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LEGAL ASPECT OF LAND CRIMINAL INVESTIGATION: SOME OBSERVATION

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Abstract:

The investigation is a pre-requisite process for any prosecution proceedings. However, the requirement of preparing an Investigation Paper (IP) is entirely new in the Malaysian Land Administration as it has only become mandatory with the coming into force of the National Land Code (Amendment) 2008 in January 2009. Prior to that, a Land Administrator can compound an offender under the National Land Code 1965 (NLC) without an IP. With the coming into operation of sections 429A and 429B of the NLC, a Land Administrator is now required to get written consent from Public Prosecutor before prosecuting or compounding an offender. Consequently, many Land Administrators have faced difficulty in offering compound or instituting prosecution proceeding due to their lack of expertise in conducting a criminal investigation and preparing IP. In relation thereof, this paper aims to discuss the importance of the criminal investigation process for offenses under the Malaysian Land Law. It will begin with the process of appointment of the Investigator. The aim is to show the effect of producing IP in order to complete the enforcement action and to secure the revenue of the State Government. It will also identify any inadequacies and challenges faced by investigators while completing the investigation. This research applies qualitative methods to achieve the objectives. Social legal research was adopted by collecting sample data from Kelantan Land Director's office and also by referring to the NLC and the Criminal Procedure Code (CPC) as primary sources. Secondary sources include books, scholarly articles and news reports found in journals, and the Internet. It is concluded that the government should consider enhancing the land criminal investigation institution by empowering the IO, providing distinctive investigation guidelines and establishing a special department for the Investigation Unit in the Office of State Director.

Keywords:

Investigation, Prosecution, Land Administrator, Public Prosecutor

Introduction

‘Criminal Offence’ is a scarce term in land administration as most of the time, it involves the processes of recording and disseminating information about ownership, value, and use of land and its associated resources¹. In certain incidents, Land Administration also consists of enforcement of criminal offences under the National Land Code 1965 (NLC) and its related regulations. In general, there are twenty-six (26) provisions under the NLC related to criminal offences or quasi criminal offences. And an enforcement action is not complete if there is no subsequent action to be taken to such offenders. The NLC provides that State Director or the District Land Administrator can institute a prosecution action under the power given by section 16 with the consent from Public Prosecutor under section 429A. The State Director and the District Land Administrator are also empowered to compound offences under section 429B to any person who is suspected of committing any criminal offences under the NLC. This article will discuss the process of investigating criminal offences under the NLC as a pre-requisite process to the prosecution proceedings with the aim to explain the importance of investigation process and to identify any inadequacies and challenges faced by the investigators whilst completing the investigation. The methodologies used in this research are combination of doctrinal research and social legal research. The main reference would be the National Land Code 1965 and the Criminal Procedure Code. This research also involves collecting sampling data from the Office of Kelantan Director of Land and Mines.

Literature Review

The researcher will focus on the criminal offences under the NLC. The stake holder’s agency for the NLC is the State Director of Land and Mines (the State Director) as provided by section 12 (3) of the NLC. The State Director on behalf of the State Authority may commence, prosecute and carry on any action, suit or other proceeding relating to state land and the enforcement of any penalty under the NLC. There are twenty-six (26) provisions under the NLC that are constituted as criminal offences. Amongst them are seven seizable offences where Land Administrator or any authorized person can arrest without warrant. The arrest can be made by an authorized enforcement officer whenever he notices the offence has been committed or in the circumstances where the officer received credible information and exists reasonable suspicious² of his having been concerned in any seizable offence. The most popular offences under the Malaysian Land Law are illegal occupation of State Land³ and unlawful extraction or removal of rock material⁴. These offences are much related to environmental issues as a result of the recklessness of illegal occupiers in carrying on such unlawful activities. Since the government is very concerned about this issue, the Malaysian Parliament has amended the NLC by increasing the maximum punishment for both offenses⁵ effectively from 1st January 2017. The punishment for illegal occupation of State Land and unlawful extraction of rock material is stated under sections 425 and 426 respectively. And any person found

¹ Mohd Shukri Ismail, Land Administration in Peninsular Malaysia: A General Overview, Jurnal Pentadbiran Tanah, 2011

² Section 23 of CPC

³ Section 425 of National Land Code

⁴ Section 426 of National Land Code

⁵ Amendment of Act A1516 was effective from 1st January, 2017.

