
NATIVE CUSTOMARY RIGHTS OVER LAND IN SARAWAK

I. Introduction

The purpose of this paper is to explain the law relating to native customary rights in respect of land in Sarawak, with reference to relevant provisions in the *Sarawak Land Code*, hereinafter referred to as the *Land Code* or the Code¹

A. Definition of Native

A 'native' is defined in section 3 of the *Interpretation Ordinance*² as any person who is a citizen of Malaysia and who belongs to one of the races which is now considered to be indigenous to Sarawak. The races which are now considered natives of Sarawak are the following: Bukitans, Lugats, Bisayahs, Lisums, Dusuns, Malays, Dayaks (Sea)³, Melanos Dayaks (Land),⁴ Muruts,⁵ Kedayans, Penans, Kalabits, Sians Kayans, Tagals, Kenyahs (including Sabups and Sipengs), Tabungs, Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits) Ukits or any admixture of the above with each other.

¹Cap. 81, Revised Laws of Sarawak 1958.

²Cap. 1, Revised Laws of Sarawak 1958. See also the definition of 'native' of Sarawak in Article 161A(6) and (7) of the *Federal Constitution*.

³Known locally as Iban.

⁴Known locally as Bidayuh.

⁵Known locally as Lun Bawang.

B. The Land Code

The present Sarawak *Land Code* was enacted in 1957 with the object of consolidating all the laws relating to land then in force into one piece of legislation. The *Land Code* came into operation on 1st January, 1958. It replaces the *Land Ordinance*⁶, *Land Settlement Ordinance*⁷, *Land (Classification) Ordinance, 1948*⁸ and the *Dealings in Land (Validation) Ordinance, 1952*⁹ together with all rules made thereunder.

The Code which is based on the Torrens system of registration of titles to land is divided into ten (10) parts¹⁰ which provides, *inter alia*, for alienation of land, administration of alienated land, classification of land, compulsory acquisition of land, settlement of rights to land, survey and registration of dealings in land. It provides for five (5) classifications of land in Sarawak. These are -

- (a) Mixed Zone Land;
- (b) Native Area Land;
- (c) Native Customary Land;
- (d) Reserved Land; and
- (e) Interior Area Land,

each of which is defined in section 2 of the Land Code.

A registered title in respect of Mixed Zone Land may be held by any person who is a Malaysian citizen or is a permanent resident in Sarawak but a registered title in respect of Native Area Land may be held only by natives of Sarawak. Interior Area Land means land which does not fall within any of the definitions of Mixed Zone Land, Native Area Land, Native Customary Land or Reserved Land.

⁶Cap. 27, Revised Laws of Sarawak, 1948.

⁷Cap. 28, Revised Laws of Sarawak, 1948.

⁸Ordinance No. 19 of 1948.

⁹Ordinance No. 11 of 1952.

¹⁰Part X, on development and subdivision of land, was inserted by the Land Code (*Amendment*) Ordinance, 1997. *The Land (Control of Sub-Division) Ordinance* (Cap. 82) has been repealed with effect from 1st August, 1998. See SWK. L. N 61/98, Part II of Sarawak Government Gazette.

II. Native Customary Land (NLC)

Native Customary Land means-

- (a) land in which native customary rights, whether communal or otherwise, have been lawfully created prior to the 1st day of January, 1958, and still subsist as such;
- (b) land from time to time comprised in a Native Communal Reserve to which section 6 of the *Land Code* applies; and
- (c) Interior Area Land upon which native customary rights have been lawfully created pursuant to a permit under section 10 of the *Land Code*.

A. Subsisting customary rights created prior to 1.1.1958

Native customary rights which have been lawfully created prior to 1st January, 1958 and still subsist as such consist of those rights which were recognised by the government or acquired under the various legislation pertaining to land which were in force before the *Land Code* came into operation on 1st January, 1958.

