

KERTAS PEMBENTANGAN 4
ROLE OF CRIMINAL INVESTIGATION UNDER
MALAYSIAN LAND LAW ⁱ

BY:

Mohd Helmi Mat Zin ⁱⁱ
Chief Assistant Director (Legal)
Kelantan State Secretary Office

1. ABSTRACT

Investigation is a pre-requisite process to the prosecution proceedings. Process of preparation of Investigation Paper (IP) is new to Malaysian Land Administration. The need of IP is vital once the National Land Code (amendment) 2008 comes into force in January, 2009. Prior to amendment, Land Administrator can simply compound the offender under the code but after that, by substituting subsection of 429A and 429B, the Land Administrator is required to get written consent from Public Prosecutor before compounding or prosecuting the offender. Since the amendment, The Land Administrator failed to offer compound or institute any prosecution proceeding because of the lack of expertise among them in conducting criminal investigation and preparing Investigation Paper. This paper will discuss the process of investigating criminal offences under Malaysian Land Law. It will begin with the process of appointment of Investigator until the process on how the Investigator proves the offences have been committed by the offender. The aim is to identify any inadequacies and challenges faced by the investigators during completing the investigation. The main reference would be the National Land Code 1965 and the Criminal Procedure Code.

2. INTRODUCTION

‘Criminal Offence’ is a very rare term in land administration. When we refer to Land Administration, our mind will focus on processes of recording and disseminating information about the ownership, value and use of land and its associated resources¹. Basically, there are twenty-six

(26) provisions under National Land Code 1965 ('NLC') is constituted as criminal offences or quasi criminal offences. State Director or Land Administrator will institute the prosecution action under the power given by section 16 of National Land Code 1965 with the consent from Public Prosecutor under section 429A and 429B of the Code when a person committed these criminal offences. This article will discuss the process of investigating criminal offences under National Land Code 1965 as a prerequisite process to the prosecution proceedings with the aim to identify any inadequacies and challenges faced by the investigators during completing the investigation. The main reference would be the National Land Code 1965 and the Criminal Procedure Code.

3. DISCUSSION

3.1 Criminal Offences Under the National Land Code 1965

There are twenty-six (26) provisions under National Land Code 1965 is 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 the authorised enforcement officer whenever he notices the offence had been done 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 Malaysian Land Law are illegal occupation of State Land³ and unlawful extraction or removal of rock material⁴. These offences are much relate to the environmental issues as a result of the recklessness of illegal occupier in carrying on such illegal activities. Since the government are very concerned to this issue, parliament amended the National Land Code 1965 by increasing the maximum punishment for both offenses⁵ effectively from 1st January 2017. Illegal activities caused environmental damage such as landslides and flash floods especially at high land area due to illegal land clearing and logging activities⁶. The uncontrolled sand extraction activity also affects to the contamination of rivers like was happened in Sungai Kinabatangan⁷. Illegal activities also give impact to the increased shortterm turbidity at the mining site

due to re-suspension of sediment, sedimentation due to stockpiling and dumping of excess mining materials and organic particulate matter, and oil spills or leakage from excavation machinery and transportation vehicles. Encroachment of river 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 costs⁸.

Instead of causing environmental damage, illegal occupation of State Land and illegal extraction of rock material affect to the income and revenue of the State. It's can be seen through payment statistics of royalty of removal of rock material and collection of fine for illegal activities under these two sections. Its showed significant difference to the collection of royalty and fine after empowering enforcement process compared to before. For example, according to statistics from Office of Kelantan Director of Land and Mines (PTG), the collection of royalty and fine increased as stated in the schedule below:

Table 1: Collection of royalty and fine under section 426 of NLC from 2012-2017

YEAR	2014	2015	2016	2017 (Feb)
Royalty (RM)	4,468,607.53	6,906,499.02	6,649,923.75	1,708,268.01
Fine (RM)	0.00	112,750.00	723,830.00	683,564.00

Significant increase begins after PTG formed an **Investigation Division** in 2015 under its administration to strengthen the enforcement process. Low collection of royalty indicates that lacking in the investigation and prosecution process lead to the failure of the State to deter the infringement of the law by the offender. Thus, it is very important to have an efficient process of

investigating, detecting and gathering of criminal evidence to achieve a successful prosecution.

