
NATIVE CUSTOMARY LAND RIGHTS IN SABAH

I. Introduction

Native customary land rights in Sabah are an integral part of the land laws as provided for under the *Land Ordinance*¹ (hereinafter referred to as “the Ordinance”) which is a principal source of substantive land laws in Sabah . This paper looks into the ingredients of native customary land rights and the importance placed on them that reflect the ways of life of the indigenous peoples of Sabah or as they are aptly and legally referred to, the natives² of Sabah.

II. Brief historical background

Long before any colonial administrator set foot on the soil of Sabah, then known as North Borneo, there existed, since time immemorial, native customary laws which have immense influence on local communal tribes and essentially guided the daily lives of the natives. When the British North Borneo Company acquired the various territories which now comprise the present day state of Sabah from the Sultan of Sulu beginning in the early 1800s until 1881 the new administrators considered it imperative to recognize the significance of such native customary laws. Recognition of these native customary laws was later incorporated as and enshrined under Article 9 of the *Royal Charter* which was granted by the British Crown on 1st November 1881. Article 9 of the Charter specifically provided that-

¹The *Land Ordinance* (Cap. 68) Revised 1996 was enacted in 1930.

²In this paper the term “native” is used to refer to the various indigenous tribes.

"In the administration of justice by the Company to the people of Borneo, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of land and goods, and testate or intestate succession thereto, and marriage, divorce and legitimacy, and other rights of property and personal rights."³

Thereafter, during the colonial administration, a number of legislation specifically relating to or directed at native affairs were introduced. Following such historic recognition, the British North Borneo Company passed what might be the first written law that specifically dealt with rights of the natives over land entitled the *Native Rights to Land Proclamation* of 1889 with the preamble "for the protection of Native Rights to Land". Earlier, a statute entitled *Poll Tax Proclamation* of 1886 also dealt with native lands. In 1902, the *Abolition of Poll Tax Proclamation* abolished the 1886 proclamation. The 1902 legislation was a code of native land tenure which made native land rights registrable and provided for the procedures regarding the practice of cultivation. The *Native Rights to Land Proclamation* of 1889 read together with the 1902 legislation was to form the basis for the introduction of the *Land Ordinances* of 1901, 1913 and 1930 culminating in the renaming of the 1930 legislation as *Land Ordinance* which has retained most of the provisions of the 1902 legislation.⁴ The Ordinance was then revised in 1996 with the insertions of all amendments which were in force up to 31st January 1996. Part IV of the Ordinance deals, *inter alia*, with customary tenure⁵ and native claims.⁶

The *Native Rights to Land Proclamation* of 1889 described native rights in land as-

- (a) land under cultivation or land used for housing;
- (b) land planted with fruit trees at a rate of twenty or more per acre;
- (c) isolated fruit trees if enclosed by a fence;

³Article 9, Royal Charter.

⁴Cap. 68.

⁵Sections 65, 66 and 69.

⁶Section 81.

- (d) grazing land stocked with animals;
- (e) wet and dry padi land so long as it was cultivated for at least three years prior to registration;
- (f) burial grounds; and
- (g) rights of way.

This description of native rights in land has been retained, with slight modification, in the Ordinance.

III. Native customary land rights

What constitute native customary land rights? Sections 15 of the enumerates what may constitute native customary rights as follows-

- (a) land possessed by customary tenure;
- (b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
- (c) isolated fruit trees, and sago, rotan, or other plant of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;
- (d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;
- (e) land that has been cultivated or built on within three years;
- (f) burial grounds or shrines;
- (g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

Under this description, a native who has a claim over land needs only to establish any one of the above rights. To do this, he must submit his claim in writing directly to the Collector or through the headman of his village.⁷ The Collector then registers his claim and the claims by other natives, if any, and, thereafter, decides whether such customary rights existed or otherwise. Section 13 of the Ordinance provides for an enquiry as to native rights if an application for a parcel

⁷The Land Ordinance, section 14.

of unalienated land is received. If no contrary claim is made the application can be processed without difficulty and a title eventually issued. If however a contrary claim existed, then the application is rejected or dealt with under section 15 of the Ordinance either by (a) the payment of monetary compensation or (b) a grant of Native Title to the successful claimant.

A. Customary tenure

Land possessed by customary tenure, appear to be the most important ground for establishing native customary rights enumerated under section 15. As a matter of practice, a native may be able to establish the other rights mentioned earlier⁸, but if he fails to establish customary tenure or makes a claim based on the other grounds then his claim may be prejudiced especially if there are other claimants over the same piece of land. This seems to be the effect of section 15 even though, it is submitted, the description should be read disjunctively.

What then is customary tenure? Section 65 of the Ordinance defines customary tenure as meaning-

the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years....

Customary tenure confers upon a native a permanent heritable and transferable right of use and occupancy in his land...⁹. A native who establishes customary tenure acquires an indefeasible interest in the land even if he does not hold a documentary title to it.

