CHAPTER I

LAND SETTLEMENT

1. Settlement:Definition

Settlement is the procedure by which land is brought on to a land register. It involves a systematic investigation and recording of interests and rights in land. Such land can be:-

(i) Unclaimed and unoccupied land known in Sarawak as unencumbered state land.

(ii) land over which rights of customary tenure are exercised - known as native customary rights.

(iii) land for which some form of legally recognised title subsists - in Sarawak such titles may have originated at any time from the 1850s to 1957 and 1958.[1]

A number of factors are taken into consideration when deciding whether or not to implement a settlement programme. Among the most important is the expectation of a future need to identify and demarcate state land for development purposes. Another consideration is connected with the urgency with which the existing pattern of land ownership should be rationalised. It has been deemed desirable

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[1]Land Manual, Vol. I, Land & Survey Department, Sarawak, p.487

and important to consolidate land holdings into economic needs of the community whose land is to be subjected to some form of consolidation. Perhaps, therefore, the greatest factor influencing settlement is the urgency with which the land use should be determined and this in turn requires that the land ownership pattern be finally and permanently recorded on the land register.[2]

The term "settlement" may give rise to confusing interpretations. In Africa, this process of ascertaining rights and interests in land is now usually known as "adjudication" so that it will not be confused with the settlement of persons on land.[3] It is interesting to note that the Report of the Land Committee, 1962 suggested that "settlement" should be called "adjudication" because one of the objectives of the land policy must be to settle people in new areas and that is what "land settlement" normally means to anybody speaking English. It also avoids any confusion with "settled land" which to the English lawyer means land tied up with family settlements and which has been the subject of much legislation known as Settled Land Acts.

2. Land Settlement under the Sarawak Land Code.

In 1958, the Sarawak Land Code came into force on 1st January. It repealed the Land Settlement Ordinance, 1933 and is the Law under which the process of land settlement is at present administered.

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[2]Land Manual, Vol. I, Land & Survey Department, p. 488

[3]Report of the Land Committee, 1962, published by authority, p.14

One of the expressed objects and reasons for the drafting of the Land Code Bill was to introduce a new system of land settlement in the expectation that it would enable most land in Sarawak to be brought on to the new Land Register within seven years.

Part V of the Land Code is wholly concerned with land settlement.

Section 84 empowers the Director of Land & Survey Department to gazette any area as a settlement area for a number of specified reasons. A wide discretion is accorded the Director who may gazette a settlement area when he deems it expedient to effect a settlement of rights because of land utilisation pressure and perhaps of the need to demarcate and register unencumbered state land.

Section 84(3) provides that the Director may assign a Settlement Officer to carry out the settlement operation. A Settlement Officer assumes direct responsibilities in the carrying out of a settlement operation. His functions and general powers are defined in Section 88. Such duties and functions include the power to order any claimant to cut the boundaries of the land claimed by him before such date as he may direct in default of compliance, may cause such boundaries to be cut at the expense of such power.

The Land Code divides settlement into settlement of alienated land and settlement of state land. In the case of state land falling within a Settlement Area, claimants are required to appear before a Settlement Officer and to produce all available

evidence in support of their claim of ownership of such land. The Settlement Officer is required to publicly investigate all claims, whether based on documentary evidence, native customary tenure or otherwise. After the final determination of claims the Settlement Officer prepares a Settlement Order which is published in the Gazette and exhibited for one month. After the expiration of that period, all parcels of land appearing for the settlement order are entered into the Register.

Section 102 of the Land Code incorporates an area of law open to various interpretations and conclusions. Section 102(1) reads. "Any person aggrieved of any act or decision of the Settlement Officer may appeal in the Court of a Magistrate of the First Class, by a petition in writing made within one month from the date of the publication in the gazette of the Settlement Order containing the decisions which is the subject of appeal, or, in the case of a decision arising out of a claim, investigation by the Settlement Officer in accordance with the provisions of Section 91(2) within one month from the date on which a copy of such decision was served on the person so aggrieved and for the purpose of any further appeal any such decision made by a Settlement Officer ..... shall be deemed to have been made in civil proceedings."

The first preliminary question that arises on a reading of Section 102(1) is as to the nature of the act or decision of the Settlement Officer. Is the act or decision of the Settlement Officer a judicial or an administrative act?

evidence in support of their claim of ownership of such land. The Settlement Officer is required to publicly investigate all claims, whether based on documentary evidence, native customary tenure or otherwise. After the final determination of claims the Settlement Officer prepares a Settlement Order which is published in the Gazette and exhibited for one month. After the expiration of that period, all parcels of land appearing for the settlement order are entered into the Register.

Section 102 of the Land Code incorporates an area of law open to various interpretations and conclusions. Section 102(1) reads. "Any person aggrieved of any act or decision of the Settlement Officer may appeal in the Court of a Magistrate of the First Class, by a petition in writing made within one month from the date of the publication in the gazette of the Settlement Order containing the decisions which is the subject of appeal, or, in the case of a decision arising out of a claim, investigation by the Settlement Officer in accordance with the provisions of Section 91(2) within one month from the date on which a copy of such decision was served on the person so aggrieved and for the purpose of any further appeal any such decision made by a Settlement Officer ..... shall be deemed to have been made in civil proceedings."

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S. A. de Smith notes that the meaning which the courts are likely to give to the term "judicial" is apt to vary according to the purpose for which it has to be defined.[4] For example, the rules protecting judicial acts within jurisdiction from collateral impeachment and granting exemptions from tortious liability for judicial acts embrace some discretionary functions that are typically administrative. It would therefore appear that acts that are typically administrative such as the acts of a Settlement Officer within Part V of the Land Code may assume a judicial character if the functions are judicial.

The first test according to S. A. de Smith for distinguishing judicial functions from other classes of functions turns upon whether the performance of the function terminates in an order that has conclusive effect. By conclusiveness is meant that the decision or order must have the force of law without the need for confirmation or adoption by any other authority and cannot be impeached indirectly in collateral proceedings.

In applying this test of conclusiveness to the act of the Settlement Officer contained in Section 102(1) it would be observed that the decision reached by the Settlement Officer terminates in an order that has conclusive effect: the settlement order. Section 95 of the Land Code provides for the making of a Settlement order by the Settlement Officer after he has investigated and determined all claims

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[4] S. A. de Smith, Judicial Review of Administrative Action, p. 66

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to the land. The Settlement Order shall also be published in the Gazette. It is therefore submitted that on the basis of the test of conclusiveness the act or decision of the Settlement Officer is a judicial act.

A second important test for identifying judicial functions according to S. A. de Smith turns on the presence of certain formal and procedural attributes. The most important characteristic of ordinary courts is that they determine on the basis of evidence and arguments submitted to them, disputes between two or more parties about their respective legal rights and duties. The Settlement Officer under Section 94 of the Land Code investigates publicly all claims to Crown Land, whether based upon documentary evidence, native customary tenure or otherwise and determines in whose favour the rights to such land shall be shown in the Settlement Order. Therefore, on the basis of powers contained in Section 94 the Settlement Officer reaches through the exercise of a judicial function a judicial decision as mentioned in Section 102(1).

The third test expounded by S. A. de Smith for identifying judicial functions and acts is that legal issues are determined by reference to principles and rules already in being.[5] A deciding body is likely to be held acting in a judicial capacity when after investigation and deliberation, it determines an issue conclusively by

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[5] S. A. de Smith, Judicial Review of Administrative Action, p. 72

the application of a pre-existing legal rule. In a land dispute as to the rightful ownership in land between two native claimants the Settlement Officer would apply the test of initial cultivation of the land. Initial cultivation has long been recognised in native customary law as bestowing native customary rights in land. The Settlement Officer, therefore, applies this rule of practice to arrive at a finding of fact. In so far, therefore, as the Settlement Officer applies principles recognised in native land tenure as establishing native customary rights to a situation of conflicting claims, he is deemed to be exercising a judicial function.

It is, therefore, submitted on the basis of these findings that the act or decision of the Settlement Officer as mentioned in Section 102(1) of the Land Code is a judicial decision. By coming to a determination of the nature of the act or decision of the Settlement Officer it is now proposed to consider the following main issue: whether Section 102(1) provides for a normal appeal procedure (within a heirarchy of courts) or a mere judicial review of what is now submitted to be a judicial decision.

The words "may appeal" in Section 102(1) may be open to two possible constructions. The Legislature may have intended to provide for the normal appeal procedure of a judicial act or decision or there was only mere intention to provide for a judicial review of a judicial decision. In other words, the question is what is counsel for the petitioner under Section 102(1) required to prove

before a Magistrate of the First Class.

Applying the literal construction rule of statute interpretation "appeal" in this instance means the normal appeal procedure. The word "appeal" is further mentioned towards the end of Section 102(1) and the relevant phrase is "for the purpose of any further appeal". This latter phrase in itself suggests that it could cover an appeal from the Court of a Magistrate of the 1st Class in Section 102(1). The wording of this phrase is vague and unambiguous and could possibly to construed as reinforcing the suggestion of a heirarchy of courts sitting on appeal from the original decision or act of the Settlement Officer.

