

Situating Native Customary Rights (NCR) to Land in Sabah and Sarawak within the Federal Constitution

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(Paper delivered at the Conference on Legal Pluralism and Indigeneity in Sarawak and Sabah, Dayak Cultural Foundation, Kuching, 7 August 2024)

Situating native land customs in Sabah and Sarawak within the legal system

- The highest law of the land, the Federal Constitution, defines law to include “any custom or usage having the force of law”(art 160(2)), embodying Malaysia’s history of legal pluralism
- Despite specific legal recognition of native land laws and customs in Sabah and Sarawak, adequate protection and regard for native customary lands and resources remains a perennial issue for local native communities in Sabah and Sarawak
- This paper examines the constitutional and legal place of native land customs within the Federal Constitution and beyond
- Reference will be made to:
 - (i) the constitutional arrangements and safeguards for Sabah and Sarawak in the Federation of Malaysia’s formation;
 - (ii) The entrenchment of English property law concepts in Sabah and Sarawak’s formal legal system;
 - (iii) judicial developments on the subject as expounded in the Federal Court decisions in the *TR Sandah* case; and
 - (iv) more recent legislative action in Sarawak to address perceived legal gaps in the recognition of native land customs

Constitutional arrangements

- Paragraphs 22, 26(4) and page 41 of the Report of the Inter-Governmental Committee on the Proposed Federation of Malaysia (RIGC), the document that sets out the future constitutional arrangements and safeguards for North Borneo (Sabah) and Sarawak, encompasses specific protections in relation to land, composition of the apex court and native law and customs (International Legal Materials , MAY 1963, Vol 2, No 3 (MAY 1963), pp 423-463)
- In respect of land, para 22 contains specific proposals for amendments of the Malayan Constitution to ensure that the governments of Sabah and Sarawak maintain their jurisdiction and a high level autonomy in relation to land, agriculture and forestry matters (these can be seen in arts 88 (additional rights of consultation in relation to Federal action in respect of domestic land) and art 95E (exclusion of States of Sabah and Sarawak from national plans and policies for land utilization, local government, development and with potential for inclusion through governmental concurrence) of the Federal Constitution)
- In respect of the judiciary, para 26(4) states “at least one of the Judges of the Supreme Court should be a Judge with Bornean judicial experience when the Court is hearing a case arising in a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State”
- Annex A sets out the intended legislative lists to accommodate Sabah and Sarawak and provides for specific matters within the exclusive constitutional purview of the state governments including: (i) native law and custom and native courts, including personal law relating to marriage, divorce, guardianship, maintenance, adoption, family law, gifts or succession, testate or intestate; (ii) land and (iii) agriculture and forestry. This can be found in Ninth sch List IIA item 13 (native law and custom and courts (applicable to Sabah and Sarawak only) and Ninth Sch List II items 2 (land) and 3 (agriculture and forestry)

Native land laws and customs: recognised but secondary?

- Three observations:
 - (i) Native law and custom did not merit an express paragraph in the main text of the RIGC;
 - (ii) State powers - land, agriculture and forestry matters treated separately from native law and custom suggesting that the scope and extent of “authorised” native law is at the discretion of the state government; and
 - (iii) the limited jurisdiction of the native courts particularly in respect of land disputes involving the state or non-native interests (in early commentary on the Malaysia Act, Groves (1963) described the customary courts in Borneo to be of “negligible significance”)
- Despite the recognition of native law and customs, the structural and institutional framework in both jurisdictions permit native land customs to be subordinated to state land laws

The dominance of the English legal system

- Prior to these constitutional arrangements, both states were under British rule where English or like laws were imposed on society albeit with some recognition of local laws and customs
- The colonial administration instituted a system of legal pluralism where selected native customary laws were supported, while those hampering commercial land exploitation were replaced with western legal concepts (Doolittle 2005)
- Accordingly, the contours of legal pluralism in respect of land have been largely viewed from State rather than Indigenous perspectives and priorities (Bulan (2007) Doolittle (2005); SUHAKAM (2013); Subramaniam (2018))
- “State” priorities in this sense would be to create, maintain and preside over an orderly land classification and regulation system that would facilitate commercial expansion and the extraction of natural resources in accordance with the agenda of the government
- Accordingly, land and resource laws during the lengthy colonial period and beyond have tended to recognise selected native customary rights, bridled by state powers to determine and extinguish such rights

