

## LISTENING TO THE INDIGENOUS VOICE FOR A DEFENSIBLE CONCEPTION OF PROPERTY IN THE DETERMINATION OF CUSTOMARY LAND RIGHTS IN MALAYSIA

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### I. Introduction

An Indian Chief was quoted in *Calder v British Columbia* as saying:

*What we don't like about the government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land – our own land... [Our] forefathers for generations and generations past had their land here all around us; chiefs had had their hunting grounds, their salmon streams, and places where they got their berries; it has always been so.<sup>1</sup>*

This statement could have been made by any indigenous person from any part of the world, whether it be a settler state in the Americas, Canada, Australia, New Zealand or a former British colony in Africa or Asia. It is echoed by Orang Asli leaders in Peninsula Malaysia, and native chiefs in Sarawak or Sabah. It could have been made yesterday, a decade or a century ago. In fact that statement was made in 1888 by one David Mackay of the Nishga'a nation of British Columbia, while addressing the Royal Commission visiting the Nishga territory, at the time when the land rights of the British colonies was being considered in the Privy Council,<sup>2</sup> the final Court of Appeal for Canada as well as the British Colonies. It embodies the sentiment and the bewilderment of indigenous peoples the world over, where they find that their rights and ownership to the ancestral land that they occupy is measured by a criterion other than their own, and is often trivialised to extinction.

The customary rights to land and the value attached to it has long been a matter considered in the common law courts. Against this backdrop, Lord Haldane cautioned against 'a tendency ... to render [customary] title conceptually in terms which are appropriate only to systems which have grown up under English law'.<sup>3</sup> This underscored the need to ascertain rights possessed by indigenous peoples through their own laws, customs and usages instead of merely importing the preconceived notions of property rights under the common law.<sup>4</sup> The paper compares the idea of property from the indigenous and 'the western' perspective and looks at the nature of usufructuary right to show that 'proprietary' rights should not be seen from only one perspective, that is the western perspective. This entails an understanding of ways of 'seeing', 'knowing' and conceptualization that may be different from the systems that have grown under common law. The paper focuses on Sarawak, the largest state in Malaysia which has a majority native population and whose interests in land are largely held under native customary tenure, often referred to as usufruct.

'Usufructuary' right is often said to be a personal right of use – a nomenclature that disregards the possibility of possession and ownership. Terms like 'licensee' and 'permit holder' that are associated with 'usufruct' have negative consequences on the quantum of payable compensations. The paper juxtaposes the restrictive provisions of the Sarawak Land Code 1958 against the actual system of native land use system and examines such land use in the light of 'property' and 'adequate compensation' under Art 13 of the Federal Constitution. It explains how a usufructuary interest amounts to a full beneficial ownership which must be compensated in the event of extinguishment or deprivation. Apart from market value, adequate compensation should take into account the communal elements and the traditional livelihood of the community which gives it its unique value as property.

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<sup>1</sup> Quoted in *Calder v British Columbia (AG)* [1973] 3 SCR 313, 319.

<sup>2</sup> *St. Catherine's Milling and Lumber Company v The Queen* (1888) 14 AC 46.

<sup>3</sup> *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 211, 399.

<sup>4</sup> [1921] 2 AC 399, 404.



equal footing with other proprietary interests: see *Canadian Pacific Ltd v Paul* [1988] 2 SCR 654 at 677.<sup>26</sup>

The usufructuary concept has been perpetuated by use of the term 'licensee' which implies no right of ownership until a document of title has been issued. In line with that concept, the definition of a proprietor in s 2 of the Sarawak Land Code:

*Includes the Government and any person entitled to an estate or interest in alienated land, whether such estate or interest is protected by registration or not, but does not include any person holding or deemed to hold land by licence from the Government. (emphasis added)*

Under the Code until a document of title has been issued, occupation of state land is deemed unlawful occupation.<sup>27</sup> Native customary rights (NCR) may be created under s 5 through felling of virgin jungle and its occupation, planting of trees, use of land for burial and shrines and for right of way but even where NCR has been created, such lands are said to be held by licence from the government. Under ss 10(3) and (4), further creation of NCR or occupation of Interior Area Land is subject to issuance of a permit to be obtained from the Superintendent of Lands.<sup>28</sup> Any native who, without a prior permit in writing from a Superintendent, occupies any Interior Area Land or fells or attempts to fell virgin jungle upon such land or attempts to create customary rights upon such land shall be guilty of an offence.<sup>29</sup>

The statute reduced native rights to a mere right of use and advanced the presumption that they have no kind of ownership or rights to land. They could enjoy the 'fruits of the land' by foraging, hunting, fishing and even by cultivation of the land, but have no absolute or statutory right to the land. Such a provision would have in no small measure been influenced by the general common law of colonial expansion and accorded with the thinking at the time when 'colonists ... conceived of the aborigines ... as 'savages' and 'wild men' living in a state of nature [who] ... did not use the land in a progressive manner, and so had no claim.'<sup>30</sup> The fact was that Sarawak was already inhabited and cultivated by groups who were not mere wanderers but were in occupation and were utilising the land according to their own customary practices.

