

**MULTI-FACETED ETHNIC IDENTITY OF INDIGENOUS GROUPS IN EAST  
MALAYSIA: PROFOUND ECONOMIC AND POLITICAL IMPLICATIONS FROM A  
LEGAL PERSPECTIVE**

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***ABSTRACT***

The paper discusses some definitions of indigenous people, looking into some elements that characterise the concept of “indigenous”. It needs to be mentioned that the focus of this paper is specifically from a legal perspective. The concept and definitions of “indigenous or native” are understood in the light of the legal framework. Hence, it looks into statutory definitions as found in the Federal Constitution as well as in the local constitutions and legislations of Sabah and Sarawak. The aim of the paper is to discuss how a native status is established in the context of the existing local legislation and judicial argumentation, particularly native land ownership and political implications involving native status identification based on local legislation and judicial interpretations. Ethnic identity in the two states is rather ambiguous and complex in East Malaysia in particular. The meanings and implications of ethnic identities in legal aspects might change subject to social, economic, and political situations. The concept of ethnic identity does not have to do purely with being born of ethnic origin. In fact, in some cases, ethnic identity can be situational in nature as “...it could be learned, cultivated and embraced over a period of time.

*Keywords:* indigenous; native; statutory; legislation; federal constitution

**Introduction**

Malaysia is a multi-ethnic and multi-religious nation comprising both dominant and non-dominant groups in which the latter normally refers to the indigenous minority groups largely found in East Malaysia. However, the question of what is and who may claim indigenous identity in Malaysia is not so clear-cut but one that is complex because there is a diverse ethnic composition particularly in the states of Sabah and Sarawak. Ethnic identity is often multi-faceted from a law perspective which has profound economic and political implications on the lives of individuals and communities. This paper seeks to analyse how ethnic identity can be significant in the way in which it may be employed or deployed or defined within a legal

perspective with a view to achieving certain goals as seen in the light of the plight of indigenous peoples in East Malaysia.

## **Literature Review**

This paper is written from a legal perspective, and it entails reviewing the literature that is mainly legal in nature while disregarding other perspectives like that of anthropology, sociology or even politics. The first part looks into the definition of the term “indigenous” as being recognised by the Working Group on Indigenous Populations/Peoples (WGIP) (Bulan, 1998), the criteria widely used in the context of court litigation.

## **DEFINITIONS OF THE TERM “INDIGENOUS”**

The term “indigenous” carries “...the notion of a people or population who have lived in a place as the original inhabitants, as opposed to another group or groups who may have subsequently come to settle or to occupy the land.<sup>2</sup>” Further, the concept of “indigenous” by Special Rapporteur Jose Martinez Cobo as endorsed by the Working Group on Indigenous Populations/Peoples (WGIP) is defined as the following:

*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems. (Bulan, 1998, p.131)*

Based on Cobo’s concept above, there are three criteria that define “indigenous” namely, a criterion that emphasises the “pre-existence” and establishment of social systems in pre-colonial or pre-invasion period; a criterion of non-dominance, that is, indigenous peoples consider themselves distinct from the dominant society as they have their own culture, language and customs and unique mechanisms for dispute resolution and social control, and a common characteristic whereby there is a determination “to preserve, develop and transmit to future generations their ancestral territories”. The three criteria will be explained further below.

While the general concept of “indigenous” is clearly explained by Cobo’s report as endorsed by WGIP, meeting at least the three criteria mentioned, statutory or legislative definitions offer some specific terms and clauses from the legal point of view. In order to see how “indigenous” or “native” is defined from a legal perspective, it is necessary to look into statutory definitions in the Federal Constitution as well as Sabah’s and Sarawak’s local legislations/ordinances. Nonetheless, at least three distinct features of the indigenous groups need to be outlined and recognised in order to understand their issues well.

### ***Distinct features (three criteria) of indigenous peoples***

One of the features seen as a criterion by Cobo’s report is the pre-existence and establishment of the social systems in the pre-colonial or pre-invasion period both in the Malay Peninsula and Borneo territories resulting in these groups having a legitimate claim to indigenous status. In that respect, the Orang Asli in the Malay Peninsula, the Dayaks of Sarawak, the various ethnic groups in Sabah that include the Dusun (or Kadazan), Bajau, Murut and other groups, the

Malays in both Sabah and Sarawak as well as the Peninsula are the indigenous peoples of Malaysia.

