

Statutory Recognition of Native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place

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The whole of the land law in Sarawak has been and is based
on the fundamental necessity for protecting native interests.

– Editor, *The Sarawak Gazette*, 1 April 1947 at p 57.

I. Introduction

The definition of law under Article 160(2) of the Federal Constitution, “includes written law, the common law in as far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law” in the Federation. Whilst customs, religion, land, forestry are matters that are within legislative jurisdiction of the states, in a state of emergency, Parliament may, under Article 150(5), make laws with respect to any matter, if it appears that the law is required. Clause 6A of art 150, however provides that this power does not extend to Malay *adat* and to any matter of native law and customs in the states of Sabah and Sarawak, underpinning the unique recognition that is intended for native law and customs, and consequently, the distinctive protection for rights based on customary laws.

Under s 3(1) of the Civil Law Act 1956 (“CLA”), the English common law is applied “so far only as the circumstances of the States on Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary”. In Sarawak,

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the precursor to the CLA, the Sarawak Application Ordinance of 1949 applied English principles of common law and equity, but also imported specific English statutes listed in the Schedule to the Ordinance. The reception of English law was however, only to the extent permitted by local circumstances and customs, and subject further, to such qualifications and local circumstances and native customs rendered necessary. It is important to bear these provisos and qualifications in mind in any discussion on customary rights.

Sarawak has a unique history of native customary rights (“NCR”) to land¹ based on *adat* or customary laws. This thread runs through the state’s land laws from the time of the Brooke rule in 1841 to Sarawak’s cession to Britain in 1946 and its independence within Malaysia in 1963. The primary legislation relevant to native rights is the Land Code 1958 (Cap 81) (“the Code”). That statute consolidated all the earlier laws and retained the provisions that embodied the concept of NCR.

When new provisions were introduced in land legislation in Sarawak in the early 1940s, voices of concern and alarm arose from various quarters, including, those from persons in government, who were directly involved in land administration. One such voice was that of JL Noakes, a former Superintendent of Lands and Surveys. In 1947 he wrote:

We must go onto the land and discover what is happening and then settle and record in our registers the present rights of the people for future administration. This is an urgent duty ... the great danger is that native *adat* will be swamped if we do not act now and translate it into a form of land

¹ Government publications use the acronym “NCR” to refer to native customary rights to land. See the *Handbook, New Concept of Development on Native Customary Rights (NCR) Land* (Kuching, Sarawak: Ministry of Land Development, 1997). See also Adam, FJ, “Customary Land Rights under the Sarawak Land Code” (1998) 25 *JMCL* 217.

tenure which will prove an adequate safeguard of those rights we are pledged to maintain.²

Noakes' evaluation of the danger of the abrogation of native rights to land based on their *adat* could not have been more exact. More than a century later, without the proper translation of the native rights into a form of land tenure that is clearly fortified by the law, the question of adequate safeguards remains just as urgent, if not more critical, and cannot be ignored.

This paper traces the historical development of the law on NCR through the Land Code and its predecessors and the "creation" of native customary lands ("NCL")³. It discusses the use of certain terminologies to describe native rights, which are alien to native concepts of land ownership, and the nebulous recognition that has ensued. It analyses the amendments that have since been made to the Code, which have redefined the character as well as extinguishment of NCR. Furthermore, it highlights the aspects of the legislation that undermines native rights or are inconsistent with native laws and customs and the provisions of the Federal Constitution. This writer argues that the Land Code should not be used as the sole and ultimate basis for interpretation and determination of NCR, because native title is based on occupation, in accordance with the native communities' traditional laws and customs. The courts should find the conjunction between native perspectives and statutory rights. Furthermore, customary laws should be considered in their own right, and not through the prism of legislation or even common law, thereby protecting the native rights as enshrined in the Federal Constitution. As crucial as judicial decisions might be, the paper finally suggests that the issues related to the NCR problems and their resolutions go beyond legal arguments to fundamental questions of the preferred land and administration policy, spanning the early years of Brooke rule to the existing Sarawak state government.

² Noakes, JL, "Land and Customs" (1947) *Sarawak Gazette* 164.

³ Lands on which native customary rights are created are called native customary lands ("NCL").

II. The Brookes (1841-1941) and the Continuing Recognition of Native Customary Rights to Land

During the period of British colonial expansion, the allegiance of British subjects to the Crown meant that generally they could not acquire territorial sovereignty in their own right. Any conquests of territories made by them were *de facto*, made on behalf of the Crown.⁴ The colonisation of Sarawak was an anomaly to this principle. Although it was ceded by the Sultan of Brunei to Sir James Brooke in 1841-1842, cession of a portion of Sarawak did not mention land, neither did the cession payments relate to the size of the area except for the Fifth Division which was ceded by the North Borneo Company in 1915. What existed were tulin rights. These were rights and interests involving the collection of money over a river system, which were personal and heritable.⁵ Sarawak became a British protectorate in 1888,⁶ was annexed as a British dominion in 1946 and became independent from Britain when it joined Malaysia in 1963.⁷ For 105 years, from 1841-

⁴ *The Queen v Symonds* (1847) [1840-1932] NZPC 387 at p 389; *Re Southern Rhodesia* [1919] AC 221. No colony could be settled without authority from the Crown. See *Campbell v Hall* (1774) Lofft 655. This was the case in *New South Wales v Commonwealth of Australia* (1975) 135 CLR 337 at p 490 where Jacob J said, "No subject could claim sovereignty over any part of the globe in his own right unless the sovereignty was bestowed on him by a sovereign power recognised by the English crown and the new sovereignty was recognised by the English Crown." See also Tarring, *Tarring's Laws Relating to the Colonies* (London: Stevens, 1913) at p 23; and Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966) at p 100.

⁵ The *Pengiran* (Brunei Malay chiefs) who held the *tulin* of Lawas and Merapok ceded those rivers "with their tributary systems and lands" in perpetuity to the Rajah. See Richards, AJN, *Sarawak Land Law and Adat: A Report* (Kuching: Sarawak Government Printers, 1961) at p 5.

⁶ A British Consul was appointed to Sarawak in January 1864 and obtained his *exequatur* through the instrumentality of Sir James Brooke, the ruler of the territory. *London Gazette*, 19 January 1864, cited in *Tarring's Law Relating to the Colonies*, *supra* n 4 at p 14.

⁷ The Malaysia Agreement was concluded in London on 9 July 1963. See *Malaysia Agreement Concluded Between the Federation of Malaya, United Kingdom of Great Britain and Northern Ireland, North Borneo, Sarawak and Singapore* (Cmnd 2094, 1963).

1946 it was ruled by the Brooke family, who themselves were British subjects. Sir James Brooke ruled from 1841-1862, Sir Charles Brooke ruled from 1862-1917, and Sir Vyner Brooke ruled from 1917-1946 (although the Japanese occupied Sarawak from 1941-1945). The historical legacy of the Brookes lies at the heart of the laws and policies relating to the question of native customary land.

Prior to the arrival of James Brooke in Sarawak there was in existence among the natives a system of land tenure based on *adat* or native customary laws. That system has remained virtually the same over the next century until the present. Under the doctrine of acquired rights in international law, in settled as well as ceded territories, English law accompanied the colonist to the extent that it was applicable to local circumstances. As such, the local customary systems of land tenure survived the Crown's acquisition of sovereignty.⁸ It is a fundamental principle that such rights "must be respected" and that "a change in sovereignty works no effect upon such rights."⁹ Although the new sovereign initially has the power to terminate local property rights as an act of state, in the absence of any contrary acts or where it elects not to apply that power, the local rights are presumed to have survived intact, subject to any modifications necessarily flowing from the change of sovereignty proper.¹⁰

The Brookes' assumption of sovereignty was circumscribed by their implicit recognition of customary rights.¹¹ They honoured and did not interfere with the customary rights of the Dayaks and the

⁸ See Meek, CK, *Land Law and Custom* (London: Oxford University Press, 2nd ed, 1949) at pp 169-171.

⁹ O'Connell, DP, *International Law in Australia* (Sydney: Law Book Company, 2nd ed, 1984) at p 377.

¹⁰ Slattery, Brian, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Studies in Aboriginal Rights No 2) (Saskatoon: Native Law Centre, University of Saskatchewan, 1983).

¹¹ Porter, AF, *Land Administration in Sarawak: An Account of the Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time (1841-1967)* (Kuching: Sarawak Government Printers, 1967).

Malays who were allowed a form of self governance in relation to their customary lands. Native customary rights consisted of a right to cultivate land, a right to wild fruits or produce of the jungle, hunting and fishing rights, burial rights and rights of inheritance. According to native conceptions, the clearing and cultivation of virgin land confers permanent rights to the person who cleared the land which he can pass on to his descendants.¹² As the term implies, NCR may only be claimed by a native,¹³ based on his membership of a native community. A person may also be entitled if he or she is deemed to be a person who has become identified with and has become subject to native personal law under the existing legislation.¹⁴

No scheme of alienation or land development was introduced by the Brookes except with respect to land where no rights or claims whether documentary or otherwise existed. There was a need, however, to regulate the administration of land. As the authorities found, the regulation of customary tenure and land use involving the many indigenous communities touched on a social consciousness in which land has an economic, social and religious significance.¹⁵

¹² See for eg, Freeman, JD, *Report on the Iban of Sarawak* (Kuching: Sarawak Government Printing Office, 1955); Geddes, WR, *The Land Dayaks of Sarawak* (London: HMSO, 1954); Richards, *supra* n 5.

¹³ "Native" refers to the heterogeneous indigenous peoples of Sarawak and Sabah. For an exhaustive treatment of definition of a native, see Bulan, R, "Indigenous Identity and the Law: Who is a Native?" (1998) 25 *JMCL* 127; Bulan, R, "Native Status and the Law" in Wu Min Aun, *Public Law in Contemporary Malaysia* (Petaling Jaya: Longman, 1999) Ch 9.

¹⁴ Sarawak Land Code 1958, ss 8 & 9; Native Courts Ordinance 1992 s 20. See also *Law Tanggie v Untong ak Gantang* [1993] 2 MLJ 537. The term "native" only applies to natural persons. A corporation may be deemed a native by specific legislation for the purpose of native holdings. See for eg, the Land Custody Development Authority Ordinance 1984 which allows the Land Custody Development Authority to hold land on behalf of native owners. The Majlis Adat Istiadat Sarawak (Amendment) Ordinance 2002 amending the Majlis Adat Istiadat Ordinance 1977 constitutes the council as a body corporate with perpetual succession which can "acquire, own, hold, lease or dispose of property both moveable and immovable, and for all purposes of the Land Code be deemed a native".

¹⁵ Porter, *supra* n 11 at p 11.

III. Codification of Customary Land Tenure (1863-1941)

From the very beginning of his rule, the first Rajah, Sir James Brooke's attitude to the introduction of a code of laws was to "go slowly and surely basing everything on their own laws consulting all the headman at every step".¹⁶ Given that milieu, over a period of time, a number of orders and regulations were promulgated and introduced.

The first attempt at codification of land tenure through the Land Regulations 1863 treated all lands as belonging to the government but only if they were "unoccupied and waste lands". Up to 1920, a number of other Land Orders¹⁷ were made which dealt only with land within the town of Kuching and land within one mile radius of the Court House. Order VIII of 1920 consolidated the preceding Land Orders and defined State land as all lands which were not leased or granted or lawfully occupied by any person. Natives could occupy land free of all charges in accordance with their customary laws provided that "where possible, claims shall be registered". The Land Orders, however, did not apply in interior areas, which to all intents and purpose were entirely inhabited by natives. Owing to poor modes of communication and economic factors, it was not possible to inquire into and to settle the individual or communal claims to land in those interior areas in any permanent manner. Much of the land in those areas were held communally, but the limits of those communal holdings were not in all cases defined for record purposes.¹⁸

¹⁶ *Id* at p 27.

¹⁷ There were some regulations dealing with sago land in 1870 and 1876. The Land Order of 1863 as revised in 1872, was again amended in 1882. There were other orders and regulations regarding mining issued at this time.

¹⁸ Leach, DL, "Land and Customs" (1947) (1 May) *Sarawak Gazette* 78. Order No L-2 operated in Native Areas. These areas were surrounded by or adjacent to large areas of Mixed Zone, such that the state of surveys, general administration and communications could be dealt with in the near future. Where these areas were not under the Land and Surveys department, they were really Interior Area Lands. Order No L-7 applied in Native Reserves which meant that they were strictly reserved for all time and no alien could acquire a title therein. As a rule, they were not properly constituted until

In 1931, Order No L-2 or the Land Order 1931¹⁹ redefined State land as “all lands for which no document of title has been issued but includes all lands which may become forfeited or may be surrendered ... by the lawful owner”. Presumably, occupation by virtue of native customary law was subsumed under “lawful owner” since the earlier term “lawfully occupied” had been omitted.²⁰ The Land Order 1931 provided for a system based on registration of deeds rather than a Torrens system.²¹

Order No L-2 was followed by Order No L-7, also known as the Land Settlement Ordinance 1933. This marked the introduction of the Torrens system, which is a system of title by registration imported from South Australia.²² Under the Torrens system, title is proved by registration, which grants in principle, an indefeasible title to land and facilitates dealings in lands. Thus, Order No L-7 provided for settlement of legal and customary rights to land and required all dealings to be registered in a Land Registry “on pain of nullity”.²³ Order L-7 however, fell short of one basic, but essential principle required of contemporary land registration – it was unable to guarantee title. The existence of equitable interests or the subsequent presentation of a claim in respect

“settlement”. The term Native Reserves was dropped in the 1940s and they are now called Native Areas.

¹⁹ The Land Order 1931 repealed all previous orders relating to land.

²⁰ The Land Order 1931 reclassified land as Town and Sub-urban Lands, *Kampung* or Village Lands and Country Lands. The power to classify vested in the Superintendent of Lands.

²¹ A system of deeds was a system of registration of Crown grants of land and all subsequent deeds or all other instruments with regard to the land, by recording and entering a copy in a land register.

²² For references to the Torrens System, see for instance, Gray, J, *et al*, *Property Law in New South Wales* (Chatswood, NSW: Lexis-Nexis Butterworths, 2007) Ch 8. For an introduction to the Malaysian Torrens system, see Teo, KS and Khaw, LT, *Land Law in Malaysia - Cases and Commentary* (Kuala Lumpur: Butterworths, 2nd ed, 1995) Ch 1.