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committing any of these offences shall on conviction be liable to a fine not exceeding five hundred thousand ringgit, or imprisonment for a term not exceeding five years, or to both.

Section 425 of the NLC states that in order to regard any wrongful act as illegal occupation, it must fulfil all elements in any paragraph of the sub-section 425 of the NLC which states as follow:

“(1) Any person who, without lawful authority-
(a) occupies, or erects any building on, any State land, reserved land or mining and; or
(b) Clears, Ploughs, digs, encloses or cultivates any such land part thereof; or
(c) cuts or removes any timber or produce on or from such land,
shall be guilty of an offence.....”

The occupation may be in the form of erecting any structure or building on the state land, reserved land or mining land; or clearing, digging, enclosing or cultivating any such land; or cutting or removing any timber or produce on or from such land.

State land means:

“all land in the state (including so much of the bed of any river, and of the foreshore and bed of the sea, as is within the territories of the State or the limits of territorial waters) other than-
(a) alienated land;
(b) reserved land;
(c) mining land;
(d) any land which, under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest”⁶

The meaning of State Land, through amendment by the Act A832 shall also includes any land alienated to a local authority or a statutory authority exercising powers vested in it by Federal or State law ⁷. If the occupation on such land is without lawful authority, the occupier is liable for the offence. It shall include any squatters who possessed the state land⁸. They definitely have no right upon the state land either in law or in equity and are forbidden by the section 425 of NLC⁹. Lawful authority is the authority given by the State Authority to any person either by alienating the state land under section 76 or granting leases under section 63 or issuing Temporary Occupation Licences pursuant to section 66 of the NLC. Even, the alienation of state land to any person is only complete upon the registration under a register document of title. Further, until such registration is effected, the land approved for alienation remains state land¹⁰.

For the offence under section 426, two elements must be fulfilled in order to prove the commission of such offence by an offender. The first element is that there must be an act of extracting or removing or transporting the rock material from the land. The second element is that there must be no lawful authority for the said extraction or removal of rock materials. In Kelantan, the lawful authority is given by the Land Administrator with the issuance of Form 13 under Rule 21, Item 59 of Kelantan Land Rules 1966. Form 13 is issued to the licensee

⁶ Section 5 of the NLC

⁷ Section 63 of the National Land Code (Amendment) Act 1992 (Act A832)

⁸ [1982] 1 MLJ 313

⁹ [2013] 8 MLJ 109

¹⁰ [1984] 1 CLJ (rep) 144

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under section 71 of the NLC. All licences issued under this section are subjected to the conditions under section 73 of the NLC¹¹.

The Role of Investigation Process

In any set of laws, if criminals have never been punished or are not subjected to any legal actions, then the laws appear to be worthless. The same goes for the provisions of the NLC when enforcement officers fail to take appropriate legal proceedings against offenders due to their incompetence to prepare Investigation Paper for such cases. Investigation process is a pre-requisite to the prosecution proceeding. Prior to the amendment of the NLC in the year 2009, Land Administrator can offer to compound any suspect according to section 429B of the NLC. After the amendment, A1333 substituted the whole section 429A and section 429B of the NLC with new provisions requiring the consent of Public Prosecutor before compounding or prosecuting the offender¹². These statutory requirements cause difficulty and hardship to Land Administrator as subsequent to the coming into force of the new statutory requirement, it was observed that the Land Administrator had failed to even offer compound to any offenders. This is mainly due to the fact that the new amendment requires consent from the Public Prosecutor and such consent will only be granted if the IP is produced to him. It makes the IP as a pillar to the success of enforcement under the NLC.