Another feature endorsed by Cobo's report is the concept of non-dominance. Generally, indigenous peoples do consider themselves distinct from the dominant society of which they are a part of. They have their own cultures, languages and customs and unique mechanisms for dispute resolution and social control. It may be that in many societies the culture of most indigenous groups would be non-dominant. However, this may not be necessarily true in some post-independent countries where politically strong indigenous groups have asserted their own culture as the national culture. For example, the description of the non-dominant indigenous group is not reflected in the Malaysian situation where the political will and the power is in the hands of the dominant Malay majority who are also considered as an indigenous people group. The situation of non-dominance among indigenous groups is well-reflected in Sabah and Sarawak.

The third feature that is typical of indigenous groups is their determination "to preserve, develop and transmit to future generations their ancestral territories". Underlying this determination is a special relationship and connection with their land. For many of these groups, the land is more than just a habitat or political boundary; it is the basis of their social organisation, economic system and cultural identification (bulan, 1998). This fact was recognised by the Malaysian High Court (Kuala Lumpur) in the case of *Kajing Tubek v Ekran Bhd*<sup>1</sup>. The plaintiffs asserted that flowing from their special relationship to the land, their homes and land would be destroyed, and their lives uprooted by the Malaysian government's proposed development of a hydroelectric project in Bakun, Sarawak. They claimed that they would suffer more greatly and directly being the natives of the area as their land and forest are not just sources of livelihood but constitute life itself, fundamental to their social, cultural and spiritual survival as native peoples. Hence, according to Bulan (1998), the emphasis on being indigenous is significant because it forms the rationale for certain basic rights which are founded solely on being the first or the original people of the land.

### **Statutory Definition**

Given the multi-racial population, it was then considered imperative to accommodate ethnic claims and specific provisions of ethnic safeguards. One of the salient features of the Constitution was the special place and privilege given to the Malays as the indigenous and economically backward, of which comes under Article 153, and the natives of Sabah and Sarawak were included in order to safeguard their customary rights and practices and economic well-being (Bulan, 1998). The presence of large indigenous groups from Sabah and Sarawak illustrates clearly that it would have been deemed necessary to lay the definitive foundation as to who is a native, particularly as it involved the conferment of special privileges (Subramaniam & Nicolas, 2018). Therefore, as regards the Federal Constitution (FC), the position and definition of natives of Sabah and Sarawak are to be considered within the context of "Bumiputera" together with the Malays as well as the Orang Asli in West Malaysia, which intrinsically provides a special place based on their indigeneity. Article 161A of the FC **states**<sup>2</sup>:

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<sup>1</sup> Bulan, Ramy, Indigenous Identity and The Law: Who is a Native? (1998) 25 *Journal of Malaysian and Comparative Law* 7, p.133

<sup>2</sup> Bulan, Ramy, Indigenous Identity and The Law: Who is a Native? (1998) 25 *Journal of Malaysian and Comparative Law* 7, 136

(6) In this Article, 'native' means

(a) In relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races; and

(b) In relation to Sabah, a person which is a citizen, is the child or grand child of a person of a race indigenous to Sabah and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.

(7) The races to be treated for the purposes of the definition of "natives" in clause (6) as indigenous to Sarawak are Bukitans, Bisayahs...(Bulan, 1998).

For both Sabah and Sarawak there are differences in the definition of 'native' as offered by the FC, that is, there is an express provision that a child born to a 'father domiciled in Sabah at the time of birth' is a native of Sabah whereas in Sarawak clause 161A does not make any distinction between a father or mother but provides that the child should be of indigenous or 'mixed blood deriving exclusively from those races'. In both contexts however, there is no explanation on the term indigenous neither is there any express reference to any other law or laws that define the term. Further differences can be found between Sabah and Sarawak on the definition of native as embodied in their respective local ordinances/legislations.

Nonetheless, it is interesting to note that the Constitution does not enumerate the various ethnic groups that would fall under the definition of "native" in respect of Sabah especially when Article 161A pertains to the special position of natives in regards of reservation of land or for alienation of land to them or for giving them preferential treatment; Article 153(9A) the definition under 161A is used in respect of services, permits etc....for Malays and natives of any of the states of Sabah and Sarawak. (Bulan, 1998).