²³ See Noakes, “Land and Custom: 3” (1947) (1 September) *Sarawak Gazette* 166. The Land Settlement Order 1933 duplicated the provisions of the Land Order and was later a source of conflict and difficulty in its implementation. Attempts to put some record in place was interrupted by the war from 1941.

of NCR could upset a claim to ownership. Registration did not perfect the title, but it did provide a system of notice of interest against the land. This was a genuine effort to “put the horse in its proper place”²⁴ but it was inadequate.

Fundamental to the implementation of a system of land registration was accurate cadastral survey which required time and adequate staff. Despite the requirement of registration, little follow up was done because there was neither machinery nor staff for executing the work. Efforts were made to complete a triangular survey in early 1930s and to settle land and to plan small roads throughout the country but the progress was slow. As a first step, village committees were provided for and established to assist the government in defining the boundaries.²⁵ A great deal of time and energy was spent on determining boundaries between longhouses and *kampongs* (villages) and getting them marked. Many of these boundaries were based on traditional communal or tribal boundaries which existed before the coming of the Brookes.²⁶

Ironically, the land office that was charged with the responsibility of surveying was afraid that there would be no land left for alienation if demarcations were complete. It was felt that people included within their bounds large areas of forest to which they had the “vaguest claims”,²⁷ signalling the underlying tension and divergence between native conception of land ownership and that of the State. This was manifested through the debates that raged in relation to the development of land laws. Arguments arose with respect to the application of “foreign” procedures to the “imprecise” rights of the ordinary farmer.²⁸

²⁴ *Ibid.*

²⁵ Sarawak Secretariat Circular No 12 of 1939.

²⁶ Delimitation of boundaries was done in the Second Division in the early 1930s. The process began in the Kanowit District in 1935 and many boundaries were delimited in the Baram following the Circular of 1939.

²⁷ Richards, *supra* n 5 at p 11.

²⁸ *Ibid.* Clearly, the idea that the native rights were imprecise arose out of the administrators' views of those rights through the prisms of “western” notions of ownership.

Strong objections to the new land orders came from administrators closely associated with native affairs. MacPherson, who was the Secretary for Native Affairs was anxious that native rights should be most closely guarded. He was concerned that the land orders would not function properly because “they [did] not reflect the existing conditions of land tenure”.²⁹ He said:

It was indefensible ... to bludgeon them [the natives] into accepting interference with the basis on which their social structure is built ... on laws and customs dealing with ownership and inheritance of land.³⁰

This caution was echoed by J L Noakes, then the Superintendent of Lands and Surveys, who commented that the land legislation “was an unsatisfactory written law” arising from an “inadequate understanding of the varying tribal laws of which “practically nothing of it [was] recorded”.³¹ Noakes lamented that “disputes [were] caused unfortunately by the premature imposition of our laws before detailed investigations”.³²

In November 1941, Parker, another government official drew attention to what he felt was a “progressive circumscribing of the peoples rights” since 1920 as one piece of land legislation followed another. He felt that the legislation had usually been copied from outside sources with the result that they “neither reflected the customary law of the natives nor accorded with their political rights”.³³ Against the backdrop of those discussions, the Brooke administration published

²⁹ The Secretary of Native Affairs was a member of the Supreme Council.

³⁰ Land Office Files quoted in Richards, *supra* n 5, Part II, para 34. It is significant that in a later move to amend the Land Code in 1965, very strong opinions were expressed by local leaders against amendments which will “undermine the whole foundation of [the] present land laws”. It was felt that “to alter the law affecting land in their ignorance will be unfair to the extreme on the natives.” See *infra* n 139.

³¹ See Noakes, *supra* n 23.

³² *Ibid.*

³³ Quoted in Richards, *supra* n 5 at pp 10-11, Part II, para 35.

a memorandum on native land tenure by means of the Secretarial Circular No 12/1939 to serve as a guide to administrators. It stated:

- (i) The right to cultivate cleared land vests in the community with priority to the heirs of the original big jungle. This right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle is in their eyes, not a matter for rule of thumb but for expert native opinion.
- (ii) The existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary right of user.
- (iii) Individual ownership is limited by the customary right of the community to 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 1939 circular was also criticised. Similar to the Land Order No L-7, it provided neither machinery nor staff for executing the work of recording boundaries and registration, with the result that little was done by way of investigation of land tenure. The situation was aggravated by the Japanese Occupation in 1941-1945 when the Japanese put a halt to the proposed programs for survey, records and registration. When the Japanese occupation ended, the most significant phase for Sarawak's land law came with the cession of the State to the British Crown.

IV. Cession of Sarawak to Great Britain and Colonial Rule (1946-1962)

On 18 May 1946, by Order No C-20 (Cession of Sarawak) 1946,³⁴ the Rajah in Council was authorised to cede the State to the British Crown. The third Rajah, Sir Vyner Brooke, executed the Instrument of Cession on 21 May 1946³⁵ giving full sovereignty and dominion over the State to His Britannic Majesty. The instrument transferred the rights of the Rajah, the Rajah in Council and the State and Government of Sarawak in all lands to His Britannic Majesty "but subject to existing private rights and native customary rights".³⁶ The Sarawak Letters Patent 1946 provided that the "Governor may ... execute ... grants and dispositions of any lands or other immovable property within Sarawak which may be lawfully granted and disposed by us".³⁷ The Royal Instructions accompanying the Letters Patent provided that:

the fullest regard is to be paid to the religion and existing rights and customs of the inhabitants of Sarawak ... and by all lawful means, to protect them in their persons and in the free enjoyment of their possessions and to prevent all violence and injustice against them.³⁸

Although English law was already applied in Sarawak, it was received afresh through the Application of Laws Ordinance 1949.³⁹

³⁴ *Sarawak Government Gazette*, 1 (1), Notification No 3 dated 1 July 1946, *Laws of Sarawak* (Revised ed, 1958) Vol VI Part II, 34.

³⁵ The instrument of Cession came into operation on 1 July 1946, *id* at p 41.

³⁶ Order No C-24, *Sarawak Government Gazette*, XXXV (7) Notification No 111, dated 25 May 1946, *Laws of Sarawak*, *id* at p 34. See Notification No 113, *Laws of Sarawak*, *id* at p 35.

³⁷ Dated 26 June 1946, the Letters Patent 1946 made provision for the government of the colony of Sarawak.

³⁸ Section 6 of The Royal Instructions were passed under the Royal Sign Manual and Signet to the Governor and Commander in Chief of Sarawak, *The Sarawak Royal Instructions 1956*, *Laws of Sarawak*, *supra* n 34 at pp 55, 59.

³⁹ Ordinance No 27 of 1949. The ordinance came into force in 1949. English law was originally received under the Sarawak Application Ordinance 1928.

That Ordinance provided for the reception of English common law and doctrines of equity together with statutes of general application, as administered in England at the commencement of the respective ordinances. English law was to be applied only to the extent permitted by local circumstances and customs and subject further, to such qualifications as local circumstances and native customs render necessary.⁴⁰ This signified the continued recognition of native customary laws, as the Brookes had done through the Rajah's Order No L-4 in 1928. Notably, these provisions are reproduced in the Civil Law Act 1956.⁴¹ As such, all the legislation on land should be measured and interpreted in the light of this foundational principle.

V. Land Enactments: Classification of Land

The first notable legislation passed by the colonial government was the Land (Classification) Ordinance 1948 (the 1948 Ordinance).⁴² The stated aim was to "regulate land use in a multi racial society and to define and protect the land rights of the indigenous people".⁴³ The Sarawak Annual Report 1951 reported that it was intended to "control non-native colonisation, and also to protect native interests in land".⁴⁴ The Land (Classification) Ordinance 1948 gave "statutory recognition to a system of land classification which had in fact been created by rules of doubtful validity promulgated under the Land and Land

⁴⁰ Cap 2 of Laws of Sarawak, *supra* n 34. Note that this is a restatement of the Rajah's Order No L-4 of 1928 which had adopted the law of England as the law of Sarawak subject to modifications by the Rajah and, as was applicable, having regard to native customs and local conditions. The official acknowledgement of customary law as a restriction on statutory law was thus perpetuated.

⁴¹ Act 67 (Revised 1972).

⁴² *Sarawak Government Gazette*, No 19 of 1948, Vol III, No 44, Notification No 1356, 16 December 1948.

⁴³ Porter, *supra* n 11 at p 60.

⁴⁴ See *Annual Report on Sarawak For The Year 1951*, Kuching, Government Printers at p 143.

Settlement Ordinances”⁴⁵ and “went far beyond the system hitherto in use and had quite a different intention and basis”.⁴⁶ That system of land classification had continued to this day under the Land Code. All land in Sarawak belong to one of six categories:

- (i) Mixed Zone Land (“MZL”) which may be held by any citizen without restriction,
- (ii) Native Area Land (“NAL”) which is land with a registered document of title but to be held by natives only,⁴⁷
- (iii) Native Communal Reserve (“NR”) which is declared by Order of the Governor in Council for use by any native community, regulated by the customary law of the community,
- (iv) Reserved Land (“RL”) which is land (1) the Government reserves under s 38 of the Land Code 1958 or prior law, (2) located within a National Park, Forest Reserve, Protected Forest, or Communal Forest, (3) occupied by the Federal,
- (v) Interior Area Land (“IAL”) which is land that does not fall under Mixed Zone or Native Area Land or Reserved Land for which title cannot be registered,
- (vi) Native Customary Land (“NCL”) (land in which customary rights whether communal or otherwise, have been created).

⁴⁵ Hickling, RH, *Hansard*, Land (Classification) Amendment Bill, Council Negeri Sitting on 21 May 1952.

⁴⁶ Mooney, P, “Land Law in Sarawak” in Ahmad Ibrahim & J Sihombing (eds), *The Centenary of the Torrens System in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1989) at p 244.

⁴⁷ Land declared as such under the Ordinance No 19/1948 remains. Native Area Land may also be declared as such under s 4(2) or (3) or (4)(b) or s 38(5) of the Land Code 1958.

At the time when the Land Code came into force in 1958, much of the land in Sarawak was under Interior Area Land.⁴⁸ By 1993, Interior Area Land and Native Customary Land still constituted the biggest area of land at 36 percent. Native Customary Land constituted 13 percent, Native Area Land constituted 12 percent, Reserved Land was 13 percent and Mixed Zone Land, 9 percent of the land in the State.⁴⁹ Far from being fixed and final, Interior Area Land could provide for the creation of other classification of land over time.⁵⁰ The Minister is authorised to convert one category of land to another. For example, land currently categorised as NAL or IAL can be declared MZL, unalienated MZL declared NAL, and IAL can be declared NAL.⁵¹ The most important land categories with respect to NCR are NCL and IAL. NCL includes land:

- (i) over which NCR "have lawfully been created prior to 1 January 1958, and still subsist as such";
- (ii) within a reserve under s 6 of the Land Code 1958; or
- (iii) IAL over which NCR "have lawfully been created pursuant to a permit under section 10" of the Land Code 1958.⁵²

IAL is the residuary category and includes lands not within the definition of RL, NCL, NAL, or MZL.⁵³ IAL is significant because

⁴⁸ At the Sarawak Council Negri sitting on 11 December 1959, A G Morrison, Acting Development Secretary said that the total area of Sarawak is approximately 47,500 square miles and the total area where non natives may acquire interest in land amounts to about 4,400 square miles. A large portion was still occupied under NCR.

⁴⁹ Zaidie K Zainie, "Native Customary Land: Policies and Legislation", Paper presented at the Seminar on Native Customary Land, Santubong Kuching Resorts, 29 September–3 October 1994.

⁵⁰ Only natives may acquire interests or occupy NAL or establish rights over IAL. The IAL is a large area but it must be qualified by the observation that MZL contains nearly all the most accessible and most valuable land in the country while a very large proportion of the IAL is at present remote and inaccessible and thus unattractive for settlement purposes.

⁵¹ Land Code 1958, s 4(1)-(3).

⁵² Land Code 1958, s 2.

⁵³ Land Code 1958, s 2.

it is the only category of land over which natives can create new NCR pursuant to s 5 of the Land Code 1958.

A. *Interior Area Land: NCR and NCL*

Interior Area Land functions as the residuary category of lands after excision of the other four classes. As soon as NCR is established over a tract of IAL, it becomes NCL.⁵⁴ Lands under IAL were lands “locked up” for the future. Most native communities inhabited those areas. They were intended to be those areas in which there was plenty of space in the interior where communication, economics and distances between human habitations made it impossible or impractical to settle or inquire into settlement or ownership by individuals or communities. No titles were issued to such areas, particularly to foreigners.⁵⁵ But when the lands became more accessible, titles to individual holdings might be issued and the land would be classified as NAL. In the words of D L Leach, then Director of Lands and Surveys:

If complications arise in any particular [interior area land] area, it is a sure indication that the land is close enough to the “civilised” part of the country and hence is becoming comparatively “crowded”. In that case, it had to be dubbed a “Native Area” and disputes settled once and for all by the land surveyor.⁵⁶

NALs are inhabited by natives, and like IAL may not be alienated to others. Much of the lands in these areas had in the past been held communally but in many cases the limits of the communal holdings were not defined for record purpose.⁵⁷

⁵⁴ This definition is retained in the Land Code 1958, ss 2, 6 & 10.

⁵⁵ One such title was issued in the Lawas District to the Borneo Evangelical Mission station. See Leach, DL’s comment, *supra* n 18. Southwell, CH, referred to this in his book *Uncharted Waters* (Calgary: Astana Publishers, 1999).

⁵⁶ Leach, *id* at p 79.

⁵⁷ *Ibid.* Note that for MZL, to get a title, all that is required of a non-native

The classification of land means that non-natives could only acquire rights in MZL.⁵⁸ As for natives, there is no restriction against acquiring interests or dealing in MZL, but in relation to other classes of lands, they are restricted from dealing with non natives and to a certain extent even among themselves. Their rights in NAL or any interests in NCL are inalienable outside the native system.⁵⁹

The alienability of their interests is in line with the long standing state government policy of preventing the natives “from impoverishing themselves by disposing lightly of their rights to others, whether alien or natives”.⁶⁰ Any agreement purporting to confer rights to a non native is illegal and the parties are guilty of an offence unless permission is granted under an appropriate law. The consideration paid under an agreement to transfer or deal with land, contrary to the Land Code, would not be recoverable.⁶¹ In general, only natural persons are entitled to designation as native but a company may be authorised to hold native property in areas designated as “development areas”.⁶²

is to make an original application for crown land. This is followed by a survey, after which the land is delineated on the cadastral map followed by the issue of a lease.