There is no extensive research being undertaken for this problem. Almost all of the previous studies did not explore or elaborate on the role and the important of criminal investigation process under Malaysian land law. Some researchers only came up with the importance of enforcement in curbing illegal land activities. There is a research which stated that these two illicit activities under sections 425 and 426 of the NLC caused environmental damage such as landslides and flash floods, especially in the high land area due to prohibited land clearing and logging activities¹³. Uncontrolled sand extraction activity also affects to the contamination of rivers like what had occurred in Sungai Kinabatangan¹⁴. The illegal activities have also impacted the increased short-term turbidity at the mining site due to re-suspension of sediment, sedimentation due to stockpiling and dumping of excess mining materials and organic particulate matters, and oil spills or leakage from excavation machinery and transportation vehicles. Encroachment of rivers caused riverbed and bank erosion and also increases suspended solids in the water at the excavation site and downstream. Suspended solids may adversely affect water users and aquatic ecosystems. The impact is particularly significant if water users downstream of the site are abstracting water for domestic use. Suspended solids can significantly increase water treatment costs¹⁵. Instead of causing environmental damage, illegal occupation of the State Land and illegal extraction of rock materials affect the income and revenue of the State. However, the research did not touch on the post-enforcement process although the process is very important. Failure to perform post-enforcement process will result in failure of the entire enforcement action itself.

The researcher has referred to the statistic of compound offered by PTG Kelantan as a sample for this research. The statistic indicated that before the amendment to the NLC in 2009, some collections of fine made by PTG Kelantan. Nevertheless, subsequent to the amendment, there was no collection of fine at all. It shows that without IP, PTG Kelantan had failed to compound

¹¹ [1991] 1 CLJ Rep 691; [1991] 1 CLJ 109

¹² Section 26 of the National Land Code (Amendment) 2008 (Act A1333)

¹³ Harlida Abdul Wahab, *Kawalan Undang-Undang Terhadap Pembangunan Di Tanah Tinggi*, Jelapang, 2002

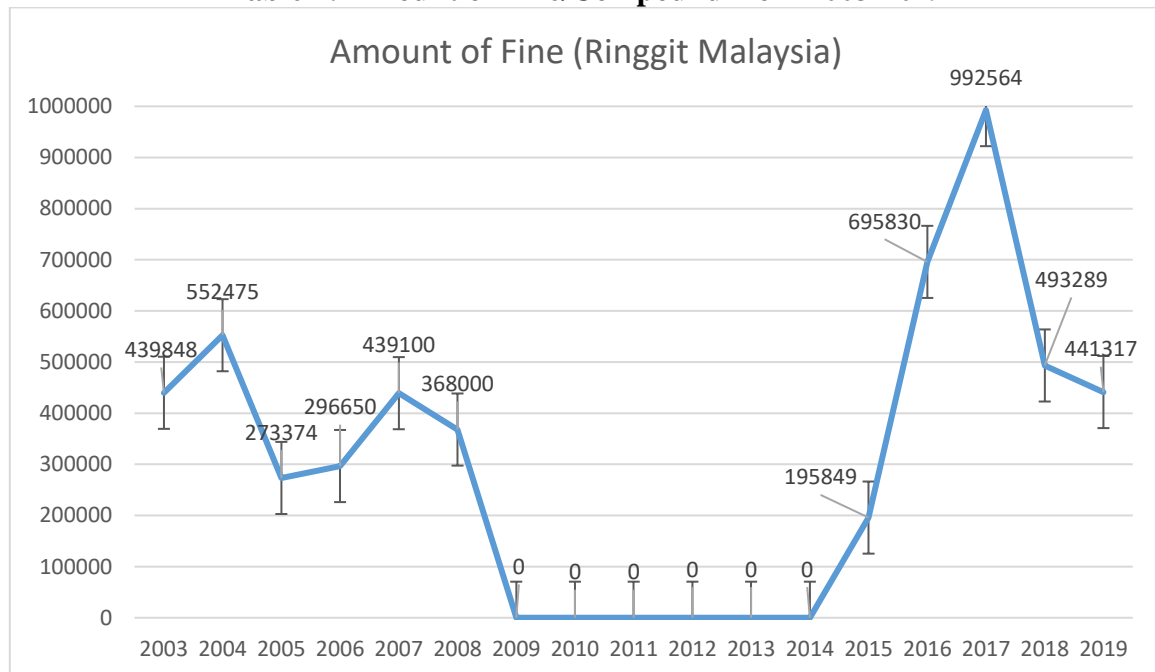
¹⁴ <http://www.bernama.com/bernama/v3/bm/printable.php?id=286173>

¹⁵ Muhammad Aqeel Asyraf (2011), *Sand mining effects, causes and concerns: A case study from Bestari Jaya, Selangor, Peninsular Malaysia*. Accademic Journal.

