After *Adong*: The Emerging Doctrine of Native Title in Malaysia

*Peter Crook**

I. Introduction

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor[1] established the concept of native title in Malaysian law. The decision was quickly followed by two High Court decisions; *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*,[2] a case involving the logging of *Iban* forest land in Bintulu, Sarawak, and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*,[3] a case involving the taking of *Temuan* land in Sepang in conjunction with the building of the Kuala Lumpur International Airport. In both cases the High Court firmly embraced the doctrine of native title and took significant steps to extend its boundaries. In *Nor Anak Nyawai*, the High Court recognised the indigenous community's control over its communal forest land and enjoined further logging by the defendant timber company. In *Sagong bin Tasi*, the High Court extended the native title of the plaintiff *Temuans* to include not only usufructory rights described in *Adong*, but also ownership of at least a portion of the plaintiffs' traditional lands. The cases were also significant because they served to illustrate the markedly different legal obstacles facing the *Orang Asli* of the Peninsula and the indigenous peoples of Sarawak and Sabah. In *Nor Anak Nyawai*, the decision rested on the High Court's assessment of Sarawak's extensive history of regulations on land use and whether they served to extinguish the plaintiffs' claim to native title.

* BA (UC, Berkeley), MA (UC, Davis), JD (UC, Davis), LLM (Harvard); Visiting Associate Professor, Faculty of Law of the University Malaya, Kuala Lumpur, Malaysia.

[1] [1997] 1 MLJ 418.

[2] [2001] 6 MLJ 241.

[3] [2002] 2 MLJ 591.

By contrast, the key issue in *Sagong bin Tasi* was the defendants' claim that the plaintiffs, while *Temuan* by descent, were no longer living in a traditional fashion as required by *Adong*. The different challenges these cases present reflect the markedly different social environments existing for indigenous peoples on the Peninsula and in Sarawak and Sabah. Both cases were appealed. As this article was awaiting publication, the Court of Appeal on 8 July 2005 rendered its decision in *Nor Anak Nyawai.* The Court allowed the appeal, ruling that the plaintiffs had failed to establish that they had in fact "occupied" the territory in dispute as required. On 19 September 2005, a second panel of the Court of Appeal rendered its decision in *Sagong bin Tasi*. The Court dismissed the defendants' appeal and granted in substantial measure a cross appeal brought by the plaintiffs. This paper will discuss the key issues raised by these cases and the significance they may have on the future development of native title in Malaysia.

II. *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*

In *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors,* the plaintiffs were residents of two longhouses located in Sekabai, Bintulu, Sarawak. They claimed that the defendant timber company had trespassed and damaged their ancestral land. The plaintiffs, however, did not hold documentary title to the land. The title to the disputed land was held by the defendant, Borneo Pulp Plantation Sdn Bhd, which had hired contractors to clear the land for commercial timber development. The plaintiffs' action rested exclusively on their claim that under *Iban* custom they had acquired native customary rights to the property. Under *Iban* custom, each longhouse community has a territory over

which it exercised control, the *pemakai menoa*. The *pemakai menoa* includes not only the land surrounding the longhouse, but also the land devoted to the gardens and farms (the *temuda*), and the rivers and jungle within a half day's walk used for hunting, fishing and gathering forest produce, the *pulau* or *pulau galau*. The plaintiffs claimed that the disputed land constituted part of the community's *pulau*.[4]

As a starting point, the High Court recognised the pre-existing rights of indigenous people as set out in *Adong*:

> ... it is common ground – arising from the decision in *Mabo v State of Queensland* (1992) 66 ALJR 408 which was followed in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 and which decision was affirmed by the Court of Appeal in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1998] 2 MLJ 158 – the common law respects the pre-existing rights under native law 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.[5]

Resolving the factual issues of the case presented little apparent difficulty for the Court. With relative ease the Court found the elements necessary to establish the plaintiffs' claim to native title over the disputed land. Without serious dispute, it concluded that the plaintiffs were in fact *Ibans* and therefore natives within the meaning of the doctrine. The Court also accepted the plaintiffs' evidence regarding the *Iban* customs of *pemakai menoa, temuda*, and *pulau galau*. Lastly, it found that the plaintiffs and their ancestors had exercised and continued to exercise these customary practices over the specific land in dispute. As will be discussed below, it is on this last point that the Court of Appeal held the trial court's findings to be in error.

The relative ease with which the factual issues were resolved by the High Court may be explained, at least in part, by the particular social environment of Sarawak. Sarawak is the largest state in Ma-

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[4] *Nor Anak Nyawai & Ors, supra*, n 2 at pp 247-251.

[5] *Ibid*, at p 245.

laysia comprising 724,450 square miles, most of which is still forested. Eighty per cent of the approximately 1.7 million Sarawakians live in rural areas.[6] Unlike the *Orang Asli* of the Peninsula or the indigenous peoples of the United States, Canada or Australia, the indigenous peoples of Sarawak have never been an insular minority in their own lands. Even today, indigenous peoples comprise nearly half the population of the state, with the *Iban* constituting the state's largest single ethnic group.[7] Given the size and character of the indigenous community, it may not be altogether surprising that the Court readily accepted evidence of the continuing existence of a traditional *Iban* community in the interior. It is noteworthy, however, that the Court was sufficiently confident in the continuing vitality of traditional communities that it extended its holding beyond the particular facts of this case and established a presumption that any longhouse community in the interior of Sarawak could be assumed to be living in a traditional manner. Summarising its conclusions the Court stated:

> Thus, when the First Rajah arrived, the *Ibans* had already a body of customs which is referred to as native customary rights and this includes the rights I have discussed. Those rights being customs, I can conclude that the plaintiffs' ancestors must have practised the same customs as the present day Ibans practise. The defendants did not point to any writing of any historian that hold a contrary view. Therefore, I conclude that the plaintiffs and their ancestors had exercised those native customary rights known as *temuda, pulau*, and *pemakai menoa*. I can also conclude that where you find a longhouse in a remote area, that is in an area with jungles and rivers, you can assume that activities connected with *temuda* and *pulau* and *pemakai menoa* have been carried out since it is the livelihood of the folks staying in the longhouse.[8]

The size and strength of the indigenous communities of Sarawak may also explain the government's early recognition of customary law

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[6] Phoa, J, "The Dayaks and Orang Ulu of Sarawak" in Nicholas, C and Singh, Raaagen (eds), *Indigenous Peoples of Asia* (Bangkok, Thailand: Asia Indigenous Peoples Pact, 1996) at p 197.

