydney: Federation Press, 1996) at 26.

66 Daniel J Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987) at 186 [*Exploring Federalism*].

means that those guarantees in place could not realize their purposes. Moreover, the factual background in *Sandah (No 1)* and *(No 2)* is complex as it was not a straightforward confrontation between the federal and state. Rather, affected indigenous communities in *Sandah (No 1)* and *(No 2)* were confronted on both fronts. It was the failure of the state government to recognise their customs which led to the challenge. Although the domain of indigenous land rights is essentially a state matter, we can also see how past political cooperation between federal and state governments had led the former to become a co-perpetrator and to interfere indirectly in indigenous land matters. Where there existed violation of customary rights, the federal government had often closed one eye to this situation.[67] With a change of government in the 2018 general election, that had changed and many expect indigenous peoples to receive a fairer treatment compared to during the previous Barisan Nasional regime. It is however impossible to provide a certain answer due to the dynamism behind this conflict.

As such, although the federal system may be the best safeguard against the incursion of federal power into state proprietary rights, subject to the caveat that there must be an equal balance between federal and state power, this is a rather simplistic view. Further, as alluded to earlier, track record of federal and state governments in protecting indigenous land rights are poor and there was also an inclination from the federal level to achieve harmonization of laws with as little conflict at federal and state level as possible, which means that native customary laws are likely to be recognised to a lesser degree so that there would be a higher uniformity in the application of laws. As such, for the indigenous communities in Sarawak, it is generally perceived negatively as a system that is incapable of guaranteeing their land rights.

The argument to have at least one judge of "Bornean judicial experience" was an attempt to underscore the existence of two separate political communities having different cultural, religious and historical roots. On this, Wong CJ had crucially pointed out the distinct lifestyle of indigenous peoples.[68] The majority's refusal to accept this argument further restricted the avenue available to them to claim their customary rights, given that differences in livelihood or local context no longer constitutes a salient factor in the recognition of such rights. This is an alarming development for the Bornean states considering the past trend of centralizing the functions of federal and state governments.

There is a high likelihood that a full panel of judges from Malaya, without prior experience of interacting with and judging them in close proximity, would not fully appreciate their living circumstances and traditional practises. Paradoxically, the sole dissenting judge was the only judge who has Bornean experiences. A panel with at least one judge who has first-hand judicial experience in the Bornean states and who is not afraid of political pressures is therefore critical in influencing the case's outcome.

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67 See Yogeswaran Subramanian, "Realising Orang Asli Customary Land Rights and Its Challenges: Some Lessons for Democratic Governance in Malaysia" in Azmin Sharon & Magdalen Spooner, *Human Rights and Democracy in Indonesia and Malaysia* (Petaling Jaya: SIRD, 2019) at 234, in which Subramanian observed that "the overall poor performance in protecting Orang Asli lands suggests a lack of priority and concerted will from both federal and state governments to protect their customary lands under the statutory scheme".

68 *Sandah (No 2), supra* note 5 at paras 139-143.

C. *The Future of Pemakai Menoa?*

Sandah (No 1) and (No 2) raise the question of whether on the short-term horizon, *pemakai menoa* would be accepted as part of the diverse legal landscape in Malaysia. Some observations may be briefly stated in this way. With the inclusion of the Bornean states to the then existing Federation of Malaya, the new federation has experienced enrichment in its pluralistic legal system. The Malaysian legal system is predominantly based on the common law. There is sharia law which operates separately and independently of common law courts. In Sarawak, there are native courts that resolve communal disputes at the local level.[69] The emergence of laws relating to indigenous land rights and the legalization of traditional customs further added to a plurality of laws and legal institutions. The consequence is that nearly all "legal issue has an ethnic or religious dimension to it",[70] which makes the resolution of many legal issues almost impossible without addressing ethno-religious sentiments that generally exists at the subconscious level.

An observation that could be made about *Sandah (No 1)* is that although on the surface, indigenous land rights appear to be free from problems associated with race, ethnicity, and religion, indigenous peoples are inevitably viewed through a racial lens. Their beliefs, cultures, ways of life and values were studied in the course of adjudication of their rights. It is relevant to point out that Article 89 and 90 of the Constitution set out Malay land rights, whereas it is the state's responsibility to enact laws concerning indigenous land rights.

Another observation is that it is the common law that gives legitimacy to native customary rights. Protection of their rights is equally subject to common law courts. The type of customs and rights to be accepted are conditioned by the common law and legislation, which are then conditioned by judges, legislators, members of the government and politicians. Ultimately, they are influenced by social forces at the micro-level. Thus, in order for *pemakai menoa* to gain recognition, it may be that efforts have to be started from the ground, amongst their communities, so that they could be both politically and socially strong in ways that allow them to influence policymaking.[71] Thus far, they are politically divided and the existence of various sub-groups in the communities exacerbates the situation. Although they are collectively and popularly known as Iban, they may be in fact Bidayuh, Muruts, Kelabit, Lun Bawang or Penan,[72] to name only a few. While they identify themselves via a common heritage and language, they are divided according to their respective customs, dialects and equally important, their allegiance to particular political leaders. About two decades ago, it was observed that they "collectively constitute numerical majorities but wield an uneven degree of political influence and economic power".[73] This statement still holds true.

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69 They are governed under Native Courts Ordinance 1992 (Ord No 2 of 1992).

70 See Preface in Andrew Harding and Dian A H Shah eds. *Law and Society in Malaysia: Pluralism, Religion and Ethnicity* (New York: Routledge, 2018).

71 *Federated Amalgamated*, *supra* note 60 at p 87.