B. Native Communal Reserve

Section 6 of the *Code* empowers the Minister to declare any area of state land to be a Native Communal Reserve for the use of any native community, in which case, rights in any such land shall be regulated by the customary law of the community for whose use it was declared to be reserved. However, the land shall continue to be state land and the native community for whose use it was reserved or any member thereof acquiring any rights therein shall hold the same as a licensee of the government.

C. Permit to occupy Interior Area Land

A permit is required by a native or a native community to occupy any Interior Area Land for the purpose of creating native customary rights

thereon. Previously, such permit may be issued by a District Officer. Section 10(3) now states, *inter alia*, that any native who, without a prior permit in writing from a Superintendent of Lands and Survey occupies any Interior Area Land or fells or attempts to fell virgin jungle upon any such land or attempts to create customary rights upon any such land shall be guilty of an offence. Section 10(4) further provides that the occupation of Interior Area Land by a native or native community without a permit in writing from a Superintendent shall not, notwithstanding any law or custom to the contrary, confer any rights or privileges on such native or native community and, in any such case, such native or native community shall be deemed to be in unlawful occupation of state land and shall be liable to the penalty provided under section 209.

The effect of section 10(3) and (4) is to restrict the creation of new native customary rights over Interior Area Land. In fact, it is no longer the policy of the government to issue any such permit under section 10 of the Land Code.

III. Creation Of Native Customary Rights

Section 5 of the Code sets out the methods by which a native may acquire native customary rights over land in Sarawak and specifies the nature and status of such rights. Section 5(2) provides -

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

The methods by which native customary rights may be acquired are-

- (a) the felling of virgin jungle and the occupation of the land thereby cleared;
- (b) the planting of land with fruit trees;
- (c) the occupation or cultivation of land;
- (d) the use of land for a burial ground or shrine;
- (e) the use of land for any class for rights of way; and
- (f) any other lawful method:

Provided that -

- (i) until any document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and
- (ii) the question whether any such right has been acquired or has been lost or extinguished shall save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

A. Nature and status of native customary rights

Section 12 of the *Land Code* provides that the entire property in and control of State land and all rivers, streams, canals, creeks and water courses and the beds thereof is and shall be vested solely in the government. By virtue of proviso (i) to section 5(2) of the Code, a native merely has a right of user as a licensee to the state land. The right to native customary lands enjoyed by natives is therefore not absolute, but a restricted one. Such right may be extinguished by the direction of the Minister issued pursuant to section 5(3) and (4) of the *Land Code* or may be lost by abandonment. Natives are in occupation of state land without any document of title or registration. Hence, the right is by virtue of their occupation thereof. As A.J.N Richards put it, 'natives enjoy their customary rights by 'licence' until a document of title is issued'.¹¹

The law on this point was previously covered by section 91(1) of the former *Land Ordinance* and by section 8(2) of the former *Land*

¹¹A.J.N Richards, *Sarawak Land Law and Adat*, Kuching, November 1961, p 12

The law on this point was previously covered by section 91(1) of the former *Land Ordinance* and by section 8(2) of the former *Land (Classification) Ordinance*, 1948. The nature of native customary right have also been stated by case law for instance, in *Keteng bin Haji Li v. Tua Kampong Suhaili*¹² Sigby J. in the course of his judgment said:

In Sarawak a person can be said to 'own' land only if there is a Land Office title subsisting in respect of that land. If there is no such title the land is Crown Land; the occupier is at best a mere licensee; and he has no legal interest which he can either charge or transfer. That is so whether for the purposes of the Land (Classification) Ordinance the land is Native Customary Land. If a person abandons his legitimate occupation of such land he does so at his peril.

And in *Nyalong ak Bungan v. The Superintendent of Lands & Surveys, 2nd Division, Simanggang*¹³, the court expressed that:

The right which the plaintiff may have created by his original clearing and cultivation is a restricted one and it can be lost by abandonment.