Primacy of English property law concepts in State legislation (1)

- English property law concepts form the basis of property and resource laws in Sabah and Sarawak today (Doolittle (2005); SUHAKAM (2013); Subramaniam (2018))
- Of note are the concepts of “radical title” and the doctrine of extinguishment, concepts traditionally alien to many native communities
- “Radical title”, a term that has evolved from Anglo-Norman feudal tenure and adopted locally, vests the underlying or ultimate title to all lands within the state in the government, grants the Crown or the State authority the power to alienate others from land and to transfer beneficial ownership of the land to itself or others (but by itself does not grant beneficial ownership)
- Statutory manifestations of the radical title of the state can be seen in the principal land laws of Sabah and Sarawak and their predecessors, that were promulgated during the colonial era prior to the formation of Malaysia (see eg s 12 of the Land Code 1958 (Sarawak); Section 5 of the Land Ordinance 1930 (Sabah); s 39 of the Forests Ordinance 2015 (Sarawak) and ss 12(3) and 38(5) of the Forest Enactment 1968 (Sabah))

Primacy of English property law concepts in State legislation (2)

- The vesting of radical title in the state enables the state government to classify and alienate land located in its jurisdiction, including determining native customary land interests
- The common law doctrine of extinguishment or delimitation of native customary rights through plain and obvious words in legislation is also embodied in domestic written laws (see for example, s 5(1) of the Land Code 1958 (Sarawak) in respect of the creation of NCR after 1 January 1958; s 5(3) of the Land Code provides for the extinguishment of NCR by ministerial directive; Forests Ordinance 2015 (Sarawak) contains extensive provisions for the executive extinguishment, regulation and admission of rights and privileges within areas proclaimed to be forest reserves and protected forests; s 22(6) of the Forest Enactment 1968 (Sabah) enables the extinguishment of all rights and privileges within an area declared to be a forest reserve)
- Consequently, native land customs in Sabah and Sarawak, developed by local communal norms and decentralised arrangements, have been in an inferior legal position compared to the centralised state powers over lands and resources since the introduction of the contemporary land regulation through colonial rule

State legal control through codification

- Limitation of NCR to land has also occurred through the legal codification process that curbs the fluidity of native customs to land and conceptualises NCR in a manner aligned with the central and formal governmental hierarchy and institutional framework, enabling native customary rights to be moulded and eroded in accordance with state priorities (see for example, the statutory definition of NCR (s 15 of the Land Ordinance 1930 (Sabah)) that does not cover the broader native customary territories and less sedentary activities; s 76(1) where legal control of native communal title is vested in the Collector of Land Revenue; Section 21 of the Forests Ordinance 2015 (Sarawak) and s 12(4)(b) of the Forest Enactment 1968 (Sabah) enabling state control of rights rights admitted and privileges conceded within any forest reserve and protected forest)
- While the contemporary land and resource regulation system in Sabah and Sarawak has accommodated and modified selected native customs to land, it has relegated native *adat* to a part of the dominant English-derived legal system rather than a distinct system of law and in many respects, continues to do so
- Such an outcome would have been near impossible without the co-option and cooperation of Indigenous elites (Colchester (2011)), whose authority had been officially recognised and reinforced over time, and became “increasingly independent of, unaccountable to, and detached from, the community members over whom they had authority and whose interests they were expected to represent” (Hooker (1980))

Judicial curtailment : *TR Sandah* (2016) and *TR Sandah* (2019)