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any offences committed and was unable to collect any money from the offenders. The situation changed after PTG Kelantan formed the Investigation Division in 2015 under its administration to strengthen the enforcement process, which results in the amount of fine increased from RM 0.00 to RM 195,849 in the year 2015. By forming the new Division, PTG Kelantan was able to produce IP to be submitted to the Public Prosecutors for the necessary consent under section 429A or 429B of the NLC. Ultimately, they can complete the enforcement action by compounding the offences or prosecuting the offenders at the court.

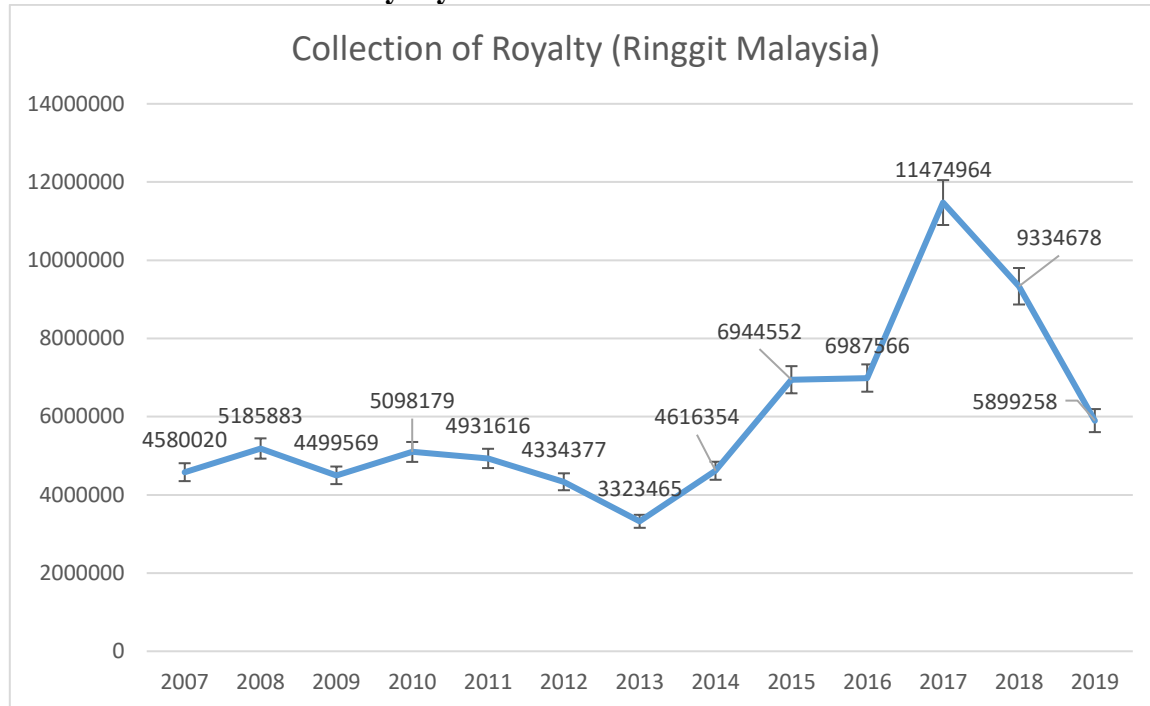
Table 1: Amount of Fine/Compound from 2003-2019



Source: PTG Kelantan Enforcement Division Report Year 2003-2019(June)

The initiative to form Investigation Division at PTG Kelantan has also resulted in the increase of collection of royalty for removal of rock materials. It shows significant difference to the collection of royalty after empowering the enforcement process compared to before. The collection of royalty has increased as stated in the schedule below:

Table 2: Collection of Royalty for Extraction of Rock Material From 2007-2019



Source: PTG Kelantan Enforcement Division Report Year 2003-2019(June)

A low collection of royalty indicates that lacking in the investigation and prosecution process leads to the failure of the State to deter the infringement of the law by offenders. Thus, it is very important to have an efficient process of investigating, detecting and gathering of criminal evidence to achieve a successful prosecution.

