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INDIGENEITY AND LAND DEMARCATION:
INCORPORATING STATUTORY AND CUSTOMARY RIGHTS

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OUTLINE

- Legal Pluralism
- Native Customary Land Rights Sourced in Plurality of Laws

Questions for discussion:

- Does the declaration of Native Communal Reserve under section 6 of Sarawak Land Code protect native land rights?
- Would proper demarcation be an adequate safeguard for customary tenure? If so what form should this take?
- Would perimeter survey under s 6 deprive individual natives/ families of their native customary lands and change it into state land?
- Does declaration of Native Communal Reserves extinguish NCR in the NCRes.

MULTI-JURIDICALISM/ LEGAL PLURALISM IN MALAYSIAN LEGAL SYSTEM

Application of more than one source of law in one legal system:

Art 160 Federal Constitution -

Law includes:

- **Written law** (Acts, Ordinances, Enactments)
- Principles of **common law** (judge made laws) and equity, and
- **Customs** and usage having the force of law.

LAW AND ITS APPLICATION TO NATIVE LAND RIGHTS

Definition of Law:

Written law

Common law

Customs and usages

International laws/ human rights laws as
applied in domestic courts

Sources of Native Land Rights

Written law

Common Law

Native law and customs / including
codified Indigenous legal traditions

International human rights laws

Natural laws- indigenous observations of
the physical world around them

UNSURVEYED LANDS – “STATE LAND”

The Land Code 1958 –
consolidates all laws in force 1957 and
took effect on 1.1. 1958

S 44 SLC : “No rights to land may be
acquired save in accordance with the
Land Code”

Section 2 SLC- All lands without
document of title is state land

Hwv- SLC does have provisions for
Native Customary Lands



PERIMETER SURVEY



- Statements by 2nd Minister Finance (Borneo Post – Oct 2016)

Phase One : Gazettement of communal lands

Phase Two: Title under s 18

Note: Until there is a documentary title – it remains state land.

WHAT EARLIER AUTHORITIES HAVE SAID

“The whole of the land law in Sarawak has and is based on the fundamental necessity for protecting native interest”

Editor, Sarawak Gazette, 1 April 1947

- 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 tenure which will prove an adequate safeguard of those rights we are pledged to maintain.
- J.L. Noakes, Land and Customs', *Sarawak Gazette* (1947) 164 (Noakes was Superintendent of Lands

WRITTEN LAW: CLASSIFICATION OF LANDS IN SARAWAK

Sarawak Land Code 1958 (Kanun Tanah Sarawak 1958)

Classification of Lands (Jenis tanah di Sarawak)

Section 4 SLC:

- Mixed Zone (anyone can hold title - native and non natives)
- Reserve Land – Government reserve
- Native Area Land – with documentary title (only for natives)
- Native Communal Reserve – to be gazetted under s 6 (only for natives)
- Interior Area Land (IAL) – no documentary title to be given
- Native Customary Land – may be created on IAL (only for natives)

EARLIER EFFORTS AT SURVEYING AND REGISTRATION OF LANDS

- 1930s –Started triangular survey but not completed - no staff for executing the work of recording boundaries and registration - little was done.
 - Order L-7 required all dealings to be registered in a Land Registry “on pain of nullity”
- .However Order L-7 fell short of one basic essential principle required of contemporary land registration –no indefeasibility of title .

SURVEYING OF LAND AND CREATION OF NATIVE COMMUNAL RESERVES UNDER S 6

Land Code 1958: Section 6

- Native Communal Reserve
- Created for a community with a **native personal law**
- Governed by the **customary laws of that community – in terms of acquisition, transfer etc,**

PROCEDURE

- Community applies to the Land & Surveys Department
- Land area is surveyed for benefit of a named community
- Director of Land & Survey gazzetes land as a communal reserve
- May be degazzeted by an order of the Minister

CONDITIONS FOR SURVEY OF LAND TO BE DONE

Application to be made by the community

- Basis of survey: Delimitation based on Aerial map of 1958
- No dispute with the government, intra community or between community members
- Community members to assist on the ground
- First step: perimeter survey
- Next step: members may apply for issuance of individual titles (in perpetuity)

