NATIVE CUSTOMARY RIGHST (NCR) OVER LAND IN SARAWAK, MALAYSIA

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1. Native Customary Right (NCR), legal definition and recognition.

Native Customary Right (NCR) is not defined in the present Land Code (Cap. 81) 1958, Sarawak, (hereinafter referred to as the "Code") but Native Customary Land is. Section 2 of the Code defines **Native Customary Land (NCL)** to mean:

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

The definition under (b) and (c) is not an issue and will not be elaborated in this paper. Suffice it is to state that under (b) above, it is an area of land gazetted by the Minister under section 6 of the Code as Native Communal Reserves for a specific native community with certain guidelines as how the said community would exercise their rights therein. Once created, it will not be disputed as it has been gazetetd accordingly. Under (c) above, the Natives could only occupy Interior Area Land upon the issuance to him of a valid permit by the Superintendent of Lands and Surveys pursuant to section 10 of the Code. This is not an issue because once a permit is granted; no one can dispute the occupation of such land by a native. What had become a hotly debated issue through the years is the definition under (a) above i.e. ***"land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January 1958 and still subsist as such".***

The definition (a) expressly provides two main criteria:

i. That it states a cut-off point by which a native has to prove the creation of NCR; i.e. before the 1st day of January 1958. (If a native creates NCR over land after 1958, it must be with a permit under section 10, as provided for under section 5 of the Code).
ii. That the said NCR Land can be created and therefore claimed by a community or an individual.
iii. That it subsists as such until today.

Section 5, of the Code states six methods by which NCR can be created after 1st January 1958:

(a) the felling of virgin jungle and the occupation of the land thereby created;
(b) the planting of land with fruit trees;
(c) the occupation or cultivation of land;
(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or
(f) any other lawful method.

Under definition (a) above, the area of land claimed as NCL usually has no title. But a native can apply for a title from the Lands and Surveys under section 18(1) of the Code if he can satisfy the Superintendent that he has occupied the said land in accordance with rights acquired by customary tenure amounting to ownership of the land for residential or agricultural purposes. A ***grant in perpetuity*** will normally be issued out to the applicant native. Section 18 states as follows:

> **"18. (1) Where the Superintendent is satisfied that a native has occupied and used any area of unalienated State land in accordance with rights acquired by customary tenure amounting to ownership of the land for residential or agricultural purposes, he may, subject to section 18A, issue to the native a grant in perpetuity of that area of land free of premium rent and other charges."**

If a title is not issued out yet to a native in such a case, he is still deemed in law having the right but his position is referred to in law as a **"licensee"**. This is provided for under the proviso (i) to section 5 of the Code which states:

> **"(i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him."**

It must be noted here that, although a native is deemed holding on licence, his status is not as a bare licensee but his right is equivalent to having a title. He has legal rights which cannot be taken away summarily without express provision of the law and that compensation must first be paid in the event his NCR is taken away or extinguished. The express provision of the Code pertaining to this matter is section 5(3) which states that "Any native customary rights may be extinguished by direction issued by the Minister". The said extinguishment shall be published in the Government gazette and one newspaper circulating in Sarawak; and exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished, is situated. Within 60 days of such publication, any native having claim of NCR may filed his claim which will be determined by the Superintendent for the purpose of compensation. Any native unsatisfied with the decision of the Superintendent may request for the matter to be referred to an arbitrator under section 212 of the Code.

Secondly, section 15 of the Code expressly provides too that ***"Without prejudice to sections 18 and 18A, State land shall not be alienated until all customary rights therein have been surrendered or extinguished or provision has been made for compensating the persons entitled to such rights."*** From this section, it is also to be noted that NCR can exist on an area designated as "State Land". This is one of the areas of great contention and misunderstanding. It is the view of some people in the relevant authority that once an area is State Land, no NCR could exist. State Land is defined simply under section 2 of the Code as *"...all land for which no document of title has been issued and all land which subsequent to the issue of a document of title may have been or may be forfeited or surrendered to or resumed by the Government,.."*