3.1.1 Elements of Offences that Need to be Proved

Section 425 of National Land Code 1965 states that whoever occupies, on any State land, reserved land or mining land without lawful authority shall be guilty of an offence. In order to constitute the offence of illegal occupation, there are 3 elements must be fulfilled. Firstly there must be an act of occupation by the offender. The occupation may be in the form of erecting any structure or building on the land, clearing, digging, enclosing or cultivating any such land and cutting or removing any timber or produce on or from such land. The second element is the occupation must be on State Land, reserved land or mining land. The third element is there must be no any lawful authority for the said occupation has been granted to the occupier. Lawful authority is the authority given by State Authority to the person either by alienating the state land under section 76 or granting leases under section 63 or issuing Temporary Occupation Licence under section 66 of National Land Code 1965.

For the offence under section 426 there are 2 elements must be fulfilled in order to prove the commission of the offence by the offender. The first element is there must be an act of extracting or removing or transporting the rock material from the land. The second element is there must be no any lawful authority for the said extraction or removal of rock material. The lawful authority is given by issuing Form 13 by Land Administrator under Rule 21, Item 59 of Kelantan Land Rules 1966 (may be different for other states). The Form 13 is issued to the licensee under section 71 of National Land Code 1965.

3.2. THE ROLE OF INVESTIGATION AND THE PROCESS

Investigation process is a pre-requisite to the prosecution proceeding. Prior to the amendment of National Land Code 1965 in year 2009 through A1333, Land Administrator can simply offer to compound the suspect according to section 429B of the Code. After amendment, A1333 substituted the whole section 429A

and Section 429B of National Land Code 1965 with new provision, requiring the consent of Public Prosecutor before compounding or prosecuting the offender. The requirement under these sections caused Land Administrator failed even to offer compound. This situation happened when the consent from Public Prosecutor only will be granted if the Investigation Paper ('IP') being produced to him. It makes the IP is a pillar to the success of enforcement under the Code. 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, National Land Code 1965 also provides power for State Director and Land Administrator to investigate the commission of an offence under the Code. If the procedure of investigation is silent in NLC then the investigator should refer the matter to provisions stated in CPC.

3.2.1 The investigation procedure under CPC

The CPC outlines the duties and obligations of the police officer to investigate criminal cases. The Code 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 Code 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 National Land Code.

3.2.2 The investigation procedure under the NLC

As mentioned above, the process of investigation for criminal cases are laid down in the CPC. However, NLC provides certain provisions relating to procedure of investigation for offences under the Code. Power of Investigation is mentioned in Part thirty-one of NLC. Section 421AA authorized State Director and Land Administrator to conduct investigation for crimes under the Code. 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 1965 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 1119 and 112 of CPC¹⁰.

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. Its same goes to the procedure where the IO cannot complete the investigation to the arrested person within twenty-four (24) hours fixed by section 28 of CPC, the IO may produce the arrested person under section 117 of 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.

3.2.3 Steps in Investigation

The duty of Investigating Officer begins once he receives Police Report (First Information Report) regarding to the commission of the 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 suspect. The IO also will record the statement of the complainant and the witnesses¹¹. The complainant is usually the Raiding Officer or Enforcement Officer who made the arrest. All the statements also 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 magistrate¹². 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 liberty¹³.

The IO will continue to investigate until the elements of offence have been fulfilled. The IO will gather all information to be analyzed to trace the real culprit because in most of the incident, the arrested person 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. There for, the IO must observe the service form from a hand to another especially if it involved the sample of exhibits to be analysed by laboratory department.