[7] Bulan, R, "Indigenous Identity and the Law: Who is a Native" (1998) 25 *JMCL* 127 at p 128.

[8] *Nor Anak Nyawai & Ors, supra*, n 2 at p 253.

and native customary rights over land. Unlike the situation in the Peninsula where the customary law of the *Orang Asli* has found little official recognition, the government of Sarawak from its earliest beginnings with the Brooke administration has acknowledged the existence and importance of customary law.[9] Recognition, however, has brought with it regulation and restriction. As the Court chronicles, Sarawak has an extensive history of regulation of customary land use and occupation. It is the impact of this regulatory scheme on customary land rights that was the key legal issue in the case. The central legal question was whether the pre-existing rights under native law or custom had been "taken away by clear and unambiguous words in a legislation".[10]

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[9] The Court stated:

> It has been said that though Sarawak was ceded to James Brooke and with it the proprietorship and sovereignty over the land, he had shown a consistent respect for native customary rights over land (see Anthony Porter - *The Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time* (1841-1965)). In fact, James Brooke had referred to native customary rights as 'the indefeasible rights of the Aborigines' (see John Templer - *The Private Letters of Sir James Brooke, KCB, Rajah of Sarawak*). James Brooke was 'acutely aware of the prior presence of native communities, whose own laws in relation to ownership and development of land have been consistently honoured' (see Anthony Porter, p 16). *Ibid,* at p 267.

The Court explained the Rajahs acceptance of customary law as a political necessity attributable to the strength of the indigenous communities:

> In my view there is another obvious though unmentioned reason for not attempting to prohibit entirely native customary rights. During the reign of the Rajah he has to contend with rebellions after rebellions of various native groups and he was able to convince one group to go on war expeditions on his behalf against the other . . . If the Rajah had abolished all those rights he would have united all the natives and he would have a war against him by a united front made up of all the natives of Sarawak. His head would have been the trophy that would be sought, it being the custom of that time to take the head of an enemy. To put it another way, the Rajah cannot afford to abolish those rights given the ability of the like of Munan to lead his people. *Ibid,* at p 267.

[10] *Ibid,* at p 245.

For the Court, extinguishment of native title could only occur as a result of the legislature's use of "clear and unambiguous words". Employing this test, the Court reviewed Sarawak's extensive history of land orders and legislation and found that at no point did the government express its clear intention to extinguish native title despite a clear pattern of increasingly restrictive land use regulation. Beginning with a review of the early land and timber orders of the late nineteenth and early twentieth centuries, the Court repeatedly found that the Brooke administration had recognised, albeit indirectly, the right of natives to continue to occupy their traditional lands. Restrictions imposed on clearing jungle land and collecting timber were interpreted by the Court as implicitly acknowledging the natives' underlying right to conduct those activities. Referring to the *Engkabang* Trees Order I of 1912, for example, the Court noted:

> ... where though it prohibits the felling of *engkabang* and *ketio* trees, it only imposes a maximum fine of $50 and nothing else. The most that can be said about this order I is that it prohibits only two types of trees and not the rest. This again is another example of the law indirectly admitting that there was a native customary right to fell timber from the jungle.[11]

Referring to the supplemental Order II which extended the prohibition to include a third specie of tree, the Court again found recognition of customary rights:

> ... this order has the effect of recognising the native customary rights of clearing jungle for cultivation. It provides for a penalty to be paid if the clearing involved the felling of three types of trees where prior permission was not obtained. It will be noticed that it does not provide for the eviction of the occupants of land that has been so cleared and cultivated.[12]

Addressing Sarawak's first comprehensive piece of land legislation, the Land Order of 1920, the Court again found evidence of the Brooke administration's continuing recognition of native customary rights.

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[11] *Ibid.* at p 264.

[12] *Ibid.*

Although the Order provided that state land was to be divided into four categories, one of which was designated as native holdings and claims to which required registration, the Court held that recognition of native title was unaffected. The Court's conclusion turned on the definition of state land as "all lands which are not leased or granted or **lawfully occupied** by any person ..."[13] Given that native customary rights had validated the continuing occupation by natives of their ancestral land, the Court reasoned that "[b]y excluding from the definition of 'State land', land that was lawfully occupied and which a native had occupied under customary law is a continuation of the recognition of native customary rights".[14] The plaintiffs' failure to register their claim under the Land Order of 1920 or its supplement, Order IX, did not affect their title. Referring to the provisions of Order IX that allowed natives to apply for three-acre lots within designated native reserves, the Court stated:

> Though there is no record of the present claim of the plaintiffs being registered, it does not follow from the non-registration that such rights can no longer be claimed. Those provisions do not concern the native customary rights that have been exercised over land, including land which a folk can traverse in half a day which means involving hundreds of acres and not just the few acres to which Order IX relates. Here again, there is no express provision to say that native customary rights hitherto enjoyed by the Ibans will no longer be recognized or that they are each to be confined to the several acres of land mentioned in Order IX. Therefore, the native customary rights that existed continued to be recognized.[15]

Despite increasingly comprehensive regulatory legislation, the Court continued to find that the government had not indicated a clear intention to eliminate customary rights. The Land Ordinance (Cap 27) of 1931 which replaced the Land Order of 1920 provided that "Crown Land" included "all lands for which no document of title has been issued ...".[16] Nevertheless the Court argued:

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[13] *Ibid,* at p 267 (emphasis added).