⁵⁸ Land Code 1958, s 8(a).

⁵⁹ Land Code 1958, ss 8 and 9. Note that the Land Code (Amendment) Ordinance 2000 (A78/2000) introduced some flexibility in dealings with NCL by allowing registered interests to be transferred to, or inherited or acquired by any native in accordance with the applicable personal law.

⁶⁰ Sarawak Land and Survey Department, Annual Report 1954 (Kuching, Government Printers) at p 4.

⁶¹ In *Law Tanggie v Untong ak Gantang and Anor* [1993] 2 MLJ 530, a claimant of Chinese (father) and Iban parentage was only able to receive NCR lands after he obtained a declaration by the native court that deemed him an Iban.

⁶² One such company is the Land Consolidated Development Authority (LCDA), which was incorporated through the Land Consolidated Development Authority Ordinance 1984. LCDA is one of the main vehicles for joint venture development of NCL. See Bulan, R “Native Customary Land: The Trust as a Device for Land Development in Sarawak” in Fadzilah Majid Cooke (ed), *State, Communities and Forests in Contemporary Borneo* (Asia-Pacific Environment Monograph I (Australia: Australian National University E Press, 2006) at pp 49 & 52 .

B. *Amendment of the Land (Classification) Ordinance 1948 in 1952: NCL to be Occupied by Natives as "Licensees" of the Crown*

One of the most significant amendments affecting native interests was the amendment of the Land (Classification) Ordinance 1948 by the Land Classification (Amendment) Ordinance 1952. Section 8 of the 1948 Ordinance allowed natives to occupy IAL for the purpose of creating NCL, but through an amendment in 1952, natives in lawful occupation of NCL were to be "licensees of Crown Land".⁶³ In one stroke, the state attempted to remove any form of proprietary rights to land from a people who for generations had occupied the land and whose lives and survival depended on the land. That pernicious provision had effectively undermined the intentment of the instrument under which the British Crown acquired Sarawak as a colony.

It was not long before the Land (Classification) Ordinance 1948, as amended in 1952, was challenged. In *Sepid anak Selir v R*,⁶⁴ one Sepid was accused of unlawful occupation of Crown land contrary to s 108 of the Land Ordinance 1948, which provided that any person in unlawful occupation of land faced a fine or imprisonment. Sepid was fined and ordered to vacate the land on the Crown's claim that the land he occupied was a Communal Forest Reserve. On appeal against his conviction, Lascelles J found no record that the land had been gazetted as a Communal Forest Reserve as contended by the Crown. The accused had lawfully occupied the land to exercise his customary rights on the IAL.

Soon after *Sepid*, in a subsequent case where the facts were similar to *Sepid*, the Supreme Court also held that one *Alem bin Kayan*⁶⁵ was in lawful occupation of IAL. In giving his decision, Lascelles J

⁶³ *Sarawak Government Gazette*, No 10 of 1952, Supplement No 17, Notification No 92, 18 June 1952.

⁶⁴ *Sepid anak Selir v R*, Criminal Appeal No A/24/54 [1951-55] SCR 36.

⁶⁵ *Alem bin Kayan v Regina* [1954] SCR 36.

remarked that if the Crown desired to preserve old jungle in the colony, then steps had be taken quickly to close the gap in the law, to prevent unfettered establishment of customary rights in interior areas.⁶⁶ Lascelles J's statement might have been merely *obiter dictum*, but it reflected the prevailing sentiment of the administrators at the time. Not surprisingly, the government moved swiftly to amend the law in 1954⁶⁷ and again in 1955.⁶⁸ The former prohibited the creation of NCR completely in MZL and the latter, precluded the creation of NCR on IAL from 16 April 1955 unless a permit was obtained from the District Officer.⁶⁹ This continued to form the basis of the Land Code that was passed in 1957.

VI. The Land Code and Its Impact on Native Land Rights

The Land Code took effect on 1 January 1958 and was an integral part of the land law system when Sarawak joined Malaysia in 1963. The preamble to the bill stated that its aim was to consolidate the existing land laws into one piece of legislation, to fill the gaps in the existing law by amending those parts that were found to be unworkable or overlapping. One of the objectives of the law was to clarify the law relating to NCR.⁷⁰

⁶⁶ Land and Survey Department, *Land Cases (1946-1968)*. The Supreme Court of Sarawak, North Borneo and Brunei handed down the judgment on 3 September 1954.

⁶⁷ The Land (Classification) Rules 1954, *Sarawak Government Gazette*, IX (23), Part II: Notification No 71, 17 September 1954.

⁶⁸ Through the Land (Classification) (Amendment) Ordinance 1955, No 1, 1955, *Sarawak Government Gazette Extraordinary*, Vol X (1), Part 1, Notification No 1, 16 April 1953.

⁶⁹ The Land Code (Amendment) Ordinance 1996 (Cap A42) substituted District Officer with Superintendent of Land. This was changed to "Minister" through the Land Code (Amendment) Ordinance 1998 (Cap A61).

⁷⁰ *Hansard*, The Land Code Bill Reading, Council Negri Sitting, Wednesday, 22 May 1957.

Hitherto, two parallel systems of issuing titles had existed. One system existed under the Land Ordinance enacted in 1931 and the other, under the Land Settlement Ordinance enacted in 1933. This resulted in duplication of work. The two Ordinances were not consistent in a number of respects. The Land Settlement Ordinance 1933 which applied to the coastal districts of Oya, Dalat, Mukah, the Nonok Peninsula and to Kuching and its surroundings, was more stringent on registration and in defeating unregistered estates and interests. The Land Ordinance 1931 applied to the rest of Sarawak and did not restrict classes of owners or proprietors who could hold land, but the Land Settlement Ordinance defined owners as the individual person, incorporated company, or body corporate, for the first time being registered as lessees of Crown land.⁷¹

There were other justifications for introducing the land bill. The law in existence had neither provision for assessment of compensation nor for challenging the decision of the Superintendent.⁷² There were Occupation Tickets issued under the Land Ordinance 1931 that were meant to be temporary documents but they had been treated as documents of title. There were questions on the definition of "proprietor" and "registered proprietor" and there was a need to unify the system of registration so that a registered proprietor's title would not be subject to challenge.⁷³ There were no provisions for determining and assessing compensation for acquisition of land, nor for challenging the decision of the Superintendent. In view of the many "inconsistencies and defects" a comprehensive code was deemed desirable to remedy the weaknesses and contradictions.⁷⁴

⁷¹ The Land Settlement Ordinance 1933 defined owners as the individual person, incorporated company or body corporate registered as the lessee of Crown land.

⁷² The Land Settlement Ordinance 1933 had no provision for challenging the decision of the Superintendent. It was felt that a new Land Code would provide an avenue for appeal to the courts or arbitration in cases where discretion is vested in the Superintendent.

⁷³ The Land Settlement Ordinance 1933, which required survey and registration, could not be extended to the whole of Sarawak because of the time and cost involved.

⁷⁴ Strickland, GE, Sarawak Attorney General, *Hansard*, *supra* n 70.

The government engaged the former Registrar General of Lands of New Zealand to collaborate with the Attorney General and the Director of Lands and Surveys to study and propose a better system. This resulted in the Land Code Bill that was first published in the *Sarawak Gazette* on 4 December 1956 for public comment before it was finalised.⁷⁵ Strickland, the State Attorney General noted an apparent lack of public interest in the detailed provisions of the bill. As for the lack of debate on the bill, he reasoned that “the Honourable Members could hardly be expected to consider the bill until they had in fact been elected”.⁷⁶ The bill went through the first reading in May 1957. In view of the bill’s “complexity” and its significance both in its objects and reasons in “breaking new ground in a number of important matters”,⁷⁷ it was referred to a Select Committee on the Land Code Bill of the Council Negri (the State Legislative Council) instead of being considered by the committee of the whole council.⁷⁸ The Select Committee reported back to the Council Negri with minimum changes, and the bill culminated in an “intricate piece of legislation” enacted as the Land Code (Cap 81).⁷⁹

The Code is largely made up of previous legislation with further imports from existing ordinances at home and abroad. This raised doubts about its suitability.⁸⁰ Indeed it is a contradiction in terms. It

⁷⁵ The bill was first published in the *Sarawak Gazette* on 4 December 1956. It was circulated to the Judiciary, the Residents and District Officers and finalised after comments had been received from these sources. Press release by the Land and Survey Department explaining changes in the proposed bill appeared in various newspapers in January 1957 in the *Sarawak Tribune*, *Sarawak Vanguard*, *Public Information Colony Bulletin*, the *Sin Wan Pau*, *Chinese Daily News*, and *Tu Tung Daily News*. It was also published in *Pedoman Rakyat* in Malay on 15 March 1957 and in Iban in *Pemberita* Issue for February 1957.

⁷⁶ *Hansard*, *supra* n 70.

⁷⁷ Strickland, *supra* n 74.

⁷⁸ See *Sarawak Government Gazette Extraordinary*, Part V, Vol X11, 48, Kuching, 6 June 1957.

⁷⁹ Mooney, *supra* n 46 at p 245.

⁸⁰ See Richards, *supra* n 5, Part II at paras 38 & 11. The new legislation

is based on a Torrens system of title by registration, where a person claiming ownership or interest must have a document of title in the form of a grant, lease or other documentary evidence of title or interests. It also provides for a system based on customary rights for which no registration is envisaged. The Torrens system envisages the survey and permanent markings of individual boundaries of land held under title and implies government guarantees of both boundaries and title. This guarantee however does not extend to native customary lands. This inequality of treatment will be dealt with further on in the paper.

At this juncture, it is important to consider the impact of the Land Code on the creation of NCR and the recognition of pre-existing rights.

A. *Creation of NCR after 1957*

The Land Code 1958 prohibits the creation of new NCR from 1 January 1958, except in accordance with the requirements of the statute.⁸¹ NCR can be created in IAL if a permit is acquired from the Superintendent and occupation is established based on the:

- (i) clearing and occupation of virgin jungle;
- (ii) planting of fruit trees on land;
- (iii) occupation or cultivation of land;

covers land registration, settlement of customary rights, alienation and land acquisition. In formulating the Land Code, the government took into consideration existing ordinances at home and abroad. These included:

- The Land Ordinance (Cap 27)
- The Land Settlement Ordinance (Cap 28)
- The Land (Classification) Ordinance of Sarawak 1955
- The Land Act of 1948, New Zealand
- The Land Code, Federated Malay States (Cap 138)
- The Land Transfer Act 1952 of New Zealand
- The Property Law Act 1952 of New Zealand
- The Land Acquisition Ordinance of Brunei
- The Transfer of Land Act (Victoria) Australia

⁸¹ Land Code 1958, s 5(1).

- (iv) use of land for burial grounds or shrines; or
- (v) use of land of any class for rights of way.

A residuary provision for the creation of NCR “by any lawful method”. This was deleted from the law in 2000,⁸² but is yet to be gazetted. The occupation of NCL or RL other than according to requirements of law is unlawful occupation.⁸³ Until the Government issues a title, natives in lawful occupation of State land are deemed licensees.⁸⁴ The Code however recognises NCR created prior to 1 January 1958.⁸⁵ Section 5(2) (ii) states:

[T]he question whether any such right has been acquired or has been lost or extinguished ... is determined by the law in force immediately prior to the 1st day of January 1958.

Whether a native or native community has acquired or lost NCR prior to 1 January 1958 is determined under the law in effect on 31 December 1957.⁸⁶ The law in existence prior to 1 January 1958 NCR is the Land (Classification) (Amendment) Ordinance 1955 (“1955 Ordinance”). As stated earlier, NCR can be created in IAL after 16 April 1955 if a permit is obtained from the District officer.⁸⁷ Since the 1955 Ordinance had no retrospective application, it neither affected existing NCR nor any pre-existing rights of the natives prior to that date.⁸⁸ Prior to 16 April 1955, statutory law consistently reaffirmed,

⁸² A78/2000.

⁸³ Land Code 1958, s 10(2).

⁸⁴ Land Code 1958, s 5(2)(i). *Superintendent of Lands and Surveys v Nor anak Nyawai & Ors* [2006] 1 MLJ 256 at pp 269-270, held that native title confers a property interest in and over land. Contrary to the definition of proprietor in s 2, which excludes those persons holding land under a licence from the Government, natives holding their lands pursuant to a licence do have a property interest in those lands.

⁸⁵ Land Code 1958, s 5(2)(ii).

⁸⁶ *Ibid.*

⁸⁷ *Nor anak Nyawai v Borneo Pulp Plantations and Ors* [2001] 6 MLJ 241 at p 284.

⁸⁸ *Ibid.*

and did not otherwise limit, native title. This was clearly expressed in *Superintendent of Lands and Surveys, Bintulu v Nor anak Nyawai & Ors*⁸⁹ where the Court of Appeal held that the common law respects pre-existing rights and that the Land Code “does not abrogate whatever native customary rights that exist before the passing of that legislation”.⁹⁰

A strict reading of s 5(2)(ii) and the 1955 Ordinance gives rise to an anomalous situation with regard to NCR created between 1955 and 1 January 1958. In an attempt to resolve this issue, the court in *Hamit Bin Matusin v Superintendent of Lands and Surveys and Anor* pronounced 1 January 1958 as the date by which NCR must exist to come within the protection of s 5(2)(ii).⁹¹

B. *Rights Based on Occupation*

The recognition of NCR on land is primarily based on occupation. The most common way NCR is created is by way of felling of virgin jungle, occupation and cultivation. The use of land for burial ground or shrine is related to and is evidence of occupation of land. Where occupation is recognised, it is only reasonable that the occupiers be given rights of way over the territory that is occupied by the community.

The Land Code does not define occupation but the courts have referred to the common law meaning of occupation as explained by Lord Denning in the Privy Council case of *Newcastle City Council v Royal Newcastle Hospital*. His Lordship said:

⁸⁹ *Supra* n 84.