It follows from such an interpretation that the Magistrate on appeal under Section 102(1) would by implication be involved in substantive issues of native customary rights relating to land. It is submitted that this cannot be the intention of the Legislature since this would mean that a judicial officer trained in the law of evidence without any practical knowledge or understanding of the nature of native customary rights in land would have the power to determine the rights of individual natives. The Legislature had instead specifically provided that the officer to be most concerned with a settlement operation including the investigation and determination of native customary rights in land be an administrative officer - the Settlement Officer. The process of investigating and determining rights in land is part of a larger administrative process of land settlement.

There is, however, an alternative construction of the words "may appeal" in Section 102(1) to mean a judicial review. When carried to its logical conclusion this interpretation would mean that the Magistration of the First Class would only be concerned with ensuring the observance of procedural rules by the Settlement Officer acting under Part V of the Land Code. In terms of a concrete example, it would mean that the Magistrate sitting in ~~only~~ a judicial review would require counsel for the petitioner to prove only that on the evidence, the Settlement Officer arrived at some decision without giving a fair hearing to both parties to the claim. Counsel might also submit that the Settlement Officer did not make or publish the Settlement Order for a period of one month. These are all procedural matters and do not pertain to the substantive issue of rightful ownership in land. The Magistrate on a judicial review, therefore, has no jurisdiction to interfere with the merits of the case.

The concept of a judicial review is more acceptable when one considers that injustice could be inflicted on a native petitioner due to inconsistency of procedure. This can be better appreciated if it is realised that the Settlement Officer may have based his decision solely on hearsay evidence. The nature of native land tenure system is such that rightful ownership could at best be determined by hearsay evidence because of the lack of objective records listing out who originally cleared and occupied the land in dispute. To base one's decision on hearsay evidence is but a

practical and necessary accomodation to the nature of native land tenure. However, if the Magistrate's Court be deemed an appeal forum from the decision of the Settlement Officer the Magistrate would make his findings based on the law of evidence which excludes hearsay evidence or unsworn uncorroborated evidence. The petitioner finds that he is subject to two different procedures before the Settlement Officer's forum and in the Court of the Magistrate of First Class. The result is that petitions may be dismissed on grounds of technical and legal inconsistencies affecting the due determination of substantive issues of native customary rights in land. It is to avoid such injustice to the native petitioner that the construction of a judicial review is preferred.

In at least one case, the ambiguity of the wording of Section 102(1) has been duly considered and examined: Beer ak Aman and 7 ors v Jonathan Sumping Bayang and Superintendent of Lands & Surveys, 1st Division.[6] The petitioners in this case sought to set aside the order made by the Settlement Officer (under Sections 94 and 95 of the Land Code) and to issue title to them the rightful owners under Section 18 of the Land Code. Besides the order made by the Settlement Officer the land in dispute had been settled in a District Native Court whose decision was upheld by the Resident Native Court on appeal. The preliminary objections in this case turned on an interpretation and

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[6] (Unreported Case), District Court Case A/CIV/122/73. This case is pending appeal.

possible implications of Section 102(1) of the Land Code.

One of the issues raised in the preliminary objections was the question whether the petition under Section 102(1) be regarded as an appeal or judicial review. Emphasis was put on the construction of the vague words "further appeal" in Section 102(1). Counsel for the petitioner contended that under Section 102 "any person aggrieved ..... may appeal .....". Third parties therefore may come into the picture. Counsel went on to submit that it appears to provide for a rehearing of new evidence. In other words, it is submitted, that Section 102(1) provided for an appeal. Counsel on the other side contended that the procedure under Section 102(1) be regarded as a judicial review of a judicial decision.

The Magistrate's Court in this case did not arrive at any decision that clarified the conflicting situation. It was held that the right of appeal against the Settlement Officer's order is a creature of state. In this case such right of appeal must be held to have been expressly provided under Section 102(1) of the Land Code. Otherwise, the Legislature would merely defeat its own purpose. The Court therefore held that on a construction of the words "for the purpose of further appeal", Section 102 must be so construed as to include the particular appeal on hand. There was no ruling as to whether the same words could be possibly construed to cover appeal from the Magistrate's Court. However, the Magistrate went on to hold that the parties should treat that petition as an appeal and adduce whatever relevant evidence is necessary. The forum of the Settlement

Officer was regarded as an administrative tribunal. The Court went on to hold that as the Settlement Officer was a quasi-judicial Officer and his forum an administrative tribunal the present action be deemed a judicial review of an administrative action of the Settlement Officer.

The Court does not seem to appreciate the contradictory nature of its findings. Beer's case, therefore, in no way offers any elucidation of the possible conflicting interpretations of Section 102(1) of the Land Code. It is submitted that the law in this area is vague and ambiguous and is in need of judicial or legislative clarification. As has been earlier mentioned the provision of an appeal forum in the Court of Magistrate of First Class could result in some measure of injustice to a native petitioner who might be harshly dealt with by an arbitrator with no working knowledge of the nature and complexities of establishing native customary rights in land. Yet other sections in Part V seems to support the conclusion that an appeal procedure is provided for under Section 102(1). Section 97 of the Land Code provides for the appointment of a committee of suitable persons to advise the Settlement Officer or any court to which appeal lies on matters of customary law. This section in particular seems to anticipate the establishment of a hierarchy of courts to sit on appeals from the original act or decision of the Settlement Officer. The words "Any court to which appeal lies" in Section 97 seem to include the Magistrate's Court under Section 102(1) and any court of appeal from a decision of the Magistrate's Court. ~~Though~~ The appointment of a

Committee of suitable persons to advise on matters of customary law may seem to go some length in meeting the problem of injustice resulting from an arbitrator determining rights without any basic knowledge of native customary rights in land. But the appointment of such a Committee does not give the Committee any independent right to appear before the Settlement Officer "or any court to which appeal lies." Such appearance by the Committee depends on the discretion of the Settlement Officer "or any court to which appeal lies." There is no mandatory provision requiring the appointment and appearance of the Committee. The fact remains that the very nature of civil litigation according to the law of evidence would render useless a great deal of evidence which has decided a case before the Settlement Officer who is expressly empowered to investigate and determine all claims even if based on native customary tenure. In native customary tenure, hearsay evidence and unsworn testimony and to a certain extent uncorroborated evidence are admissible and highly relied upon. A judicial officer such as the Magistrate acting under Section 102(1) would deem such evidence inadmissible and would dismiss petitions on grounds of non-compliance with technical rules of evidence and ordinary civil litigation.

The Native Courts Ordinance, 1952 also provides for a forum of determination of rights in land between native parties in the event where a title has not been issued by the Land Office: Section 5(1)(e) of the Native Courts Ordinance. There has been some attempt to accomodate the concurrent jurisdiction of native courts in Section 86(2) of the Land Code. Section 86(2) reads: "Any proceedings commenced before the

the notification is published, may be continued and the Settlement Officer may delay/with the rights in the land concerned until such /dealings proceedings have been finally determined."

Section 86(2) may be construed as giving rise to an implied recognition of the existence of the native courts in concurrent jurisdiction in land disputes. The decision of a native court in a land dispute between native claimants has the effect of a judgement in personam at least.

Therefore the words "any proceedings" in Section 86(2) would by implication include proceedings in native courts. Hence a recognition of the competent jurisdiction of native courts. The question that arises is how far is a decision following proceedings in native courts binding on the Settlement Officer when he acts under Section 95(1) of the Land Code. Section 95(1) is concerned with the issue of a Settlement Order by a Settlement Officer after full investigation and final determination of all claims by the said officer. It is significant in this instance to note that the Legislature did not expressly provide the Settlement Officer with any power to upturn or reverse a decision of the native courts. By implication from the wording of Section 86(2) which requires the Settlement Officer to delay dealings with the rights in the land, it would follow that the Settlement Officer must give the highest consideration and be bound to follow the decision of the native court when he determines the same dispute before him under Section 95(1)

of the Land Code. It cannot be construed that the Legislature was not aware of the jurisdiction of Native Courts under the Native Courts Ordinance when it drafted and implemented Part V of the Land Code.

A contrary interpretation may, however, be arrived at by a construction of Section 94(2) of the Land Code. Section 94(2) of the Land Code reads: "In the case of native customary rights the Settlement Officer may provide for the extinguishment thereof by the payment of compensation or shall show the same in the Settlement Order, and if the rights are such as would enable a lease to be issued to the persons entitled, shall enter also all the particulars to enable a lease to be issued .....". Therefore, where a native court has decided in a land dispute who would be deemed the rightful customary right holder the Settlement Officer may extinguish such native customary rights by payment of compensation. This has the indirect effect of overruling the decision of a native court recognised as a court of competent jurisdiction.