[14] *Ibid,* at p 268.

[15] *Ibid,* at p 269.

[16] *Ibid,* at p 270.

> But there is no mention that native customary rights can no longer exist if no title had been issued. If it was the intention to abolish native customary rights which existed only before the arrival of the Rajah there must be clear words to that effect but there was none. Given the Rajah's intention to protect the natives, it is inconceivable that it was intended by Cap 27 Ordinance to completely wipe out the native customary rights of the Ibans. Therefore, Crown land it may be but it is nevertheless subject to native customary rights.[17]

In support of its position, the Court observed that section 2 of the Ordinance provided that "nothing in this Ordinance shall affect the past operation of laws relating to land previously in force ...".[18] Based on its interpretation of the Rajahs' past orders, the Court concluded:

> It can be seen from s 2 that native customary rights continued to be recognized since native customs would come under 'the past operation of laws' which is that when the Rajah first took over Sarawak it was subject to native rights and which native customary rights had since been the subject of declarations by the orders and ordinances which I have referred to.[19]

Through a parity of reasoning, the Court found that the subsequent enactments of the Brooke administration through the 1930s continued to recognise the vitality of native title.[20]

In the Land Classification Ordinance 1948, as amended in 1952, 1954 and 1955, the British colonial administration, which had succeeded the Brooke administration in 1946, specifically prohibited the creation of native customary rights over interior land without prior permission.

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[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid,* at p 272.

[20] The Land Settlement Ordinance (Cap 28) 1933, section 66 restricted the creation of native customary rights but the saving clause in section 1(3) exempted lands over which rights had already been created. Similarly, the Land Settlement Rules 1934 and the Secretariat Circular No 12 of 1939 were held by the Court to not affect native title despite the registration requirements they contained.

Again, the Court found that pre-existing customary rights were unaffected:

> For the first time there is a prohibition against the creation of native customary rights in Interior Area Land unless there was prior written permission from a district officer. Existing native customary rights of the plaintiffs, which had been exercised since the time of the ancestors of the plaintiffs, that is before 1955, were not affected as those amendments were not stated to apply retrospectively. Again, it must be remembered that following the authorities I have already referred clear and unambiguous words in a legislation are required to abolish those rights and there is none of that.[21]

Similarly, the Court found that the Sarawak Land Code 1958 did not abrogate existing native customary rights but simply prevented natives from claiming new territory.[22]

The Court concluded its review of Sarawak's extensive history of land regulation stating simply that "[t]o sum up, the plaintiffs' right of *temuda, pulau* and *pemakai menoa* had survived all the orders and legislation".[23]

Although the Court devoted considerable attention to the question of legislative extinguishment of native customary rights, it paid relatively little attention to the nature of the rights granted to the plaintiffs by virtue of their customary rights. Consistent with *Adong*, the Court did not recognise the plaintiffs as possessing title to the land in dispute. In its discussion of the Land Ordinance 1948, the Court acknowledged that the plaintiffs did not hold title to the land, but it was clearly uncomfortable characterising the plaintiffs' status as that of mere licensees, as provided in section 8(3) of the Land Ordinance and subsequently in section 5(2) of Sarawak Land Code 1958. The Court stated:

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[21] *Nor Anak Nyawai & Ors, supra,* n 2 at p 284.

[22] In addition to its exhaustive analysis of land regulation, the Court also reviewed the codification of *Iban* customary law and the legislation establishing the native courts system and found that in neither case did the legislation abolish the customary rights claimed by the plaintiffs.

[23] *Nor Anak Nyawai & Ors, supra,* n 2 at p 298.

> While it is correct that the plaintiffs do not hold any title to the land and may be termed licensees but their license ... 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 ... The description of native customary rights as 'licences' is ill fitting and this was clearly illustrated by *Richards*, at p 18, in these words:
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> ... Neither will 'licence' or 'permission' do to describe land rights. Permission is revocable at any time or expires by lack of renewal, and licence is 'a right of user not annexed to land'. Use of these terms would almost imply that no rights existed at all. Occupation of land without document or registration has been acquiesced in for so long, that title would appear to have been obtained by prescription to a large part of 'the bundle of rights'.[24]

The Court, however, simply left this issue unresolved and did not elaborate further upon the nature and extent of the rights encompassed by native customary rights. Despite the Court's silence, it did recognise the plaintiffs' control over their communal land in fashioning its remedy. The Court declared that the plaintiffs had the right "to exercise native customary rights in the disputed area"[25] and then enjoined the defendants from entering the disputed area. It also voided defendants' title to the area and ordered the defendants' title to be rectified to exclude the disputed area.

III. *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*

The second case, *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*, grew out of the construction of the Kuala Lumpur International Airport in Sepang, Selangor. The land in dispute was a strip of approximately 38 acres, running through a gazetted aboriginal reserve that was taken to form part of the highway leading to the airport. The plaintiffs represented Kampong Bukit Tampoi, a community of *Temuans* who had been living on the site and claimed it as part of their ancestral lands. The defendants, regarded the land in dispute as

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[24] *Ibid*, at p 284.

[25] *Ibid*, at p 299.

state land, refused to recognise any proprietary rights on the part the of plaintiffs and refused to compensate the plaintiffs for the loss of the land, offering instead compensation only for the loss of the plaintiffs' crops, fruit trees and buildings.