⁹⁰ *Ibid* at p 270. Prior to 16 April 1955, statutory law consistently reaffirmed native title. In any case, the Land Code 1958 is not an exhaustive body of law that addresses all aspects of land tenure in Sarawak. This is especially true in light of s 5(2) of the Land Code 1958, which makes no attempt to define the parameters of native customary rights in existence prior to 1 January 1958.

⁹¹ [2001] 3 MLJ 535 at p 541. The High Court held that native customary rights may only be created or acquired by way of transfer, gift or occupation on or before the cut off date of 1 January 1958.

Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering ... There must be something done on the land, not necessarily on the whole but on part in respect of the whole. ... a farmer occupies the whole of his farm even though he does not set foot on the woodlands within a year's end to another.⁹²

Lord Denning's dictum was referred to in *Ara binte Aman & Ors v Superintendent of Lands & Mines, Second Division*⁹³ a case that dealt with the question of occupation of the land. Since s 5 does not define occupation, the court reverted to the repealed Land Settlement Ordinance and held that there had to be "continuous occupation" as provided by s 66 of the said Ordinance. Occupation was held to be based on clearing of the land and a continuous occupation, whether by cultivation or otherwise. Since the plaintiffs were found to have allowed unhindered use of the land by others for a period of 20 years, they were said to have acquiesced to it and have thus abandoned the land. Nonetheless, Lascelles J acknowledged that the longer the jungle was allowed to grow, the better the land was for the purpose of farming. Destroying the re-growth clearly made the land unusable for some years and diminished its value.⁹⁴ In practice, that cycle could be as long as 15-20 years or more and every case should be considered on its own merits. None of the appellants however pleaded this.

⁹² [1959] 1 All ER 734.

⁹³ [1975] 1 MLJ 208. See also *Mohd Puttit b Abg Samsuddin v Superintendent of Land and Surveys, First Division*, Kuching District Court Civil Case No B/CIV/103/75 where the meaning of "occupation" in *Newcastle City Council v Royal Newcastle Hospital* (1959) 1 All ER 734 was followed.

⁹⁴ *Sijip anak Majan v Regina* (1954) *Land Cases (1946-1968), A Selection of Judgments and Orders of the Superior Courts Affecting Interests in Lands in Sarawak (1969)*, at pp 5-7, Supreme Court of Sarawak, North Borneo and Brunei.

The question of occupation was considered in the celebrated case of *Nor Nyawai v Borneo Plantations Sdn Bhd & Superintendent of Lands and Surveys & Anor*.⁹⁵ The defendants, the Borneo Pulp Plantations had encroached into some land which the plaintiff Ibans claimed to be land held by them according to customary practices. The High Court held that the Iban customary practice existed and plaintiffs were held to have occupied and cultivated their *temuda* lands, under s 5(2)(a) and (c). Ian Chin J explained the customary practice quoting from a paper by Tan Sri Datuk Gerunsin Lemat thus:

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

The purpose of creating a *pemakai menoa* involves the ritual ceremony of *panggul menoa*. After the ceremony has been performed, the first cutting of virgin jungle for settlement and farming can commence. From then onwards, the community can establish its rights to the felled area, boundaries (*garis menoa*) are drawn between the villages. These boundaries normally follow streams watersheds, ridges and permanent landmarks.

Pemakai menoa includes cultivated land (*tanah umai*), old longhouse sites (*tembawai*) cemetery (*pendam*) and forest area (*pulau*).

On 9 July 2005,⁹⁶ the Court of Appeal overturned the High Court decision on the grounds that there was insufficient evidence to show the respondents' occupation in the disputed area. They had nevertheless satisfied the test for NCR in the adjacent area. The Court of Appeal began its analysis by noting that the doctrine of native

⁹⁵ [2001] 2 CLJ 769.

⁹⁶ "Borneo Pulp Wins Appeal Case on NCR Land" *The Sarawak Tribune*, Saturday, 9 July 2005 at p 3.

title required the group to be in continuous occupation of the land in dispute. It then quoted with approval the High Court's decision in *Sagong bin Tasi v Kerajaan Negeri Selangor*⁹⁷ regarding the limitation that the High Court placed on the area that may be claimed, holding that their native title was "limited only to an 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".⁹⁸

For the Court of Appeal, occupation other than by settlement and cultivation was beyond protection. Otherwise, it would mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed and foraged in the areas. With respect, the Court of Appeal's decision is a contradiction in terms. On the one hand, it endorsed the High Court's decision and affirmed that the concept of the *pemakai menoa* was part of the Iban customary practice, but on the other hand, it narrowed occupation to settlement and cultivation, which is only one segment of the *pemakai menoa*. This contrast is at odds with the basic concept of the *pemakai menoa*. Furthermore, the claims in *Sagong Tasi* did not concern areas over which the Orang Asli exercised hunting and foraging rights but on land where they had settled. In that respect, it could therefore be said that the holding relating to their rights in those areas is *obiter dicta*.

Despite reversing the High Court on the issue of occupation, the Court of Appeal affirmed that the Iban customary practice of *pemakai menoa* existed as an established custom relating to land. It also affirmed the High Court's decision that the common law respects the pre-existing rights under native laws and customs and that native customary rights do not owe their existence to statutes. Those rights had existed long before there was any legislation.⁹⁹

⁹⁷ [2001] 2 MLJ 591.

⁹⁸ *Superintendent of Lands and Surveys, Binulu v Nor anak Nyawai & Ors*, *supra* n 84 at p 269.

⁹⁹ *Ibid.*

Subsequent to *Nor Nyawai*, in *Madeli bin Salleh (Suing as Administrator of the Estate of Salleh bin Kilong, dcd) v Superintendent of Lands and Surveys, Miri Division & Anor*¹⁰⁰ the Court of Appeal, affirmed by the Federal Court,¹⁰¹ held that occupation need not necessarily be actual physical occupation. What is important is control over the land and the ability to exclude others from the land. The Federal Court found that the plaintiff established occupation through evidence that he visited the land once a month, he had correspondence with the government with regards to the land, and there were evidences of planted fruit trees. Just because the appellant did not live on the disputed land did not mean that he was no longer in control or did not occupy it. This is a pertinent issue as many indigenous people leave their villages for urban areas for employment, and would return on specific occasions to their land. A strict application of occupation would have the effect of unjustly and automatically depriving them of their rights.

C. A Code "For Better Protection" of Native Rights?

When it was enacted, the Code interpreted the government policy at that time. It was based on three principles, namely: that undeveloped land was Crown land, the initiative in alienation of Crown land must come from the individual, and that Crown land must be paid for.¹⁰² The first principle did not cause any hardship because the natives never readily accepted the idea that land under fallow was unoccupied, neither did they accept the idea that undeveloped land necessarily belonged to the Crown. However, individual application for land is not a requirement under the Code. As for paying for Crown land or for documentary evidence, a native would be unwilling to pay to obtain title to lands that he or she believes to be his or her own already and there is a degree of protection under native laws and customs. Be

¹⁰⁰ [2005] 5 MLJ 305.

¹⁰¹ [2007] 2 MLJ 677.

¹⁰² Richards, "Report of the Land Committee in Brief", 9 November 1962, at p 2.

that as it may, the Code stipulates that until a document of title has been issued, any occupation of state land without a permit under ss 10(3) and (4) obtainable from the Superintendent of Lands¹⁰³ would be deemed unlawful occupation and is an offence.¹⁰⁴ Even where NCR had been created, such lands would be held by licence from the government. This has given rise to contentions and problems.

The term "permit" or permission implies that no proprietary rights exists.¹⁰⁵ A permit expires by lack of renewal and is revocable at any time. Although the Code provides for the issuance of permits, in practice, permits are rare and perhaps even non-existent. Permits had formally been discontinued through a government directive in 1964¹⁰⁶ further restricting creation of NCR and making native occupiers "illegal occupants" on their own land. Neither existing native social structures nor the traditional land use practices have been fully taken cognizance of. The position has been summed up by Digby J in *Keteng bin Haji Li v Tua Kampung Suhaili*:

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

¹⁰³ Amended by Land Code (Amendment) Ordinance 1996, Cap A42. District Officer is replaced by Superintendent of Lands, Department of Land and Survey.

¹⁰⁴ Sections 10 and 209.

¹⁰⁵ The Superintendent has discretion to decide whether to grant a permit under the Code ss 5-7, 10. If he considers that it would prejudice the individual or communal rights of other inhabitants a permit would be denied. An aggrieved person may appeal to the Director within 21 days with provision for a further appeal by petition to the Minister within 30 days. Note that the Superintendent may permit the temporary occupation of State land under temporary licences under s 29 of the Code. The licence is not transferable or transmissible and is not registrable in the Register. This is a separate provision from s 10 which provides for a specific permit for creation of NCR.

¹⁰⁶ Zaidie Zainie, *supra* n 49. In 1961, Richards wrote, "I know of no permits issued under s 10 of the Land Code or of any recently established rights denied under s 5." See also Adam, *supra* n 1.

he can either charge or transfer ... This is so whether for the purposes of the *Land (Classification) Ordinance* the land is Native Customary land; Reserved Land or Interior Area land. If a person abandons his legitimate occupation of such land, he does so at his peril.¹⁰⁷

In that case, the Kuching District Court held that there was a sale of land between two natives. On appeal, Digby J decided the case on grounds of abandonment of interest rather than a sale or mortgage. With respect, clearly his Lordship could not recognise the sale when the occupier is held to be a "mere licensee" with no legal interest which he could transfer or charge. The concept of a licence, effectively denied the existence of a valid native perspective of land ownership based on an elaborate system of rules and customs.

In essence, the definition of the law and the extent of an existing right is defined by the dominant law, namely, the English colonial law. Inherent in such a view is that natives merely have "use and enjoyment" and not ownership. Under English law, a licence is a right of a user, which exists at the pleasure of the legal owner. By using the terms "permit" and "licence" the statute reduced native rights to land a mere "user" right or a "usufruct" and advanced the presumption that they have no legal ownership or rights to land. They could enjoy the "fruits of the land" by foraging, hunting, fishing and even by cultivation of the land, but they had no ownership or rights to the land.¹⁰⁸ This gives rise to a radical difference between the western and native conception of property.

¹⁰⁷ (1951-54) SCR 9.

¹⁰⁸ The term "usufruct" which is often associated with native customary tenure had historically been founded in the sovereignty, first of the local kings, and then of the British Crown. However, these sovereignties on their own did not extinguish these rights. Rather, they continued unless specifically withdrawn by the sovereign. It is well to note that the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 had established that the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land so

The wide gap in these approaches could be explained by the general common law of colonial expansion, which as some writers suggested, accorded with the imperialist thinking at the time when “colonists ... conceived of the aborigines ... as ‘savages’ and ‘wild men’ living in a state of nature [who] ... did not use the land in a progressive manner, and so had no claim”¹⁰⁹ and were too low in scale of social organisation to be acknowledged as possessing rights and interests in land. This was “characteristic of the self-serving ethnocentricity upon which colonialism [was] based”.¹¹⁰ In Sarawak, the reality was that, land was already inhabited and cultivated by people groups who were not mere wanderers but were in occupation and utilising the land according to their own customary practices.

Clearly, the indigenous notion of ownership is at odds with the European view of ownership. The latter generally emerges in a market economy and clearly defines and sanctions individual rights to land,¹¹¹ whereas the notion of individual ownership is not fundamental to traditional native ideas of land. Very often, it is presumed that native conceptions of ownership must conform to the European or “western” ideas in order to be valid and it is this, that eventually crystallises into legislation.

The courts in Sarawak found this a difficult matter to deal with, as evident in Lascelles J’s judgment in *Sat anak Akum & Anor*

as to displace any presumptive title of the natives. This decision had been applied in *Mabo No 2* and followed in *Adong bin Kuwau v Kerajaan Negeri Johor*, *Nor anak Nyawai v Borneo Pulp Plantation* (HC) and *Superintendent of Land and Surveys. Miri Division v Madeli bin Salleh (Suing as Administrator of Salleh Kilong)*.

¹⁰⁹ Bain, A, “Introduction. The Past As Future: Aborigines, Australia and The (Dis) Course of History” in B Attwood (ed), *The Age of Mabo* (Sydney: Allen & Unwin, 1996) at pp viii-x. See also *Mabo No 2* (1992) 107 ALR 1 at p 41 (Brennan J).

¹¹⁰ McNeil, Kent, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at p 92.

¹¹¹ Parsons, “FAO Agricultural Study: The Owner Cultivator in Progressive Agriculture”, cited in Richards, *supra* n 5 at p 17.

v Randing ak Charareng.¹¹² In a case involving disposal of NCL by will, he admitted that the most difficult part of the whole question was “although it may casually be referred to as property ‘owned’ by the testator [it] is not in actual fact his to do as he likes with”. Furthermore, while *temuda* rights are “a form of customary tenure: the holders are the licencees of the Crown” he said, “but it has been my experience that this is difficult to explain to Dayaks in general and they regard it as land owned by them.”

In *Sijip anak Majan v Regina*,¹¹³ the inappropriate use of the term licence was apparent. There, Lascelles J recognised that NCR interest on land constituted a proprietary interest. The learned judge reiterated a statement by the State Counsel Peter Mooney that “as licencees” the native occupants were “entitled to benefits from the land” and “permission for others to use that land would be necessary”.¹¹⁴ Mooney had pointed out that there was no estate which could be created in English law that would be on all fours with that of the lawful occupier of *jerame*. The nearest approach in English law was “a tenant at will entitled to emblements”.¹¹⁵ Lascelles J said:

[T]he *Land (Classification) Ordinance* admittedly makes the Rituh Dayaks licencee of the land but *there is no avoiding the fact* that in this colony such an occupier has an interest which is an exclusive one: to hold otherwise would create chaos throughout the vast areas of Sarawak which are at this time held under customary tenure. (Emphasis added.)

Clearly, the existence of an exclusive interest was recognised. Nonetheless, the ill fitting term licencee had perfunctorily been retained and continued to be used in all subsequent cases. A strict construction of s 5 of the Code meant that NCR holders would not to be able to

¹¹² (1957) SCR 52.