It is, however, submitted that there are no clear-cut or expressed provisions allowing the Settlement Officer to overrule or upturn a decision by the native court. If any contrary implication is read in interpreting Part V of the Land

Code the purpose of establishing native courts of competent jurisdiction would be defeated.[7]

In 1940 a circular to Government Departments entitled "Sarawak Land Policy with particular reference to native claims to customary rights and settlement of non-natives" was issued. The Circular stated "the object of Government today, ... is through the machinery of Land Settlement to record as extinsively as possible all customary or other rights and to safeguard them by the issue of documentary titles." The Circular went on to anticipate as probable that as the Colony developed the tendency would be for the demand for individual rights by individual title to increase; it was probable also that in the perhaps very remote future customary tenure would disappear entirely. However, the Circular stated that the speed with which this process would be carried out must naturally depend upon the wishes of the communities concerned and the stage in this evolutionary process reached by particular communities.

Today, in an independent Sarawak within Malaysia, customary tenure is still very much in existence. The Settlement Officer in Part V of the Land Code is empowered to investigate

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[7] In an interview with the Attorney-General, Sarawak, in Kuching, it was suggested that by reason of the rule of law the Settlement Officer should abide by the decision of a native court, determining native rights in that particular dispute.

and decide all claims based on native customary tenure. Particular provisions in Part V, such as Section 102(1) are prone to interpretations to the prejudice of the native litigant. There is a growing need to revise the law contained in Part V and to clarify areas of doubt so as to reach agreement on the construction of important sections.

CHAPTER II

LAND ARBITRATION

Land arbitration in the context of this chapter relates to the process of determination of native customary rights in land in the event of competing claims by native parties. Determination of land disputes between native litigants is deemed an important aspect in the study of native land administration.

The procedure for determination of land disputes between native litigants under statute is governed by the provisions of the Native Courts Ordinance Cap. 43 of 1952. In this chapter it is proposed mainly to study particular provisions in the Native Courts Ordinance with a view to illustrating areas of inconsistency in the administration of justice in relation to a land dispute case between claimants to native customary rights in land.

Land disputes between native parties are mainly concerned with the question of establishment of native customary rights so as to establish rightful ownership of the land in dispute. There is at present a lack of records which could provide objective evidence as to exercise of customary rights in the first place, through a method of initial cultivation. Most of the records from the period of colonial rule were destroyed during the Japanese Occupation. As such it is extremely difficult for native courts to establish native

customary rights in land as the act of initial cultivation may be attributed to the life-time of the predecessors of present native claimants.

In recognition of the peculiar nature of determining the establishment of native customary rights in land the Legislature enacted the Native Courts Ordinance in 1952. Native courts constituted under this Ordinance were not affected by the provisions of the Evidence Ordinance, Cap. 54. This was because in order to arrive at some definite decision hearsay evidence and unsworn testimony of parties and their witnesses have to be resorted to. Hence, native courts under the Native Courts Ordinance are constituted as a hierarchy of courts different and seperated from the ordinary courts of the Land.

1. The Native Courts Ordinance, 1952

Section 3 of the Native Courts Ordinance sets out the types of native courts of original jurisdiction. These are the District Native Court, the Native Officer's or Chief's Court, the Headman's Court.

The term "original jurisdiction" implies that a potential native plaintiff has at his discretion three types of courts of the same jurisdiction and level in the hierarchy of courts. In practice, however, these three types of native courts are approached at different levels in the hierarchy of native courts. The native plaintiff normally commences proceedings in the Headman's Court. If he is

dissatisfied with the decision arrived at, he may proceed further to the Native Officer's or Chief's (Penghulu) Court and thereafter to the District Native Court.

Nevertheless, in bringing an action in a native court the potential plaintiff is also influenced by a residence criteria: the eventual venue depends on the area in which the contending parties reside. If the plaintiff and defendant parties are from different longhouses or kampongs proceedings may begin in a Penghulu's Court where the presiding Penghulu exercises jurisdiction over both parties. The parties to a litigation within a particular District may choose to begin proceedings in the first instance in the District Native Court.

Section 5(1)(e) of the Native Courts Ordinance specifies that native courts shall have jurisdiction concurrent with such other courts as may be empowered to try the same over any case concerning land to which there is no title issued by the Land Office and in which all the parties are subject to the same native system of personal law. In the same section the Native Courts are also given jurisdiction over matrimonial and sexual offences and in cases arising from breach of native law or custom.

It is proposed at this juncture to consider some outstanding features of native litigation process as provided under the Native Courts Ordinance.

Freeman notes that the main duty of a Tuai Rumah (the Iban

equivalent to a Headman) is to watch over conduct and to safeguard and administer the customary law. The most important function of a Tuai Rumah is to act as the judicial warden and principal arbiter of his community.[8] He exercises his jural role by settling disputes as to land ownership and family law matters. The logical consequence of this feature of native social life was the setting up of Headmen Courts under the Native Courts Ordinance.

The procedure before a native court is on the whole an informal procedure corresponding more to a public hearing. Moreover, the decisions reached are generally based on equity rather than on precedent. Law is appealed to because it is the modern substitute for war. Before 1952, the Government in exercising its jural functions of determination after investigation of native customary rights in land was respected as a source of security in an untrustworthy world. This respect was based on the equity and reliability of its decisions.[9] In native litigation decisions are reached with regard to the peculiar nature of facts and merits in each case, rather than a rigid application of certain principles. The same respect in the Government in colonial days was purported to be transferred to native courts under the Native Courts Ordinance as from 1952. To the extent that those vested with powers to determine

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[8] Freeman, Report on the Iban, p. 115

[9] Geddes, The Land Dayaks of Sarawak, Colonial Research studies No. 14, p. 51.

disputes derive their authority from traditional leadership the same respect was forthcoming.

In a native court the demeanour of witnesses is an important consideration since this generally affected the weight of evidence and the eventual decision arrived. Witnesses, however, have been known to distort facts and events.[10] Freeman again points out that the native litigant believes that justice goes to the strongest advocate.[11] This situation is encouraged by lack of objective evidence on record. Hence evidence in native courts are mostly hearsay evidence though the courts may require evidence to be corroborated. Geddes refers to records on land disputes and customary rights in land which were destroyed during the Japanese Occupation or are not in a form which permits easy reference. Therefore, a later judgement may be given inconsistent with an earlier one on the same dispute brought by the party dissatisfied with the earlier decision. It is a common practice for old disputes to be reopened when the losing party feels that the arbiter has forgotten his previous decision.[12] The evidence given by witnesses of traditional authority in a native community and persons of respect are heavily relied upon. Roth makes an

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10 Geddes, The Land Dayaks of Sarawak, Colonial Research Studies No. 14, p. 52

11 Freeman, Report on the Iban, p. 115

12 Geddes, The Land Dayaks of Sarawak, Colonial Research Studies No. 14, p. 54

interesting observation. He notes that land among the Hill Dayaks being so abundant in proportion to the number of inhabitants that little of it is the property of individuals. However, each tribe has its limits, which have been handed down from father to son for ages so that every old man of a tribe knows the exact entent of its district.[13] It is very often the evidence of such witnesses as the "old man" that is relied upon by a Tuai Rumah's Court or a Penghulu's Court or even the District Native Court in the absence of other reliable evidence.

The procedure in native courts is expressly excluded from the ambit of the Evidence Ordinance, Cap. 54. Hence hearsay evidence is admissible and evidence may not begiven on oath. This represents one major accomodation to the distinct character of native customary rights administered in native courts. Section 7(4) of the Native Courts Ordinance recognised that no proceedings in a native court and no summons, warrant, process, order or decree issued or made thereby shall be varied or declared void upon appeal or revision solely be reason of any defect in procedure or want of form but every court exercising powers of appeal or revision under this Ordinance shall decide all matters according to substantial justice without undue regard to technicalities. Yet, in practice, the working of Section 8(2) of the Native Courts Ordinance has given rise to significant preoccupation

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[13] Roth, The Natives of Sarawak and British North Borneo, Vol. 1, p. 419

in matters of procedure because of observance of the law of evidence laid out in the Evidence Ordinance.

Section 8(2) of the Native Courts Ordinance provides that there shall be a Native Court of Appeal which shall in each case be presided over by a Judge and shall consist of one or more Judges and of persons qualified to provide in a Native Court or persons who the Governor is satisfied have knowledge of the customary law or of one of the customary laws relevant to the determination of the appeal.

Section 2 of the Evidence Ordinance provides specifically that judicial proceedings before a native court are not covered by the Ordinance except in cases in which the person presiding over such court is a Judge or a Magistrate. Therefore, the Judge sitting in the Native Court of Appeal is bound to follow rules of evidence as prescribed under the Evidence Ordinance. This provision together with the fact that the Judge is judicially trained in the law of evidence in practice leads to considerable preoccupation with procedure and rejection of hearsay evidence.