The issues presented in the case were substantially different from those seen in *Nor Anak Nyawai*. Unlike the Sarawak case, a serious challenge was made to the plaintiffs' status as an indigenous group. The defendants claimed that although the plaintiffs may be members of the *Temuan* group, they do not continue to practice *Temuan* culture and therefore no longer met the definition of aboriginal people. A second set of issues involved the rights to be afforded to aboriginal people under the doctrine of native title. In *Adong*, the Court recognised the right of aboriginal people only to continue "to live on their land as their forefathers had lived ...".[26] Native title did not include the right "to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein ...".[27] The plaintiffs in *Sagong bin Tasi* sought to expand native title to include actual title to the land. Moreover, they sought to establish that the state government had an ongoing fiduciary duty owed to the *Orang Asli* to protect their ownership interests in the land.

Addressing the challenge to the plaintiffs' status as aborigines, the Court turned to the statutory definition of aborigine contained in section 3 of the Aboriginal Peoples Act 1954 and held that the plaintiffs had to show "that they speak an aboriginal language, follow an aboriginal way of life as well as aboriginal customs and beliefs".[28] Evidence was presented that the community in Kampong Bukit Tampoi was governed by a traditional tribal council, the "*Lembaga Adat*". Under the authority of the *Lembaga Adat*, the Court noted that marriages are conducted, communal activities are organised, social conduct is supervised and disputes are resolved. It concluded that:

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[26] *Adong bin Kuwau & Ors, supra*, n 1 at p 430.

[27] *Ibid.*

[28] *Sagong bin Tasi & Ors, supra*, n 3 at p 604.

> ... it is manifestly evident that the Temuan people of Kampong Bukit Tampoi live in an organized society, with a system of adjudicating disputes, governed by their laws and customs and that they still practice a specific political system according to their culture with specific persons to hold offices that had been passed down from generation to generation.[29]

The Court also recounted the evidence presented on a wide range of cultural practices which it characterised as essential, practices such as the customs relating to land tenure, burial practices, religion, place names, inheritance and language.[30]

The Court was unmoved by evidence suggesting that the plaintiffs' cultural life had been so altered by modernisation that they should no longer be considered as traditional *Temuans*. The Court's conclusion was unaffected by the fact that:

(a) They [the plaintiffs] no longer depended on foraging for their livelihood in accordance with their tradition;
(b) they cultivated the lands with non-traditional crops such as palm oil;
(c) they also speak other languages in addition to the Temuan language;
(d) some members of the family embrace other religions, and/or marry outsiders;
(e) some family members work elsewhere either before or after the acquisition; and
(f) the Jawatankuasa Kemajuan and Keselamatan Kampung ('JKKK') was set up by the JHEOA to manage their affairs.[31]

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[29] *Ibid.*

[30] *Ibid,* at pp 604-606.

[31] *Ibid,* at p 606. It needs to be noted that the High Court also found that the plaintiffs had met their burden of proving continuous occupation of the land in dispute. The Court concluded that the evidence showed that the plaintiffs and their ancestors had been in continuous occupation for at least 210 years, see *Sagong bin Tasi & Ors, supra,* n 3 at p 610.

The degree to which contemporary claimants are required to observe the customs of their ancestors will likely be a key to the ultimate usefulness of native title in preserving indigenous land in Malaysia. Cultural change is inevitable, but it is particularly dramatic for indigenous groups who have been subjected to the rigors of colonisation as have the *Orang Asli*. To insist that claimants continue to live as their ancestors did, unchanged by contact with outsiders, would of course prove an insurmountable obstacle to any claim. The common law test set out in *Mabo No. 2* and adopted by the Court in *Adong* however, suggests a measure of flexibility. As summarised by the Federal Court of Australia in *Pareroultja & Ors v Tickner & Ors*[32] and quoted by the Court in *Adong*, the test refers to aboriginal people and their continuing connection to the land maintained through the observance of the traditional laws and customs of the group, without focusing on any particular cultural feature:

> .... if a group of aboriginal people substantially maintains its traditional connection with the land by acknowledging the laws and observing the customs of the group, the traditional native title of the group to the land continues to exist. Once the traditional acknowledgment of the laws and observance of the customs of the group ceases, the foundation of native title to the land expires and the title of the Crown becomes a full beneficial title.[33]

In this case, however, the Court did not refer to the common law standard, relying instead on the statutory definition of aborigine in section 3 of the Aboriginal Peoples Act 1954. Although the Court found that the evidence of cultural dilution was insufficient in this case to jeopardise the plaintiffs' status, the use of the statutory definition of "aborigine" in this context may limit the scope of native title in the future. Under the approach endorsed by the Court in *Adong*, contemporary claimants need only show that their group maintains a substantial traditional connection to their ancestral land through the observance of traditional law and custom.[34] Section 3 of the Aboriginal Peoples Act

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[32] (1993) 117 ALR 206 at p 213.

[33] *Supra*, n 1 at p 429.

[34] See *Mabo & Ors v Queensland, Western Australia v Ward* (2000) 170 ALR 159; *Yorta Yorta Community v Victoria* (2001) 180 ALR 655; *Delgamuukw v British Columbia* (1997) 153 DLR 4th 193.

appears more demanding, requiring claimants to prove not only that they observe traditional customs, but that they also follow an aboriginal way of life and speak an aboriginal language. With the accelerating pace of modernisation, meeting this standard may become increasingly more difficult, particularly for the *Orang Asli* of the Peninsula.

Unlike the indigenous peoples of Sarawak, the 18 sub-groups collectively known as the *Orang Asli* constitute a small minority of the Malaysian population, numbering little more than 100,000 individuals living in small communities spread throughout the Peninsula.[35] Despite their small numbers, the *Orang Asli* have been the subject of government development schemes for many years. Beginning with the Emergency, *Orang Asli* groups have been subjected to a series of schemes designed to integrate, or as some have argued, assimilate them into the modern Malaysian society.[36] While these schemes may provide a modicum of housing, educational opportunities, access to medical services and employment, they also serve to discourage the traditional way of life. Thus, if the *Orang Asli* are not to be entirely dispossessed of their ancestral lands, a flexible standard that is sensitive to the inevitable effects of modernisation and government policies on traditional culture is necessary.