¹¹³ (1954) SCR 40.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

bring an action for trespass and accordingly has no remedy against a third party who disturbs him in the exercise of his license.¹¹⁶ This would be completely unjust, against the inherent rights of the traditional owners. In a long awaited development, the Court of Appeal in *Superintendent of Lands, Bintulu v Nor anak Nyawai* has now endorsed the High Court's view that "such licence cannot be terminable at will" and that their native rights "are native customary rights which can only be extinguished in accordance with laws and this is after payment of compensation".¹¹⁷ This constitutes recognition of a proprietary right to the land which is protected under Article 13 of the Federal Constitution.¹¹⁸ Where a proprietary interest based on occupation is recognised, a case for trespass could be maintained against a third party.¹¹⁹

Under s 18 of the Code, a native may be given a grant in perpetuity, and where a native has "occupied and used ... unalienated state land ... in accordance with rights acquired by customary tenure amounting to ownership",¹²⁰ where land is used for residence and agricultural purposes. According to native perspectives, rights held under native laws and customs amount to full ownership. The Land Committee suggested that where an individual or family has the right

¹¹⁶ This was the approach used in *Juti ak Maga & Ors v Lien Ho Sawmill Bhd & 2 Ors*, Suit No 21-44 of 2001, Clement Skinner J.

¹¹⁷ *Supra* n 87.

¹¹⁸ Art 13 of the Federal Constitution states:

(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.

¹¹⁹ In Peninsula Malaysia, where aboriginal customary rights of aboriginal peoples were in question, the court in *Sagong Tasi v Kerajaan Negeri Selangor* [2001] 2 MLJ 591 had recognised Temuan (Orang Asli) customary interests in the lands occupied by them and they could maintain a case for trespass against intrusion of a third party.

¹²⁰ Section 18 was amended in 1963 following a report by the Land Committee in 1962 to allow for replacement of customary tenure by a lease for 99 years. This was amended in 1974, reverting the position to providing for a grant in perpetuity where the rights "amount to ownership".

to exclude other individuals or families from the occupation or use of a piece of land, the rights in that land must be regarded as amounting to ownership.¹²¹

This underscores the point that ownership under customary laws is best understood through considering indigenous history and patterns of land usage rather than importing the western notions of ownership. Although differently developed, indigenous systems have their own precision and enforceability.¹²² It was in this context that Lord Haldane at the Privy Council cautioned the courts to keep in close check the “tendency, operating at times unconsciously, to render ... title conceptually in terms which are appropriate only to systems which have grown up under English law”.¹²³ That caution is fitting for a jurisdiction like Sarawak where reception of the common law and doctrines of equity and statutes of general application, is limited by local circumstances and native customs. Clearly, the native notion of communal or village territorial lands and land based on household ownership is contrary to the strict individual tenure envisaged by the Land Code. This and other considerations were not fully explored prior to the introduction of the legislation, thus it is not surprising that there were many criticisms levelled against the Code from its very inception.

VII. Criticisms of the Land Code and Introduction of the Land Bills of 1964

Within the first year of its operation the Land Code was criticised as being prematurely introduced. There were suggestions that its preparation “should have been preceded by a review and clarification of government policy regarding land”.¹²⁴ Its provisions were said to be

¹²¹ Richards, *supra* n 102 at p 10.

¹²² *Re Southern Rhodesia* (1919) AC 211.

¹²³ *Amodu Tijani v Secretary to the Government, Southern Nigeria* [1921] 2 AC 399 at pp 403-404.

¹²⁴ *Annual Report of the Land and Survey Department 1958*, Government Printers, Kuching.

“extremely detailed and rigid”¹²⁵ and a “complete review and more extensive amendment” was needed.¹²⁶ The government reacted to the criticisms by appointing a committee to review the land law as a whole. They gave their report in 1962.¹²⁷ Their major recommendations were summed up in the following:¹²⁸

- (i) that provision be made to enable existing customary rights in land, when they approximate to ownership to be recognised as such without payment of survey fees, premium, rent;¹²⁹
- (ii) that the present wasteful system of individual application of land be abolished;
- (iii) that the village or block system be used for the purposes of land administration and registration;
- (iv) that provision be made for systematic adjudication for the rationalisation of native customary tenures;
- (v) that land classification be abolished and that the native interests be protected by a provision in the law that the native may not dispose of his land without the Resident’s consent;¹³⁰
- (vi) that various procedures in the Department of Lands and Survey be simplified;
- (vii) that the rent of agricultural land be abolished; and
- (viii) that the Land Code be broken into six ordinances to give effect to these recommendations.¹³¹

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Richards, *Report of the Land Committee* (Government Printers, 1963).

¹²⁸ *Id* at p 16. See also “Land Policy Changes in Sarawak, 8 Recommendations” *The Sarawak Tribune*, 5 March 1963, at p 1 cols 1-3 and “Comment: Land and its Use” *The Sarawak Tribune* at p 4, cols 2-5.

¹²⁹ This resulted in the amendment of s 18 in 1963 to issue a lease of 99 years in place of NCR. This was later reversed in 1974 to provide grant in perpetuity. *Supra* n 120.

¹³⁰ *Supra* n 124 at para 38. There were five divisions in the state with a Resident as the highest administrative head.

¹³¹ *Id* at para 233.

The Committee's recommendations were accepted in principle subject to certain reservations. In particular, the government felt it could not afford to abolish rent on agricultural land.¹³² One of the first responses to the recommendations was the passing of the Land Code (Amendment) Ordinance in December 1963, which enabled natives to hold titles based on customary rights to be issued free of charge, and to remove the restriction of *pesaka*¹³³ land as embodied in s 41 of the Land Code.¹³⁴

Steps were taken to pass four ordinances to give effect to the recommendations of the Committee. Three bills were published on 12 February 1964 and the fourth on 11 March 1964. These were:

- (i) the Land Acquisition Bill, which consisted substantially of the provisions of the Land Acquisition Act 1960 of Malaya relating to resumption of land but with modifications;
- (ii) the Land Adjudication Bill, which provided for the settlement of land on a block basis instead of individual applications for particular lots;
- (iii) the Land (Native Dealings) Bill, which provided for all dealings by natives to be by consent of the Resident; and
- (iv) the State Lands and Registration Bill.

The last bill published on 11 March 1964 declared *inter alia*, all lands to be state lands vested in the state, save to the extent it had been alienated or was subject to an interest subsisting under a native system of personal law. The state "will recognise customary rights to

¹³² Richards, *Statement on the Report of the Land Committee* (Approved by the Governor in Council on 1 February 1963), Secretariat, Kuching, (C/3093/62/A).

¹³³ *Tanah Pesaka* is defined by Richards, *supra* n 5, as "land held under free title by persons native to Sarawak". *Pesaka* is often understood to be inherited property. *Pesaka* lands granted under s 41 were given to any native, but limited to not more four acres per person for a period of 999 years for agricultural use.

¹³⁴ "Encouragement to Farmers to hold Land, Another Step Forward" *The Sarawak Tribune*, Wednesday, 4 December 1963, at p 1 cols 1-3.

land when they amount to ownership – the land will be surveyed and *pesaka* title given to the natives”.¹³⁵ Other proposed changes included converting all the existing leases given to natives for lands under customary rights to *pesaka* titles, unless the land is used for something else other than agriculture. All country lands used for agriculture (whether native or non-native) were to be given a grant in perpetuity to 99 year lease instead of 60 years.

The bills were heralded as “absolutely revolutionary proposals”.¹³⁶ However, they were opposed, largely because the provisions were thought to be “unfair” and believed to work adversely

¹³⁵ “New Land Legislation” *The Sarawak Tribune*, Kuching, Sarawak, October 1963, 3 col 4; “New Proposals on Land Policy” *The Sarawak Tribune*, Kuching, Sarawak, 9 March 1964, cols 1-2. The new proposals were available in print and if approved by Council Negri they would make revolutionary changes to the land law. See also “Teo Speaks of The State Land and Registration Bill” *The Sarawak Tribune*, Kuching, Sarawak, 10 March 1964, at p 9 cols 1-3.

¹³⁶ Speaking in a radio broadcast on the four new bills, Teo Kui Seng, the Minister for Natural Resources, referred to the Government’s Land Policy and said:

I mentioned that some of our changes would be revolutionary. Farmers will in future hold their land in perpetuity provided the land continues to be used for farming. Existing titles of this kind will be extended in the same way. It will not be rented to you for a mere 60 years. With this security in tenure, the agricultural land you hold will be much more valuable to you and your family. What a change this is! For years, Native landowners exercising customary rights have never been treated as true land owners. Now you are going to get your customary rights properly recognised with a *pesaka* title in perpetuity and you are going to find your selves safer with this title because the land will be surveyed and registered. The new *pesaka* titles will be free of charges so long as it is used for agriculture and is not sold or let out of the family. The new land legislation will fundamentally change the situation regarding land holding in Sarawak. We are going to abolish the complicated old land classification system. We are going to abolish it because we believe the rural

against the interests of the natives. The bill that attracted the greatest concern was the Land (Native Dealings) Bill¹³⁷ which purported to do away with classification of land. Furthermore, it purported to cover every dealing undertaken by natives, whether among themselves, with the government or approved statutory bodies, and would enable a Resident to appoint a Land Committee who could give or withhold consent to any dealing by a native. Any application for consent was to be made in statutory form to the Land Committee, through a District Officer and the applicant was required to appear before the committee at a time and place to be notified. A native person had to state the reasons for the land deal, and any decision by the committee would only be subject to review by a Resident whose decision would be final. Without such consent, all dealings would be null and void.

Strong opposition mounted against the government, within and without. It was felt that the unfettered discretion and extensive powers granted to the Land Committees, would interfere with the rights of the natives as the powers could be exercised arbitrarily.¹³⁸ There were feelings that the concepts contained in the Land (Native Dealings) Bill

people want more freedom to decide for themselves what they want to do with their land. If a native who has a *pesaka* title, decides that he has more land than he needs - and many have - he will be able to sell it in exactly the same way as a non-Native now has to do. In certain circumstances, he will also be able to rent his land to somebody else.

We do not wish such land sales to be reckless; so they will be subject to the approval of a local Land Committee which will be responsible for seeing the native farmer retains enough land for the use of himself and his family.

Reported in *The Sarawak Tribune*, Kuching, Sarawak, 12 March 1964 cols 1-5. See also "New Legislation To Break Down Racial Compartments" *The Sarawak Tribune*, Kuching, Sarawak, 9 March 1965, at p 8 cols 1-3. According to Teo Kui Seng, one of the aims of the legislation was to "break down the watertight racial compartments in which so many rural farmers live".

¹³⁷ *Sarawak Government Gazette*, Part III Vol XIX (12 February 1964) N 12.

¹³⁸ Kana, MP, "Native Land System in Sarawak", Project Paper, Faculty of Law, University of Malaya, 1975/76.

undermined the whole foundation of the land law that was in existence and the amendments would work adversely against the natives, and that further consultations with the people were needed. The natives had to be prepared for the impact of the new laws. As a result, the bills were aborted and withdrawn at the last minute by the Government Bench on 11 May 1965, the day they were to be passed in the Council Negeri.¹³⁹ They were never reintroduced. As such, the Land Code continued to be the law of the state despite its faults but has survived as “a reasonably practicable frame within which to work”.¹⁴⁰ It was not until two decades later that major amendments were introduced.

¹³⁹ “Important Land Bills Withdrawn in Council Negeri LAST MINUTE ACT” *The Sarawak Tribune*, 12 May 1965, at p 1. Iban and Malay leaders had planned to block the bills from being passed, saying that they wanted further consultations with the people. In order “not to create any disunity among its members and people” and in view of the fact that “unity and security of the country transcends all else”, the bills were withdrawn. Notably, *The Sarawak Tribune*, Tuesday 11 May 1965 reported that the Council Negeri was meeting on 12 May to discuss, among others, the Land Bills. On the same day, the paper reported “BPS Opposes Passing of Proposed Land Bills”. There were very strong opinions expressed against the bills. The president of the Barisan Pemuda Sarawak, Tuan Haji M. Su’at Tahir said:

The natives in this country have nothing else left except land. The new land bills [a]ffect the principles of land law which have been passed [and] followed in Sarawak for generations. To alter the law affecting land in their ignorance will be unfair to the extreme on the natives.

It is appreciated that our State must carry on the development programmes in order to keep up the pace of progress ... The question is whether our present land law hinders progress in our development ... The answer is NO. Why then is it necessary to pass these new laws?

As to the concept contained in the *Land (Native Dealings) Bill*, it is felt that this undermines the whole foundation of our present land law which will work adversely against natives.

It is strongly felt that the three other bills should not be passed until such time as the native population is more prepared to resist the impact of the new law.

¹⁴⁰ Porter, *supra* n 11 at p 11.

VIII. Amendments to the Land Code: Redefining the Parameters of NCR

From 1970s, numerous changes had been made to the Land Code with regards to NCR. An amendment in 1996 shifted the onus of proving customary rights to NCR against a presumption in favour of the state.¹⁴¹ Furthermore, it provided that “notwithstanding any law or custom to the contrary”, occupation without a permit in writing under s 10 shall not confer any right or privilege on any native or native community.¹⁴² That amendment was a clear attempt at radical discontinuity,¹⁴³ that is, to remove drastically any vestige of claim based on customs. It has the potential to render the local people “squatters in their own dwellings, and trespassers in their own gardens”.¹⁴⁴ Whatever the intent of the provision might be, it cannot be taken as a blanket extinguishment of existing rights.

¹⁴¹ The Land Code (Amendment) Ordinance 1996 (Cap A42) introduced s 5(3) which states:

Whenever any dispute shall arise as whether any native 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 is not encumbered by such rights.” The terms of s 5(3) are pervasive. Hitherto there has not been any real challenge to the section. An attempt in *Shaharudin Ali and Anor v Superintendent of Lands and Surveys, Kuching Division* to challenge the state’s power to extinguish NCR under the amended s 5(3) and (4) and to challenge the constitutionality of the section *vis-vis* art 161A of the Federal Constitution failed.

¹⁴² In any such case, he is deemed to be in unlawful occupation and s 209 (compounding of offences) applies.

¹⁴³ Slattery, “Land Rights of Indigenous Canadian Peoples as Affected by the Crown’s Acquisition of Their Territories”, Doctoral dissertation, Faculty of Law, Oxford University, 1979, at pp 50-59.

¹⁴⁴ Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, *supra* n 10 at p 9, used this phrase to describe the impact of the doctrine of radical discontinuity.