Though Section 2 of the Evidence Ordinance includes a Magistrate, in practice the District Officer sitting in a District Native Court by virtue of his qualification as an administrative officer does not abide by the rules of evidence. In practice, therefore, the word "Magistrate" in Section 2 of the Evidence Ordinance is construed to mean a Magistrate with the necessary legal and judicial qualifications and does not include a District Officer exercising the powers of a

Magistrate of First Class in the District Native Court.

The Judge on appeal in the Native Court of Appeal is, therefore, concerned with observance of the rules of evidence. Hearsay evidence is inadmissible though this may constitute the sole basis of arriving at decisions in the lower native courts. Such differing modes of procedure may well result in a significant measure of injustice to the native litigant in a land dispute case. In the lower courts of first instance a native plaintiff may be permitted to establish native customary rights in land by calling in witnesses who testify by means of hearsay evidence that the native plaintiff rightfully inherited land in which native customary rights were established through initial cultivation by the great-grandfather of the plaintiff. Such evidence would be inadmissible in the Native Court of Appeal. The result is considerable hardship and injustice to the native plaintiff or the party contending on the other side.[14]

It is submitted that by its very nature native customary rights in land and disputes arising would best be determined by administrative officers with practical understanding of native custom. Courts of law with their strict adherence to the rules of the law of evidence as in the Native Court of Appeal, are not the most appropriate

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[14] This practice was recognised in an interview with the Attorney-General of Sarawak in Kuching. It was estimated that 9 out of 10 cases which reached the Native Court of Appeal would be dismissed because of non-observance of rules of evidence and procedure.

forums for the determination of native customary rights in land. It is further submitted that in order to avoid hardship or native litigants the Resident Native Court should be constituted as the highest court of appeal so that a consistent procedure be adhered.

In constituting the various types of native courts it will be noted that the Legislature relied on recognised and traditional authority within native communities. Hence, traditional leadership such as headmen and penghulus and Tuai Rumahs were vested with legal jurisdiction to settle native disputes. Therefore, it is submitted that the Native Courts Ordinance was intended to operate on principles of traditional authority accorded to headmen, penghulus and Tua Kampongs in native society. Decisions reached by these men of traditional authority have in most cases been duly executed by the parties concerned as a measure of recognition of the jural role and authority of headmen. Very often such traditional authority have been involved in safeguarding and administrating native customs as well as settling innumerable disputes. Such reliance on traditional authority established in history accounts for the marked absence of any provisions in the present Ordinance for the execution of decisions of native courts in the Native Courts Ordinance. The result in a land dispute case would be that the party ruled to be in unlawful occupation of the land in dispute by the native court may yet persist in occupying the land without any effective sanctions enforced against him by statute.

It is, therefore, submitted that the absence of provisions for due execution of native courts' decisions with its necessary sanctions in event of default impedes the effective functioning of native courts. Provisions for enforcement and execution of decisions are all the more necessary today. This is because education and subsequent exposure to different values have resulted in basic changes in mentality among natives as to the inherent jural authority of traditional leadership.

The situation is further aggravated by the policy of the Government presently to effect the appointment of Penghulus, Pengarahs and Temenggongs. In the past, such appointments were left to popular choice by the native communities. This has led to a change in status of such traditional leadership since these are now considered by the native communities more as civil servants than as leaders in their own right.

It is therefore submitted that fundamental changes of this nature within native society must be accomodated. The law must change accordingly so as to serve changing situations within the society.

The setting up of a different heirarchy of courts for native communities seperate from the ordinary courts of the land is as relevant and necessary in 1952 as it is today. As various changes are effected in native land administration in the future land disputes can be expected to increase. This is because increased Government penetration in native area land and native customary land through land development programmes requires the prior determination of the extent of effective establishment of native customary rights.

CHAPTER III

LAND CLASSIFICATION

1. Definition

Land classification is seperately considered under Part II of the Land Code. Part II of the Land Code provides the basis for land administration under the Land Code. Land classification refers to the process by which land in Sarawak is classified into different classes with different effects and implications. There are at present native area land, mixed zone land, reserved land and interior area land. Native customary land is not a distinct class of land under Part II of the Land Code but nevertheless has a very real existence.

The method of classification of land has produced various consequences. An underlying consideration behind such land classification provisions has been to discourage the practice of transfering title to land by the native to the non-native. This practice has been prevalent for generations and threatens to render the native population landless. Problems arise as regards the legality of transactions bona fide entered into before the classification provisions of Part II were enforced. The Government has approached this problem of pre-statute transactions by granting some form of equitable recognition. Nevertheless, one consequence following the implementation of Part II of the Land Code has been the problem of unlawful occupation of native

area land by non-natives.

2. History of Land Classification, 1948 - 1958

The most important Ordinance to receive the Governor's Assent in 1948 was the Land (Classification) Ordinance. This purported to give legal effect to the system of land classification then considered by the Government to be necessary to regulate land-use in a multi-racial society and to define and protect the special rights of the indigeneous peoples so far as they are related to land.[15] The 1948 Ordinance provided for the classification of all land in Sarawak into one of the following groups:-

(a) Mixed Zone Land

(b) Native Area Land

(c) Native Customary Land

(d) Reserved Land

(e) Interior Area Land

The practical effect of the Ordinance was to restrict the availability to "non-natives" of land to such areas as were by definition or later Notification declared to be Mixed Zone Land and to restrict the freedom of "natives" to deal in land so that they were legally able to deal only with other "natives", other than in areas of Mixed Zone Land.

Amendments to the Land (Classification) Ordinance were made in 1954 and 1955. These amendments resulted partly from a

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15 Porter, Land Administration in Sarawak, pp. 60, 61

realisation by Land and Survey Department that the Ordinance was not fulfilling its objects and partly because of the loopholes exposed by Lascelles J. in the case of Sepid anak Selir v R[16]

Within a few months of the decision in this case, the Land (Classification) (Amendment) Ordinance of 1955 was drafted and enacted.

In Sepid's case, the appellants were convicted in the Police Court at Serian in June 1954 for unlawful occupation of Crown Land, contrary to Section 108 of the Land Ordinance. They were fined and ordered to vacate the land. The appellants appealed against their conviction. Lascelles J., on appeal upheld the appeal, quashed the fine and set aside the order of the trial Court. In his judgement, Lascelles J. held that in a prosecution under Section 108 of the Land Ordinance, it is essential that it be proved that the accused was in unlawful occupation of Crown Land or land reserved for a public purpose. The judge went on to lay out the five classes of land under Section 3(1) of the Land Classification Ordinance of 1948. Section 7(3) of the same Ordinance states that land which is not Mized Zone Land or Native Area Land or Native Customary Land or Reserved Land is Interior Area Land. The records showed that the whole area in which the four appellants occupied parcels of land was marked as Communal Forest Reserve. However, whatever type of reserve it was meant to be it was

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16 (1944 - 5) Supreme Court Report, 36

never gazetted as such and therefore was still clearly Interior Area Land. Section 8 of the Land Classification Ordinance provided that natives may occupy such land for the purpose of creating customary rights, which was clearly what the appellants were doing in that case. It was therefore held that though powers existed for converting Interior Area Land into Mixed Zone, Native Area, Native Communal Reserve or Reserved Land it was clear that in that case no such power had yet been exercised in respect of that land. The appellants were clearly acting within their legal rights in doing what they did. The judgement in this case therefore revealed a loophole in the existing law by which the creation of new customary rights could be effected. The Land Classification Rules of 1954 and Land Classification (Amendment) Ordinance of 1955 were enacted shortly. The effect was to prohibit the creation of new customary rights in accordance with "adat" with effect from 16th April, 1955, and to provide penalties for the transfer or attempted transfer of any rights or privileges over all land, other than Mixed Zone Land, to any person other than a native of Sarawak.

The next stage in the history of Land Classification is the enactment of the Sarawak Land Code in 1958. This Code incorporated the provisions of the Land Classification Ordinance, 1948 and Land Classification (Amendment) Ordinance, 1955. One of the objects of the Land Code Bill was to clarify the law relating to native customary rights. The Land Code in Section 5 continue to effectively restrict the creation of further customary rights. The effect is to virtually

prohibit the creation of new customary rights, which would otherwise be recognised by law, unless a permit to clear virgin jungle or to occupy Interior Area Land has been obtained from the District Officer under Section 10(4) of the Code.

3. Land Classification under the Land Code, 1958

In 1958, the Land Code was enacted. One of the objects of the Land Code Bill was to clarify the law relating to native customary rights. The Land Code in Section 5 continued to effectively restrict the creation of further customary rights. ~~This led to virtual prohibition of the creation of native customary rights which would otherwise be recognised by law, unless a permit to clear virgin jungle or to occupy Interior Area Land has been obtained from the District Officer under Section 10(4) of the Code.~~

Part II of the Land Code enabled additional areas of Mixed Zone Land, Native Area Land and Interior Area Land to be constituted. The status of Native Customary Land is specifically preserved, regardless of its location and whether it takes within an area otherwise generally declared to be Mixed Zone Land, Native Area Land or Interior Area Land.