The other major set of issues addressed by the Court concerned the character of the rights to which indigenous people as holders of native title are entitled. As the Court recounted, *Adong* granted native rights *over* the land but not rights *to* the land. In practical terms, this meant that natives had the right to move freely about 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.[37] The rationale for this distinction was that native title arose from the traditional uses to which

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[35] See Nicholas, C, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsula Malaysia* (Copenhagen: IWGIA, 2000) at pp 1-7.

[36] *Ibid*, at pp 93-104; see also Denton, RK, Endicott, K Gomes, A and Hooker HB, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous People* (Boston: Allyn and Bacon, 1997).

[37] *Sagong bin Tasi & Ors, supra*, n 3 at p 611.

the property had been put by the claimants' ancestors prior to contact with outsiders. The scope of the title to which contemporary claimants were entitled was limited to those same uses. What native title granted was the right "to live on their land as their forefathers had lived".[38]

In *Sagong bin Tasi,* the Court extended native title to include the ownership of the land itself. The Court's approach in distinguishing *Adong* from the case before it was two-fold. First distinguishing the facts of this case from those in *Adong,* the Court noted that unlike the *Adong* case that involved a large area of jungle in which the plaintiffs in *Adong* traditionally foraged, only a small portion of *Temuan* traditional land was in dispute. Moreover, the land was used by the plaintiffs for dwelling purposes, and not foraging. The Court stated:[39]

> 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.[40]

Second, revisiting a number of the authorities relied upon by *Adong,* the Court argued that aboriginal people's rights have long been recognised as including interest in the land and not merely usufructuary rights. Referring to *Mabo No. 2,* the Court observed that although the "*Adong* case purported to follow *Mabo No. 2,* it did not consider that an essential character of aboriginal title to the land as described by the High Court of Australia was proprietary interest in the land itself".[41]

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[38] *Ibid.*

[39] The Court also found significant the *Temuan* customs relating to land which recognized individual or family ownership of property.

[40] *Sagong bin Tasi & Ors, supra,* n 3 at p 611.

[41] *Ibid,* at p 613.

The Court also found support in more recent case law, citing with approval both the Australian case of *The Wiks Peoples v Queensland*[42] and the Canadian case of *Delgamuukw v British Columbia*.[43] Based on this review, the Court concluded that "... 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".[44]

Turning to the issue of compensation, the Court, citing *Adong*, held that the proprietary rights recognised under native title fell within the ambit of Article 13(2) of the Federal Constitution which prohibits the compulsory acquisition of land without adequate compensation.[45] At the time of the state's acquisition of the land, it had only offered the plaintiffs compensation for the loss of their crops, fruit trees and building structures, as was provided in the Aboriginal Peoples Act.[46] Having found a proprietary interest in the land, the Court ruled that the compensation offered was inadequate and as a consequence, the acquisition of the plaintiffs' land was unlawful under Article 13(2) of the Federal Constitution. The Court held that adequate compensation for the land was to be determined pursuant to the Land Acquisition Act 1960, the general law governing compulsory acquisition of land in Malaysia.

The strong position the Court takes in extending native title to include interest in land is hard to reconcile with the limitation it places on the area to which that interest attaches. The Court qualifies its

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[42] (1996) 141 ALR 129.

[43] (1997) 153 DLR 4th 193.

[44] *Sagong bin Tasi & Ors, supra,* n 3 at p 615.

[45] Article 13 - Rights to Property

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[46] Again citing *Adong*, the Court held that the Aboriginal Peoples Act 1954 did not limit the plaintiffs' right to compensation and that the rights under the APA are complementary to the rights to which the plaintiffs are entitled under the common law and the Constitution.

conclusion that native title is an interest in land by limiting those proprietary interests only to land devoted to settlements, as follows:

> ... 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.[47]

There seems to be little justification for establishing such a two-tiered system. The Court's legal argument for extending native title to include interest in land does not appear to support limiting that interest only to land used for one specific purpose. The basis upon which native title is recognised is the continuance of a traditional connection between indigenous people and their land. That connection would seem by necessity to include the land upon which that traditional way of life depends. Separating settlements from the land from which the settlement and its occupants derive their livelihood could ultimately threaten the continuation of the traditional character of the settlement itself and would impair the ability of indigenous people to respond and adapt to the pressures of modernisation in a manner consistent with their traditions. As will be seen, the High Court's position on this issue figures prominently in the Court of Appeal's decision in *Nor Anak Nyawai*.

In addition to extending native title to include interest in land, the Court also recognised that the state and federal governments owed a fiduciary duty towards the plaintiffs. Citing *Mabo No. 2* and the *Wiks* case, the Court found that "it is a duty to protect the welfare of the aborigines including their land rights and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs".[48] The Court found evidence of the Malaysian Government's fiduciary duty toward the *Orang Asli* in Article 8(5)(c) of the Constitution which exempts from the guarantee of equal protec-

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[47] *Sagong bin Tasi & Ors, supra,* n 3 at p 615.

[48] *Ibid,* at p 618.

tion any legislation providing for the protection, well being or advancement of the aboriginal peoples of the Malay Peninsula and in Item 16 of the Ninth Schedule of the Constitution which empowers the Federal Government to enact laws for the welfare of the aborigines. The Court also noted the Aboriginal Peoples Act 1954 enacted for the protection of aboriginal people and the Jabatan Hal Ehwal Orang Asli (JHEOA) established under the authority of the Act. Having established the government's fiduciary duty, the Court found that the government had breached its duty by depriving the plaintiffs of their land and unlawfully evicting them, which entitled the plaintiffs to the value of the lands lost.[49]

Establishing a fiduciary duty on the part of the government towards the *Orang Asli* has tremendous potential significance for the indigenous communities in Malaysia. As a fiduciary, the government would be under an obligation to act fairly towards the *Orang Asli*. The primary duty of a fiduciary is loyalty, requiring the fiduciary to hold the beneficiary's interest paramount. Consequently, the government's fiduciary duty towards the *Orang Asli* could mean far more than simply compensating the *Orang Asli* for the loss of their ancestral lands. It could require, as the Canadian case of *Delgamuukw v British Columbia*[50] suggests, involvement of aboriginal peoples in the decision-making process itself. This offers the alluring possibility that the *Orang Asli* could participate in a meaningful way in shaping their future.