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

- (a) Any person both whose parents are or were members of a people indigenous to the Colony; or
- (b) Any person ordinarily resident in the Colony and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof; or
- (c) Any person who is ordinarily resident in the Colony, is a member of Suluk, Kagayan, Simonol...or of a people indigenous to the Colony of Sarawak or the State of Brunei, has lived as and been a member of a native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout the period and whose stay in the Colony is not limited under any of the provisions of the Immigration Ordinance.

Provided that if one of such person's parents is or was a member of any such people either lives or if the deceased is buried or reputed to be buried on the colony, then the qualifying period shall be reduced to two years.

(d) any person who is ordinarily resident in the colony is a member of a people indigenous to Indonesia, or the Sulu group of Islands in the Philippine Archipelago or the Federation of Malaya or the Colony of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout the period and whose stay in the colony is not limited under any of the provisions of the Immigration Ordinance.

No claim by any person to be a native by virtue of the provisions of paragraph (b), (c), or (d) hereof shall be recognised as valid unless supported by an appropriate declaration made by a Native Court under section 3; however, the amended section 3 of the 1952 Ordinance allows any person claiming to be a native to apply to the Native Court for a declaration that:

(a) such a person is recognised by native law and custom as the parent or child, as the case, or any other person or

(b) that such person is a member of a native community, has lived during any stated period, and while so living has borne a good character, or

(c) that such person is a member of a people named in paragraphs (c) or (d) of subsection (1) of section 2; or

(d) that a parent of such a person is or was a member of a people named in paragraph (c) of sub-section 2 and living, or if the deceased is buried or reputed to be buried, in the colony.

From these amendments, the key definition in the 1952 Ordinance (amended s4 of Ordinance No.20 of 1958) is that native refers to 'persons indigenous to the colony' and 'persons ordinarily resident' one of whose parents was an indigenous person or one of whose parents was an indigenous person from Brunei, Sarawak, the Straits Settlement, the Federated Malay States, Indonesia and Sulu Islands<sup>3</sup>.

In Sarawak, 'native' had been defined through legislation as early as 1920. In Interpretation Ordinance (Cap 1) (Revised Laws of Sarawak 1958), it states that a native is any person who is a citizen of Malaysia and who belongs to any of the races considered to be indigenous to Sarawak. The Land Code of 1958 consolidated the earlier statutes relating to land whereby sections 8 and 9 of the Code, read together with section 20 of native Court Ordinance 1992, make it possible for a person to claim native status by being identified with a particular native community (Bulan, 1998, p.143).

The implications of these definitions of 'native' by statutes for both Sabah and Sarawak mean that only natives may claim to be subject to native customary law as a personal system of law (Bulan, 2015; 2019). However, the claim to native status by any person in both states is not a straightforward matter, and it has to go through judicial interpretations to determine the term 'native'. Yet, the term 'indigenous' or 'native' is a very significant element for judges to

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<sup>3</sup> Bulan, Ramy, Indigenous Identity and The Law: Who is a Native? (1998) 25 *Journal of Malaysian and Comparative Law* 7, p.140

determine whether or not an individual in court cases involving mostly native customary land disputes and claims for 'native status' for permanent residency is to be considered native, and hence, qualifies for native status/privileges, bearing an ethnic identity. It is in determining this ethnic identity of any person who puts a claim to it before the law that requires judges to be accurate because the way in which it may be employed or deployed or defined with a view to achieving certain goals can have profound economic and political implications on the lives of individuals and communities. With respect to some general concepts of the meaning of 'indigenous' as defined by Cobo report as well as statutory definitions in the Federal Constitution and local legislative meanings accorded in ordinances and statutes of Sabah and Sarawak as explained earlier, it is possible to analyse and discuss economic and political implications in regard to cases involving 'indigenous claim' for native status or ethnic identity.

## **Discussion**

This section highlights the discussion on economic and political implications as a consequence of the statutory definitions of the native status of an indigenous person. based on legal-doctrinal analysis, several court cases have been identified and discussed in terms of economic and political implications.

