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KAYAN LAND TENURE AND THE DISTRIBUTION OF
DEVOLVABLE USUFRUCT IN BORNEO

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INTRODUCTION

The literature on land tenure among the indigenous peoples of Borneo perpetuates an error with regard to the Kayan system of land tenure. It is stated that among the Kayan no devolvable usufructary rights are created by the clearing of primary forest (e.g. Rousseau 1977:136) and that the Kayan land tenure system is, therefore, like that of the Rungus of Sabah. However, according to my field inquiries the Kayan and Rungus have radically different systems of land tenure. In correcting this misapprehension it will be necessary to review the status of research on land tenure in Borneo and pose critical questions for further research.¹

THE TYPES OF LAND TENURE SYSTEMS IN THE
SWIDDEN SOCIETIES OF BORNEO

There are two basic types of land tenure systems found in those societies practicing swidden agriculture (see Appell 1971a). First, there is what I term "the circulating usufruct system"; and second, there is what I call "the devolvable usufruct system" (See Appell 1971b).²

In the system of circulating usufruct, once a swidden area has reverted to forest, any member of the village may cut the forest again to make a swidden without seeking permission of the previous cultivator. In other words, no devolvable or permanent use rights are established by cutting primary forest. Examples of this type of system may be found among the Rungus (See Appell 1971b, 1976) and the Bulusu' (see Appell 1983a, n.d.).

In the system of devolvable usufruct, the cutting of primary forest creates rights in the area that may be exercised over a period of years or permanently, and these rights may be transferred to other jural entities. The Iban (Freeman 1955), the Bidayuh Land Dayak (Geddes 1954), the Kenyah (Whittier 1973), the Lun Bawang (Deegan 1973), the Mualang (Drake 1982), the Ma'anyan (Hudson 1972), the Melanau (Morris 1976), the Bisaya (Peranio 1977), the Kantu' Dayak (Dove 1981, n.d.) and the Selako Dayak (Schneider 1974), the Maloh (King 1978:206-7), the Punan Bah (Nicolaisen 1983), all have this form of land tenure. Jural rights over secondary forest may be transferred to other jural entities, either individuals or corporate groups, by various mechanisms, and these include devisal, sale, gift, or division between sections of a partitioning Iban bilek (see Freeman 1955:43). The mechanisms of devolution and the jural entities with the capacity to hold rights vary with each society, and this variation produces two subclasses of devolvable usufruct.³

Among the Iban, rights lie with the bilek as a corporate group. As this is a perpetual corporate group, the possibility of transfer by devisal, i.e. by inheritance, does not arise. When partition in an Iban bilek occurs, the rights to this secondary forest are divided between the two sections over time as they each reuse parcels of secondary forest for the first time and thereby establish new rights over it.

However, among the Land Dayak rights established by the individual cutting primary forest are inherited by all his descendants. That is, the rights reside with individuals and not a corporate grouping (see Appell 1971b). To distinguish these two types, I propose to refer to the former as "partitionable usufruct" and the later as "devisable usufruct."

This results in the following classification:

- 1.0 Circulating usufruct.
- 2.0 Devolvable usufruct.
 - 2.1 Partitionable usufruct.
 - 2.2 Divisible usufruct.

An interesting variation on devolvable usufruct occurs among the Mualang Dayak, according to Drake (1982:101-102):

The felling of large trees in primary forest is very considerable work, and a man is compensated for such work by having rights to cultivate that land for four consecutive times before fellow longhouse members can use it. Given an average fallowing period of seven years, this extended tenure would consume, at a minimum, 32 years and, most likely, somewhat longer. These extended use rights are shared by the spouse and children and will pass on to their descendents until consumed.

Because of this example of use rights of limited duration, I have termed the general class as "devolvable usufruct," and this subclass as "devisable usufruct," to avoid any use of the term "permanent," as I have done in the past before reading Drake's work (cf. Appell 1971a). Permanency is not necessarily associated with the establishment of rights over secondary forest.

The Kenyah of Kalimantan also have an interesting variation of devolvable usufruct, according to Whittier (1973). Rights over secondary forest may be of three types: primary, secondary, and tertiary. Chin (1984), however, does not discuss this in his study of Kenyah agriculture in Sarawak. Since Whittier also studied the Kenyah in Sarawak, it is reasonable to assume that Chin overlooked this variation.⁴ Whittier (1973:62) writes:

The man who first cuts primary jungle gains rights to that parcel of land. Children remaining in the household inherit primary rights to the land. Those who move to other households in the village retain secondary rights, i.e., they may use the land if no primary right holder wants it. Children moving to other villages, retain a tertiary right to the land, but with land pressure in the area today, it is unlikely that such rights can be activated.

It would thus appear that the primary rights are partitionable usufruct and the secondary and tertiary rights are devisable.