IV. The Appellate Decision in *Nor Anak Nyawai*

As mentioned above, the decisions in both *Nor Anak Nyawai* and *Sagong bin Tasi* were appealed. On 8 July 2005, the Court of Appeal granted the defendants' appeal in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal.*[51] The decision focused primarily on the sufficiency of the factual findings of

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[49] *Ibid,* at p 620.

[50] [1997] 3 SCR 1010.

[51] [2006] 1 MLJ 256.

the High Court. Before addressing the evidentiary issues at stake, however, the Court reviewed the High Court's legal conclusions. It affirmed the High Court's major legal conclusion that the Sarawak Land Code "does not abrogate whatever native customary rights that exist before the passing of that legislation"[52] and also endorsed the High Court's rather equivocal position on the rights granted by native title; "that although the natives may not hold any title to the land and may be termed licencees, 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".[53] On appeal, the key issue for the Court of Appeal was whether there was sufficient evidence to support a finding that the plaintiffs "occupied" the land in dispute.[54] Although characterising the issue as primarily evidentiary, the Court through its interpretation of the requirement of "occupation" imposed a significant limitation on the potential scope of native title.

The Court began its legal analysis by noting that the doctrine of native title requires the aboriginal group to be in continuous occupation of the land in dispute. It quotes with approval the High Court's decision in *Sagong bin Tasi* but only regarding the limitation that the High Court had placed on the doctrine restricting its application to native settlement. Quoting *Sagong bin Tasi*:

> 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.[55]

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[52] *Ibid,* at p 270.

[53] *Ibid.*

[54] *Ibid,* at pp 267 and 269.

[55] Emphasis added by the Court of Appeal. *Ibid* at p 269.

Later, the Court of Appeal continued that "we are inclined to agree with the view of the learned trial Judge in *Sagong Bin Tasi & Ors* [2002] 2 MLJ 591 that the claim should not be extended to areas where '*they used to roam to forage for their livelihood in accordance with their tradition*'".[56]

Limiting occupation to mean only areas of settlement or cultivation severely limits the scope of native title. In terms of *Iban* tradition, this limitation would appear to mean that the Court of Appeal would not recognise, as the trial court had, the *Iban's* communal forest reserve, its "*pulau*", since it is used for neither settlement nor cultivation. The Court's analysis of the evidence appears to bear this out. In reviewing the evidence, the Court found significant the uncontested testimony of a former headman that there was no "*temuda*" in the area; in other words no cultivation.[57] The Court also gave great weight to an aerial photograph taken in 1951 which showed the disputed area covered with jungle. The trial court had accepted the plaintiffs' argument that the land could have been cleared by the plaintiffs' ancestors and subsequently replanted with trees. The Court of Appeal disagreed, again citing the testimony that there was no "*temuda*" in the area.[58] Also, of significance to the Court was the testimony that the plaintiffs' longhouses had been located outside the disputed area; in other words, there was no evidence of settlement in the disputed area.[59] Based on these findings, the Court of Appeal concluded that the trial court's finding that the land in dispute had been occupied by the plaintiffs was not supported by the evidence.[60]

The Court of Appeal is drawing a very clear line in limiting the application of native title. It is equating occupation with that of settlement

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[56] *Ibid,* at p 269.

[57] *Ibid,* at p 272.

[58] *Ibid.*

[59] *Ibid.*

[60] The Court also discounted the testimony of the plaintiffs as self-serving and of little or no weight in the absence of credible corroborative evidence of *pulau* in the area, of which he found none. *Ibid.*

or cultivation and contrasting that with land upon which native peoples "roam" or "forage". For the Court of Appeal, the latter is beyond protection because "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 of food".[61]

The contrast drawn by the Court of Appeal seems at odds with the policies underlying the doctrine itself. Native title rests on the recognition by the courts of native peoples' pre-existing rights to land and their continuing distinctive cultural connection with it. As discussed above, separating native settlements from the surrounding land from which a community's traditional culture and livelihood have been drawn would handicap the community's ability to maintain its distinctive way of life thereby jeopardising the underlying basis for any claim. Nor is this restrictive interpretation compelled by case law. The facts of *Adong* itself involved a river catchment area of some 53,000 acres over which the plaintiff *Jakun* tribe lived and foraged. Yet, *Adong* speaks of native title in broad cultural terms. It refers to the significant connection between native people and the land and holds that native people have a right, "to live on their land as their forefathers had lived ...".[62] In the leading Canadian case of *Delgamuukw v British Columbia,*[63] the Supreme Court of Canada speaks directly to the issue of occupation, but rather than setting out a bright line rule, it takes a far more nuanced approach. The Court said: "[p]hysical 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 ...".[64] For the Canadian court, the inquiry is whether the occupation was exclusive at sovereignty and whether a substantial connection has been maintained between the native people and the land. It does not confine its inquiry to any predetermined use.

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[61] *Ibid,* at p 269.

[62] *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor, supra,* n 1 at p 430.

[63] [1997] 3 SCR 1010.

[64] *Ibid,* at p 1101. See also, *R v Marshall* 2005 SCJ No 44 decided July 20, 2005.

The decision in *Nor Anak Nyawai* certainly clouds the future of native title in Malaysia. On the one hand, the Court of Appeal does affirm the continued existence of native title in Sarawak despite the extensive legislative history of land regulation. However, the Court of Appeal also endorses the position of the High Court in *Nor Anak Nyawai* holding that native title does not include an interest in land. In addition, the limitation it places on native title limiting it to areas of settlement and cultivation substantially restricts the application of the doctrine.