Native Area Land means land other than Mixed Zone Land which may be held by a native under a document of title or which becomes Native Area Land by virtue of a direction under sub-section 38 of the Land Code. Native Area Land may be declared to be such under a subsisting declaration made under the former land (classification)

Ordinance 1948,or under Section 4(2) or (3) of the Land Code.[17] This class of land consists of roughly 10% in 1965 of a total of 48,050 square miles in Sarawak. Some of this land is held under title, some under native system of personal law, that is, customary rights and some still unemcumbered. Non-natives are not allowed to acquire or have any direct or indirect interest in this class of land.

Mixed Zone Land as defined in Section 2 of the Land Code covers a total area of approximately 20% of the whole of the land in the State in 1965. Mixed Zone Land is land which may be acquired by both natives and non-natives. It is in this class of land that a great number of dealings have resulted in transfer of title by natives to non-natives.

Reserved Land includes Crown Land which is actually used for Government purposes or is left for future Government or public use and is not available for alienation. This class of land consists of about 30% of the total area of land in Sarawak. It constitutes land which may be disposed by the Government if it deems it necessary to accomodate the interests of natives or non-natives.

Interior Area Land forming about 40% of the whole land in the State is land which does not fall within the three classes of land. It is land which is subject to native customary rights.

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17 Land Manual, Vol. I, Land & Survey Dept., Sarawak, Page 523. Acreage figures of the different classes of land were obtained from a guide book published by the Information Service, 1965.

39/...

Native customary land is not a specifically constituted class of land. Section 2 of the Land Code defines it as -

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.

It may be noted that the land tenure system in Sarawak is based on twin principles: the need to protect the native population from exploitation by non-natives of whatever race and the corresponding need to provide non-natives with enough land and to define and assure them of their legitimate rights in land. The test of economic benefit for the country cannot be neglected in land alienation. Such considerations account for the racial classification land pattern in Part II of the Land Code. In 1951, an official paper entitled "Sarawak Land Policy with particular reference to native claims to customary rights and settlement of non-natives" intended for all Government officers dealing with land questions was issued. The paper stressed

that the general economic benefit of the country must be an important consideration in dealing upon the allocation of unalienated lands. However, the paper recognised that the Government did not intend to apply the test of pure economic benefit without due and sympathetic regard to the customs of the natives and the rights established. Hence the peculiar racial classification pattern in Part II of the Land Code today. Such protective measures were in line with Government policy to protect the natives and their land interests till such time as they could protect themselves.

Several criticisms have been levelled against the retention of the present land classification pattern.

Firstly, it was argued that the present pattern, resulting in inalienability of native land and native customary land has prevented the acceptance of such land for mortgaging or charging purposes. This has in turn brought about slow progress in economic development among the natives. Credit facilities would not be available for the native farmer. Such fears are well-founded specially since existing commercial banks do not in practice accept native land for mortgaging or charging purposes. The situation is further aggravated by the fact that most native customary land within the interior area land are undeveloped and inaccessible so as to fetch low market value. Land classified as Mixed Zone are usually located in and around urban (town) areas and near major trunk roads.

Any suggestion to counter this criticism that calls for the law to be so revised as to allow for allienability of native land may

well bring about intense native reaction. The situation is not without remedy. It is submitted that these circumstances should provide added impetus to the development of native banking and rural credit facilities. Such measures would, however, require active Government participation because of the lack of local capital and funds among the native population in Sarawak. In Peninsular Malaysia a similar experience has been responsible for the growth of banks such as Bank Bumiputra. The promotion and extension of credit facilities to native population would also provide the native farmer with the necessary capital and funds and expertise to develop his land thus obtaining in the long-run a higher market value.

Education remains a major weapon in bringing about greater awareness of business opportunities and the need for economic development among the natives. Only when they begin to broaden their outlook and cultivate a business mind can real economic progress become possible in the future. This is a question of change in basic values and priorities that incorporates some degree of mental revolution among natives in their attitude towards greater participation in the business, finance and economic world.

Another criticism levelled against the retention of the present land classification pattern is that the division between native land and Mixed Zone Land is unreal in practice and therefore serves no useful purpose. The critics hold the view that such division has not reduced the incidence of unlawful occupation of native land by "landless" non-natives. Such unlawful occupation persists at present in spite of

the prohibition under Section 8 of the Land Code. To a significant degree the problem of unlawful occupation reached acute proportions when an act of transfer of title in land to a non-native by a native during the period before 1958 was devoid of legal recognition when the land became classified as native land under Part II of the Land Code after 1958.

It is submitted that the twin considerations of catering to non-native demand for more land and protecting the interests of natives in land till such time as they could protect themselves could be realised significantly by overcoming the problem of unlawful occupation of native land.

4. The Problem of Unlawful Occupation of Native Land

The problem of unlawful occupation of native land by non-natives has hampered efforts to improve the quality of native land and proprietorship.

Section 8 of the Land Code states that a person who is not a native of Sarawak may not acquire any right or privilege whatever over any native area land, native customary land or interior area land. Any agreement purporting to transfer or confer any such right or privilege or which would result in such person enjoying any such right or privilege shall be deemed to have been entered into for illegal consideration. The section further provides that any person purporting to enter into any such agreements shall be guilty of an offence and liable to a fine of one thousand dollars. Nowhere in this section o-

the Land Code is there any provision governing transactions or agreements entered into between a native and a non-native party during the period before the enactment of the Land Code in 1958. It must be remembered that such bona fide transactions between the respective parties for valuable consideration had given rise to rights in personam resulting in actual transfer of title to the non-native at the time of the contract between the parties.

This situation has been met with an administrative act outside the provisions of the Land Code. The Government now issues permits extending over a period of seven years under Rule 19 of the Land Rules. This is not a blanket provision to cover such cases. There has been to date only one instance of ussue of such permits: that in the Simuju area at the 44th to 67th Mile, Kuching - Simanggang Road.[18] The permits were designed for non-permanent cultivation such as padi-planting and the cultivation of cash crops. However, in the Simuju area permits have also been granted where permanent cultivation is practised. Such permits are applicable to land within native area land or native customary land where rights have been established under Section 5 of the Land Code.

As regards the Government and the non-native party, the position is that no form of legal recognition is accorded to the original pre-statute transaction which purported and in most instances

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18 Interview with Settlement Officer, Land & Survey Department, Kuching, May 1975.

did in fact transfer rightful ownership to the non-native party.

The question arises as to the rights in personam between the contracting parties: the non-native party on the one hand and the native party on the other. A major question that arises is whether the original contract be construed as being void between the parties on grounds of illegality of contract. If the contract be rendered void as being against public policy the non-native party cannot claim damages for breach of contract or recover money or property transferred under it. On the other hand if the contract be deemed valid, it could give rise to rights in personam between the parties. The proposition is that a valid pre-1958 contract could only be construed void for illegality as between the parties if Section 8 is deemed to have a retrospective effect. There is no express provision in the Land Code that allows for the retrospective operation of Section 8 of the Land Code so as to render the pre-1958 contract void for illegality between the parties. The issue, however, arises as to whether Section 8 could be construed to allow such a retrospective effect by implication. The case of West v. Gwynne[19] is commonly understood as laying down a fundamental rule of construction.[20] This rule is to the effect that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or rises by necessary and distinct implication. Wright J. in Re Athlumney[21] stated thus: "Perhpps no rule of construction is more firmly established

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19 [1911] 2 Ch 1

20 Maxwell on Interpretation of Statutes, edtd. by P.St.J.Langan, p.215

21 [1898] 2 QB 551

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than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

On the basis of these two propositions it is submitted that Section 8 of the Land Code should not be construed as to allow a retrospective effect. Assuming that a non-native party has entered into a bona fide oral agreement for valuable consideration for the transfer of ownership in land to him from the native customary right holder the ensuing contract is valid. It follows that the non-native party may enforce rights in personam against the native party such as damages for breach of contract or recovery of consideration in the event that the native party to the contract exerts his customary right claim to the land. The question that follows from this conclusion pertains to the possible defence of frustration of contract open to the native party in the event that the original contract is held valid and enforceable. Subsequent to the formation of the contract, there has been a change of circumstances which rendered the contract legally impossible of performance and therefore frustrated.[22] Such a change of circumstance can be attributed to the act of the Government in enacting the classification provisions of Part II of the Land Code. Land that was once free for disposal to non-natives by a native customary right holder of land is now under a legal encumbrance.

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22 Anson's Law of Contract, edited by A. G. Guest, p. 453

That particular piece of land which was the subject of the original contract may now have been classified as native area land or native customary land and therefore inaccessible to non-natives. The effect of a successful plea of frustration of contract would bring the original contract to an end forthwith and automatically.