72 See Welyne Jeffery Jehom, "Ethnicity and Ethnic Identity in Sarawak" (1999) 55 Akademia 83 at 88.

73 Benedict Kingsbury Source, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 The American Journal of International Law at 431. See also *Exploring Federalism, supra* note 65 at 87, in which Elazar stated that "pluralism is likely to sustain itself in polities in which strongly rooted primordial groups continue to dominate political and social life".

D. *Construing Rights and Article 160*

The Federal Court's interpretation of indigenous land rights and its consideration of the review application reveals some of its approaches towards construing constitutional rights. With respect, the Federal Court had not treated *Sandah (No 1)* and *(No 2)* as a proper constitutional case. Because of the nature of the issues arising in this case, the Federal Court had arguably placed a disproportionate emphasis on the principle of *res judicata* in approaching a constitutional case. The court's concern about repetitive litigation of this case is misplaced especially where there was no majority decision. On the contrary, the justification for a second review is not as strong as if there was a clear majority. But, in any constitutional case, to err on the side of caution is preferable where rights are threatened.

There was very limited engagement with the Constitution in *Sandah (No 2)* except for a brief discussion of Article 122 of the Constitution, which concerns the structure of the Federal Court. In *Sandah (No 1)*, the majority's focus was squarely on the interpretation of Article 160(2) of the Constitution. In both of its decisions, the Federal Court had not considered fundamental liberties as laid down in Part II of the Constitution except with some discussions by Wong CJ. Basic rights such as freedom of movement and association, right to property, life, liberty and self-determination are relevant determinants of the claim. The court's reluctance to consider constitutional rights in detail sent a negative signal to the society that loss of land rights is unimportant, what is more important is the integration of indigenous peoples into the mainstream society.

Article 160 of the Constitution plays a central role in giving express recognition to native customary laws. To recapitulate, it prescribes law to include "written law, the common law. . .and any custom or usage having the force of law in the Federation". It appears detailed in scope, however, the term "having the force of law" adds some ambiguities and leaves room for multiple interpretations in situations where they have yet been defined conclusively in statutes.[74] The majority's decision was grounded in the common law perspective on land that the land must be felled, cultivated and being possessed for it to be recognised. If not, to have the force of law, a custom must be explicitly legislated. Zainun J, on the other hand, offered a broad reading of Article 160 in viewing such a requirement to have been met if custom is *sui generis.*

Bearing this in mind, it is necessary to interpret the Constitution in totality to avoid a mere reference to Article 160. Textualism in constitutional interpretation ought to be restricted in applying common law principles. It was said that "[t]he common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time".[75] An understanding of Article 160 is arguably incomplete without ample consideration of constitutional rights provisions. It should not be understood in a way that deprive rights, and should only include laws that do not infringe fundamental rights. Further, any interpretation of the law should generally address and mirror the needs of the present society. A

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[74] There was the *Sarawak Land Code (Amendment) Bill 2018* which sought to recognise "native territorial domain" but this amendment was criticized by Baru Bian for various reasons which are out of scope for this paper to discuss.

[75] David A Strauss, "Common Law Constitutional Interpretation" (1996) 63 University of Chicago Law Review 877 at 879.

positivist approach, which may be described in the passage below is, with all due respect, undesirable in interpreting rights:

> At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects, but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress.[76]

On the other hand, the Supreme Court of Canada rejected the dominant legal conceptualisation that often lacks appreciation of historical, cultural and social realities of indigenous peoples:

> The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge, disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.[77]

Although it is now settled that the common law recognises native customary law, uncertainty over the proper interpretation of the extent to which it could be recognised remains. A review of the case is clearly needed to resolve the law convincingly so that justice is not delayed.

VI. Conclusion

Sandah (No 1) and (No 2) are unique cases involving the recognition of indigenous customs unique to them and their rights as promised in the MA63 and the IGC Report. Non-recognition of their customs could be the underlying issue of the widening socioeconomic gap between indigenous and non-indigenous peoples in the state. Likewise, long-standing incursion of land rights has worked to derail their morale, self-determination and socio-political empowerment, which might have affected their well-being to a significant extent. The proposition in *Sandah (No 1)* that the customs of indigenous communities must find their origin in statutes coupled with the Constitution's silence on their customs not only do not ameliorate this cause, but also presents a significant structural factor in enabling courts to better protect their pre-existing rights and interests in their land. Furthermore, the current position that their rights are limited to cultivated land means that unfelled jungles are now prone to logging activities. An important question that needs to be asked is, what

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[76] John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954) at 30, cited in David J Bederman, *Custom as a Source of Law* (New York: Cambridge University Press, 2010) at 123.

[77] *Calder v Attorney General of British Columbia* [1973] SCR 313 at 346.

this decision meant for the impoverished indigenous communities even if it means little to them, in terms of the uplifting of their confidence and morale. Simply relying on the courts to create new changes is no longer adequate, since ultimately, it is the politicians of the ruling federal and state governments who have the last say in the reform of the native land system.

Sandah (No 2) offers a picture of the link between indigenous land rights and the federal system. Federalism is supposed to provide stronger protection of their rights but we see how institutional framework, intergovernmental agreements, the distribution of powers between several spheres of government, the federal-state relations and inaction of the state government have an important bearing on the level of protection of their rights in the state. The setback to the strong argument for having a judge with Bornean experience may prove the long-held view that Malaysian federal governance is one of centralisation. However, increasing dynamism behind those complexities indicates that the future trajectory of the system and the conflicts that presented in this paper remain uncertain.