V. The Appellate Decision in *Sagong bin Tasi*

Two months after *Nor Anak Nyawai,* on 19 September 2005, the Court of Appeal issued its decision in *Sagong bin Tasi*. In a strongly worded opinion, the Court under Justice Gopal Sri Ram dismissed the defendants' appeal.[65] The decision is noteworthy on a number of points but in particular for the markedly liberal interpretation given to the Aboriginal Peoples Act 1954 and the forceful position it takes on the scope of the fiduciary duty owed by the state and federal governments towards aboriginal people. The appellate case in *Sagong bin Tasi* consisted of two distinct actions. The defendants' appeal challenged the High Court's ruling that native title constituted an interest in land and that compensation should be measured under the Land Acquisition Act of 1960. The plaintiffs brought a cross appeal challenging the High Court's refusal to award compensation for the defendants' seizure of a second piece of land contiguous to the land for which compensation had been awarded. The plaintiffs also challenged the High

[65] *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289.

Court's decision to award damages for trespass against some but not all the defendants and its refusal to award exemplary damages.[66]

As to the nature of the interest that can be acquired under native title, the Court of Appeal looked first to the common law. Its analysis is brief and does not discuss at length the nature of the rights granted under native title. Relying primarily on the Privy Council's decision in *Amodu Tijani v The Secretary of State, Southern Nigeria*[67] and its own decision in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*,[68] the Court found that the determination as to the nature of native title is essentially a factual matter: "[t]he precise nature of such a customary title depends on the practices and usages of each individual community... What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community".[69] In this case the facts as found by the High Court were not disputed and therefore the Court of Appeal concluded as follows:

> In accordance with well established principles, it is a matter on which an appellate court will only disagree with the trial judge in the rarest of cases. Here, of course, there is complete acceptance by the respondents of the facts as found by the learned judge. I have already set out his conclusions on the proved facts. Based on those facts and on the authorities he concluded that the plaintiffs had established their claim to a customary title to the land in question.[70]

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[66] The High Court had found that the second and third defendants (a public limited company involved in road construction and the Malaysian Highway Authority, respectively) had trespassed on the plaintiffs' land and were liable for damages. The first and fourth defendants (the State Government of Selangor and the Government of Malaysia, respectively) were held not liable for trespass. The High Court also refused to award exemplary damages against the second and third defendants. See *Sagong bin Tasi & Ors, supra* n 3 at p 621.

[67] (1921) 2 AC 399

[68] *Supra*, n 1.

[69] *Supra*, n 65 at pp 301-302.

[70] *Ibid*, at p 302.

Having affirmed the plaintiffs' title to the land under common law, the Court then turned to the impact of the Aboriginal Peoples Act 1954. It began its analysis with an exploration of the purpose behind the Act. Drawing on the legislative debates at the time of the passage of the Act, a policy statement of the administrative department established by the Act and other extrinsic materials, the Court concluded that the purpose of the 1954 Act was "to protect and uplift the First Peoples of this country" making it "fundamentally a human rights statute".[71] Citing for support a series of Canadian cases,[72] the Court held that the Act "acquires a quasi constitutional status giving it pre-eminence over ordinary legislation", and requiring that it "receive a broad and liberal interpretation".[73] This interpretation "calls for a construction liberally in favour of the aborigines as enhancing their rights rather than curtailing them".[74]

With the firm commitment of the legislature to promote and protect the welfare of aboriginal peoples in mind, the Court examined the provisions of the Aboriginal Peoples Act which provided for the establishment of aboriginal areas and aboriginal reserves. Under these sections, alienation of land within either aboriginal areas or reserves is restricted and generally can only be done with the consent of the Director General.[75] Rejecting the defendants' argument that the Aboriginal Peoples Act merely empowers the government to alienate land to natives but does not recognise pre-existing native title, the Court

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[71] *Ibid,* at p 304.

[72] *Ibid,* at p 304-305. *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145; *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114; *Dickason v Univeristy of Alberta* [1992] 2 SCR 1103.

[73] *Ibid,* at p 304.

[74] *Ibid,* at p 305.

[75] *Ibid,* pp 305-307. Section 6 for instance provides in pertinent part: "(2) Within an aboriginal area- (iii) no land shall be alienated, granted leased or otherwise disposed of to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Director General".

returned to the underlying purpose of the Act itself: "[s]uch an interpretation of these sections will curtail or restrict aboriginal land rights and therefore would run counter to the purpose of the 1954 Act".[76] Later, the Court continued:

> If, in the absence of a specific alienation to him, an aborigine is to receive no interest in the land that he and generations of his forefathers have lived and worked upon, then the 1954 Act was a wasted piece of legislative action. Remember that the purpose of the 1954 Act was to provide socio-economic upliftment of the aborigines. Land being a very valuable socio-economic commodity, it was the undoubted intention of the legislature not to deprive those in the class to whom the plaintiffs belong of the customary title existing at common law.[77]

The Court concluded its treatment of this issue by holding:

> The evidence led in the court below and the findings of fact made by the learned judge which are unchallenged before us leave no room for doubt that the plaintiffs had ownership of the lands in question under a customary community title of a permanent nature. Therefore, it is my considered judgment that the learned judge did not fall into any error when he held that the plaintiffs had customary community title to the land in question. I would accordingly affirm his judgment on this point.[78]

As to compensation for the value of the land seized, the Court affirmed the High Court's determination that Article 13(2) of the Federal Constitution required that adequate compensation be awarded and that such compensation should be determined under the Land Acquisition Act 1960.[79]

The plaintiffs' cross appeal concerned the High Court's failure to award compensation for the seizure of a second continuous piece of land. The High Court did not explain the reasons for rejecting the

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[76] *Ibid*, at p 307.