The classic case that is often quoted as an authority is the case *Keteng bin Haji Li v Tua Kampong Suhaili* where Digby J said:

*In Sarawak a person can be said to 'own' land only if there is a land office title subsisting in respect of that land. If there is no such title the land is Crown land; the occupier is at best a mere licensee; and he has no legal interest which he can either charge or transfer... This is so whether for the purposes of the Land (Classification) Ordinance the land is Native customary land, Reserved Land or Interior area land. If a person abandons his legitimate occupation of such land, he does so at his peril.*<sup>31</sup>

The concept of a licence as envisaged by Digby J effectively denied the existence of a valid native perspective of land ownership based on an elaborate system of rules and customs and is 'characteristic of the self-serving ethnocentricity upon which colonialism is based'.<sup>32</sup> A licence is a right of user, not annexed to the land, which exists at the pleasure of the legal owner. A licensee has no interest in land, and accordingly has no remedy against a third party who disturbs him in the exercise of his licence.<sup>33</sup> Permit or permission<sup>34</sup> implies that no proprietary rights existed. A

<sup>26</sup> *Ibid.*, 1093-95.

<sup>27</sup> Sections 10 and 209.

<sup>28</sup> Amended by *Land Code (Amendment) Ordinance 1996*, Cap A42. District Officer is replaced by Superintendent of Lands, Department of Lands and Survey.

<sup>29</sup> Penalty, in the case of a first offence, is a fine of RM1000 and in the case of a second or subsequent offence, imprisonment for two years and a fine of RM5000.

<sup>30</sup> Bain Attwood, 'Introduction: The Past as Future: Aborigines, Australia and the (Dis)Course of History' in B Attwood (ed), *The Age of Mabo* (1996) viii-x.

<sup>31</sup> (1951-54) SCR 9.

<sup>32</sup> Kent McNeil, 'A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aborigines' (1990) 16 *Monash University Law Review* 91-110, 92.

<sup>33</sup> *Clerk & Lindsell on Torts* (14<sup>th</sup> edn) 773 para 1336. This was the approach taken in a case in the High Court in Sibul, Sarawak between *Juti ak Maga & Ors v Lien Ho Sawmill Bhd & 2 Ors* (Unreported, Suit No. 21-44 of 2001). In a plea for interlocutory injunction, on a strict application of s 5, the court held that the plaintiff was a licensee by law and therefore had no right to bring an action for trespass.



permit is revocable at any time or expires by lack of renewal. While a provision remains for the issuance of permits, in practice, permits were rare and perhaps even non-existent. They were formally discontinued through a government directive in 1964.<sup>35</sup> These provisions not only restricted further creation of customary rights on land, but made native occupiers 'illegal occupants' on their own land. Neither existing native social structures nor the traditional land use practices are fully taken cognisance of, despite the fact that these are integral to the survival of those communities. What is recognised is an occupational right which is restricted to specific methods and duration.

Soon after the passage of the Land Ordinance 1948, the predecessor of the Land Code, the inappropriate adoption of the term licence was not totally unnoticed. Despite the ordinary meaning of the term 'licence', the effect attributed by the courts to a licence point to a proprietary right in the land. In *Sijip anak Majan v Regina*<sup>36</sup> Lascelles J commented that although the plaintiff's interest on land, was termed a licence, the plaintiffs were entitled to benefits from the land, and that 'permission for others to use the land would be necessary'. He referred to the statement by the state counsel Peter Mooney that as licensees they were 'entitled to benefits from the land' and 'permission for others to use that land would be necessary'. Lascelle J said

*Mr Mooney submitted that even if the Rituh Dayaks were licensees they were entitled to the benefits from the land and these benefits had been lessened. He pointed that there was no such estate which can be created in English law which is on all fours with that of lawful occupier of jerame and that we must look to our own land laws for guidance on this point. He suggested that a tenant at will, entitled to embellments, was the nearest approach. He further submitted that the only definition of property which could be followed is the one given in the Sarawak Interpretation Ordinance.*

His Honour then held

*The Land (Classification) Ordinance admittedly makes the Rituh Dayaks licensee of the land but there is no avoiding the fact that in this colony such an occupier has an interest which is an exclusive one: to hold otherwise would create chaos throughout the vast areas of Sarawak which are at this time held under customary tenure Section 92 of the Land Ordinance further lays down that even when the government requires such land for a residential, mining or other reserve or for public purpose formal notice to quit is necessary and such compensation shall be paid as is reasonable. I am satisfied that there was 'property' within the meaning appearing in the Interpretation Ordinance and that is the meaning which must apply in this case before me. The persons who suffered the loss are clearly the people who held land by customary tenure. (emphasis added).<sup>37</sup>*

