

**Native Title in Sarawak: Pushing The Frontiers of Native Customary Rights To
Land (NCR) Beyond The Written Law**

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The Malaysian state of Sarawak has a unique history of native title based on *adat* or customary laws. Native customary rights to land or "NCR"¹ is a golden thread that runs through the state's land laws from the time of the Brooke rule in 1841 to Sarawak's cession to Britain in 1946 and its independence within Malaysia in 1963. In 1948 the colonial government incorporated NCR into land legislation which eventually became the Land Code 1958, a consolidation of earlier laws. This paper looks at NCR under the Land Code 1958 (Cap 81) and argues for a broader "entitling condition" based on occupation and possession and in accordance with the native communities' traditional laws and customs.

Legislature has defined and redefined the principles governing the recognition of NCR under the code. Technically based on the Torrens system, an interest under the code can be owned only if registered. Where there is no registered title an occupier is at best a licensee or a permit holder, both of which do not grant proprietary rights. The code however does not provide for registration of titles in land classified as Interior Area Land, where most NCR land held by natives is located.

The code does not envisage native social structures nor the traditional land use practices that are integral to the survival of those communities. Although NCR under the code is primarily based on occupation, section 5 restricts that to specified methods and limits NCR to those created before 1st January 1958. This is unduly restrictive and an undue infringement on native rights. What has evolved and translated into current executive decisions often do not reflect the historical, original intendment and spirit of the law. Arguably what was meant to provide a vehicle for the natives to enjoy an inherent right, has inadvertently become the barrier to its actualization and it appears, the progressive circumscribing of their rights have continued.

¹ Government publications use the acronym "NCR" to refer to native customary rights to land. See the *Handbook, New Concept of Development on Native Customary Rights (NCR) Land*, Ministry of Land Development, Sarawak, 1997; See also Francis. J. Adam., 1998. "Customary Land Rights under the Sarawak Land Code", *Journal Of Malaysian and Comparative Law Journal* 25 (1998): 217

This paper argues that the Land Code cannot be taken to be the ultimate “all and be all” basis for the consideration of NCR. For a start, the provisions of the code were formulated based on alien feudal concepts of land that neither reflect the existing conditions of land tenure nor adequately encapsulates the native views of land occupation nor their concepts of communal rights of ownership. Interestingly, an amendment to the code in 2000 introduced the term “native rights” to mean rights “created by or belonging to a native over land not issued with a title”. Although it is given a narrow statutory meaning, courts must take account the common law’s recognition of ancestral laws and customs of the native peoples who occupied the land “with sensitivity to the native perspective on the meaning of the rights at stake”². It is possible to approach interpretations of native rights with a non-conflictual view without regarding the sources as in competition with the statute but to search for bridging grounds. As long as that right has not been extinguished by “clear and plain intention” of legislature or surrendered to the state, those rights remain.

The paper will look at the case of *Nor Nyawai v Borneo Pulp Plantations Sdn Bhd & Ors* [2001] 2 CLJ 769 (HC). Native Ibans proved that their customary rights is based on an exclusive use and occupation of land and their customary practices on the land are evidences of their occupation as normative communities surviving on the land. Those rights may have been regulated but not extinguished by statute.

In the Orang Asli cases of *Sagong Tasi & Ors v Kerajaan Negeri Selangor* [2002] 2 MLJ 591(HC) following *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 (HC); [1998] 2MLJ 418 (CA) it was held that the aboriginal common law and statutory rights had to be looked at conjunctively. Both rights, the court held, are complementary. The nature or content of this “complementary” right is not clear. However the courts in *Adong*, *Nor Nyawai* and *Sagong* have employed the terms “heritage”, “traditional” “pre-existing”, “customary” and in *Sagong*, *sui generis* to describe those rights, implying that native rights are unique and cannot merely be understood without looking beyond common law or the statutory provisions. A *sui generis* approach to interpreting native rights suggests the possibility that the native rights stem from alternative sources of law that reflect the unique historical presence and occupation of native on their land.

² *R v Sparrow* [1990] 1 SCR 1075 at 1112