[77] *Ibid.*

[78] *Ibid*, at p 308

[79] *Ibid*, at pp 309-311.

plaintiffs' claim. On appeal, the state and federal governments argued that the land was not gazetted as aboriginal reserve and they have no duty to gazette the land. Consequently, as ungazetted land, there was no duty to compensate the plaintiffs for its seizure.[80]

The Court of Appeal approached this issue in terms of the fiduciary duty owed by the state and federal governments towards aboriginal peoples. Affirming the High Court's finding that the state and federal governments breached their fiduciary status towards plaintiffs by depriving them of their land without adequate compensation, the Court of Appeal extended the governments' fiduciary duty to include the duty to gazette land upon which the state government knew had been settled by some of the plaintiffs. The Court stated:

> Here you have a case where the first defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the ungazetted area. It was aware that so long as that area remained ungazetted, the plaintiffs' rights in the land were in serious jeopardy. It was aware of the 'protect and promote' policy that it and the fourth defendant had committed themselves to. The welfare of the plaintiffs, on the particular facts of this case, was therefore not only not protected, but ignored and/or acted against by the first defendant and/or the fourth defendant. These defendants put it out of their contemplation that they were ones there to protect these vulnerable First Peoples of this country. Whom else could these plaintiffs turn to? In that state of affairs, by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendant committed a breach of fiduciary duty.[81]

The Court's obvious concern over the failure of the defendants to meet their responsibilities toward the plaintiffs was also reflected in the Court's decision on the issue of exemplary damages for trespass.[82]

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[80] *Ibid,* at p 311.

[81] *Ibid,* at p 314.

[82] As to the challenge to the High Court's failure to find the state and federal government liable for trespass, the Court of Appeal rejected the plaintiffs appeal, finding that the plaintiffs had failed to claim damages for trespass against either defendant. *Ibid,* at pp 314-315.

The second and third defendants [a public limited company involved in road construction and the Malaysian Highway Authority, respectively] had challenged the High Court's finding that they had been guilty of trespass.[83] The plaintiffs had challenged the High Court's failure to award exemplary damages against these defendants for the trespass.

Dismissing the defendants' arguments as without merit and affirming the High Court's decision to award compensatory damages, the Court turned to the issue of exemplary damages.[84] Reviewing the conduct of the Malaysian Highway Authority, the Court concluded that exemplary damages were in order:

> The evidence in relation to the methods adopted by the third defendant to evict the plaintiffs was rehearsed before us at length during argument. No purpose will be served by its repetition here. Suffice to say that very highhanded tactics were employed. It is fortunate that the police were present to keep the peace. It may well be imagined what may have happened if they had not agreed to oversee the eviction. In summary what was done was to forcibly demolish the plaintiffs' houses and meeting hall. The plaintiffs and their families were unceremoniously asked to go and fend for themselves in unkind weather. Looking at the evidence in totality I am satisfied that this is a proper case for an award of exemplary damages.[85]

The Court's decision in *Sagong bin Tasi* provides strong support for the doctrine of native title. The Court's affirmation of the High Court's determination that native title constitutes an interest in land is noteworthy. Its interpretation of the Aboriginal Peoples Act as a human rights statute, linking it closely to an underlying policy of protecting and promoting the welfare aboriginal peoples suggests that the Aboriginal Peoples Act 1954 might become in the future a more significant tool for protecting native lands in the Peninsula. And certainly, the Court's strong statement regarding the scope of the government's fiduciary duty towards aboriginal peoples holds out hope that greater attention

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[83] *Ibid,* at pp 314-315.

[84] *Ibid,* at pp 315-317.

[85] *Ibid,* at pp 317-318.

will be given to the welfare of native peoples and lead to greater participation by native peoples in the decisions that affect their future.

VI. Conclusion

The decisions in *Sagong bin Tasi* and *Nor Anak Nyawai* rendered by different panels of the Court of Appeal leave us, however, with an uneven picture of the future of the doctrine of native title. Both decisions contribute to the continued existence of native title in Malaysian law, yet they differ substantially in both tone and substance. On the one hand, *Nor Anak Nyawai* serves to limit the application of native title and the rights granted by it. On the other hand, *Sagong bin Tasi* suggests a more vigorous application of the doctrine and a heightened concern for the welfare of native peoples and the protection of their lands. Presumably only time will tell which path the courts will ultimately choose.

The Beginning and End of the Life Cycle*

*Dame Elizabeth Butler-Sloss GBE***

I give this lecture with some diffidence but I hope it will be of interest to you since it raises issues of general morality and medical ethics which from time to time require decisions in English courts. These are questions which also are in the minds of and require anxious consideration by the individual and the community in many countries across the world. They raise the issue of the right to life and its obverse, the right to die, or rather the right not to be kept alive. In England in recent times, these questions have become increasingly important and relevant to more and more people. This is as a result of the advances of medical science and technology. Over the years, innovations in medical science have changed almost beyond recognition our social landscape. From birth to death, and most things in between, medical advances have transformed our expectations. Children are kept alive in circumstances in which 25 years ago they would have died at birth. The ageing population now enjoys a greater life expectancy than that of past generations; life-saving and life-prolonging technologies have made a profound difference to the treatment options available for the terminally ill. Inevitably, there will be divergent views as to the appropriateness of such treatments. Doctors sometimes disagree with patients and/or their relatives, and patients may themselves disagree with their family and friends. A doctor's devotion to preserving the life of his patients may conflict sharply with the patient's own values and wish for a dignified and humane death. These conflicting values bring into sharp focus a tension between two principles fundamental to many societies: the sanctity of life, and the individual's right to self-determination or, as it is sometimes called, personal autonomy.

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** Chancellor, University of the West of England, Bristol, The United Kingdom; formerly President of the Family Division of the High Court of Justice.