The second proviso to section 5 of the Code further added *that "the question whether any such right (NCR) has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January 1958."* Although the methods of creating NCR is stated expressly under section 5 (2) of the Code as referred to earlier, those methods are not the method stated in the law in force immediately prior to the 1st day of January 1958. Reading closely section 5(1) of the Code, those six methods appear to refer to the creation of NCR after 1st day of January 1958. The law applicable before 1st January 1958 is section 66 of the Land Settlement Ordinance 1933, where NCR is recognized in respect of:

(a) ***land planted with fruit trees,*** when the number of fruit trees amounts to twenty and upwards to each acre;

(b) land that is in continuous occupation or has been cultivated or built on within three years;

(c) burial grounds or shrines;

(d) usual rights of way for men and animals from rivers, roads or houses to any or all of the above.

The important phrases in the above section are "***land that is planted with fruit trees", "land that is in continuous occupation" or "has been cultivated" or "built on" or "burial grounds"*** because these are the evidences that one must prove in NCR claim.

2. Problems Related to NCR claims

i. Although the law recognizes NCR claim by customary tenure, it throws the onus or burden on the natives to prove their claim. This can be difficult but not impossible. The difficulty arises because bulks of the NCL in Sarawak are not issued with titles. One of the main reasons given by the Government for not able to issue titles is lack of fund to survey these lands. Government publicly acknowledges that there are 1.6 million hectares of land under NCL in Sarawak, but these areas are not identified. Therefore, when loggers and planters of oil palm or trees are issued with licence or provisional leases, the Natives are at a disadvantage when faced with these loggers and planters as the natives have no document to prove their claim of NCR.

ii. The Government's definition and/or understanding of NCR claim is only restricted to cultivated area or farmed area locally referred to as ***"temuda"*** which must have been cultivated or farmed before 1st January 1958. On the other hand, the natives believe that their NCR claim goes beyond their ***"temuda".*** It includes their communal lands or territorial domain locally referred to as ***"pemakai menua"*** and the "**reserved virgin forests**" within their ***"pemakai menua"*** locally referred to as ***"pulau". "Pulau"*** is preserved or reserved specifically to meet the domestic needs of the natives. Normally this is an area abundant with timber for boats, house, different kinds of fruit trees, jungle produce with medicinal value, a hunting ground, fishing ground etc to cater to their daily needs. (But see the landmark decision in ***Nor Nyawai's Case*** discussed below

where ***"pemakai menua"*** and "***pulau"*** had been declared and recognized as NCL).

iii. Because of such different in understanding of what constitutes NCL or NCR, logging licenses and provisional leases are issued out covering ***"pemakai menua"*** and "***pulau"*** of the natives in Sarawak. Because of this differing views, the matter always end up in Court for determination. (Since 1988 my legal firm had taken up 123 cases of NCR claims, majority of which are still pending in the High Court of Sarawak).

3. Case Laws on NCR

Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769.

- **Facts of the case**

This is a representative action on behalf of an Iban longhouse in Sarawak, Malaysia who took legal action against the Defendants which includes the State Government of Sarawak over their Native Customary Land ***(pulau)*** having been included in a provisional lease (PL) granted to the 1st defendant for the planting of trees (acacia). The plaintiffs complained that their said Native Customary Land (NCL) was included in the area under the PL. The plaintiffs claimed that such inclusion of their said NCL was unlawful and illegal because no extinguishment of their NCR in accordance with the Land Code, Sarawak was ever done. They pray for the exclusion of their said NCL from the said PL. In the trial the Court has to examine the rights (NCR) of an indigenous Iban in relation to the lands and its resources to which they had no documentary title (NCL), and the recognition of the common law for the pre-existing righst under native or custom. The dispute also called for a consideration of whether the various legislation throughout the period traversing the reign of the Sultan of Brunei before 1841 through to the time when Sarawak joined with the other states to form Malaysia in 1963 had extinguished those native rights and whether those rights were ever exercised in the disputed area. Amongst other things, the defendants argued that the plaintiffs' NCR (if any) had been eroded and/or extinguished by legislation.