3.3 THE ISSUES AND CHALLENGES OF INVESTIGATION PROCESS

Criminal Investigation by Land Administrator for offences under National Land Code 1965 is very new and not much exercised in this country. Therefore, it did not get much attention from the Management to enhance and to strengthen this area. The main problem with the investigation process is lack of expertise in this area. The officer especially Settlement Officer never being 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 National Land

Code 1965 produced by JKPTG have 'forgotten' to prepare the guideline for Investigation process under National Land Code 1965.

Another problem which leads to the failure to prepare Investigation Paper is appointment of IO. Most of Land Office including Office of State Director did not appoint any officer to be an IO to handle the case. The Public Prosecutor unable to give consent either to compound or to prosecute the suspect if there is no IP prepared for him. The consent from Public Prosecutor is mandatory to allow Land Administrator to proceed the case. For example, the cases handled by PTG Kelantan only being granted the consent to compound and prosecute the suspect after PTG initiated the appointment of IO in year 2015. The statistic for the consent from Public Prosecutor after the amendment of National Land Code 1965 can be seen in the schedule below:

Table 2: Number of Consent from Public Prosecutor

YEAR	2009	2010	2011	2012	2013	2014	2015	2016	2017
Consent	0	0	0	0	0	0	28	37	6

Lacks of 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 need to apply to PDRM to 'borrow' the lock-up. Sometimes, PDRM reluctant to lend the lock-up because the case is not under their investigation. The suspect finally was released although the investigation did not being completed yet.

4. CONCLUSION

Investigation is the most important aspect to ensure the success of enforcement process under National Land Code 1965. Without investigation and prosecution, the offenders cannot be convicted for the offences that was committed by them. The punishment is important 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 National Land Code 1965. The government also should consider to establish separate department for Investigation Unit in Office of State Director to make sure the officer appointed as IO can concentrate to their core business and to develop the expertise in this area. For the Investigating Officer, they should equip themselves with skills and legal knowledge because any negligence on the part of the investigator will result the failure in the prosecution.

ENDNOTES

- 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.

- 6 Harlida Abdul Wahab, Kawalan Undang-Undang Terhadap Pembangunan Di Tanah Tinggi, Jelapang, 2002
- 7 <http://www.bernama.com/bernama/v3/bm/printable.php?id=286173>
- 8 Muhammad Aqeel Asyraf (2011), Sand mining effects, causes and concerns: A case study from Bestari Jaya, Selangor, Peninsular Malaysia. Accademic Journal.
- 9 S111 mentions about power of Investigating Officer to require attendance of witness and if the witness refuses to attend as so required the officer may report such refusal to a Magistrate to issue a warrant to secure the attendance of that witness.
- 10 S112 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 S113 of the CPC hat states about admission of statements made by the person who is charged with any offence
- 11 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.
- 12 Section 117 of CPC
- 13 Article 5(1) of Federal Constitution

References

- Mohd Shukri Ismail, Land Administration In Peninsular Malaysia: A General Overview, Jurnal Pentadbiran Tanah,1-15 (2011)
- Harlida Abdul Wahab.: Kawalan Undang-Undang Terhadap Pembangunan Di Tanah Tinggi, Jelapang, 63-69(2002)
- Muhammad Aqeel Asyraf.: Sand mining effects, causes and concerns: A case study from Bestari Jaya, Selangor, Peninsular Malaysia, Accademic Journal, Vol. 6(6), pp. 12161231 (2011).
- The Malaysian National News Agency,<http://www.bernama.com/bernama/v3/bm/printable.php?id=286173> National Land Code 1965
- Kelantan Land Rules 1966
- Criminal Procedure Code [Act 593]

ⁱ This Paper was presented in The International Conference on Law and Society on 4th April 2017 at Universitas Muhammadiyah, Jogjakarta

ⁱⁱ Chief Assistant Director (Legal) at Kelantan State Secretary Office