Such are the possible interpretations that arise with regard to pre-statute contracts entered into between non-native and native parties. It is submitted that the status of these contracts is in need of some form of official clarification so as to ascertain the true nature of the rights and obligations of the respective parties.

The grant of permits presently for a duration of seven years may lead to fresh problems at the expiration of such period. Most if not all of those in the Simuju area are involved in pepper cultivation. Pepper cultivation is a long-term venture and if farmers are required to vacate the land at the expiration of seven years, the result could be extensive crop wastage in the event of the crop being abandoned before maturity.

Another factor that has to be taken into consideration is the inherent immobility of a rural non-native farmer who has depended on the land for his sole means of livelihood. Lack of finance and expertise may well prevent him from successfully adapting a new way of life away from reliance on his land. Such causes may operate to establish a new "landless" class of non-native farmers who are required to vacate their land but who cannot find alternative employment or means of livelihood.

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This can have serious repurcussions on efforts by the Government to administer to native area land and native customary land since force of circumstances may render such land open to "squatting" or unlawful occupation by non-natives. It is, therefore, submitted that this consequence could be avoided by a policy of leasing of suitably classified land to non-natives affected by the issue of permits under Rule 19 of the Land Rules after the expiration of the seven years. This would prevent native land from being utilised by non-natives, thus hampering efforts to consolidate and rehabilitate native area land and native customary land.

In the event that a particular plot of land is utilised for the cultivation of pepper crop not reaching maturity, the Government should allow for continued occupation by the non-native farmer for such period as to prevent unnecessary crop wastage.

Practical considerations of this nature should therefore not be merely dismissed if undesirable effects on native land administration must be avoided.

5. Land (Native Dealings) Bill, 1964 [23]

It is proposed to examine the only serious effort to date to provide some alternative to the present classification provisions under the Land Code. This was the Land (Native Dealings) Bill, 1964 which was largely drafted based on the recommendations of the Land Committee, 1962.

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[23] Published by Sarawak Gazette, 1964

The Land Committee in considering questions of policy behind the Land Code appreciated the urgent need of the non-natives for more land. At the same time, the Land Committee was of the opinion that the native must be prevented from disposing of his land till he has been educated in how to use it properly. The Committee, therefore, wholly agreed with the general intentions which underlie the policy expressed in the Land Classification provisions. Nevertheless, the Committee did not agree with the method which has been chosen to effect it.

It was the purported aim of the Land (Native Dealings) Bill, 1964 to provide for some control over dealings in land by natives. In the "Objects and Reasons" of the Bill, it was stated that the Bill be a replacement of the somewhat "unwieldly provisions" of Part II of the Land Code. Sections 3, 4 and 5 of the proposed Bill sought to provide for the control of dealings in land by natives or between a native and a non-native through the setting up of Land Committees, whose consent to any such dealing in land would be required. Section 6 of the proposed Bill prohibited all or any specified class of dealings in any specified area. Sections 7 and 12 of the proposed Bill were concerned with procedures before a Land Committee and for a review of decisions by the Governor in Council.

Of all the four Bills (State Lands & Registration Bill, Land Adjudication Bill, Land Acquisition Bill, Land (Native Dealing) Bill) proposed to be tabled in the Council Negri the Land (Native Dealings) Bill brought about the most intense political opposition.

The Government of the day was finally influenced to defer tabling of the Bills in the Council Negri.

The basic objection by the native community to the implementation of this Bill was the very real fear that their interests in land would be interfered with and that they be denied a favourable construction at law with regard to native land tenure. It was particularly felt by the natives that the extensive powers of the Land Committee were too arbitrary in that all native dealings in the State would be virtually dependent on the consent or disapproval of the Land Committee.

It is deemed worthwhile to note at this juncture the New Zealand approach to alienation of Native Land. In 1954, a former Registrar-General of Lands in New Zealand, Mr. Caradus, was appointed specifically to undertake the preparation of the draft consolidated Land Code. Mr. Caradus consulted in his preparation the Land Transfer Act, 1952, New Zealand; the Property Law Act, 1952, New Zealand and a few sections of the Land Act, 1948, New Zealand. The influence of New Zealand land legislation is considerable in the drafting of the Sarawak Land Code,1958 and the New Zealand approach to alienation of native land is worth of consideration.

In New Zealand, dealings in land by natives with the intention of selling the land to non-natives (the Europeans) are forbidden without the consent of a statutory authority: the Native Trustee. Before giving his consent the Native Trustee must satisfy

himself that:

a) the document has been duly executed;

b) the alienation is not contrary to fairness and good faith or to the interest of the native alienating;

c) no native is rendered landless by the alienation;

d) the consideration money is adequate;

e) the purchase money has been paid or adequately secured;

f) the alienation is not a breach of trust. [24]

It is possible only to speculate on the likely response to the Land (Native Dealings) Bill, 1964 had similar conditions and guarantees been expressly provided in the Bill. The Land Committee, 1962, however, considered that such statutory restrictions for what is essentially an evolutionary process would make it far too rigid. For example, it is desirable to examine what other resources a native seller may have but the statutory requirement that he must have other land would in its turn entail laying down how much other land and would inevitably produce anomalies. [25] The Committee, therefore, suggested that all that is needed for the protection of native interests is a simple law to the effect that "no native shall sell, lease, charge or in anywhere dispose of or deal with his land or any right or interest in

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[24] "Report of the Land Committee, 1962", Sarawak Printing Office, Appendix E.

[25] Ibid., p. 16

it" except with the consent of the Resident who shall have power to delegate his authority to District Officers or some native body or authority which may be expressly appointed for such purpose. The Committee recommended that a directive should be issued by the Central Government in order to ensure some uniformity of approach by the Residents.

It is submitted that a more favourable response could be expected had similar guarantees of the New Zealand law regarding alienation of native land be included in the proposed Land (Native Dealings) Bill, 1964. It is further submitted that the Land Committee failed to appreciate the political significance of inclusion of such guarantees. This is because native opposition to the Bill was based on a very real fear that native interests as protected and assured under the present Land Code would be manipulated by the Land Committees appointed under the proposed Bill. Throughout the history of land administration the native population had regarded itself as possessing "secured assets" in land. By "secured assets" is meant that although not all the 50% of the land now falling into Native Area Land and Interior Area Land has been acquired by native population they as natives are nevertheless entitled to acquire under title or by creation of native customary rights in both classes of land. Therefore, any attempt to do away with such protection and assurances would understandably rouse native reaction.

The future may see the greater spread of education among natives leading to a reduction in the rate of illiteracy. Education will

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The future may see the greater spread of education among natives leading to a reduction in the rate of illiteracy. Education will

bring changes in native outlook and priorities and reduce the present immobility experienced by the bulk of native population. [26] Until such a period of time, land classification as it presently stands may constitute both a necessary and desirable feature of native land administration. Yet it must also be recognised that the existing system of land classification can be of economic and social benefit only if complementary measures such as consolidation and rehabitation of native land be undertaken.

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[26] The immobility experienced by the bulk of the native population arises from the fact that the natives lack the necessary qualifications and expertise to venture to other means of livelihood and Land ownership has traditionally been regarded as secure property for them and their children. Until the natives become better equipped for a way of life away from the traditional occupation of padi cultivation and dependence on the land, they are likely to resist any move to abolish the present system of land classification which protects their land interests to a significant extant. Land classification as it presently exists under Part II of the Land Code is but a formal extension of the long standing Government policy of protecting the native interests in land till such time as the natives are fit to protect themselves.

CHAPTER IV

LAND CONSOLIDATION AND REHABITATION

1. Definition

Land consolidation and rehabitation, components of the major concept of land development, are not completely new concepts in the history of land administration in Sarawak. The significant move at present is the drafting of a seperate Ordinance specifically on land consolidation and rehabitation with particular emphasis on native customary land: the Sarawak Land Consolidation and Rehabitation Authority Bill (hereinafter referred to as the proposed Bill).

The term, land consolidation, refers to a process by which individual land units are brought together under a single management so as to enjoy the benefits of large-scale production. Rehabitation of land is a follow-up process and as the term implies represents planned effort to improve the quality and pattern of land use. Consolidation and rehabitation of land are complementary concepts in the process of land development.

2. Principles of Land Tenure among the Ibans

It is deemed necessary to provide some understanding of land tenure among the natives and relevant concepts in native culture. For this purpose a major native group, the Ibans, is chosen. Only by understanding parts of Iban culture pertaining to land tenure can it

be possible to appreciate some of the far-reaching effects and implications of the proposed Land Consolidation and Rehabitation Authority Bill.

There are two basic concepts in land tenure among the Ibans.[27] The first concept is land held by a longhouse community not in communal ownership but by common right of access. By this is meant that rights of access to such land or territory allotted to a particular longhouse are held in common as against the members of all other longhouses. This practice is in line with general Iban notions of community life and sharing of resources. Such land or territory allotted to a particular longhouse normally constitutes the surrounding contiguous territory of the longhouse called the "menoa". It includes besides farms and gardens the water than runs through it and the forest round about it to the extent of half a day's journey.[28] Kinship is important within the longhouse but relations not living in it have no authority there over land.