### ***Economic and Political Implications***

The Cobo report points out clearly that a common characteristic indigenous peoples share is their determination 'to preserve, develop and transmit future generations their ancestral territories'. According to Bulan (1988), this means that underlying such determination is '...a special relationship and an umbilical connection with their land. It means that the land is more than just a habitat or a political boundary; it is in fact, the very foundation of their social organisation, economic system and cultural identification (p.132). In the case of ***Kajing Tubek v Ekran Bhd***<sup>4</sup>, the Malaysian High Court (Kuala Lumpur) recognised the special relationship that natives have with their lands. The plaintiffs asserted that based on that special relationship to the land, their homes and land would be destroyed, and their lives would be uprooted by the Malaysian government's proposed hydroelectric project development in Bakun, Sarawak. They claimed that such development would cause natives in that area to suffer more severely and directly than others because their land and forest are not just a source of livelihood but embody life itself, fundamental to their social, cultural and spiritual survival as native peoples. The native title arises out of native customs. These customs, which define the content of native title, are part of Malaysia's law and protected under the *Federal Constitution*. Because they embody and protect the special relationship between natives and their land, the application of customs in recognising native titles ensures the continuation of native communities. The implementation of customs is also consistent with common law, which directs courts to define native lands with reference to native customs (Bulan & Locklear, 2008, p.160). The court considered this ground as sufficient to justify a declaration of their legal position, which is one that is substantial and of genuine interest.

In the case of natives in Sarawak, Article 153 of the *Federal Constitution* also imposes a fiduciary obligation on the Yang di-Pertuan Agong (the King) to protect the interests of the natives of Sarawak and Sabah. Further, preferential treatment as regards alienation of land by the state is contained in Article 161A (5), while protection of native law and custom is also enshrined under Article 150(6A), Clause 5. Clearly, there is legal recognition that natives are especially vulnerable to the power of government, and this justifies their preferential treatment (Bulan, 2006, p.58). In another case, along a similar line of indigeneity, ***Adong bin Kuwau &***

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<sup>4</sup> Bulan, Ramy, Indigenous Identity and The Law: Who is a Native? (1998) 25 *Journal of Malaysian and Comparative Law* 7, p.133

**Ors v Kerajaan Negeri Johor Anor**<sup>5</sup>The courts also recognised the rights of Orang Asli to their traditional and ancestral land upon which they foraged for their livelihood according to their tradition (Subramaniam, 2018).

Similarly, in the case of **Nikodemus Singai & Ors v Sibulipway Sdn Bhd & Ors**<sup>6</sup>, Rhodzariah Bujang JC (as her ladyship then was) had stated:

[10] ...I am of the view that cases involving claims of native customary rights such as this one are an exception to O'Reilly's principle. I came to this decision because the prosecution of the plaintiff's right here is a genus in itself for by its very definition that right is largely unsupported by evidence; it is almost purely proved by oral evidence based on customs and tradition and is a peculiarity of only two states Sabah and Sarawak. For the natives in these two states - their rights to the land - to forage, to hunt, to fish and to cultivate their land, for it is not just a place to build a home but their very livelihood - this right is handed down one generation to the next.

Based on the judicial interpretations in those cases, the emphasis on being indigenous with an ethnic identity is significant as regards economic implications because it forms the rationale for certain basic rights which are founded purely on being the first or the original (pre-existent) people in the land (Subramaniam, 2018).

Judicial interpretation with respect to a case where there was a claim to be considered as a native can also be seen in **Liew Siew Yin & District Officer, Jesselton**<sup>7</sup>, whereby the appellant applied for a certificate from the native court to rank as a native. His father was Chinese, and his mother was Dusun. The issue was whether he had brought his case within s 2(1)(b) of the Interpretation (Definition of a Native) Ordinance. He had to satisfy the court that he was a person ordinarily resident in the colony, being and living as a member of a native community, and at least one of his parents was a native. The court felt that he had satisfied two of the requirements of the sub-section but had failed to justify a claim of being and living as a member of a native community.

It was pointed out that he had given his children Chinese names, and he had never paid poll tax. Having noted that he had subjected himself to Chinese custom, the court proceeded to say that the main reason for his failure was his residence in an area which was not predominantly native. However, the presiding District officer went on to say that if he elects to take up residence in a predominantly native community and renews his application, he might receive a favourable consideration. The emphasis on the issue of residence seems to suggest that a certain situational factor can determine indigenous claim. In this case, proof of residence as well as assimilation into a native community (Bulan, 1988). The case of **Ong Seng Kee v District Officer, Inanam**<sup>8</sup>, whereby the claimant, a Sino-Kadazan, lived in a Chinese-style house near Kampung Kapak. The Native Court at Inanam accepted the evidence of the Orang Tua of Inanam that the appellant had involved himself in native festivities and ceremonies in the village. The fact that he lived in a predominantly native area was an important determining factor.