In the more recent case of *Nor Nyawai v Borneo Plantations Sdn Bhd & Superintendent of Lands and Survey & Anor*<sup>38,39</sup> the High Court had occasion to consider the occupation of land by native Iban. This was a case of an encroachment by the defendants, the Borneo Pulp Plantations into some land which the plaintiff Iban claimed to be land which they held according to their customary practices. The High Court held that the plaintiffs have occupied and cultivated their *temuda* land under their personal laws and this fell under s 5(2)(a) and (c). In that case Ian Chin J further recognised the existence of the Iban *pemakai menoa* (the area from which its members *makai* lit, 'eat') and *pulau galau* (land reserved for communal use). Ian Chin J quoted from a paper by Tan Sri Datuk Gerunsin Lembat thus:

*Pemakai menoa is an area of land held by a distinct longhouse or village community and includes farms, gardens, fruit groves, cemetery, water and forest within a defined boundary (garis menoa).*

*The purpose (sic) of creating a pemakai menoa involves the ritual ceremony of panggul menoa. After the ceremony has been performed, the first cutting of virgin jungle for settlement and farming can commence. From then onwards, the community can establish its rights to the felled area,*

<sup>34</sup> Land Code s 10(5), (6), (7) sub-s 5 goes further to provide that the Superintendent's consent for the purpose of any permit shall not be given if he considers that it would prejudice the individual or communal rights of other inhabitants. An aggrieved person may appeal to the Director within 21 days with a further appeal by petition to the Minister within 30 days.

<sup>35</sup> Zaidie K Zainie, 'Native Customary Land: Policies and Legislation' (paper presented at the Seminar on Native Customary Land, Kuching, 29 September–3 October 1994). Also A J N Richards wrote in 1961, 'I know of no permits issued under s 10 of the Land Code or of any recently established rights denied under s 5'. See also Francis John Adam, 'Native Customary Land Rights in Sarawak' (1998) 25 (special edn) *Journal of Malaysian and Comparative Law* 217.

<sup>36</sup> *Land Cases (1946–1968)* 49.

<sup>37</sup> *Ibid.*, 49, 51.

<sup>38</sup> [2001] 2 CLJ 769.

<sup>39</sup> [2001] 2 CLJ 769.



boundaries (*garis menoa*) are drawn between the villages. These boundaries normally follow streams watersheds, ridges and permanent landmarks.

*Pemakai menoa* includes cultivated land (*tanah umai*), old longhouse sites (*tembawai*) cemetery (*pendam*) and forest area (*pulau*).

The Court of Appeal overturned the High Court decision on 9 July 2005,<sup>40</sup> holding that there was insufficient proof of occupation by the respondents (Iban) in the disputed area, although they had satisfied the test for NCR in the adjacent area. Nonetheless, the decision of the Court of Appeal<sup>41</sup> notably did not disturb the High Court's finding that the Iban concept of *pemakai menoa* exists. The court endorsed the expositions of the law by the learned judge at the High Court, that that the common law respects the pre-existence of rights under native laws or customs and they do not owe their existence to statutes. Legislation was only relevant to determine how much of those native customary rights have been extinguished. The *Sarawak Land Code* does not abrogate whatever native customary rights that existed before the passing of that legislation even though natives are no longer able to claim new territory without a permit under section 10 of that legislation.

The High Court said that the plaintiffs did not hold documentary title to the land, but they had a licence to the land. But Ian Chin J was clearly uncomfortable characterising the plaintiffs' status as that of mere licensees, as provided in s 8(3) of the *Land Ordinance* and subsequently in s 5(2) of *Sarawak Land Code 1958*:

*While it is correct that the plaintiffs do not hold any title to the land and may be termed licensees but their licence ... cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation ... The description of native customary rights as 'licences' is ill-fitting and this was clearly illustrated by Richards, at p 18, in these words:*

*"... Neither will 'licence' or 'permission' do to describe land rights. Permission is revocable at any time or expires by lack of renewal, and licence is 'a right of user not annexed to land'. Use of these terms would almost imply that no rights existed at all. Occupation of land without document or registration has been acquiesced in for so long, that title would appear to have been obtained by prescription to a large part of 'the bundle of rights'."*<sup>42</sup>

A finding that NCR exists would clearly allow for an action to be brought against another for trespass on land, indicating full control and possession. Such interest can only be extinguished in accordance with laws and this is after payment of compensation'.

In contrast to the licence under s 5 of the *Land Code*, a grant in perpetuity can be given by the Director of Lands and Survey to a native under s 18 in situations where a native has 'occupied and used' any area of unalienated state land in accordance with rights acquired by customary tenure 'amounting to ownership of land' for residential or agricultural purpose.<sup>43</sup> It is unclear what the term 'amounting to ownership' means. It is suggested that this should encompass long occupation and use of the land according to their customary practices, which grants full beneficial ownership.

A new s 15 introduced in 2002<sup>44</sup> provides that no state land shall be alienated or used for public purposes until all NCR has been surrendered or compensated. This is a tacit acknowledgment of the existence of NCR and for 'full respect' to be given to NCR in Sarawak, the right must amount to a 'full beneficial ownership', which may be assessed in economic terms and subject to full compensation upon any form of deprivation. This brings us to the question of adequacy of compensation for deprivation and compulsory acquisition of land.