A second concept in Iban land tenure is actual or individual family ownership. This is created by the felling of primary forest and this is normally practised by individual bilek - families. By clearing the virgin forest from a tract of land, a bilek family

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[27] Freeman, Report on the Iban, p. 143

[28] A. J. N. Richards, Land Law and Adat, p. 16

secures full discretionary rights over the secondary jungle which springs up within a few months of the first padi harvest. Initial cultivation of land therefore gives family ownership to that land on the basis of a perpetual title. This practice of acquiring individual family ownership of land is recognised by Section 5 of the Land Code. The provisions of Section 5(2) of the Land Code inter alia states that native customary rights in land may be acquired by the felling of virgin jungle and the occupation of land thereby cleared. A subsidiary concept within the major concept of actual or individual family ownership is individual ownership of trees and jungle plants. A. J. N. Richards in his printed report on Sarawak Land Law and Adat mentions this practice whereby a man and his family can claim an exclusive right to certain wild trees and plants in the forest outside his private "sphere of influence" if he makes them on discovery. Hence the popular expeditions to interior hilly areas to "harvest" illipenut or "engkabang" by Iban families.

The Iban way of life is centred on padi cultivation traditionally carried out following the wasteful method of shifting cultivation. Freeman in "Report on the Iban of Sarawak" notes that in Iban eyes there was sufficient forest land to provide for untold future generations and their whole policy was to exploit the stored up fertility of virgin land by extracting from it two or three successive crops and then to move on to fresh fields. Under these conditions no complex system of land tenure was possible. The average Iban farm (umai) is between four to five acres.

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Apportionment of land is therefore decided by some means of independent action taken by most bilek families.

Iban customary land adat recognises also a concept whereby certain families for various reasons engage in borrowing and interchanging land. Such borrowing of land happens when one family requests (minta) for the use of another family's land because its own holdings are not adequate for its needs. Usually such requests are granted but there is no change of tenure and only a taking of one season's crop plus the payment of a small nominal rent. Reciprocity is the principle governing these transactions.

Common rights of access to land within a longhouse territory and initial cultivation principle are basic concepts that have governed the culture of Ibans. Iban economy is predominantly agriculture and of a subsistence nature. The Iban social system consists of social interaction of values which are based on principles of kinship and community living and sharing. These features of Iban culture are the ones the proposed Bill intend to change and remould.

3. Development Objectives

Community resettlement and land development schemes were first introduced under the 1st and 2nd Malaysia Plans. Land Development schemes begun under the 1964 - 1969 Development Plan were afterwards incorporated into the 1st Malaysia Development Plan of 1966 - 1970.

The basic development objective is to increase income and improve the standard of living of rural communities. Economically,

therefore, the rural development programme had two objectives:

(i) to improve the productivity of existing farming land, and

(ii) to open up new opportunities for the depressed farmer and to provide sufficient new agricultural holdings for the expanding population.[29]

In 1960, the rural community may be regarded as consisting of three major groups:-

(i) The Native hill padi farmer who had established rights over something in excess of 8,000 square miles of land.

(ii) The settled cultivator, largely of Chinese descent and concentrated mainly in those areas classified as Mixed Zone Land.

(iii) The depressed farmer who might be of any race.

Typical examples are the Melanaus Sago planters on the coastal areas of the Third Division; the Ibans of certain parts of the

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[29] Land & Survey Department Report for period 1960 - 1965, p. 41

Ulu Ai in Second Division.[30]

In order, therefore, to accelerate the economic and social development of the rural areas the Government launched the Land Development Schemes. These schemes were modelled after the then FLDA schemes in Peninsular Malaysia. However, in Sarawak the development effort is concentrated on schemes within Development areas. One of the reasons for the decision to concentrate on selected Development Area is the need to direct primary efforts to areas with more fertile soils.

By 1968, seven schemes were in progress in various parts of the country. These were Triboh (Serian District), Melugu and Skrang (Simanggang District), Meradong and Sibentek (Sibu District), Lambir (Miri District), Lubai Tengah (Limbang District). These schemes grouped together indigeneous people and the Chinese to form communities large enough to provide the necessary social services such as schools, dispensaries and water supplies. These seven schemes covered a total acreage for cultivation of mainly rubber of 22,000 acres to benefit about 1,700 families.[31]

Of these schemes only Sibentek and Lambir were on State land. The others were on Native Customary Land.

Rural development is therefore a form of direct Government intrusion and participation. Native farmers lack the necessary capital

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[30] Land & Survey Department Report for period 1960 - 1965, p. 41

[31] Y. L. Lee, "Land Use in Sarawak", Sarawak Museum Journal, Vol. XVI, 1968 p. 287

and expertise to farm on their own. Government development programmes involving a process of resettlement and land development in native communities necessarily imply some disruption of native culture and way of life. The need to replace hill padi cultivation with a more productive form of agriculture was recognised.[32] This will be one form of disruption of culture since to most native peoples of Sarawak hill padi planting following the traditional method of shifting cultivation has very deep religious connotations and hence a change in farming method means something far more that the mere abandoning of a tradition. Freeman notes that the growing of padi is a ritual undertaking of the Ibans for generations.[33] Planned resettlement and land development will therefore cause a serious disruption of native cultures.

The Sarawak Land Development Board is constituted with statutory powers and responsibilities for initiating and operating land development schemes at present. Such schemes were mainly motivated to meet the demands for land by the Chinese people. The demand for land is greatest near the main centre of Chinese agricultural communities where there is much underemployment despite the available of local capital for opening new lands. Schemes were also aimed at encouraging the indigeneous peoples to adopt more permanent systems of cultivation and in this way make available extra land for non-indigeneous groups.[34]

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32 Land & Survey Department Report for period, 1960 - 1965, p. 40

33 Freeman, Report on the Iban, p. 166

34 Y. L. Lee, "Land Use in Sarawak", Sarawak Museum Journal, Vol. XVI, 1968, p. 287

Land development schemes have also extended to the cultivation of other cash crops particularly pepper and oil-palm. Hence the oil palm schemes in Miri District. Some 51,000 acres are proposed for cocoa cultivation under the Third Malaysia Plan.[35]

4. Development Problems faced by Natives

There are various outstanding development problems faced by the native farmer that have contributed to the slow pace of development.

The first serious problem may be construed as the cultural problems and way of life among the natives that basically pose an obstacle to necessary change for development to proceed. A single predominant feature in the Iban economy is subsistence agriculture resulting in shifting cultivation of padi. Productivity is low in proportion to the effort required so that the farmers get only a small return for much ardous work. To most of the native peoples of Sarawak, hill padi planting has very deep religious connotations and hence a change in farming method means something far more than the mere abandoning of a tradition.[36]

For generations, therefore, the native farmer has concentrated his economic efforts to one skill: padi cultivation. Development programmes would necessarily require some measure of resettlement or at least some move away from the traditional way of life. By reason of the fact that

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[35] Information disclosed during interview with the Secretary, Sarawak Land Development Board, in Kuching, May, 1975.

[36] Land & Survey Department Report for period 1960 - 1965, p. 42

the native farmer is unskilled in other modes of occupation and livelihood, the problem of mobility arises. There is insufficient diversification of skill to enable the native farmer to migrate to new areas for purposes of economic development. At present the farming population is scattered at very low density over a very large area.

The majority of land now presently held under native customary rights is generally of poor soil quality, inaccessible and remote from urban areas. As a result the native farmer has always experienced a problem of land title. The practice is not to accept native customary land as good securities for loan. Rural credit facilities are not provided to any significant extent at present.

Native farmers in rural areas face the problem of expertise to an acute extent. In fact, agricultural expertise amongst the native farming populace is very low and this in turn made finance short. Essential infrastructure is lacking and transportation both slow and costly.

Perhaps the basic problem a native farmer faces can be attributed to illiteracy. Education has not been sufficiently appreciated. When natives were asked to give up hill padi farming abruptly and entirely to ensure the success of land development schemes they were largely unwilling to do so. This is because both on longstanding traditional and religious grounds they do not wish their children to be landless.[37]

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[37] Sarawak Land & Survey Department Report for period 1960 - 1965, p. 46

Only when such beliefs are discarded can any form of planned land development, consolidation and rehabitation proceed. Education is the best method to bring about such changes in outlook among the natives. [38]

5. The Proposed Sarawak Land Consolidation & Rehabitation Authority Bill

The proposed Bill is intended to coordinate efforts to improve the quality and nature of native land proprietorship by the establishment of a statutory body.