- **Findings of the Court**

The High Court held amongst other things the followings:

i. The Ibans have a body of customs referred to as customary rights and the plaintiffs' ancestors must have practiced the same customs as the present-day Ibans. Evidence adduced indicated that the plaintiffs' ancestors had accessed the land for hunting, fishing, farming and collection of forest produce-all in the exercise of NCR. The rights of an Iban arise by virtue of being a member of a community that occupies a longhouse and these rights, unless lost, pass down through the generations. The plaintiffs therefore were rightfully in possession of these rights.

ii. The very presence of a longhouse and its proximity to the disputed area, compounded by the fact that the disputed area fell within the boundaries of the longhouse, together with other evidence of communal existence render it probable and support the assertion that the plaintiffs and their ancestors had indeed accessed the disputed area until they were prevented from doing so by the total destruction of the trees by the defendants.

iii. Customary law is a practice by habit of the people and not the dictate of the written law. All orders dating from the era of Rajah Brooke to current legislation declare in no uncertain terms the right of a native to clear virgin jungle, access the land surrounding the longhouse for cultivation, fishing, hunting and collection of jungle produce. Legislation has neither abolished nor extinguished NCR. On the contrary, legislation has consistently recognized and honoured NCR even though it was not in written form.

The Defendants appealed against the decision of the High Court and the Court of Appeal allowed their appeal on one ground i.e that the plaintiffs failed to prove their claim of occupation over the *pulau* area, but ***affirmed the legal position as stated by the Learned trial Judge.*** The Plaintiffs had appealed against that decision of the Appeal Court on the finding of facts but interestingly the State Government of Sarawak did not appeal on the finding of law as stated above. As such it is submitted that what was held by the High Court Judge is the true and legal position of NCR in Sarawak today.

A month after the decision of the Court of Appeal in ***Nor anak Nyawai's*** case *supra,* another decision came out from the Court appeal which followed the High Court's Judge in ***Nor Nyawai's*** case on the legal status of NCR and its definition in Sarawak . This is referred to as the ***Madelli's case.***

The ***Madelli's case*** was in fact a case involving a Malay person who is referred to as a native under the Constitution of Sarawak. Nevertheless the decision of ***Nor anak Nyawai*** applies. This is also true to the rest of the natives tribes in Sarawak.

- **What about the Nomadic Penans?**

Many people believes that, since the nomadic Penans do not farm and cultivate for a living, it is argued that they cannot claim NCR under the Land Code. It is my submission that the nomadic Penans can claim NCR under the laws of Sarawak if they can prove "occupation" of an area, since time immemorial. At the moment there is no direct decision on this matter for the Penans, but two cases are now pending in the High Court of Sarawak, pertaining to this very issue.

4. Definition of Legality

> **"Timber harvested by licensed person from approved areas and timber products exported in accordance with the laws, regulations and procedures pertaining to forestry, timber industry and trade of Malaysia."**

The above definition of legality had been proposed by the Malaysian Government through the Ministry of Plantation Industries and Commodities, at its "Consultations with Stakeholder Groups Related to the EU FLEGT VPA Negotiations in Malaysia" meeting in Kota Kinabalu, Sabah, Malaysia on the 22nd June 2007. At this meting I proposed to include the following amendment after the word "areas"**-"free from any NCR claim".** So the definition should read:

> **"Timber harvested by licensed person from approved areas free from any NCR claim, and timber products exported in accordance with the laws,**

regulations and procedures pertaining to forestry, timber industry and trade of Malaysia."

My proposal was meant to high light the fact that NCR claim must be dealt with and must expressly be stated in the definition legality. Because NCR over land in Sarawak is recognized under the laws of the country and confirmed by the Courts in Malaysia, areas which become a dispute because of NCR claim cannot in law be regarded as legal. Its legality is being questioned until a final decision is made by a competent authority no less then the High Court. This should be the case for Sarawak, Malaysia.