#### IV. 'Usufruct' as a Proprietary Right under Art 13 of the Federal Constitution

It clear from the above discussion that the usufructuary rights of the natives under their laws and custom is a proprietary right that is protected by the Federal Constitution. It is not merely a personal right but an interest that amounts to a full beneficial ownership which is a proprietary right. Despite the use of the term license, in both contexts, the rights have economic value and fall under Art 13 of the Federal Constitution which means that any deprivation of such right must be subject to compensation.

<sup>40</sup> 'Borneo Pulp wins Appeal Case on NCR Land', *The Sarawak Tribune*, Saturday, 9 July 2005, 3.

<sup>41</sup> *Superintendent of Lands and Survey, Bintulu v Nor Anak Nyawai and Ors* and two other appeals [2006] 6 MLJ 256.

<sup>42</sup> *Ibid.*, 284.

<sup>43</sup> Section 18 was amended in 1963 following the report of the Land Committee in 1962 to allow for replacement of customary tenure by a lease for 99 years free of all charges. This was, however, amended in 1974 when the provision reverted to the original provision allowing for a grant in perpetuity of NCR land.

<sup>44</sup> *Land Code (Amendment) Ordinance 2002*.



Article 13 of the Federal Constitution states:

- (1) No person shall be deprived of property save in accordance with law.
- (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

'Property' in Art 13, is 'not used in a special sense. It means what people can own and buy and sell, give security for debts, use, wear out, improve, give away, destroy, settle on trust, leave by will or succeed to on intestacy.'<sup>45</sup> It is something that has a value which, when compulsorily acquired or used, can be assessed in economic terms.<sup>46</sup> For an interpretation of 'property' the court in *Adong bin Kuwau v Kerajaan Negeri Johor*<sup>47</sup> relied on the Indian case of *Rabindra Kumar v Forest Officer*.<sup>48</sup> That case dealt with the meaning 'property' under *Indian Constitution* art 19(1), which is similar to Art 13 of the Federal Constitution. The term 'property' is explained thus:

*[I]n the strict legal sense, the word property signifies valuable rights or interests protected by law and this is the primary appropriate and broader signification of the term. In modern legal system, property includes practically all valuable rights ... it can be enjoyed as property and recognized as equitable interests as well as legal interests and extending to every species of valuable rights or interests in either real or personal property or easements, franchises and incorporeal hereditaments. The term comprises also all rights which are incidental to the use, enjoyment and disposition of intangible things, the bare possession, with colour or right of anything of value, the right to be protected in one's possession of a thing or in one's privilege belonging to him as a member for the Commonwealth including the right to contest judicially any invasion of that which one possesses or owns. The property may reasonably be construed to include obligation rights and other intangible and physical things and thus the word 'property' means not only the thing but also the rights in the physical and corporeal thing which are created and sanctioned by law.*<sup>49</sup>

Relying on the above case and the Federal Court case of *Selangor Pilot Association v Government of Malaysia*<sup>50</sup> Mokhtar Sidin JCA (as he then was) gave a wide interpretation to proprietary rights and held that the aboriginal rights under common law and statutory law are proprietary rights protected by art 13 of the *Federal Constitution*. The view of the High Court was fully endorsed by the Court of Appeal.

The question of customary title as a proprietary right was also dealt with in *Sagong Tasi v Kerajaan Negeri Selangor* where the rights of the Orang Asli were called usufructuary rights which they could not convey, lease or transfer. Mohd Noor Ahmad J referred to *Mabo No.2*, and to the decision of Brennan J where he said

*Whether or not land is owned by the individual members of a community, a community which asserts and asserts effectively that none of its members has any right to occupy and use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by the community and, by importing definitions of 'property' which require an alienability under the municipal laws of our society, to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in the people: land is susceptible of ownership, and there are no other owners.*<sup>51</sup>

Brennan J went on to explain that although aboriginal title was a communal title, individuals within the community could, by its laws and customs, possess proprietary individual rights over their respective parcels of land. He said

*Indeed it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of the representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of*

<sup>45</sup> L A Sheridan, 'The Mysterious Case of the Disappearing Business: Government of Malaysia & Anor v Selangor Pilot Association' (1977) 4(1) *Journal of Malaysian and Comparative Law* 2, 3.

<sup>46</sup> Andrew Harding, 'Property Rights under the Malaysian Constitution', in F A Trindade and H P Lee (eds), *The Constitution of Malaysia, Further Perspectives and Developments, Essays in Honour of Tun Mohamed Suffian* (1986) 59-75, 66.

<sup>47</sup> [1997] 1 MLJ 418.

<sup>48</sup> AIR (1955) Manipur 49.

<sup>49</sup> AIR (1955) Manipur 49, 53-54.

<sup>50</sup> [1975] 2 MLJ 66. Suffian LP at 69 adopted the construction placed on the Indian article by the Indian Supreme Court on the unamended art 31 where the language of art 13 approximates with the language of the Indian art 31 before its amendment.