RESIDUAL RIGHTS HELD BY THE VILLAGE

In all land tenure systems residual rights over land are held by the village as a corporate group. However, the development of the jural personality of the village varies among the various societies. In some instances the jural nature of this village entity may verge on being an actual corporation (see Appell 1976).⁵ In other instances, as among the Bulusu', the jural personality of the village is only minimally developed. Bulusu' village boundaries are not heavily guarded, and a nonvillage member can cut his swidden within the village boundaries without permission of the headman. But if he chooses to do so, and this only rarely happens, he forfeits his right to turn to the headman for help in the settlement of any dispute that might arise. In the time prior to the establishment of the Dutch colonial government in the area, this could result in the intruder losing his life.

Thus, in each jural system the nature of the residual rights held by the village varies. At a minimum the residual rights involve only the power to restrict all nonresidents from cultivating in the village reserve or territory. In other instances, where the jural personality of the village is more developed, rights to other resources may be involved, as, for example, nonresidents may not enter the territory while the village is carrying on a ceremony to re-establish the fertility of the village and its territory, or nonresidents may not cut timber in the village territory to use for longhouses. Or there may be incidents of ownership by the village over the usufruct that prevent the holder of them from selling them to nonresidents. Or the owner of rights on leaving a village may have to relinquish them so that the land returns to the village reserve. And any other resident may then establish permanent rights on cutting the forest (see Dove n.d.).⁶

THE KAYAN LAND TENURE SYSTEM: DEVOLVABLE USUFRUCT

In 1980 I visited Sarawak and spoke to a Kayan informant from the Balui region then living in Kuching. In reply to my inquiries, he stated that the cutting of primary forest does establish use rights over the area. That is, an individual desiring to cultivate a swidden in secondary forest first has to obtain permission from the individual who had originally cut the primary forest in that area.

In 1980-81, while conducting research in East Kalimantan, I was able again to discuss with a Kalimantan Kayan living in Tanjung Selor the nature of the Kayan system of land tenure. He also stated that the cutting of primary forest establishes use rights by the cutter over the area.

I then wrote C. Hudson Southwell, an authority of Kayan adat, and inquired as to his understanding of the matter. He replied (letter September 7, 1982):

You asked about Kayan social organization, with special reference to land tenure.

My information about rural land tenure among the Kayans is the same as yours, that when a Kayan cuts down virgin forest he establishes hereditary rights to that land for future cultivation. By customary Kayan lore, and Kayan law, he holds exclusive right to that land. If someone else wishes to use the land, the owner of those rights may lease it to others for a fee in cash or for a share of its produce; or the rights may be sold altogether for any other purpose, such as a plantation of rubber or coffee.

DO THE KAYAN HAVE PARTITIONABLE USUFRUCT
OR DEVISABLE USUFRUCT?

The nature of my inquiries were such that I was not able to ascertain whether the Kayan have partitionable or devisable usufruct. Since I have not conducted research on this in a Kayan village itself, I have not had the opportunity to inquire as to whether or not the Kayan domestic family is a corporate unit--crucial to this form of inquiry.

And if it is, whether it is of limited duration or perpetual and with regard to what types of property, i.e., land, fruit trees, gongs, jars, etc. Therefore, I have been hesitant to push my informants any further in this matter to resolve this part of the problem.

OBSERVATIONAL PROCEDURES TO DISTINGUISH PARTITIONABLE USUFRUCT FROM DEVISABLE USUFRUCT

There are several crucial tests to be applied to distinguish partitionable from devisable usufruct. These tests have to do with the structure of the domestic family at the time of cutting primary forest (see Figure One.)

In the case of 1.0, if A cuts primary forest while his children Y and Z are living in his household but X has married and is living with his own wife in a separate house, do all children, X, Y, and Z get rights to the area on his death? If this is the case, this is an example of devisable rights in which rights are created by the actor individually and not on behalf of a corporate domestic family that exists either in perpetuity or for a limited life.

However, if the jural system considers that only Y and Z have rights in example 1.0, there may be two bases for this. Y and Z, as opposed to X, may have claim to the rights on the basis that they were helping their father during the agricultural years that the primary forest was cut. An example of this type of preferential claim occurs among the Rungus with regard to moveable property purchased while a child was actively farming with his parents (see Appell 1974). Or, only Y and Z have a claim because when the father cut the primary forest he is considered to have done this as a representative of the family, as structured at that time. To date we have no ethnographic examples of this but it is conceivable that this type of legal reasoning could occur in some society in Borneo. Such an instance would indicate that the family is a corporate grouping with respect to rights over land. But as I shall demonstrate shortly, it would be a corporate group of limited life rather than a perpetual corporate grouping.

To distinguish these forms of devisable rights from partitionable rights, the following question has to be asked: Do those children who have joined their spouses' households on marriage, but after the clearing of the swidden areas in question, lose their usufruct rights? If they do, it is partitionable usufruct. For example, in illustration 1.0, if Y marries and moves into his wife's longhouse apartment, joining the domestic family of his wife, under partitionable usufruct he would have no rights to secondary forest from his natal family. He could only use those held by his wife's domestic family.