Given that a person can be said to own land only if there is a land office title subsisting in the land if no such title exists the occupier is a mere licensee of state land. Also, in the absence of a document of title or other documentary evidence, a native may have difficulty in proving 'ownership' to any customary land he occupies and which he claims to be his through one of the methods of acquisition specified in section 5(2) of the Code. Needless to say, the onus is on him to prove that such customary rights have been lawfully acquired in accordance with the relevant law applicable because section 5(7) of the *Land Code* expressly provides as follows:

Whenever any dispute shall arise as to whether any customary rights exists or subsists over any State land, it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights.

¹²(1951) SCR p. 9.

¹³(1967) 2 MLJ 249, at p. 251.

To appreciate the present applicable laws, it is useful to understand the background and the development of the law prior to 1st January, 1958. As stated earlier the relevant laws governing alienated land held under titles and native customary land in Sarawak were the *Land Ordinance*, *Land Settlement Ordinance* and the *Land (Classification) Ordinance*, 1948 which have since been repealed by the *Land Code*. The relevant provisions are explained below:

- a) **The Land Ordinance** was enacted in 1931 and came into force on 1st January, 1932. Its purpose was to consolidate and amend all previous Orders and Regulations relating to land. Section 90 of the Ordinance provided, *inter alia*, for free ownership of land of 3 acres by natives for certain purposes. Section 91 provided for the constitution of native land reserves for the communal use of Malay kampungs and native houses and natives were also permitted to occupy land individually by customary tenure, in both of which no ownership of land shall vest in the natives.
- (b) **The Land Settlement Ordinance** was enacted in June 1933. Its purpose was to provide for settlement of rights to land and registration of titles in respect of such rights. Section 66 of the Ordinance provided that native customary rights shall be recognised over the following -
 - (i) land planted with fruit trees, when the number of fruit trees amounted to twenty and upwards to each acre;
 - (ii) land in continuous occupation or has been cultivated or built on within three years;
 - (iii) burial grounds or shrines;
 - (iv) usual rights of way for men and animals from rivers, roads, or houses to any or all of the above.
- c) **Secretariat Circular No. 12/1939**: This was only an administrative circular. While the government recognised native customary rights to land, there were practical problems in the administration of land encumbered by customary rights. In 1939, the government found it necessary to publish a Memorandum on native land tenure to enable all officials to acquire a better understanding of the subject.

rights to land, there were practical problems in the administration of land encumbered by customary rights. In 1939, the government found it necessary to publish a Memorandum on native land tenure to enable all officials to acquire a better understanding of the subject. That Memorandum stated that all natives of Sarawak followed Indonesian 'adat' to a greater or lesser degree and that land tenure 'adat' was broadly in accordance with principles which are set out below:

- (i) The right to cultivate cleared land vested in the community with priority to the heirs of the original feller of big jungle. This right had to be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle was not a matter for rule of thumb but for expert native opinion.
 - (ii) Where not inconsistent with the above, the existence of permanent cultivation of a reasonable density was evidence of customary ownership as opposed to customary right of user.
 - (iii) Individual ownership was limited by the customary right of the community to a say in the matter of disposal to anyone outside the community.
 - (iv) No community or individual may hold up land in excess of their requirements and, in the extreme case, removal to another district automatically extinguished all rights of the user. The old Order (*ie* Fruit Trees Order, 1899¹⁴) dated 10.8.1899 was an excellent exposition of this principle.^{14a}
- (d) **The Land Classification Ordinance 1948** came into force on 1st January 1949. Its purpose was to declare the law governing certain classification of land, to make provision for the transfer of land from one class to another and to make provision for defining the rights of natives and non-natives in such land. Section 3(1) of the Ordinance provided for the classification of all land in Sarawak

¹⁴*Fruit Trees Order*, 1899 contained in "Orders issued by H.H The Rajah of Sarawak" from 1899 to 1900.