More comprehensive amendments were made by the Land Code (Amendment) Ordinance 2000¹⁴⁵ which sought to harmonise the processes and procedures relating to NCR land with those of other alienated land in terms of procedure for resumption of land, adjudication of compensation payable for termination of rights, and creation of a Registry of Native Rights. A new s 7A (1) defines for the first time “native rights” as rights “created by or belonging to a native over land not issued with a document of title”. These rights are streamlined into:

- (i) rights lawfully created pursuant to s 5(1) or (2) of the Code;
- (ii) rights and privileges over any Native Communal Reserve¹⁴⁶ under s 6(1); and
- (iii) rights within a *kampung* (village) reserve under s 7.¹⁴⁷

The clause “any lawful methods” under s 5(2)(f) of the Land Code was deleted through the (Amendment) Ordinance 2000, purportedly “for the sake of legal certainty and clarity and for removing uncertainty among natives, land administrators, legal and judicial officers”.¹⁴⁸ The Attorney General took the view that there could not be any other lawful methods apart from the five methods referred to in s 5. However, it is implicit in the provision of “any lawful method”, that the methods originally stipulated in s 5 are not exhaustive. The practice of customary land tenure certainly did not cease in 1958. Some lands were acquired through exchange or as marriage dowries or gifts, which are subsumed under the “other lawful methods”.¹⁴⁹ The

¹⁴⁵ A78/2000.

¹⁴⁶ Native Communal Reserves are created and gazetted for use of a particular communities governed by their own personal laws. These reserves may not necessarily be in Interior Area Land.

¹⁴⁷ This has been used to create government reserves for settlement of natives in a *kampung* (village) environment. See for eg, The Samarahan Land District (Government Reserve) Declaration 1994 (GN 2234/1994).

¹⁴⁸ Fong, J, “Recent Legislative Changes on The Law Affecting Native Customary Land”, Paper Presented at a Seminar on Native Customary Land, Land and Survey Department, Miri, Sarawak, 6 September 2000.

¹⁴⁹ Bian, Baru, “Native Customary Land Rights in Sarawak: The Impact of

deletion of s 5(2)(f) further diminished broader native rights under native laws and customs. The same Amendment (Ordinance) has provided for a registry of native interests.

A. *Registration of Native Rights versus a System of Registration of Title*

A new s 7A(2) establishes the Register of Native Rights which is to be maintained and opened for public inspection in accordance with rules made under s 213.¹⁵⁰ Rights created under ss 5 and 6(1) may be registered and the registered owner is deemed the lawful owner until the High Court makes an order to the contrary.¹⁵¹ This registration of NCR is a system of registration of title as opposed to the system of title by registration, where the registration is the source of the

Adong's case", Paper Presented at the "International Workshop in Customary Land Rights: Recent Developments", Faculty of Law, University of Malaya, 18-19 February 2000.

¹⁵⁰ The details of what interests should be included in the registry are to be determined by the *Majlis Mesyuarat Kerajaan Negeri* (the State Executive Council). It will also determine matters relating to:

- (i) the keeping of a register of Native rights under s 7A(2), the making of any entry and the conditions for registration of any native rights in the said Register;
- (ii) the procedure for the registration of native rights described in s 7A(1), the transfer, transmission, inheritance and acquisition and other matters affecting such rights;
- (iii) inspection of the Register of Native Rights and supply of extracts of details of entries to the public and the payable fees; and
- (iv) the procedures for the conduct for inquiry under the new s 51(2) and (3) empowering the Superintendent to issue summons to any person who has submitted claims under s 49.

¹⁵¹ Any person who is aggrieved by the decision of the Registrar in not registering a right, transfer, transmission, inheritance or acquisition in his favour or who claims that the right that is registered in the name of another named person may apply to the High Court for an order that his right be registered or the Register be rectified as the case may be. Under s 7 c (2), if the Registrar is satisfied that any entry or particular right registered in the Register of Native Rights has been procured by fraud, misrepresentation or mistake the Registrar may amend, rectify or delete the same.

title.¹⁵² Registration under s 7A merely constitutes a record or “certification to right[s]”¹⁵³ and does not constitute indefeasibility of title, nor alters the character of NCR beyond an administrative expediency.¹⁵⁴ In contrast to s 7A, ss 131 and 132(1) of the Code guarantee indefeasibility of title of a registered proprietor of interests that is registered in the Land Register required by s 112. No title or right to land included in the register under s 112 can be acquired by adverse possession because an indefeasible title is unchallengeable. Be that as it may, s 7A holds a promise of some form of record of interest. However, as at the time of writing, the administrative infrastructure necessary to implement the Register of Native Rights has yet to be established.

B. *Extinguishment or Termination of NCR: Tightening the Grip of the Law*

Another major subject of amendment is the termination of rights. Extinguishment of NCR was originally governed by s 82(2) and (3) of the Land Code. The section was deleted in 1974, followed by other extensive amendments to facilitate extinguishment of NCR. In particular, s 5 was extended to include new sub-ss (3), (4) and (5).¹⁵⁵ In 1994, amendments were made to empower the Minister to extinguish NCR, and in 1996, further amendments to streamline the process of extinguishment were made.¹⁵⁶ It was only in 1998 that a provision was made to put in place a mechanism for assessment and payment of compensation.¹⁵⁷

¹⁵² See *Breskar v Wall* (1971) 126 CLR 376 at p 385, per Barwick CJ; See also *Re Cartlidge and Granville Savings and Mortgage Corp* (1987) 34 DLR (4th) 161 at p 172, per Philip J; and *Frazer v Walker* [1967] 1 AC 567 at pp 580F-581A, 585 A-C (Privy Council).

¹⁵³ Fong, *supra* n 148.

¹⁵⁴ Compare this with the proposed amendments in the 1964 bills where registration was proposed for lands “which amounted to ownership” and for registration as *pesaka* titles.

¹⁵⁵ Land Code (Amendment) Ordinance 1974.

¹⁵⁶ Through the Land Code (Amendment) Ordinances 1994 and 1996 respectively.

¹⁵⁷ Prior to 1998, no provision was made for the quantum of compensation

An amendment in 2000 replaced the term “extinguishment” with “termination” of NCR.¹⁵⁸ The question is whether this amendment introduced mere semantics? Whilst there appears to be little difference in the English terminologies, the translations into Malay, the language commonly used by communities in the interior, reveal a slight shade in meaning. The Malay for “extinguishment”, which is *dimansuh* or *dilenyapkan*, connotes complete abolishment, obliteration or non recognition of a right, without a trace, whereas the term “terminated”, which is translated as *ditamatkan*, implies a limiting or cutting back of an existing right. In line with the recognition of pre-existing rights, the term *tamatkan* is preferred, and thus the corresponding English word, “terminated”.

Under s 5(4) of the Code, the state may terminate NCR created under ss 5(1)-(2). Compensation must be paid for such termination and upon termination, the land formerly subject to the rights is “resumed by the government.” The process of resumption which includes resumption of land for public purposes, is governed by ss 45-83. To fully understand the operation of the above provisions, s 5(4) must be read with s 15(1) of the Land Code which provides that, where NCR have been created over state land, no alienation or use of such land for a public purpose may be made until all NCR over the land are surrendered, terminated, or compensation has been paid. Where the land is to be transferred pursuant to a deed of surrender,¹⁵⁹ the Superintendent must provide notice to the community and examine and respond in writing to objections from individuals claiming NCR over the land.¹⁶⁰

payable. See *Minister for Lands and Mineral Resources v Bilam ak Chandai*, Kuching High Court Civil Appeal No 2 of 1971, *Land and Survey Cases* (1969-1987) at p 709.

¹⁵⁸ A 78/2000.

¹⁵⁹ Until 2002, there was no provision for any form or procedure for such surrender or extinguishment under s 15. Many thousands of land parcels and individual claims in respect of customary rights were surrendered, whether legally or otherwise under s 15. See *Land and Survey Department, Land Branch Manual* Vol 1 at p 65.

¹⁶⁰ Land Code 1958 s 15(2)(a)-(c).

The State, through the Minister, may declare that NCL¹⁶¹ is needed for one of the purposes described in s 46 of the Land Code.¹⁶² The declaration must describe the public purpose for which the land is required, state that any NCR to the land acquired under ss 5-7 of the Land Code are deemed terminated as of the date the declaration is published, and state that compensation claims for such termination of rights may be pursued under s 49.¹⁶³

The position today is that any NCR lawfully created under ss 5(1) and (2), or any communal land under s 6, may be terminated subject to payment of compensation. Claims for compensation have to be made to the Superintendent of Lands within the prescribed period of 60 days from date of publication or exhibition of the direction. A dissatisfied claimant may request for the matter to be referred to arbitration, within 21 days on grounds of:

- (i) rejection or non recognition of his or her claim to NCR;
- (ii) inadequate or inequitable allocation of land over which NCRs are to be exercised; or
- (iii) inadequate, unfair or unreasonable amount or apportionment of compensation made by the Superintendent.

An amendment in 2002¹⁶⁴ introduced a new s 15, to provide for the process of surrender of NCR for public purposes by means of a deed of surrender, subject to payment of compensation. Section 15 gives an opportunity for a person to surrender his rights, but in the event that he fails or refuses to do so, the state would take action for resumption of the land. Any person who has any objection to surrendering his rights must put his or her objection in writing within

¹⁶¹ As noted earlier, NCL includes, land within a reserve under s 6, IAL over which NCR have been created pursuant to a permit under s 10, and land over which NCR were created prior to 1 January 1958. In comparison to the lands potentially subject to termination under s 5(4), a broader category of lands may be terminated under s 46.

¹⁶² Land Code 1958, s 48(1).

¹⁶³ Land Code 1958, ss 48(1), 48(2)(a) & 48(2)(b).

¹⁶⁴ Land Code (Amendment) Ordinance 2000.

21 days of the notice. These are the only statutory restraints on the extinguishment authority of the state: payment of compensation and notice to native owners. The notice that is required under s 48(2)(c) is to be given in the *Gazette*, on notice boards of the Superintendent of Land and Surveys or the District Officer for the area where the land is located and in the case of NCL, a newspaper circulating in Sarawak. These methods are however, frequently ineffective, as natives residing in the interior do not regularly visit the District office. Furthermore, many are illiterate, thus there is no guarantee that they will receive actual notice of extinguishment without additional assistance.

Even where rights are terminated, it cannot be considered a blanket extinguishment of all existing rights. Following the cases of *Mabo (No 2) v Queensland*¹⁶⁵ and *The Wik Peoples v Queensland*,¹⁶⁶ the court in *Nor Nyawai* established that exercise of a power to extinguish native title must reveal a “clear and unambiguous intention” to do so, whether the action be taken by the legislature or the executive. Using the clear and unambiguous intention test, Ian Chin J at the High Court held that NCR in Sarawak has neither been abolished by legislation nor by executive action from the time of the Brookes.¹⁶⁷ While extinguishment involves a loss of right, it is different from loss of right through “non-use” which is explained below.

C. *Loss of NCR and the Concept of Abandonment*

Loss of rights to NCR is to be distinguished from extinguishment. Section 5(2) speaks of rights being “created” and the rights being lost

¹⁶⁵ (1992) 175 CLR 1.

¹⁶⁶ [1996-1997] CLR 1.

¹⁶⁷ A detailed restatement of this test was set out by Olney J of the Federal Court (Australia) in the *Yarmirr and Others* (1998) 156 ALR 370 at p 429:

First, the common law will not recognise a native title which has been extinguished. Secondly, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the legislature or the executive. Thirdly, a clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which

or extinguished. The latter is by direction of the Minister whereas the former would accrue through other factors including acquiescence and the claimant's conduct. The notion of occupation is implicitly linked with the idea of abandonment. In the cases of *Nyalong v Superintendent of Lands and Surveys, 2nd Division, Simanggang*,¹⁶⁸ *Udin anak Lampon v Tuai Rumah Utom*,¹⁶⁹ *Abang v Saripah*,¹⁷⁰ *Ara binte Aman & Ors v Superintendent of Lands and Mines, 2nd Division*¹⁷¹ and *Injing v Tuah & Anor*¹⁷² the courts had held that NCR could be lost by non-use or by abandonment of customary land. While the period of non-use varied in each case, the physical *pindah* (moving or emigrating) of a person had often been interpreted non occupation which constituted abandonment. Even the non-use of the land as a result of the interference of the Japanese Occupation of Sarawak had in *Ara binte Aman*'s case been held to be non-use amounting to abandonment. One would have thought that there must be some form of voluntary intent in the person's conduct to constitute abandonment.

creates a regime of control that is consistent with the continued enjoyment of native title. Fourthly, if inconsistency is held to exist between the rights and interests conferred under statutory grants, the native title rights and interests must yield, to the extent of inconsistency, to the rights of the grantee. Fifthly, extinguishment can only be determined by reference to such particular rights and interest as may be asserted and established, and sixthly, a native title which confers a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time.

¹⁶⁸ [1967] 2 MLJ 249, per Silke J.

¹⁶⁹ [1949] SCR 3.

¹⁷⁰ [1970] 1 MLJ 164. Following *Nyalong* and *Udin anak Lampon* [1949] SCR 3, the respondent was said to have lost her right to her *temuda* because she had left it for 20 years. She had no power to alienate it, and the land was declared as *tanah orang pindah* and left for the people in the area.

¹⁷¹ [1975] 1 MLJ 208. See also *Mohd Puttit b Abg Samsuddun*, Court Civil Case No B/CIV/103/75, as the meaning of occupation in *Newcastle City Council* (1959) 1 All ER 734, is followed.

¹⁷² [1971] 1 MLJ 115.

A common argument used to further a case for abandonment was the Fruit Tree Order of Rajah Brooke dated 10 August 1899 which stated: "Any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district nor may he prevent others farming thereon unless he holds such land under grant".¹⁷³ That order must however, be understood in context – as an order promulgated to keep Iban movements in check for easy administration and to stem "destructive" shifting cultivation.¹⁷⁴ The Iban were known for their traditional custom of *bejalai* – which were frequent expeditions out of their traditional territories and it is probable that term *adat pindah* (mobility custom) which was the essence of the Fruit Tree Order was to control the incursion in other areas settled by other groups.