<sup>51</sup> (1992) 175 CLR 1.



*individual non proprietary rights that are derived from the community's laws, and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.*<sup>52</sup>

'In keeping with worldwide recognition now being given to aboriginal rights' and having considered the facts before him, Mohd Nor Ahmad J concluded that the right of Orang Asli to land is a proprietary right 'in their customary and ancestral lands'. This decision applies to the question of usufructuary right in *Nor Nyawai*. Having established that the right is a proprietary right, the next important issue is its protection under the Constitution.

#### V. Protection of Property Against Deprivation and Acquisition Without Compensation

Under art 13(1) and (2), deprivation could only be done 'in accordance with the law' and no law shall provide for 'compulsory acquisition' without adequate compensation. It is important to note briefly the impact of the two clauses of the article which are to be read disjunctively. The term deprivation includes any loss of property as a result of statute or executive act, which might, but does not necessarily, involve acquisition of property. Viscount Dilhorne, delivering the majority opinion in *Selangor Pilot Association* case, said

*A person may be deprived of his property by another acquiring it or using it but those are not the only ways by which he can be deprived. As a matter of drafting, it would be wrong to use the word 'deprived' in art 13(1) if it meant and only meant acquisition or use when those words are used in art 13(2).*<sup>53</sup>

Article 13(1) renders unconstitutional a statute or executive act which deprives a person of property and which is contrary to natural justice or due process of law. Article 13(2) renders unconstitutional a statute which provides for compulsory acquisition or use of property but which does not also make adequate compensation. This is a check on the legislature, not the executive.<sup>54</sup> In other words, clause (1) gives a right to natural justice or due process in the case of deprivation, but clause (2) gives a right to adequate compensation in the case of compulsory acquisition or use; deprivation may involve acquisition or use, in which case both rights come into play.<sup>55</sup> A right to compensation must be implied into any deprivation, and any deprivation of land under any legislation must be read subject to the *Federal Constitution*. *Adong bin Kuwau* dealt with it thus:

*The Federal Constitution art 13 supersedes both statutory law and common law and mandates that all acquisition of proprietary rights shall be compensated and that any law made for the compulsory acquisition or use of property without compensation shall be rendered void in accordance with art 4 of the Federal Constitution.*<sup>56</sup>

The Court of Appeal affirmed that decision saying that 'where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the *Federal Constitution*.'<sup>57</sup> I suggest that deprivation might encompass elements of dispossession, withdrawal, extinguishment or termination of property. Compulsory acquisition, on the other hand, should be interpreted broadly to include effective acquisition even when there is no actual transfer of title, but involves more than mere deprivation.<sup>58</sup> Where the conditions of Art 13 are not satisfied, any deprivation or compulsory acquisition will be unconstitutional. Harding puts it in this way

*The statute must make provision for the assessment and payment of adequate compensation, in that it must either fix the compensation, or provide principles for the assessment of the compensation, at a figure which bears a reasonable relation to the current market value of the property. Thus the claimant will have no argument based on the Constitution merely on the grounds that the compensation awarded is less than the market value of the property; he will be able to base his argument on art 13(2) only if the statute makes no or inadequate provision for adequate compensation.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Selangor Pilot Association* [1977] 1 MLJ 133, 135

<sup>54</sup> Harding, above n 46, 72.

<sup>55</sup> *Ibid.*, 73.

<sup>56</sup> [1998] 2 MLJ 418, 434.

<sup>57</sup> *Ibid.*, 158, 164.

<sup>58</sup> *Ibid.*



## VI. What is Adequate Compensation?

The term 'adequate compensation' postulates a sum which is a just reimbursement for the loss of the land and is a sum equivalent to 'full compensation'.<sup>59</sup> What factors should properly be taken into account when assessing 'adequate compensation' under art 13(2)? Harding suggests that 'adequate' means 'corresponding to the current market value of the property acquired' or, in the case of use, 'corresponding to the current market rental of the property used (or the equivalent), for the relevant period'. He noted, however, the difficulty of assessment and market value of land, as even experts in valuation may reach radically different valuations. Be that as it may, the courts have said that the principles in respect of compensation awarded under the *Land Acquisition Act 1960* would apply to award of compensation under the *Land Code*.<sup>60</sup>

What is the meaning of market value in the context of the *Land Code*? In *Ahmat bin Gani & 11 Ors v Superintendent of Lands & Surveys, First Division*<sup>61</sup> land owners were dissatisfied and objected to awards by the Superintendent upon acquisition of certain lands situated in Native Area Lands.<sup>62</sup> Since the code does not define market value the court referred to an Indian authority<sup>63</sup> and held that

*The market value of land may be roughly described as the price that an owner willing, and not obliged to sell, might reasonably expect to obtain from a willing purchaser of the land.*

The fair market value of the lands is to be determined by 'evidence of sales of the same land or similar land in the neighbourhood, after making due allowance for all the circumstances'.<sup>64</sup> The potentialities must be taken into consideration, which means 'future utility' or 'the probable use of the land in a mere lucrative manner' or also called 'special adaptability' of the land.<sup>65</sup>

Payment of compensation applies not only in respect of acquisition of land but also extinguishment. In the context of Sarawak, apart from 'acquisition', the terms 'resumption'<sup>66</sup> and 'extinguishment' are used.