^{14a}A.F Porter, *Land Administration in Sarawak*, 1967, p.13.

and communal lands under the *Land Settlement Rules, 1934*, non-natives were restricted from acquiring any rights over such land. Section 8(3) of the Ordinance originally permitted any person to occupy Interior Area Land for the purpose of creating native customary rights thereon. However, this Ordinance was later amended by the *Land (Classification)(Amendment) Ordinance, 1954*¹⁵ and the *Land (Classification)(Amendment) Ordinance, 1955*.¹⁶ The effect of these amendments was that native customary rights could not be created over Mixed Zone Land or Native Area Land with effect from 21 May 1954. Also, with effect from 16 April, 1955, native customary rights could only be created on Interior Area Land by the felling of virgin jungle if a permit in writing was obtained from a District Officer within whose district the land was situated.

V. Protection Of Native Customary Rights

Section 8 of the Code prohibits the acquisition of any rights or privileges whatever by non-natives over any Native Area Land, Native Customary Land or Interior Area Land. It further states, *inter alia*, that any agreement purporting to transfer or confer any such rights or privileges shall be deemed to have been entered into for an illegal consideration. However, section 9 provides some qualifications to section 8. A non-native is permitted to acquire any land to which section 8 applies or of any rights or interest in or over such land -

- (a) whenever such non-native has become identified with and subject to any native system of personal law, for instance, pursuant to section 20 of the *Native Courts Ordinance, 1992*¹⁷;
- (b) whenever such non-native has been issued with any permit relating to Native Area Land or Native Customary Land, issued under any rules made under section 8A of the former Land (Classification) Ordinance, 1948, or issued under rules¹⁸ made in that behalf

¹⁵Ordinance No. 3 of 1954, effective from 21.5.1954.

¹⁶Ordinance No. 1 of 1955, effective from 16.4.1955.

¹⁷Ordinance No. 9 of 1992, effective 1.6.1993.

any rules made under section 8A of the former Land (Classification) Ordinance, 1948, or issued under rules¹⁸ made in that behalf under section 213, to the extent of the rights conferred by such permit; or

- (c) under or by virtue of a dealing executed by the registered proprietor of Native Area Land in favour of such person as may be authorised by any general or special direction of the Majlis Mesyuarat Kerajaan Negeri (*ie* State Cabinet), and in any such case that person shall, for all purposes of the *Land Code* relating to the dealing, be deemed to be a native.

Further section 15 of the Code provides that, without prejudice to sections 18 and 18A, state land shall not be alienated until all customary rights therein have been surrendered or extinguished or provisions have been made for compensating the persons entitled to such rights.

VI Extinguishment of Native Customary Rights

The extinguishment of native customary rights to land were originally governed by section 82(2) and (3) of the *Land Code*. These subsections were deleted by the *Land Code (Amendment) Ordinance, 1974*¹⁹ which also amended section 5 by adding new subsections (3), (4) and (5) thereto. Subsequently, subsections 5(3) and (4), the were again amended by the *Land Code (Amendment) Ordinance, 1996*²⁰ in order to streamline the process of extinguishing native customary rights to land.

Native customary rights over any land may be extinguished by the direction of the Minister made pursuant to section 5(3) by the payment of compensation or by making available other land over which such rights may be exercised with or without the payment of additional compensation. The direction must specify a date when the native customary rights shall be extinguished and the land held under such rights

¹⁸See *Land Rules* in Part 1 of Second Schedule to the *Land Code*.

¹⁹Ordinance No. 2 of 1974.

²⁰Cap. A.42, effective on 15.1.1997.

gazette and in a newspaper circulating in Sarawak and further exhibited at the district office where the land is situated.

Section 5(3)(b) states that any claim for compensation, together with proof in support thereof, must be submitted to the Superintendent of Lands and Surveys in the prescribed form within the period specified in the direction, which period shall not be less than sixty (60) days from the date of publication or exhibition of the direction. Section 5(3)(c) states that no claim for compensation shall be entertained if the claim is not submitted within the period stipulated in the direction.