"Abandonment" can only be fully understood in the context of the interest, the personal laws and the customary practices of each community. In most native communities including the Iban, the right to the land arises as a member of a domestic household in community. It is a right that is heritable by the descendants which includes rights in a *pemakai menoa*.¹⁷⁵ Within the *pemakai menoa*, the rights to the *tembawai* (old longhouse sites) and the *pendam* (burial grounds) remains with the community, and cannot be lost. *Temuda* rights certainly cannot be lost. A description of how the *adat* keeps the land within the community is described by Lascelles J in *Sat anak Akum v Randong Ak Charareng* which bears reproducing:

¹⁷³ [1949] SCR 3.

¹⁷⁴ What was seen as undesirable "destructive" shifting cultivation was really a forest-fallow farming system.

¹⁷⁵ Lemat, Gerunsin, "Native Customary Land and Adat", Paper Presented at Seminar Pembangunan Tanah Pusaka Bumiputra, Kuching, Sarawak, 29–30 October 1994. Other groups practise similar concepts. The Kelabit for instance, subscribe to a similar concept of territorial village lands (*tana' bawang*), and have corresponding rights in the cultivated lands (*lati'*), old longhouse sites (*ruma' maun*), and secondary forests of various stages of growth (*amug*). They also had a concept of communal reserve (*pulau*) which they called *ulung*.

If the "owner" leaves the district, the land reverts to the longhouse for communal use under the authority of the Tuai Rumah who can allocate the land to anyone in the house who he considers most needs the land. This of course only applies if there are no heirs remaining in the district. If such do remain, then they take over the use of the land. If ever the "owner" returns to the district, he can resume the use of the land. The "owner" leaving the district without any heirs to take over the land may arrange for someone else to have the prior right to farm that land by taking from him what is called "*Tungkus Asi*", which is some form of token to bind the agreement. It may not be anything of value, which would invalidate the transaction, but may consist of as much as a pig. The rights taken over by the person paying the *Tungkus Asi* are inheritable by the heirs of that person but revert to the original owner if he returns, or to his heirs if they return.¹⁷⁶ There is no question of loss of "user rights" or reversion to the state under the *adat* as the beneficial interest remains in the community if not in the domestic household.¹⁷⁷

Despite the provision that migration to another area might cause loss of a right,¹⁷⁸ this has to be considered in the light of each community's personal law and the circumstances of each case. For instance, in *Sumbang anak Sekam v Engkarong anak Ajah*,¹⁷⁹ the holder of NCL who moved to another village but remained under the jurisdiction of the same *Penghulu*, continued to retain full farming rights provided he was within "reasonable farming distance." This is a question of fact.¹⁸⁰ Whereas in the past, a "half days walk" was

¹⁷⁶ *Supra* n 112.

¹⁷⁷ Cliff Sather, for instance, wrote of how among the Saribas Iban claims to tree tenures are not lost. See C Sather, "Trees and Tenure in Paku Iban Society: The Management of Secondary Forest Resources in a Long Established Iban Community" (1990) 1 (1) *Borneo Review* at pp 17-40.

¹⁷⁸ Native Customary Laws Ordinance (Cap 51) Vol VII, *Sarawak Law*, App A, at para 7.

¹⁷⁹ [1958] SCR 95.

¹⁸⁰ It has been suggested that a journey on foot to the farm in the morning

reasonable distance, with better means of transport, today, longer distances can be covered in a day.

Another pertinent factor is the trend of out-migration from rural areas in search of employment. This entails that many families leave their lands for a considerable period. Would this constitute abandonment of land and thus loss of right? In *Nor Nyawai*, Ian Chin J at the High Court gave an enlightening discussion on the need for young natives to leave their villages for education and to find employment in urban areas, and how as a foundation to their survival, it is imperative that they had their land to go back to. He observed that:

they still need the longhouse to go home to and the native customary rights to farm, fish, hunt and gather forest produce. Without the longhouse and its *pemakai menoa*, the economically poor Iban living in the urban area would be destitute. For the economically poor Iban, they will greatly need the *galau* or *pulau galau* ... if they are not to be vagabonds in their own land. As for the rich Iban, ... that they should forget about their heritage ... is against what everyone knows is the accepted practice of "going home".¹⁸¹

That statement is illuminating and underlines the reality faced by the Iban and all other groups. The Kelabits, for instance, practise a similar concept of territorial village lands and ownership through the

and back in the evening is reasonable farming distance. See Adenan Haji Satem, "Pindah" (1977) 28 February, *Sarawak Gazette* at pp 18-19.

¹⁸¹ Ian Chin J in *Nor Nyawai* [2001] 2 CLJ 769. The situation in Sarawak is not such that the whole community might be completely displaced to the point where it is difficult to establish connection with the land. As Ian Chin J noted, people maintain their connection with the "home" lands through regular visits. It would be unrealistic and dangerous to adopt too a strict construction that demands a physical presence. In Australia, for example, where proof of "connection" with the land is a factor to be considered, the absence of physical connection may not be fatal to a claim, as native title could be sustained by non physical connection to the land that is maintained through the acknowledgement and observance of traditional law and customs. See *De Rose v South Australia* (No 2) (2005) 145 FCR 290.

domestic household. Abandonment might only be imputed to a person or family where there is a plain and clear intention to leave or to emigrate to another village against advice, on pain of a warning or *ukum* (fine) in defiance of the wishes of the headman.

There is no question of abandonment or loss of land where persons move in pursuit of education or for purposes of employment.¹⁸² In 1998, it was reported that 63.8 per cent of the Kelabit population had moved to towns primarily for education and for employment.¹⁸³ In an urban survey conducted by this writer in 2003, 76 per cent of the respondents had initially left the Kelabit highlands for education.¹⁸⁴ To say that they have abandoned their rights would be to compel them to either stay and make a living in the village or choose to leave in pursuit of knowledge and forgo their rights. This would be an arbitrary diminution of the community's right and is unjust. As Ian Chin J noted, the logical outcome of holding that a right is lost upon such out-migration would be that eventually "the community will lose its value as a cohesive and disciplinary force and will disappear, leaving the mass of individuals who will suffer a miracle of adaptation".¹⁸⁵ While these remarks are *obiter dictum*, and Chin J had been criticised for being overly anxious to find a right for the plaintiffs in *Nor Nyawai*, the statements underscore the reality of contemporary native life and modern survival.

¹⁸² See Draft Code of Adat Kelabit 2000.

¹⁸³ Ose Murang, "Migration in Sarawak, The Kelabit Experience" (1998) 3 (1) *Sarawak Development Journal* 1.

¹⁸⁴ Bulan, R, "Native Title in Sarawak, Malaysia: Kelabit Land Rights in Transition", Doctoral Dissertation, Australian National University, Canberra, Australia, 2005 at p 116.

¹⁸⁵ *Supra* n 181.

IX. Tensions Between the Land Code and Native Laws and Customs: Challenges for a Just Recognition of Native Rights

The Land Code has created several challenges for native communities seeking to secure their rights over traditional lands. In general, these challenges are summarised in this section as they relate to the statute's failure to recognise traditional forms of occupation according to native customary laws, the state's failure to issue and protect documentary titles to lands over which natives exercise NCR, and its broad authority to extinguish NCR.

A. Failure to Recognise Traditional Forms of Occupation

Section 5(2) of the Land Code defines occupation for purposes of creating NCR as of 1 January 1958 in a limited manner that fails to fully account for the traditional means by which natives have occupied lands, which includes the maintenance of uncultivated jungle within their territories that they use for hunting, gathering, and other practices that record their customs, traditions and history. Some of these native customs have been recognised by the courts.¹⁸⁶ Section 5(2) sets out a narrow category of occupation, primarily by settlement or cultivation. Although a residual category authorising the creation of NCR "by any lawful method" captured other methods of occupation based on native customs, that provision was deleted in 2000.

As indicated earlier, the preference for occupation through permanent settlement or cultivation of lands has historical roots. During the period of colonization, Europeans sought to justify their acquisition of lands already occupied by indigenous people based on the rationale that "Europeans had a right to bring lands into production if they were

¹⁸⁶ In *Superintendent of Lands & Surveys, Bintulu v Nor Nyawai* [2006] 1 MLJ 256 at p 263. The Court of Appeal acknowledged the Iban tradition of *pulau* or *pulau galau* which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce.

left uncultivated by indigenous inhabitants".¹⁸⁷ This sense of entitlement had its origins in the elevation of European conceptions of beneficial uses of land, which favoured agricultural endeavours, over hunting, fishing and gathering, activities viewed by Europeans as the underutilization of valuable agricultural land. According to this view, the failure of indigenous people to cultivate land relegated them to a lower status on the scale of development, thereby justifying European intervention, purportedly, to correct the deficiency. Fortunately, developments in the law have rejected this rationale.¹⁸⁸ Prejudice

¹⁸⁷ *Mabo (No 2)* 107 ALR 1, 21 (Brennan J). The bias against nomadic cultures is also reflected in the defendant's argument in *Johnson v M'Intosh*, 21 US 543 (1823), 1823 US LEXIS 293 at pp 32-35:

On the part of the defendants, it was insisted, that the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations ... The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them. It is a violation of the rights of others to exclude them from the use of what we do not want, and they have an occasion for. Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over; and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it ... According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle.

¹⁸⁸ As early as 1835, the US Supreme Court acknowledged that nomadic Indian tribes occupied land in a manner that established rights recognised under the common law: "their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive

against land tenure practices that fail to conform with western conceptions of beneficial land use should have no place in modern law. Be that as it may, the legacy of bias against occupation of land through hunting, fishing and gathering activities is still evident in the s 5(2) of the Land Code.

B. *Documenting and Protecting NCR*

Two provisions of the Land Code anticipate the issuance of documentary title to natives with respect to lands over which they exercise NCR. Section 5(2) provides that “until a document of title has been issued” natives lawfully in occupation are deemed to hold the land as licensees. On the other hand, s 18(1) authorises the Director to issue grants in perpetuity over any lands occupied and used by a native “in accordance with rights acquired by customary tenure amounting to ownership”.

Prior to issuing titles reflecting native interests in their lands, the State must first survey and map those lands. Sarawak has identified lack of funding as the primary reason it has failed to survey NCL and issue titles.¹⁸⁹ Despite the lack of surveys, the State has acknowledged 1.6 million hectares of NCL in Sarawak.¹⁹⁰ Even if the government does not issue a title document, it could still issue a permit to natives pursuant to s 10 of the Code, which as noted earlier, is a requirement for establishing NCR over IAL.¹⁹¹ But again, a 1964 policy of the Sarawak Government, which it continues to follow, effectively prohibits the issuance of these permits to individual natives. An amendment in

enjoyment in their own way for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorised sale to individuals.” *Mitchel v US* 34 US 711, 746 (1835). See also *Mabo No 2*, *supra* n 187 at p 189 where Toohey J said, “It is clear, however, that a nomadic lifestyle is not inconsistent with occupancy.”

¹⁸⁹ Bian, Baru, “Native Customary Rights over Land in Sarawak - A Case Study”, Paper Presented at the Malaysian Forest Dialogue “Challenges in Implementing and Financing Sustainable Forest Management”, Kuala Lumpur, 22-23 October 2007, at pp 6-7.

¹⁹⁰ *Ibid.*

¹⁹¹ Land Code 1958, s 5(1).

1998 made it an offence and increased the penalty which includes imprisonment for occupation without a permit.¹⁹² Given that scenario, the provisions of s 10 are not “practical politics”¹⁹³ as they are “unenforceable and ... tends to bring both law and administration into contempt”.¹⁹⁴ Furthermore, as noted above, where there are established interests, although s 7A(2) of the Land Code requires the state to establish a Register of Native Rights, as of the date of writing, no such register has yet been established.

Even without surveys or the issuance of individual title reflecting native rights, the Land Code authorizes the issuance of leases to parties who may not be natives. Under s 18A, the Superintendent of Land may issue a provisional lease to “a body corporate” for up to 60 years over “unalienated State land, over which a native ... acquired ownership thereof by exercise of native customary rights under section 5” where such land is within a Development Area or a Sarawak Land Development Area.

The Superintendent may lease contiguous areas of native and state land after the land is combined into one parcel “for the purpose of granting a single document of title to the body corporate”.¹⁹⁵ A body corporate is defined as a corporation that has been deemed a native pursuant to s 9(1)(d) “for the purpose of or relating to a dealing under this Code, in or over Native Area Land”.¹⁹⁶ Once the lease expires, the native whose land had been subject to the lease can request that the Superintendent issue a grant over the land or any part of land.¹⁹⁷ The Superintendent has the discretion, subject to the Director’s approval, to issue the grant.¹⁹⁸

¹⁹² Land Code (Amendment) No 2 Ordinance 1998 (Cap A61).

¹⁹³ See Richards, *supra* n 102 at p 5.

¹⁹⁴ *Ibid.*

¹⁹⁵ Land Code 1958, s 18A(2).

¹⁹⁶ Land Code 1958, s 18A(4). The reference to Native Area Land suggests that the only land for which the Superintendent may issue a lease under s 18A is Native Area Land.

¹⁹⁷ Land Code 1958, s 18A(3).

¹⁹⁸ Land Code 1958, s 18A(3).

Ironically, although s 18A recognises natives as the owners of the land prior to the issuance of the lease, they are not entitled to receive a title to their land until after the lease expires. In the meantime, under s 28, where survey is impracticable, a provisional lease may be given to a body corporate approved by the Minister, even where part of that land includes native holdings. At present, there appears to be no clear mechanism in place for the reversion to the natives. Any native whose land is included in such lease may apply to the Superintendent for an issue of a grant to him and the discretion is vested with the Director of Lands and Surveys. The uncertainty surrounding the title of the native landowners could in some circumstances, result in a lessee gaining greater rights over the land. If the native owners are not provided with adequate compensation for the lease of their land, then s 18A could violate Article 13(2) of the Federal Constitution.¹⁹⁹

Further, adding to the difficulty created by the lack of documentary title is the statutory shifting of the burden of proving the existence of customary rights on the native claimant. At the same time, the statute presumes that the State owns land free and clear of NCR until NCR are established²⁰⁰ and the occupation of land without a permit from the Superintendent confers no right on a native or native community, regardless of law or custom to the contrary.²⁰¹ The operation of this section must be balanced with s 15(1) which requires that lands subject to NCR "shall not be used ... for a public purpose until all native customary rights have been surrendered or terminated or provision for compensating the persons entitled thereto have been made." These issues are inevitably tied with the definition of state land.