SECTION 6: DETAILS

S6(1) Minister signifies in the Gazette

- Declares any area of State land to be Native Communal Reserve -for use of a native community
- Section 6(2): Regulated by the customary laws of the community - in relation to acquisition, transfer, and transmission , rights and privileges
- Section 6(3): Land continues to be held as licensee of the state
- Section 6 (3): If any individual native customary rights established – issue of document of title is the absolute discretion of the Director
- Provided the MINISTER may of his own motion or petition review or confirm/amend that discretion
- S 6(4): Land may be taken for public purpose – subject to compensation
- S 6 (5): May apply Part V SLC – procedure for settlement of rights

SOME STATEMENTS & POSITIONS ON IMPACT NATIVE COMMUNAL RESERVES AND ITS PERIMETER SURVEY

Eg. Statement in the Borneo Post

- Section 6 is to give lands to landless natives.
- Lands declared as Native Communal Reserves become state land – “down graded from proprietary rights under NCR to being mere licencees on the land “ - this injustice cause hardship and irretrievable damage.
- *Is this a correct statement of the law?*

CHARACTER OF NCR UNDER THE LAND CODE

S 5(1): As from 1st January 1958 NCR S5 (1): NCR may be created after 1.1 1957 over Interior Area Land upon a permit issued under s 10 of the Land Code ,

OR

where **native communal reserve is declared under s 6** of the SLC (see S 2)

S 5 (2) (i) Native lawfully in occupation holds by **licence from the government unless and until a document of title is issued to him under s 18.**

NATIVE CUSTOMARY LAND

When NCR is created on Interior Area Land it is called Native Customary Land.

Native Customary Land under s 2 includes :

- NCR whether **communal or otherwise**
- Lawfully created prior to 1.1 1958 and still subsists;
- Land comprised in a **communal reserve** under s 6

After 1.1 1958 – NCL is

- Interior Area Land upon which NCR has been created under a permit granted by the Superintendent of L & S under s10
- **OR communal reserve under s 6**

CREATION OF NCR ON INTERIOR AREA LAND UNDER S 5 OF THE SLC

S 5 (1) NCR May be created in accordance with native customary law of the community

S 5(2) Methods NCR may be acquired:

- (a) The felling of virgin jungle and occupation of the land
- (b) Planting of land with fruit trees
- (c) Occupation of cultivated land
- (d) Use of land for a burial ground or shrine
- (e) Use of land for rights of way
- (f) Any other lawful means (*deleted in 2000 but not yet enforced*)

S5 AND S 6 COMPARED

- Section 5
- Prove NCR – Evidence of Amug, (temuda) traditional occupation, settlement sites, burial grounds,

Native Customary Land

- Natives are **Liscencees**
- S 5(4) May be **terminated** / resumed/extinguished by the state ? **Yes.** (See s15)
- Silent on public purpose (but see *Bato Bagi v Sarawak Govt*)
- Subject to compensation (Art 13)

- Section 6
- Does not require s 5 evidence. (eg. Long Peluan) Gazette State land as communal Reserve – to be regulated by customary law of the community,

Native Customary Land

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- S 6 (4) May be **extinguished? Yes .**
- For public purpose (see s46)
- Subject to compensation (Art 13)

CHALLENGES IN PROVING OCCUPATION

- Courts have declared natives have pre-existing rights based on customary laws and common law –subject to proof of occupation
- Government perimeter survey towards gazettelement of communal reserves – based on aerial photographs / aerial maps before 1958. Does not take into account other evidences on the ground
- Suggest: L & S need to consult community on the ground –in some places not done satisfactorily
- Allow for evidence based surveys-

SAGAU BATU BALA V ZAHARAH

- Court of Appeal statement:
- Lands Reserved under s 6 are state lands not NCR land
- Referring to s6(3) – parties are licencees “ No one member has monopoly over any area of land that has been declared as native reserve pursuant to s 6(1) **even if he has acquired NCR over the land .**

QN: DOES A DECLARATION OF NATIVE COMMUNAL RESERVE EXTINGUISH NCR RIGHTS ON THE LAND?

- **When does Extinguishment occur?**
- Rights may be extinguished but by clear and unambiguous words in a legislation or directives
- NCR do not owe existence to statutes – legislation is relevant to determine how much of those NCR has been extinguished.
- NCR can only be extinguished in accordance with laws and after payment of compensation
- Declaration on NCRes is not an alienation of state land and thus does not fall under s15 which requires extinguishment

- In conclusion, the declaration of the native communal reserve does not extinguish the pre-existing NCR on the land.
- Thank you for listening.