It appears that the direction of the Minister issued under section 5(3) to extinguish native customary rights on any land cannot be questioned or challenged.²¹ Section 5(4) merely specifies the grounds upon which a claimant dissatisfied with the decision of the superintendent, may require him to refer the matter to arbitration in accordance with section 212 of the *Land Code*. These grounds are -

- (a) rejection or non-recognition of his claim to native customary rights;
- (b) inadequate or inequitable allocation of land over which native customary rights are to be exercised; or
- (c) inadequate, unfair or unreasonable amount or apportionment of compensation made by the Superintendent.

The request for arbitration must be made within 21 days from the date of receipt of the decision of the superintendent. Upon receipt of the notice of arbitration, the superintendent shall deposit the compensation payable in the High Court pending the outcome of the arbitration.

Where native customary rights on any land have been extinguished, in what manner and on what principle is compensation to be assessed? The High Court in *Minister For Lands and Mineral Resources v. Bilam ak Chandai*²² observed that the former section 82(2) of the *Land Code* did not provide for it. In that case, the court ruled that in determining the amount of compensation, the potential use of the requi-

²¹ Compare the former wordings of section 5(3) inserted by Ordinance No. 2 of 1974.

²² Kuching High Court Civil Appeal No. 2 of 1971, printed in *Land & Survey Land Cases*, 1969 - 1987, p. 709.

termining the amount of compensation, the potential use of the requisitioned 'land' for commercial purpose was irrelevant and should not be considered. The court further expressed the opinion that compensation must be for the extinguishment of the native customary rights. Apart from giving value for the loss of the 'land', fruit trees, crops or building lawfully erected on it, an item for reasonable removal expenses ought to be included in appropriate cases. In determining the value of the 'land' the bona fide selling prices of neighbouring property held under title at the material time and subject to the same condition and use, could be taken into account. However, the court emphasised that each case must be considered on its own facts.²³

VII. Loss Of Native Customary Rights

A. Non-use or abandonment of customary land

Native customary rights may be lost by evidence of non-use or abandonment of the land over a long period of time. In *Nyalong ak Bungan v. Superintendent of Lands and Surveys, Second Division, Simanggang*²⁴ the court ruled that the non-use of native customary land for a period of over 20 years by the plaintiff and allowing the use of the land by others amounted to abandonment which resulted in the loss of customary rights acquired over the land. Also, in *Ara bte Aman & Others v. Superintendant of Lands & Mines, 2nd Division*²⁵ the court held that even assuming that there was some evidence of occupation and customary rights, they had clearly been lost by reason of non-use since the Japanese occupation, non-use having been admitted by the appellants. In *Mohd. Putit bin Abang Samsudin v. Superintendent of Lands & Surveys, 1st Division*²⁶, the Magistrate's Court held that even if customary right was created on the subject land before 21.5.1954, the appellant had lost his rights since he or his father had abandoned the land for over 30 years.

²³ *Ibid*, p. 720.

²⁴ (1967) 2 MJL 249

²⁵ (1975) 1 MLJ 208

²⁶ (1975) Kuching District Court Civil Case No. B/CIV/103/75, printed in *Land & Survey Land Cases, 1969 - 1987*, p. 440.

The 'owner' of land held under customary rights may also lose or forfeit his rights in the land if he moves out of a longhouse and emigrates to another district or longhouse under the jurisdiction of another Penghulu.²⁷ In *Injing v. Tuah and Anor*.²⁸ the Native Court of Appeal, dealing with land held under Dayak customary law of the 3rd Division of Sarawak held that if the owner of such customary farming land not only moves out of the longhouse but also leaves the same Penghulu's district and emigrates to another Division in Sarawak with his family, he shall be deemed to have abandoned his 'temuda' land and lost all his customary rights to it.²⁹ The same principles have been restated in section 73 of the *Adat Iban* 1993³⁰ which provides, *inter alia*, that any person who moves out of his longhouse to another division or district or to the jurisdiction of another Penghulu without prior approval of the district officer or without the consent of the 'Tuai Rumah' (headman) or Penghulu of the area shall be deprived of all untitled farming land or any customary land that has not been planted with crops and all such land shall be owned in common by the people of the longhouse concerned. Section 28 of the *Adet Kayan-Kenyah*, 1994³¹ also contains a similar provision.