## VII. Acquisition and Extinguishment and Compensation

Through the *Land Code (Amendment) Ordinance 2000*, the term 'termination' replaced 'extinguishment'.<sup>67</sup> The change in terminology from extinguishment to termination was primarily done to avoid misunderstanding of the effect of the terms when translated into Malay, the official language. Extinguishment, which is translated as *dimansuhkan*, connotes complete abolishment of the right, whereas termination is translated *ditamatkan*, which implies a cutting back of an existing right.<sup>68</sup> What is important is that there is a 'clear and plain intention' to extinguish. This test that applied in *Mabo (No. 2)*, and in *Wik*, was used in *Nor Nyawai*.

<sup>59</sup> *Stroud's Judicial Dictionary* (4<sup>th</sup> edn, 1971).

<sup>60</sup> *Ahmat bin Gani & 11 Others v Superintendent of Lands and Survey, First Division (FC), Land Cases (1969–1987)* 20–30, 25.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Land Code 1958* s 48.

<sup>63</sup> The court referred to *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] MLJ 69, 71 where Buhagiar J adopted the definition of Jenkins J in *Kailas Chandras v Secretary of State* (1913) 17 Cal LJ 35.

<sup>64</sup> Buhagiar J in *Kailas Chandras v Secretary of State* (1913) 17 Cal LJ 35. This was quoted by Suffian J (as he then was) in delivering the leading judgment of the Federal Court in the case of *Superintendent of Lands and Survey v Aik Hoe & Co Ltd* [1966] 1 MLJ 243, 247.

<sup>65</sup> Per George Seah J in *Ahmat bin Gani & 11 Ors v Superintendent of Land and Survey, First Division, Land Cases (1969–1987)* 9. The court referred to the Privy Council case of *Vyricheria Narayan Gajapatirju v The Revenue Divisional Officer, Vizagapatam* (1930) AC 302, 313, where Lord Romer said:

...it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at a time which its value is to be determined...but also by reference to the users to which it is reasonably capable of being put in the future. No authority indeed is required for the proposition. It is a self evident one. No one can suppose in the case of land, which is certain or even likely, to be used in the immediate or reasonably near future for the building purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste lands or that, in ascertaining its value the possibility of its being used for building purposes would have to be taken into account.

<sup>66</sup> Resumption under Part IV includes surrender of land and declaration of lands for public purposes.

<sup>67</sup> Part IV is titled 'resumption of land' and the words 'extinguishment' and 'extinguished' wherever they appear is substituted with 'termination' and 'terminated' respectively. See also *Land Code* ss 4, 15, 33A, 94 and 141.

<sup>68</sup> Personal communication with an officer of the Sarawak Lands and Survey Department, Kuching, June 2002.



Whilst the *Land Code* has always provided for compensation to be awarded in the event of acquisition or extinguishment of land, until the amendment in 1998, the question of how and on what principles compensation was to be determined was left to the discretion of the settlement officer.<sup>69</sup>

The first case that dealt with extinguishment on NCR was *Ansi Rengan v Hoe Hung Sawmill Ltd.*<sup>70</sup> Damages of RM500 were awarded to the plaintiff based on 'the return which the plaintiff might be likely to get from the land if he had exercised his right to cultivate it'.<sup>71</sup> Pike CJ noted that he could not alienate or subdivide the land, nor could he build upon it nor raise a mortgage on it, and on 'a shifting cultivation basis the plaintiff could not have farmed the land more than once'.

In *The Minister for Land and Mineral Resources v Bilam anak Chandai*,<sup>72</sup> when George Seah J had to deal with compensation paid upon the extinguishment of NCR land, he noted that the *Land Code* did not provide what manner and on what principles compensation was to be assessed upon extinguishments under the direction of the Minister.<sup>73</sup> Thus, it was submitted for the Minister that the only rights that entitled *Bilam* to compensation was his loss of 'land', viz one acre, and loss of cultivation thereon. And for the native respondent, it was contended that as a result of the requisition, he had lost his ancestral land which he had inherited and which, by custom, he could not alienate but must hand down to his heirs. He and his descendants might dwell, build and develop the land. The arbitrator gave to the respondent compensation for potential use of land in the future. The question was whether it legitimate to take the potential use of the land for purposes other than agriculture?

On appeal, George Seah J considered the basis of valuation adopted by the Superintendent of Lands and Survey and the Settlement Officer and held that compensation must be for the extinguishment of NCR with value to be given for the loss of the 'land', fruit trees, crops or building lawfully erected on it. Reasonable removal expenses ought to be included in appropriate cases. In determining the value of the 'land', the *bona fide* selling prices of neighbouring property held under title and subject to the same condition and use could be taken into account but the potential use of the requisitioned 'land' is irrelevant.<sup>74</sup>

The learned judge was careful to state that this was merely *obiter*, and not stated as a rule that applies to every situation. He warned that each case must be considered on its own facts.