In Section 2 of the proposed Bill, the Land Consolidation & Rehabitation Authority is deemed a native of Sarawak for purposes of the Land Code. Section 4 of the proposed Bill lays down the functions of the Authority. These included the important function of promoting the occupation and better utilisation of land as well as to consolidate uneconomic holdings and to rehabitate land owners or holders of customary rights by providing economic farm units and other forms of settled agriculture in the rural areas.

One major change which the proposed Authority intends to affect is a gradual replacement of the traditional method of padi cultivation to permanent agriculture. In this respect the proposed Bill

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[38] Education can also help reduce the rate of illiteracy among the natives. Educated natives would be able to seek means of employment and livelihood away from sole dependence on the land. In an article in the Far Eastern Economic Review, James Morgan reported that it had been discovered that in Malaysia, persons who have completed as little as three or four years of schooling earn over ten times as much as those who are illiterate. James Morgan, "How Big the Imbalance", FEER, Vol. IXIX, No. 39 (Sept. 26, 1970), p. 22

intends to overcome the problems of low productivity and uneconomical utilisation of land by natives.

Part IV of the proposed Bill provides for the creation from time to time by notice in the Gazette of Development Areas. Section 17 of the proposed Bill sought to preserve the legal ownership or customary rights of any land included in a Development Area. This section was probably drafted with a view to prevent native reaction being roused. However, the rights of these customary rights holders will be held subject to the right of the Authority to exclusive occupation of the land. The Authority proposed to operate within these Development Areas through the appointment of suitable persons to be the nominated occupier or occupiers of any area of land within a Development Area. A nominated occupier's rights are akin to that of a licencee in the possession and use of his land. The nominated occupier may be the owner or he may be any other person appointed by the Authority.

There is, therefore, a temporary suspension or deprivation of of native customary rights in land during the development period in a Development Area. The holder of native customary rights now possesses only the rights of a licencee in land. After development has been completed in a Development Area, Part IV of the proposed Bill provides for a surrender of the interests of native customary rights holders to the Government. Such land shall be allocated back to the former owners or other persons as grants in perpetuity or leases or be granted to any corporation established under Section 13 of the proposed Bill.

The first major change that the proposed Bill intends to introduce is to change the status of title in native customary land in a Development Area. This is necessary to facilitate planned development. By planned development the Authority hopes to improve the quality of native customary land and to make it more acceptable as securities for loans. Lack of expertise as experienced by the native farmer at present will be met by the establishment of this Authority to provide the necessary expertise and funds.

The ordinary native customary rights holder who in most instances is illiterate would not view the acts of the Authority under the proposed Bill most favourably. The native farmer would in all probability view the Authority's intentions as amounting to eventual and complete acquisition of land they consider rightfully theirs. The acquisition of rights of ownership in land in a Development Area is a discretion of the proposed Authority and not by the long-standing traditional method of initial clearing and cultivation of land.

Another change under the proposed Bill would be the introduction of a permanent diversified agriculture based on the cultivation of cash crops such as rubber, pepper and oil palm. The practice of shifting cultivation of a single crop, padi, would be discarded. There may well be resistance by natives at the initial stages at least to the introduction of an unfamiliar cash economy.

One of the prerequisites to the smooth implementation of land consolidation and rehabitation programmes would be a preliminary

stage of resettlement of native population within a Development Area and from outside to within a Development Area. Inhabitants from different longhouses or kampongs may be integrated into one planned village. Such a move would imply that families dwelling for generations in one longhouse would be seperated and resettled in a different environment. Community living in a longhouse would be split into individual living of each bilek-family.

Such effects of the introduction of this proposed Bill would require a complete change in outlook and mentality by natives in native customary land. Native reception of such changes in their way of life will determine the degree of success this proposed Authority achieves. There must also be a coming to terms with a break in traditional leadership when longhouses are split into individual units in a planned village. The traditional office of a Tuai Rumah in a longhouse will be no longer possible. Moreover the traditional litigation process practised by a longhouse community which is recognised under the Native Courts Ordinance, 1952 becomes obsolete. Basically community life must be replaced by notions of individual survival.

It is possible that Section 16(2) of the proposed Bill was drafted to meet obstacles caused by traditional native concepts of land tenure. Section 16(2) provides for the taking of adequate steps to ascertain the wishes of the land owners and customary rights holders. The subsection goes on to provide that any area shall not be declared a Development Area unless objections have been fully considered and

notwithstanding such objections the Authority is of the opinion that the land should be made a Development Area. The Authority has considerable discretion to reach the final decision.

In the past there has been the establishment of Development Committees on District and Divisional levels. This practice has now been abolished. Besides being efforts designed to involve local leadership within a Development Area. Development Committees assume greate relevance when Section 4(1)(e) of the proposed Bill is considered. Section 4(1)(e) provided that the Authority shall be responsible for improving the quality of life in the rural areas through the provision of social and economic ameneties within the Development Areas. By social and economic ameneties one can expect the setting up of schools, dispensaries and cooperatives.

Land consolidation and rehabitation will require a readjustment of social and economic values among the natives. As early as the publication of the First Report of the Working Party appointed to give effect to the recommendations of the Land Committee, 1962, it was recognised that the native farmer must be assisted in making the necessary adjustments by means of organised process. The 1962 Land Committee was not even considering direct intrusion in the way of life and concept of land tenure of the natives. It is submitted that organised processes are even more relevant when the proposed Authority in this instance declares an area within native customary land to be a Development Area. Unless he is so assisted the native

farmer will have change thrust upon him by uncontrolled social and economic forces at an intolerable pace.

One of these organised processes referred to earlier would be a Development Committee. It is submitted that each Development Area within a particular district be represented in a District Development Committee. These Development Committees at District level could be organised under the chairmanship of the District Officer with the representatives of each Development Area sitting as members. In this way the District Development Committee can act as the major forum to ascertain the wishes and relevant objections of land owners and customary rights holders in an Area proposed to be declared a Development Area.

The needs and ideas of District Development Committees in a particular Division could be translated to a Divisional Development Committee. This would act as a centre of coordination formulating a broad outline plan under the chairmanship of the Resident in each Division.

At present resettlement of natives and land consolidation and rehanitation has proceeded only on an informal basis. One of the first schemes of major resettlement is in the 3rd Division in the Oya area motivated mainly by security reasons. This scheme is popularly referred to as "skuau" and in the other districts such as in and around Kanowit similar schemes are being initiated under the guidance of RASCOM (Rajang Security Command).

Native customary land generally constitute land with poor soils. This factor of ecological composition together with the fact that native customary rights holders lack the necessary capital and expertise to develop their land makes the proposed introduction of a Land Consolidation and Rehabitation Authority appropriate at this stage of native land administration.

CONCLUSION

Land administration with particular emphasis on native customary rights has now been examined in its various aspects. The Sarawak Land Code in spite of its faults continues to be the principal statutory authority for most day-to-day aspects of land administration.[39]

In the area of land settlement the Land Code is the single important legislation. Various important sections in Part V on Settlement in the Land Code are of vague and ambigious interpretation. Such sections include S.102 which does not settle definitely the question whether a judicial review or appeal procedure is intended before the Magistrate. The Settlement Officer carries out a wide range of duties and functions including the judicial function of investigating and determining native customary rights to land under Section 94. There is a pressing need to review the provisions of Part V of the Land Code in order to assert and carry out the intention of the Legislature.

Land arbitration under the hierarchy of native courts constituted by the Native Courts Ordinance has assumed increasing importance. The questions that arise pertain to the suitability of native courts to serve and provide for efficient and proper administration of justice. A religious criteria[40] might be applied in future to

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[39] Porter, Land Administration in Sarawak, p. 111

[40] A suggestion by Islamic officials after visit in July, 1975 as reported in New Straits Times.

differentiate a major native community, the Malays, from the rest of the native population. This raises questions as to the future trend in land arbitration between the two groups, both presently covered by the provisions of Native Courts Ordinance.

The reasons which led the Legislature to provide for a racial land classification pattern under Part II of the Land Code have not been completely realised since 1958. It has been felt over the years that due and sympathetic regard to the native customary rights in land is impossible to reconcile with the corresponding objective of economic benefit and development to the country. Such process of reconciliation cannot come about unaided. Hence the need to introduce land consolidation and rehabitation programmes with particular emphasis on native customary land has crystallised in the proposed Land Consolidation and Rehabitation Authority Bill. The implementation of the provisions of this proposed Bill may well achieve a balanced economic growth in the State.

One predominant problem in the administration of native customary rights in land is that of unlawful occupation of native land by non-natives. The problem developed mainly because of the Chinese demand for more land. This problem has been dealt with by an exercise of policy rather than by reliance on law. Hence the issue of permits to non-natives under Rule 19 of the Land Rules.

Land administration with particular emphasis on native customary rights in land continues to be a blend of adat law on the

one hand and statute law under the Land Code on the other hand. It might be possible to foresee a future where native customary rights in land cease to exist especially as land becomes scarce and premanent agriculture is gradually accepted by the native population. Land development will undoubtedly achieve priority in any future undertaking in the process of native land administration.