VIII. Adjudication of Claims and Issue of Titles over Native Customary Land

Where there is no dispute concerning a particular native customary land, section 18(1) of the *Land Code* sets out the procedure whereby the superintendent may issue a grant in perpetuity to a native who has

²⁷Penghulu is a community leader appointed to take charge of several longhouses or villages within a District of Sarawak.

²⁸(1971) 1 MLJ 115

²⁹See also *Udin ak Lampon v. Tuai Rumah Utom* (1949) SCR 3 and *Abang v. Saripah* (1970) 1MLJ 164.

³⁰*Adat Iban Order*, 1993, made under the *Native Customary Laws Ordinance* (Cap. 51) and published in *Sarawak Government Gazette* No. Swk. L.N 18/93, effective on 1st June, 1993.

³¹*Adet Kayan-Kenyah Order*, 1994, made under the *Native Customary Laws Ordinance* (Cap. 51) and published in *Sarawak Government Gazette* No. Swk. L.N 28/94, effective on 1st June, 1994.

the superintendent may issue a grant in perpetuity to a native who has occupied and used any area of unalienated state land in accordance with rights acquired by customary tenure amounting to ownership of the land for residential or agricultural purposes.

In most cases however the superintendent will call for investigation, survey and hearing of rightful claimants of legal or customary rights to land in areas declared to be settlement operation areas in accordance with the procedures as specified in Part V of the *Land Code*. This process may be cumbersome and time consuming particularly if there are disputes to be settled before such land can be surveyed and then issued with titles.

In either case, Native Customary Land ceases to be so classified when it is surveyed and issued with titles. Where the land concerned is within an area declared to be Mixed Zone Land, then on the issue of title it would become Mixed Zone Land. Elsewhere, in respect of land declared to be Native Area Land, on the issue of title, it would become Native Area Land.

Where there exist any disputes involving native customary land section 5(3) of the *Native Courts Ordinance* 1992 provides that cases concerning disputes involving untitled land in which all parties are subject to the same native system of personal law shall be heard at the first instance before a Chief's Court which exercises jurisdiction in the area in which such land is situate. Section 22 of the Ordinance states that where a final order is made by a Native Court concerning any claim or dispute over native customary land to which no title has been issued by the land office, the court making the order may direct that such an order shall have the same effect as that of a settlement order made by a settlement officer under section 95 of the *Land Code*. Such order shall be enforced or dealt with in accordance with section 95(2) and (3) and section 96 of the same which provides that no such direction shall be issued by the court until a copy of the order has been served on the Director of Lands and Surveys and he does not, within 21 days from the date of service of that order, furnish written objection to the court against the making of the direction.

The Government has always given due recognition to native customary rights over land in Sarawak, which have been acquired by a native or any native community in the manner set out in section 5(2) of the *Land Code*. As discussed above, until a document of title has been issued in respect of the land over which a native claims native customary rights, such land shall continue to be state land and the native in occupation thereof shall be deemed to hold land by licence of the state. Like any other licence, it can be withdrawn by the state, subject to any protection provided in the *Code*. Hence, the rights or privileges acquired or enjoyed by a native over such customary land are very limited since they may be extinguished or may be lost by non-use or abandonment of the land concerned.

One of the ways in which to accord some protection to customary rights held by natives over untitled state land, and in order to enhance the value of such land, is to expedite the survey and adjudication of rights to such land and eventually to issue titles to any such land pursuant to section 18 or through the process of settlement operations under Part V of the *Code*. The process involved is however cumbersome and time consuming. It is incumbent on the natives themselves, with the assistance of the government and its agencies or in joint-venture with the private sector, to consider practical and viable strategies by which they can develop their native customary lands for agricultural estates or for other commercial enterprises for their mutual economic benefits.

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