In another case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors*,<sup>75</sup> a representative action was brought by some natives from the area affected by the building of the Bakun hydro-electric dam. The court noted that some compensation had been paid to the plaintiffs for the loss of their NCR, but noted that the extinguishment was in accordance with the provisions of existing written law. Gopal Sri Ram JCA noted that the deprivation of the 'livelihood and cultural heritage' of the natives 'certainly comes within the scope of the expression of 'life' in art 5(1) of the *Federal Constitution*. The learned judge quoted the Indian authority where the court said 'where there is deprivation of livelihood or one's way of life, that is to say, one's culture, there is deprivation of life itself'.<sup>76</sup> The native Kayan, in that case had brought an action questioning the validity of the law on Environmental

<sup>69</sup> Sections 30(A) and (B) of the Order VIII of 1920, for instance, provided that whenever the government 'resumes possession of any occupied land for any purpose' claims for compensation are to be made to the Superintendent. The basis of valuation 'for all country lands shall be the original costs, plus a reasonable amount to compensate for actual expenditure, and interest on money spent on improving land'.

<sup>70</sup> Kuching High Court Civil Suit No. K 4 of 1965 dated 2 May 1968 (unreported). See *Land Cases (1946-1968)* Land and Survey Department, Sarawak, 220.

<sup>71</sup> *Ibid.*, 226.

<sup>72</sup> *Land Cases (1969-1987)*, Lands and Survey Department, Sarawak, Kuching High Court (Civil Application No. 2 of 1971).

<sup>73</sup> This was done under s 82(2), which has since been deleted. George Seah J noted also that, although express provisions were made for the payment of monetary compensation to a native whose customary rights have been extinguished, there was unfortunately no provision as to the manner or basis on which compensation was to be determined either by a settlement officer under the *Land Settlement Ordinance* or by the Superintendent of Lands and Survey under the *Land Ordinance*.

<sup>74</sup> *Land Cases (1969-1987)* at 720.

<sup>75</sup> [1997] 4 CLJ 254. The deprivation of interests as outlined in *Adong's* case was not pleaded in this case. This writer questioned the basis for giving monetary value to 'deprivation of life'. Elsewhere, Ramy Bulan, 'Native Title as a Proprietary Right: A Step in the Right Direction?' (2001) *Asia Pacific Law Review* emphasised that the survival of an indigenous community depends on the land, and cannot really be quantified in monetary terms because the removal and dispossession from their lands constitutes the deprivation of life. As the judge in *Adong* said (1998) MLJ 418, 435,

'...an aborigine will not be in the same category as the other Malaysian citizen, for an aboriginal has a special attachment to his land and without any skill, education or way to live as the other communities, he would find it very difficult if not impossible to relocate himself and start afresh.'

Conversion of the rights into monetary terms could mean that the rights are easily converted into money, and compensation may be paid on the basis that the group can 'regenerate' the money. The harsh reality is that the monetary benefits may not last. Since their lives are so entwined with land, which is their basic 'economic' and 'survival' base, once removed from it, their cultural base would also be destroyed. The article should, be seen as work in progress. While on the one hand it cannot be properly 'substituted',



Impact Assessment. It was held that the respondents did not have 'substantive *locus standi*' and there was no consideration by the courts of the adequacy of compensation for deprivation of livelihood.<sup>77</sup>

In 1998, an amendment to the *Land Code* set out rules for the assessment of compensation payable for the extinguishment of native customary rights but these were deleted in 2000<sup>78</sup> when a new s 5(4) provided for termination and resumption of land by the state. The said amendments made major changes in relation to extinguishment of rights and payments of compensation. Among the objectives of the amendment were the harmonisation of the process and procedure for the resumption of land under native customary rights with that of other with that of alienated land and harmonisation of the process of adjudicating the amount of compensation to be paid.

The use of 'termination' and 'extinguishment' reinforces the idea of the land as being 'state land' but at the same time, provision for compensation reinforces the proprietary nature of the rights and interests in the land. Now that the principle upon which compensation is paid is now harmonised, addressing the uncertainty that has long clouded the position or compensation of NCR. Section 60 enumerates the matters to be taken into consideration in determining compensation of resumed land. In summary, these are:

- the market value of the land at the date of notification of resumption;<sup>79</sup>
- increase in value of the other land of the interested person, which results from the resumption;
- damage suffered or sustained as a result of the severance of the land, whether to his other property or to his actual earnings;
- reasonable expenses incidental to change of residence or business premises which were 'compelled' by the resumption;
- improvement to the land made with prior consent of the Superintendent after the notice is posted; and
- in particular, for NCL and *kampung* reserves, payment to be made for cost of resettlement or relocation which the government had agreed to.