The two cases in Sabah illustrate how native status can be obtained subject to certain determining factors, such as being and living in a predominantly native community and assimilating into a native culture. This seems to support the fact that one's claim over

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<sup>5</sup> [1997] 1 MLJ 418

<sup>6</sup> [2010] 5 AMR 77; [2010] 10 CLJ 383

<sup>7</sup> Bulan, Ramy, Indigenous Identity and The Law: Who is a Native? (1998) 25 *Journal of Malaysian and Comparative Law* 7, p.154

<sup>8</sup> Bulan, Ramy, Indigenous Identity and The Law: Who is a Native? (1998) 25 *Journal of Malaysian and Comparative Law* 7, p.155

indigeneity does not have to do with purely being born with ethnic identity but by satisfying the Native Court as to the fulfilment of the two determining factors mentioned earlier.

In Sarawak, the High Court in Kuching decided on the issue in the case of **Law Tanggie v Untong ak Gantang**<sup>9</sup>. The plaintiff was born to a Chinese father and an Iban mother. The facts were that the plaintiff alleged that he bought a piece of land which was held under native title. It was transferred into the name of his uncle, the first defendant (who was Iban), as his nominee until he attained or acquired a native status. The plaintiff applied on the same day to be declared a native by statutory declaration. When he finally attained the native status, he brought an action for the return of the land. Although the counsel for the defendant argued that it was an illegal transaction by virtue of the plaintiff not being a native, Richard Malanjum JC recognised the fact that the plaintiff was identified as a native of Sarawak. The factors that determine the native status as they appeared in the statutory declaration of the plaintiff and the witnesses were that while the father was Chinese, he had taken on a native name, was accepted as a member of the Iban community, lived as a Dayak, paid door tax as a Dayak, was buried in a Dayak cemetery. His children had carried on as Dayaks. The District Officer approved the plaintiff's application claiming to be identified with the Iban community under then s 13 (1) of the Native Ordinance of the Land Code (Bulan, 1998). Again, it is clear that one can attain a native status by satisfying certain determining factors, which are not necessarily being born with pure ethnic identity.

Claiming and gaining of native status or ethnic identity, perhaps for political implication can be seen in the Federal Court case of **Datuk Syed Kechik bin Syed Mohd v Government of Malaysia & Anor**<sup>10</sup> considering the determination of native status. As a political secretary to Tun Mustapha, he applied to the Native Court of Kota Kinabalu for a declaration of status as "Anak Negeri" or native of Sabah within the Interpretation (Definition of Native) Ordinance. He was duly declared and admitted as an "Anak Negeri" under s 2(10(d) and s 3(1)(b) of the

Ordinance on the basis that he was ordinarily resident in Sabah; he lived as and had been a member of a native community for a continuous period of five years immediately preceding his claim to be a native, was of good character, and was not limited by the Immigration Ordinance. Suffian LP (decision read by Lee Hun Hoe CJ, Borneo) held that he was entitled to the declaration that he sought, that he was a permanent resident in Sabah. Lee Hun Hoe CJ (Borneo), in his decision also recognised and gave great weight to the Native Court's declaration of the applicant as a native. As he attained a native status, Datuk Syed Kechik continued to live in Sabah, acquired property there and was appointed a Senator representing Sabah affairs. His case justifies what it means to attain a native status as it clearly shows how his ethnic identity or acquired Sabah indigeneity had economic and political implications on his livelihood. The implication is that he is considered a native in Sabah and is entitled to be treated as such under the immigration law. As a native, he belongs to Sabah. Datuk Syed Kechik's case represents a very special case. His relationship with the government of the day and the political scenario at that time played a vital role in making it possible for him to apply for the status of a native Sabahan.

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<sup>9</sup>Bulan, Ramy, Indigenous Identity and The Law: Who is a Native? (1998) 25 *Journal of Malaysian and Comparative Law* 7, p.161

<sup>10</sup> Bulan, Ramy, Indigenous Identity and The Law: Who is a Native? (1998) 25 *Journal of Malaysian and Comparative Law* 7, p.156



## Conclusion

In conclusion, attaining a native status with an ethnic identity may not entail one being purely born a native, as portrayed in court cases discussed. What matters is the fact that ethnic identity in the two states of Sabah and Sarawak can be significant in the way it is employed, deployed or defined with a view to achieving certain goals, be it economic or political. However, in recent times, there has been a tightening of the immigration rules in Sabah, making it more difficult to claim resident status. In contrast, Sarawak has always been stringent in its control over immigration, especially against those from Peninsular Malaysia.

## Biodata

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