Customary tenure is subject, however, to prudent management as may be prescribed by the Collector¹⁰. An owner or claimant is liable to render free labour in the interest of himself and community when required by the Native Chief or the Headman of the village to which he belongs.¹¹

⁸ *Ibid.*, section 15.

⁹ *Ibid.*, section 66.

¹⁰ *Ibid.*, section 66(a).

¹¹ *Ibid.*, section 66(b). The vernacular term for community work is "mogitatabang" (kadasandusun word) or "gotong-royong" (malay).

Having established customary tenure, the claimant ought to apply for a documentary title as he may be required to do so by the Collector in any case.¹² Therefore, the issuance of a Native Title over land is dependent upon a native successfully establishing customary tenure over such land.

B. Native title

While a native title may be acquired by the process described above it may also be acquired through the usual procedure of applying for unalienated land under section 70(1) of the Ordinance. Land applied through the latter must not exceed twenty hectares and the usage of the land is solely for agricultural purposes. Upon approval of such application, *bona fide* cultivation must be done within six months and cultivation of the whole area to be completed within three years. If the landowner fails to comply with these conditions the Government may re-enter the uncultivated portion of the land.

It may be implied, however, that a land application for unalienated land is subject to an enquiry as to native customary rights before such land is approved to the applicant.

C. Communal native titles

The Ordinance also provides for the conferment of collective native customary rights by way of customary tenure over land to a native community if such native customary rights cannot be assigned to an individual native. Such provision is contained in section 76 of the Ordinance as follows-

In cases where a claim to customary tenure of land has been established or a claim to native customary rights has been dealt with by a grant of land and such land is held for the common use and benefit

¹²*Ibid.*, section 67(2).

of natives and is not assigned to any individual as his private property it shall be lawful for the Minister to sanction a communal for such land in the name of the trustee for the natives concerned but without power of sale such communal native title shall be held to be a title under this Part, but shall be subject to such rent as the Minister may order.

Instances of where such communal native title may be found are villages without demarcated individual boundary, grazing land for cattle and other domesticated animals or burial grounds or shrines. Land held by natives through a communal native title may be sub-divided and assigned to individual owners of that particular community.

IV. Restrictions on native titles

Under section 17(1) of the *Land Ordinance* "all dealings in land between non-natives on the one hand and natives on the other hand are... expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law...". Such dealings relate to sale and purchase, sublease, creation of trust, grant of power of attorney¹³ or any transaction of whatever nature by which land is affected under the Ordinance. The restriction does not cover a charge of the land in favour of any bank, financial institution or body corporate approved by the Yang di-Pertua Negeri.¹⁴ The restriction may be waived by a written consent of the Minister. The rationale behind this restriction appears to be to protect native lands and, presumably, native customary rights from being converted and transferred to non-natives. Section 17, therefore, conforms with the protection afforded to natives during the inception of the colonial administration. It is submitted that without such restrictions, Part IV of the Ordinance would probably become redundant and superfluous.

¹³It is doubtful if the grant of a power of attorney could be considered a "dealing" if it merely confers upon the non-native the power to do an act on behalf of the native without any substantial benefit to the attorney.

¹⁴Previously, the governor.

A. Exceptions to restrictions

In the quest for more derivative economic benefits from land held by natives, certain amendments to the Ordinance had been introduced by the State Assembly. Firstly, the amendments provide for an opportunity for the sale and purchase of native land between a non-native and native on the condition that the native title is to be surrendered and a country lease or town lease would be issued by the Government to the non-native purchaser. Such lease however, involves premium and rent.¹⁵ Secondly, banks and financial institutions or a body corporate may accept native titles as security or collateral for loans.¹⁶ Sublease of a native title to a non-native is allowed for a term not exceeding 99 years.¹⁷ Section 17(5) has recently been amended to reduce the sublease to a period not exceeding 10 years and to require an approval from the Minister if the sublease exceeds such period.¹⁸

V. Conclusion

In conclusion, there are ample provisions for the conferment of native customary rights in land to natives in Sabah. There are equally adequate protection against the transfer of native titles to non-natives. It cannot be denied that these provisions can be, and had been, circumvented but not without risks of the dealings being challenged by any member of the family of the native vendor or donor.¹⁹ In particular, section 17(5) has attracted a number of subleases at such a low rental which benefits the native title holder albeit only in the short run. Be that as it may, generally, the Ordinance as well as the other legislation

¹⁵*Land Ordinance* (Sabah Cap. 68) Revised 1996, section 12(2).

¹⁶*Ibid.*, section 17(4).

¹⁷*Ibid.*, section 17(5).

¹⁸The amendments are pending ratification by the Yang Di-Pertua Negeri (the head of state).

¹⁹A native who holds a country lease or town lease may dispose of his land to whomever he wishes or execute a power of attorney without any restriction.

relating to native affairs have, so far, worked well within the framework of the federal form of government in Sabah.

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