Basically, criminal cases are investigated under the Criminal Procedure Code ('CPC') of Malaysia. This Code is derived from the English criminal procedure and practice through the adoption of the Indian Criminal Procedure Code 1873. Besides that, the National Land Code 1965 also provides power for the State Director and Land Administrator to investigate the commission of an offence under the CPC. If the procedure of investigation is silent in the NLC, then the investigator should refer the matter to provisions stated in the CPC.

Investigation Procedure under the CPC

The CPC outlines the duties and obligations of the police officer to investigate criminal cases. The CPC also provides a guideline for proper investigation and it starts when the officer in charge receives a report from the complainant. Chapter XIII deals with information given to the police and their powers to investigate. Further, the CPC also provides specific powers to the court to issue a search warrant, authorizing a search prior to the seizure process. However, there is no specific provision in the CPC on investigating cases under the NLC.

Investigation Procedure under the NLC

As mentioned above, the process of investigation for criminal cases are laid down in the CPC. However, the NLC provides certain provisions relating to procedure of investigation for offences under the NLC. Power of Investigation is mentioned in Part Thirty-One of the NLC. Section 421AA authorizes State Director and Land Administrator to conduct investigation for

crimes under the NLC¹⁶. Any authorized person who is appointed as Investigating Officer is advisable to be gazetted as Land Administrator for special purpose to carry out the investigation process. The procedure of investigation in the NLC is mentioned in section 421AB (power to require attendance of witness) and section 421AC (power to examine the witness) which is *in pari materia* with section 111 and 112 of the CPC¹⁷. Nevertheless, the investigating officer (IO) relies greatly on the CPC due to its comprehensiveness. For instance, the requirement of recording the process of investigation in Investigation Diary (ID) under section 119 of the CPC must be thoroughly observed and strictly conducted using the prescribed forms and procedures. The same goes to the procedures where if the IO cannot complete the investigation for the arrested person within twenty-four (24) hours fixed by section 28 of the CPC, the IO may produce the arrested person under section 117 of the CPC before a magistrate to get authorization to further detain the arrested person in his custody. Further, the CPC also provides specific powers to the court to issue a search warrant and warrant to compel a witness or suspect to give evidence in the course of investigation. When a person was arrested under the NLC in relation to the commission of any offence under the NLC, all the provisions of the CPC shall apply in relation to the person so arrested¹⁸.

Steps in Investigation

The duty of Investigating Officer begins once he receives a Police Report (First Information Report) regarding the commission of a crime under the NLC. Immediately after getting the order to investigate from his superior officer, the IO will first visit the place of the incident to gather information from the scene and start to record the cautioned statement from the suspect¹⁹. The IO will also record the statement of the complainant and the witnesses²⁰. The complainant is usually the Raiding Officer or Enforcement Officer who made the arrest. All the statements will be recorded and reduced into writing and signed by the person making it. If the IO cannot complete the investigation within twenty-four hours, an order to further detain the suspect must be acquired from a magistrate²¹. The IO is under a duty to respect the personal liberty of the suspect. Any wrongful detention will constitute a deprivation of the suspect's personal liberty²².

The IO will continue to investigate until the elements of offence have been fulfilled. The IO will gather all information to be analysed to trace the real culprit because in most cases, the arrested person is only an agent to the main offender. The investigator must also ensure that there is no break in the chain of evidence. A failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. Therefore, the IO must observe the service form from a hand to another, especially if it involves the sample of exhibits to be analysed by the laboratory department.

¹⁶ This section was inserted by section 60 of the National Land Code (Amendment) 1992 (Act A832) to enable the State Director or the Land Administrator to investigate the alleged commission of an offence prior to leading the prosecution of that offence.