- In *Madeli bin Salleh* [2008] 2 MLJ 677, the Federal Court decided that the Malaysian common law recognises and protects the pre-existing customary rights of natives to their customary lands and resources without the need for executive or legislative sanction (see also *Nor Anak Nyawai* [2006] 1 MLJ 256 – intersection between common law and customary laws)
- Subsequently, the Federal Court decisions in the *TR Sandah* case curtailed this right and the broader intent of the RIGC on Bornean judicial participation in appeals arising in a Bornean state
- In *TR Sandah* [2017] 2 MLJ 281, the Federal Court determined by a majority that the common law recognition of NCR to land in Sarawak or, specifically, Iban customary rights, did not extend to the broader native customary territory (*pemakai menoa*) and forest reserved for food and forest produce (*pulau*), because these customs were not contained in any of the legislation and executive orders in Sarawak – a narrow interpretation of the phrase of “having the force of law” in art 160 of the Federal Constitution

Judicial curtailment : *TR Sandah* (2016) and *TR Sandah* (2019)

- The natives reviewed the decision mainly on the basis that the Federal Court was effectively split 2:2 on the common law question and there was no judge with Bornean experience that heard the appeal and lost the review by a majority of 4:1 (see *TR Sandah* [2019] 6 MLJ 141)
- The first main ground was dismissed on the basis of the need for finality in litigation and that the ultimate overall order made was by a majority of 2:1 (cf dissenting judgment of David Wong CJSS)
- The second argument to have at least one judge of “Bornean judicial experience” was an attempt to underscore the existence of two separate political communities (Peninsular Malaysia and Bornean Malaysia) having different cultural, religious and historical roots
- Applying the case of *Keruntum* [2018] 4 MLJ 145, the majority took the narrow view and held that paragraph 26(4) of the IGC Report on the inclusion of a judge with Bornean experiences as it “was never implemented by an express provision in the Constitution nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak” (cf David Wong CJSS)
- If native law is really to be specially protected, then, as with the syariah courts, the final authority should be judges familiar with the legal tradition in question (Harding 2016)
- Chua (2020) observes that the participation of judges from the Bornean state adheres to the spirit of federalism and the setback to the strong argument for having a judge with Bornean experience may suggest that Malaysian federal governance is one of centralisation

Limitation of native land customs by statute: The case of the 2018 Sarawak Land Code amendments

- In response to the Federal Court decision in *TR Sandah* , the Sarawak state government amended the Sarawak Land Code 1958 to recognise the approximates (see definition of “usufructuary rights” (s 2) added by the 2018 amendment) of the *pemakai menoa* and *pulau galau* land customs
- The new s 6A, that was inserted by the amendment, recognises native communal claims for usufructuary rights within native territorial domains where successful claims result in the issuance of a native communal title to be held in trust for the native community
- However, the proviso to s 6A(2) limits the spatial extent of these claims to 1000 hectares and enables the State executive (through either Superintendent of Land and Surveys who determines claims for such areas not exceeding 500 hectares or the relevant Minister, with the approval of the State Exco, who can allow claims up to one thousand hectares
- The arbitrary ceiling cap of 1,000 hectares severely limits legally recognisable NCR to land as there are many cases where the *pemakai menoa* or *pulau galau* exceeds 1,000 hectares (the appeals in *TR Sandah* involved areas of 2,712 and 4,270 hectares respectively)
- This development suggests the continued regulation, limitation and moderation of native law customs in a manner that subordinates them to written law

Conclusion

- Like many other colonial jurisdictions, the English-derived constitutional and legal system in Sabah and Sarawak has functioned to subordinate the status of native land laws and customs to a source of law that requires state sanction or “authorization”
- The fact that these states are now governed by natives themselves has not alleviated the status of native land laws to parity when pitted against the dominant legal system
- The refusal of the Federal Court to consider diversity in local context as a justiciable factor in *TR Sandah* may well constrict the prospects for legal pluralism in Sabah and Sarawak
- In the end, the formal legal system has enabled the state to determine its own agenda for land regulation that continues not to prioritise legal pluralism
- Notwithstanding the skew towards legal centralism ie the State being the sole source of the law and other systems being subordinate, the Sabah and Sarawak state governments possess wide powers and autonomy over matters relating to land and native customs
- Should there be the state and political will to do so, the existing legal system has the capacity and potential to better accommodate native land laws and customs