The courts are to disregard the urgency of the resumption, the increase in the value of the land resumed which is likely to accrue from its use after resumption<sup>80</sup> or evidence of sales of comparative properties unless the sales are *bona fide* and not for speculative purposes.<sup>81</sup>

The significance of these provisions is that lands under native title are given a clear proprietary component by statutory law. For compensation purposes, there appears to be no distinction made between 'extinguishment' and 'termination' or 'surrender' provided a person is able to satisfy the onus of proof of interest under s 83. Interest in land being resumed under s 83 includes both registered and unregistered interest under s 132 as well as rights lawfully created under ss 5, 6 or 7.<sup>82</sup> These provisions bring the *Land Code* in line with art 13. Compensation payments are recognition of 'value' to the property that can be assessed in economic terms.

As procedure for adjudication of land has been harmonised, and market value of land is a determining factor in payable compensation, since most of the lands under customary tenure are in the interior, the impact of that is that they

the pragmatic approach to deprivation or acquisition of their lands is to adequately compensate them when acquisition or deprivation occurs. One of the ways to decide on adequacy of compensation is to look at the proprietary value of the interest.

<sup>76</sup> AIR 1965 SC, 190. That case considered 'adequate compensation' under art 31, which is similar to art 13 of the Federal Constitution.

<sup>77</sup> The argument on right to 'life' has not been further developed.

<sup>78</sup> The *Land Code (Amendment) Ordinance 2000* (Cap A 78) is yet to take effect.

<sup>79</sup> Under s 60 to determine the market value:

- a) improvement made within two years prior to resumption is to be disregarded unless it can be proved to be made in good faith and not in contemplation of proceedings for resumption.
- b) the value is not to exceed the price which a *bona fide* purchaser might reasonably be expected to pay for the land on the basis of its existing use or in anticipation of the continued use of land
- c) having regard to the category of land no account taken of 'any potential value for the land for any other higher or more intensive use'.

<sup>80</sup> Also, any enhancement or likely enhancement in value of land as a result of development in the neighbourhood by provision of roads and other amenities.

<sup>81</sup> See s 61 (a)-(j) for matters to be disregarded in determining compensation. Note, also, the rules as to the amount of compensation payable under s 62.

<sup>82</sup> A person shall not be deemed to be interested in any land being resumed or occupied unless he has an interest under s 132. This section provides for registered interest with indefeasibility of title, although it is not registered or has an interest registered under Part VI. The definition includes rights or equity which a person may have against a person receiving or entitled to receive compensation.



still get minimal compensation compared to the quantum that is given for other types of land. In *Ahmat bin Gani*,<sup>83</sup> for instance where it was argued that assessment for compensation for NCR should be on the same measure as that of Mixed Zone lands on grounds that they were subject to compulsory acquisition by the government for the same purpose at the same time the topography of the lands in the Native Reserve were the same as that of the Mixed Zone. George Seah J at the High Court had this to say :

*It is common knowledge that the lands within the mixed zone area in Sarawak can fetch a much higher price than lands situated in the native reserves and held under native land title. Because of this major difference, there could ...be no similarity. Without similarity there could be no comparison.*

### VIII. Concluding Remarks

The *Land Code* is a contradiction in terms. While insisting that an NCR holder is a licensee and, by definition, not a proprietor of land, it is clear that the code recognises that NCL do have an 'economic component'. The procedures that have recently been legislated within the code for the payment of compensation in the event of resumption, surrender or termination of NCR, with specific guidelines to arrive at compensation, has brought the code in line with the *Federal Constitution*.<sup>84</sup>

This paper has clearly shown that a 'usufruct' in land is a beneficial right akin to ownership and is a proprietary right, even if does not accord with the nature of property under English law. This falls within the purview of Art 13 and any deprivation of right or interest under native title must only be done 'in accordance with law'. Extinguishments or termination of rights must be a 'clear and unambiguous' intention to terminate the rights, and such termination must be adequately compensated.

There is still an inherent problem, as *Ahmat's* case revealed. Lands held by natives do not fetch the same market price as Mixed Zone lands because of the location – in the interior – where infrastructure, access and communication networks are limited. Lack of security of tenure and its inalienability except to other natives also keeps the market value low. As it is most native peoples are reluctant to part with their lands which they regard as ancestral 'heirlooms'. But the disinclination to part with the land resumed is irrelevant in consideration of compensation. One of the fairest way to compensate native peoples is to replace the lands that are acquired with similar lands elsewhere, where they can carry on the same customary practices. Given the fact that the Superintendent has no power to compensate landowners with sufficient money to enable them to buy similar land elsewhere, this would be a fair option. Perhaps another possible way to redress this is to take into account the fact that their lives are so intertwined with the land which results in and perpetuates their vulnerability. Any removal of the land base is a removal of their cultural base and directly their survival as a community. Along with other factors, this should be given due weight and consideration. This way, indigenous conceptions of rights to land can be given full respect to achieve a just and equitable value to their traditional lands.

<sup>83</sup> *Land Cases* (1969–1987) 20–30, 25.

<sup>84</sup> Any legislation that provided for the acquisition of property without making provision for compensation would be unlawful as against the Federal Constitution. The amendments were made in 2000, but have yet to be gazetted and enforced.