¹⁹⁹ See Bulan, R, *supra* n 62 at pp 60-61.

²⁰⁰ Land Code 1958, s 5(3).

²⁰¹ Land Code 1958, s 5(4). Introduced through Land Code (Amendment) Ordinance 1996 (Cap A42).

C. *Definition of State Lands and Extinguishment of NCR*

Section 2 of the *Land Code 1958* defines State land as “all land for which no document of title has been issued”, suggesting that lands held by natives under native title are also State lands. Section 12 on the other hand, states that “the entire property in and control of State land and all of rivers, streams and canals, creeks and water courses and the bed thereof is and shall be vested solely in the Government.” There is no saving mention of the rights of those who are in customary occupation. The definition in s 2, in combination with s 12 seems harsh, “unwise and unfair”.²⁰² The underlying reason for this was the English doctrine of tenures where the Crown was said to have the radical title upon acquisition of sovereignty. The King was deemed to own all the land in England, having, at one point in the past, physically occupied all lands in its territory. Subsequent to this deemed occupation, the King issued grants entitling occupants to certain property rights as tenants to lands. But the doctrine was based on legal fiction since the King was never in occupation of all lands. The radical title however did not vest absolute ownership in the crown or diminish the rights of indigenous peoples where they are already in occupation.²⁰³ Clearly, the position in Sarawak was that the natives were prior inhabitants of much of the areas in the interior, giving them a claim based on occupation.

Recent case law development has clearly established this principle in Sarawak. The Federal Court in *Madeli bin Salleh*, held that upon acquisition of sovereignty, the Crown (and its successors) obtained radical, but not absolute beneficial ownership of land.²⁰⁴ At most, Sarawak holds radical title to lands over which natives exercise NCR.²⁰⁵ In other common law courts in Australia and South Africa, interpretation of statutory provisions similar to s 2 have rejected the

²⁰² Richards, *supra* n 102 at p 6.

²⁰³ McNeil, Kent, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at p 108.

²⁰⁴ [8/10/07] Civil Appeal No 01-1-2006 (Q) (Unreported) 26.

²⁰⁵ *Ibid.*

construction that such statutes extinguish native title. The court in *Mabo (No 2)* said that such a construction “would be truly barbarian”.²⁰⁶

It would be well to consider the proposal by the 1962 Land Committee,²⁰⁷ that s 12 should make it clear that customary rights are to be respected and would not merely be eliminated. This would bring it in line with Instrument of Cession, where the rights of the Rajah and His Government in all lands were transferred to Her Majesty subject to existing private rights and native customary rights.

Sarawak’s statutory authority to extinguish NCR has a significant impact on native communities. Considering the central importance of land to natives as the essence of their community and spiritual life and the key input in their economies, any termination of land rights could cause irretrievable damage to native communities. The only statutory restraints on the extinguishment authority require that compensation be paid to the native owners and the Director provides notice in the *Gazette*, on the notice boards of the Superintendent and District Officer for the area where the land is located, and in the case of NCL, in a newspaper circulating in Sarawak.²⁰⁸ As mentioned earlier, this method may not be that effective and there is no guarantee that the affected parties will receive actual notice of the termination in time to allow them to put in their claims within the stipulated time.

²⁰⁶ *Supra* n 187 at p 48 (Brennan J).

²⁰⁷ *Ibid.*

²⁰⁸ Land Code 1958, s 48(2)(c). Section 15(2)(b) also requires that before signing a deed of surrender, the Superintendent must post a notice in the District Office and “other Government places in the neighbourhood where the land is located” inviting objections to the intended surrender of NCR. The Superintendent must also serve a copy of the notice on the Headman of the area where the land is located. Objectors are given 21 days from the date of the posting in the *Gazette* to submit an objection in writing to the Superintendent. Presumably, the reference to notice in the *Gazette* is the notice required by s 48(2)(c).

The Malaysian courts have held that native title constitutes a property right in and to the land and therefore, constitutes more than a licence to occupy.²⁰⁹ Its status as a full beneficial ownership interest in land is inconsistent with the ability of the state to unilaterally extinguish that interest, as such a broad power implies that native title is “no more than a permissive occupancy which [Sarawak] was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for their traditional purposes”.²¹⁰ If this implication were accepted, native title holders would be deprived of any security since they would be liable to be dispossessed at behest of the executive.

Given the importance of land to the continued economic, cultural and spiritual existence of native communities, it is essential that the power to extinguish native title be subject an effective procedure and to the some form of consultation with the affected community. The absence of meaningful restraints on Sarawak’s power to extinguish NCR exacerbates the existing vulnerabilities and hurdles native communities face with regard to establishing and protecting NCR.

X. The Adjudication of Rights and Approach to the NCR Question – A Question of Policy?

Legally, the unequal status accorded to native title rights *vis-à-vis* non-native property rights is inconsistent with equality provisions of Article 8 and positive protection of indigenous rights under Article 153 the Federal Constitution. It also goes against the non-discrimination in indigenous land rights which is a defining feature of native title law in other common law jurisdictions such as Australia, Canada, the United States, and South Africa as well as under international human rights law. Even assuming native communities successfully establish their NCR, Sarawak’s broad statutory authority to extinguish those rights

²⁰⁹ *Sagong Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591 at p 615.

²¹⁰ *Supra* n 187 at p 90 (Dean and Gaudron JJ).

continues to expose natives to additional risks, as the loss of NCR through extinguishment has the potential to destroy irreplaceable features of cultural, spiritual, and community life, in addition to the loss of property rights.

Many of the problems that have arisen in the determination of native rights stem from the nebulous recognition given to NCR in the Land Code. While s 18 provides for “rights amounting to full ownership”, that right can only be meaningful, if recognition of rights is based on native law and customs on its own merits and not merely through the prism of common law or statute. Along with recognition, there has to be the political will for implementation of an equitable policy. Granted that there is a need to alienate land for agricultural development or other uses, no alienation should dispossess resident natives on land necessary for their livelihood. It is noteworthy that in 1969, Goh Meng Teck, a former Director of Lands and Surveys wrote:

[I]t is the accepted policy of the state government not to interfere with the ways of life of the various native races and to make available for general alienation only land in excess of their minimum requirements. Under the system of shifting cultivation a minimum of 60-65 acres of land is required for each “bilek”.²¹¹

The minimum acreage of 60-65 acres that Goh referred to is a reasonable reflection of what many households or *bilek* would claim under NCR, taking into account the land fallow system practised under customary tenure. Given that NCR claims are based on customary tenure, it is important to re-examine the efficacy of the laws that are applied with regard to native rights today. With regard to practical acknowledgment and implementation of the rights, Land Committee had rightly pointed out that it might well be “more a matter of bargaining and agreement than of any formal decision based on judicial principles.” It would be “a question of policy rather than of law and it will involve

²¹¹ Goh Meng Teck, “Brief on Sarawak Land Tenure System”, Kuching, 31 December 1969.

political and administrative considerations as well as close knowledge of the people concerned".²¹²

Indeed, the appreciation of customary laws and native rights, must involve a proper understanding of their ethnography and must take sociological considerations into account.²¹³ It may be necessary to ascertain the cognitive categories by which they structure their ideas and their notions of rights and ownership, communally and otherwise.

XI. Concluding remarks

It is clear that the ethnographic realities of native occupation defy the stipulations under s 5. An approach based on the written law as the sole and ultimate basis of interpretation of native rights may lead to undue infringement of native rights through its restrictive provisions. As it evolved, the Code was riddled with weaknesses and inconsistencies, particularly as it pertained to native customary rights, which had not been adequately provided for. Clearly, the criticisms made against the Land bill at its inception were not without justification. As the Report of the Land and Survey Department itself stated, the Code was prematurely introduced.²¹⁴ It consolidated the old orders with the addition only of minor improvements "without reference to the real needs of the people most concerned"²¹⁵ and "no formal investigation of the economic situation or the peoples own practices and beliefs in respect of land had been made".²¹⁶ The Code had hitherto existed with all its weaknesses with the rights there under whittled further through successive amendments.

²¹² Richards, *supra* n 102 at p 10.

²¹³ Hooker, MB, "Native Title in Malaysia: Adong's Case" (2001) 3 *Asian Law Journal* 189 at p 206.

²¹⁴ *Annual Report of the Land and Survey Department 1959*, Sarawak Government Printers, Kuching.

²¹⁵ Richards, *supra* n 5 at p 9.

²¹⁶ *Ibid.*

The statutory methods under ss 5(1) and 10 through which natives could obtain documentary proof of use or ownership of land have proven inadequate. Even if a native is able to meet the occupation requirements of s 5(2), he would still be unable to get a permit, given the government's directive that halted the issuance of individual permits to natives in 1964.²¹⁷ Lack of government funding for surveys precludes the possibility of title under s 18, as native owners do not have the financial resources to do their own requisite survey. At the same time, provisional leases have been issued to non-natives over lands in "development areas" on which some native communities claim to exercise NCR or areas which they consider their ancestral lands. This has compelled natives to "prove" evidence of their occupation through a variety of ways, including written "inventories" of their interests, community mapping and the drawing of self-made maps.²¹⁸ It must however be noted that the combined effect of ss 20 and 23 of the Land Surveyors Ordinance 2001, makes it an offence for anyone who is not registered with the Board of Surveyors to represent a map as a cadastral map, possibly nullifying the acceptance of the maps done through community mapping. This is generally perceived as another hurdle which is created against the proving of NCR.

With or without written records, since native rights find their source not in the legislation but in occupation and a long enduring connection with the land, it is submitted that a fair approach to construction of native rights must not only look at the statutes, and common law's recognition of customs but must truly incorporate native concepts to land ownership, to ensure that its rightful status as a proprietary right that is protected by the Article 13 of Federal Constitution. There must be a "pragmatic compromise between traditional indigenous forms and [western] ideas and methods" to

²¹⁷ Zaidie K Zainie, *supra* n 49.

²¹⁸ Some of the ways of establishing these interests and the types of "inventories" are dealt with elsewhere. See Bulan, R, "Boundaries, Territorial Domains and Kelabit Customary Practices: Discovering the Hidden Landscape" (2003) 34 *Borneo Research Bulletin* at pp 18-61.

achieve an equitable interpretation.²¹⁹ In this respect, it is noteworthy that the late RH Hickling, former Acting Sarawak Attorney General wrote:

Here in Sarawak we do not yet know enough of the minds of our law communities ... This may not disclose a defect in our law, but it certainly illustrates a defect in our administration of justice, and one which we seek to remedy not by research which is necessary to arrive at an understanding of justice, but by more and more statute and case law: for we are reluctant to recognize custom and the native mind as an equally proper and valid source of law. Our statutes are applied with all the rigid logic of an ancient western legal system; *we continue to be misled by noises of Leviathan; and we have forgotten the duties of a trustee toward the beneficiaries of his trust.* Our reforms have begun with the administration not of justice but of law; ... not with a comprehensive literature on *adat* law but with a revised edition of the statute law and the increasing complexities, of an ever increasing number of ordinances, rules, regulations and by-laws.²²⁰ (Emphasis added.)

He went further to say:

It is not good enough to pile law upon imported law without giving consideration to those who have laws of their own. The people suffer a diminution of their rights when their rights are denied them and then replaced by a lease. We have gone wrong by starting at the top instead of getting down to the ground and building up from there.²²¹

²¹⁹ Reece, Bob, "The Long Life of Charles Brooke" (2003) 34 *Borneo Research Bulletin* 79 at p 82. Reece wrote that the Brooke *raj* was unique in the degree of indigenous agreement that it won through its pragmatic compromise between traditional indigenous forms and European ideas and methods.

²²⁰ Hickling, "The People and Leviathan (or Adat Law and the State)" (1954) 4 *Sarawak Museum Journal* 163.

²²¹ *Ibid.*

It was in the same vein that Noakes wrote in 1947, of the urgency of “going to the ground to discover what [was] happening”.²²² That need is as urgent a duty today as it was half a century ago. *Adat* remains relevant in the governance and administration of native rights to land. Thus the preservation of the *adat* and the rights imbedded in them, as well as the institutions that support them is important. Failure to appreciate that may result in miscarriage of justice.²²³

It is imperative that the courts understand the ethnographic realities on the ground, to appreciate the oral histories, and to adapt the laws of evidence to give due weight to native intellectual practices, customs and traditions, thus preserving the unique place of natives customs under Article 160 the Federal Constitution, in consonance with safeguards under Article 153 as well as Article 150(6), and s 3 of the “local circumstances” provisio of s 3 of the CLA 1956. It is when indigenou conceptions are given full respect, that a just and equitable value to their traditional lands can be achieved, thereby, upholding the spirit upon which the British colonial government took over Sarawak and the continuing recognition that was part of the negotiated terms upon which Sarawak became part of Malaysia. Integrity requires that this fact be recognised and honour demands that it be upheld, for in as much as these issues involve questions of law and judicial decisions, their implementation primarily involves questions of policy and political will.

²²² Noakes, *supra* n 2.

²²³ As Lamer CJ said in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, it may well be that a trial court may “fail to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims” if there is no discovery of those principles.

Legal Issues Concerning the Transsexual Community in Malaysia†

Sridevi Thambapillay*

I. Introduction

Transsexuality has been considered by many a phenomenon of the late 20th century when functions of the hormones began to be understood and surgical options became technically possible. The word was probably popularised in the late 1940s and 1950s by Dr Harry Benjamin, an American psychiatrist. Transsexuality is a gender identity disorder in which there is strong cross-gender identification.¹

In Malaysia, the local term for male transsexuals is *mak nyah* (ie males who want to be females in every aspect) while and for female transsexuals is *pak nyah* (females who want to be males in every aspect). One of the biggest problems faced by the transsexual community in Malaysia is that of exclusion. They have been frequently overlooked and excluded from decisions that affect their welfare, livelihood and legal status. Prior to 2001, there was no ministry regarded as suitable to look into the problems faced by this community, as a result they were heavily marginalised, under-represented and misunderstood, although the Malaysian Federal Constitution has provided for equality protection in Article 8. Article 8(1) and (2) of the Constitution states the following:

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¹ See “Transsexuality – An Evangelical Christian Response”, <http://www.ncf.org.my/news.print.cfm?&Menuid=12&action=view&retrieveid+658>, accessed on 8 November 2006.