The case of 2.0 illustrates another test for the locus and type of rights over secondary forest. Individual A marries and creates family 2.1. He then divorces and creates family 2.2. If Z has rights in primary forest cut by A while living in 2.1, or if X and Y have rights in forest cut by A while living in 2.2, then the system is devisable usufruct. If children from other marriages do not share in these rights, then the rights are corporately held by the domestic family in which the individual resided while he cut the primary forest. And in this case it would be a system of partitionable usufruct if the domestic family exists in perpetuity as the Iban bilek, and rights are not owned by those marrying out.

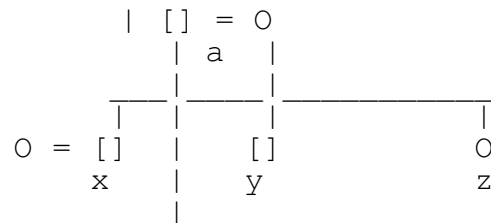
Since it is possible that a domestic family might exist in perpetuity with regard to other assets and not land rights, it is critical to establish whether the use rights are held by the corporate grouping or by individuals. That is, are they devised to all children or kept within the domestic family so that those marrying out receive no rights.

There is still the possibility that the domestic family is corporate with regard to land rights but nevertheless has a limited life. The Rungus domestic family provides an example of this with regard to property other than land rights. At the dissolution of the parental domestic family in such a case, all corporately held assets would be devised on the children. In instances such as this it is again devisable usufruct.

Thus, we end up with three classes of devisable usufruct on the basis of the conditions under which they were created: those rights corporately created in a limited

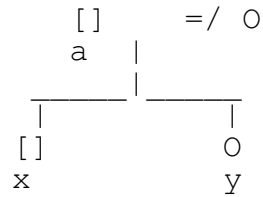
FIGURE ONE: DOMESTIC FAMILY STRUCTURE

1.0

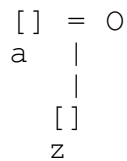


2.0

2.1



2.2



Key: [] - Male O - Female = / - Divorce

life domestic family; those rights which seem to adhere to the individual who does the work, as in the case of 1.0 above and which are inherited by his children; and those rights which are created by the family as a unit and which are devised only on those children who participated in the creation of them.

CONCLUSION

All external classifications do some violence to the ethnographic facts. In this instance we have the Kenyah land tenure system which appears to fall between the two major classes. That is, the Kenyah have both partitionable and devisable usufruct. Secondary and tertiary rights are devisable as all children participate in them. But primary rights are partitionable usufruct since the children who remain in the household of the original family have access to these prior rights over the swidden areas, and these prior rights are held by the continuing domestic family as a corporate asset.

We have also presented evidence that the Kayan system of land tenure involves devolvable usufruct. It is of considerable importance now for someone to conduct field research to establish whether this devolvable usufruct is partitionable or devisable.

But this is only one part of the research that is necessary to clarify the nature of land rights in Borneo societies. There are many aspects of the nature of land rights that are not touched upon in many of the ethnographies cited above. For example, it is not clear whether the rights described pertain both to wet rice land, where such is cultivated, in addition to the swidden areas. And it is also not clear in some instances whether the domestic family exists in perpetuity, whether it is a limited life corporate group with regard to land rights, or whether it is neither of these so that land rights are held by individuals and not corporate groups. Thus, the distinction is often not made between rights held by a group versus rights held by the individual (see Appell 1971b, 1983b, 1984).

Finally, to complete our understanding of the land tenure systems of Borneo, we badly need research on land

rights over permanent field systems such as found in societies practicing wet rice agriculture.

NOTES

- 1 I want to express my appreciation to the Department of Anthropology, Research School of Pacific Studies, Australian National University, and the National Science Foundation (Grants GS-923 and BNS-79-15343) which have at various times supported by research on land tenure in Borneo. I also want to express my appreciation to the Department of Anthropology, National Museum of Natural History, Smithsonian Institution, for their sponsorship of my recent research.
- 2 In Appell (1983a:41) I use the terms "circulating system" and "contingent system" for these two systems. The terminology I use here supercedes this as I believe it is more appropriate.
- 3 In Appell (1971a) I suggested that there might be an ecological explanation for the development of devolvable usufruct. Secondary forest is of some value in regions of high rainfall. This is because the slash from secondary forest dries out faster than that from primary forest, and therefore it has the potentiality of burning more completely. Further field research in 1980-81 among the Bulusu' suggests that the matter is more complicated than that. The Bulusu' system is that of circulating usufruct, yet this occurs in a region of very high rainfall in contrast to the Rungus ecosystem which has a significant dry season. However, see Dove (n.d.).
- 4 Hudson (1972) reports a somewhat similar system among the Ma'anyan.
- 5 See Appell (1983b, 1984) for the distinction between a "corporate group" and a "corporation."
- 6 Padoch (1978) suggests that among the Iban the loss of rights on leaving a village may be a relatively recent

development. Earlier a bilek did not lose its rights on moving to a nearby village, only if it moved out of the region entirely.

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