¹⁷ Section 112 mentions about oral examination of witnesses by the police. The witness is bound to answer all questions relating to the case in a truthful manner. His statement then shall be reduced into writing and signed by him. This section is read together with section 113 of the CPC that states about admission of statements made by the person who is charged with any offence

¹⁸ Section 426A (4) provides the application of the provisions in the CPC in relation to a person arrested under NLC.

¹⁹ Section 426A was inserted by the National Land Code (Amendment) 1974 (Act A264)

²⁰ Section 421AC provides power of Investigating Officer to examine orally any person supposed to be acquainted with the facts and circumstances of the case and the person is bound to all questions relating to such case.

²¹ Section 117 of CPC

²² Article 5(1) of Federal Constitution

The Issues and Challenges of Investigation Process

Criminal Investigation by Land Administrator for offences under the NLC is relatively new and is not much exercised in this country. Therefore, it does not get much attention from the Management to enhance and to strengthen this area. The main problem with the investigation process is the lack of expertise in this area. The officer, especially Settlement Officer, has never been exposed to the process of investigating criminal offences. The Settlement Officer is more synonym with land survey and plan. There is no manual provided by Department of Director General of Land and Mines Malaysia (JKPTG) pertaining to the process of completing Investigation Paper. The Manual of the NLC produced by JKPTG has yet to prepare guidelines for investigation process under the NLC.

Another problem that leads to the failure to prepare IP is the appointment of IO himself. Most of the Land Offices, including the Office of State Director, do not appoint any officer to be an IO to handle cases. The Public Prosecutor is unable to give consent either to compound or to prosecute the suspect if there is no IP prepared for him. The consent from the Public Prosecutor is mandatory to allow the Land Administrator to proceed with the case. As mentioned above, the observation at PTG Kelantan found that the PTG Kelantan has only been granted the consent to compound and prosecute suspected offenders after PTG Kelantan initiated the appointment of IO in the year 2015 by establishing an Investigation Division. Without the appointment of IO to investigate such cases, the enforcement action will not be concluded and no offer to compound will be issued to the offenders.

Lacks facilities also contribute to the problem in completing investigation process. The most crucial is the availability of lock-up. In the event when the IO needs to detain the suspect in his custody, the IO needs to apply to PDRM to 'borrow' the lock-up. Sometimes, PDRM is reluctant to lend the lock-up because the case is not under their investigations. The suspect is finally released, although the investigation has not completed yet.

Another significant challenge faced by enforcement officers is the intervention from the politicians or State Assembly Members when the enforcement actions are about to be commenced. It is observed that there are cases in which the member of the State Assembly has requested for fines to be reduced or no action to be taken on their subjects. As a result of the pressure, there are cases where some compounds offered to the suspect were reduced up to 90 percent from the original offer. It is argued that such intervention is among the factors that has caused selective enforcement of laws and rules. Some projects seem to be shaded by politicians. In this regard, the State Authority should play its role by ensuring that all Land Offices and PTG carry out duties without fear and favour and in a fair and just manner.

Since the criminal offences under the NLC are regarded as "regulatory" crimes rather than "mainstream" crimes such as murder, theft, rape and many others, the law enforcement, investigation and determination of liability have been undertaken under the same institution i.e. under the State Director office. The practice appears to be contrary to the separation of powers doctrine which requires such processes to be undertaken by different agencies. In the current situation, PTG does not only exercise investigatory and prosecuting powers, but it is also involved, to some extent, in rule-making and adjudication. Consequently, this makes the investigation and prosecution matters are less important under land administration. It is also open for allegation of bias during the investigation process.

Conclusion

Investigation is the most crucial aspect of ensuring the success of the enforcement process under the NLC. Without investigation and prosecution, the offenders cannot be convicted for the offences committed by them. The punishment is essential to deter the offender from repeating the same offences. Thus, the government should give attention to enhance the procedure of criminal investigation among IO appointed to handle the case under the NLC. The government should also consider establishing a separate department for Investigation Unit in the Office of State Director to make sure the officer appointed as IO can concentrate on their core business and to develop the expertise in this area. For the Investigating Officers, they should equip themselves with skills and legal knowledge because any negligence on their part will result in the failure of the prosecution.

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