

# Bridging the Gap: The Quest for Effective Protection of Native Customary Rights (NCR) In Sarawak

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## ABSTRACT

The Native Customary Rights (NCR) in Sarawak is a deep intersection of ancestry, traditional adat, and the law. Although the Malaysian judicial system has traditionally recognized NCR as preexisting rights based on communal practices, modern claimants are increasingly encountering an increasing enforcement gap. This paper focuses on the systemic obstacles to legal recognition as it becomes effective protection, particularly exploring how the tension between indigenous territorial ideas (including pemakai menoa and pulau galau) and the limiting structures of the Sarawak Land Code are connected. The study draws on the doctrinal review of landmark cases, such as the move towards expansionary recognition in (Nyawai, 2001) to the restrictive interpretations in (2017), to emphasise how overwhelming evidentiary burdens and technical mapping requirements tend to dismiss valid customary claims. The example of (Tebari, 2018) can be used as a point of reference to exemplify how a dependence on oral history is often compromised by incongruent technical evidence and procedural obstacles. Based on a comparative analysis with the Australian model of the native title system, the paper suggests that judicial recognition cannot be successful in the absence of institutional support. This paper therefore suggests the creation of a dedicated NCR forum or an enhanced Native Court system that is well equipped with multidisciplinary skills and adaptable evidentiary principles. This kind of reform is necessary to close the gap between the paper recognition and the real protection of the land rights of indigenous people in a culturally-appropriate and legally-uniform way.

**Keywords:** Native Customary Rights (NCR); Sarawak Land Code; Adat; Specialist Tribunal; Native Title.

## INTRODUCTION

Land to Indigenous people of Sarawak is not only a monetary resource but also an indivisible part of identity and lineage, spiritual heritage. Although Malaysian courts have recognized that Native Customary Rights (NCR) are created under an existing body of native law and custom and not state concessions, the battle has since changed focus to enacting it instead of recognizing it. Clients experience huge obstacles, such as technical evidence standard and legal limitations, evident in the case, such as (Tebari, 2018), where the oral history was inadequate unless supported by credible mapping. This paper suggests the establishment of a specialist NCR forum to help get beyond the paper recognition to culturally relevant protection.

## LITERATURE REVIEW

The academic nature of the discussion of the concept of Native Customary Rights (NCR) in Sarawak shows just how disconnected the legal acknowledgment of indigenous land rights and their application under the Malaysian law are. Theorists like (Langub, 2024) affirm that NCR are deeply rooted in adat (customary law), which is established as an independent normative system that is not influenced by colonial and statutory intervention. According to this line of thinking, the indigenous tenure is not only concerned with individual agricultural land parcels but a broader territory, namely 'pemakai menoa' and pulau galau, which is vital in spiritual continuity and subsistence of the community. Nonetheless, Langub points out a major legislative tension: The Sarawak

Land Code tends to narrow these broad territorial rights to a smaller, cultivation-based paradigm, recognizing land cleared prior to the 1958 statutory cut-off.

Further, (Zubir & Wook, 2023) follows up on the roller-coaster course of the Malaysian judiciary to mediate on these rights. They point out an initial expansionary period during which courts under the influence of international common law precedents such as the *Mabo (No 2)* in Australia acknowledged NCR as pre-existing proprietary interests that are independent of state grants. However, in the recent literature, a limiting change has been highlighted, such as the (2017) ruling that has reinstated the strict statutory definitions that communal forests are not covered by the law. All of this scholarship is pointing to the idea that although judiciary can shape the law, institutional deficiencies and a lack of specialized procedures, such as those in the Native Title Act of 1993 in Australia, leave indigenous populations facing insurmountable evidentiary burdens. Therefore, the existing literature supports the shift in the form of recognition of customary law by courts to a dedicated institutional framework that can resolve the issue of the reconciliation between customary law and formal land administration.

## RESEARCH METHODOLOGY

The research process in this paper uses a two-fold method which includes a doctrinal study and a comparative research to examine the legal issues of Native Customary Rights (NCR) in Sarawak. The doctrinal element is a thorough study of primary sources of law, such as the Sarawak Land Code, the constitutional provisions and major reported case law. This discussion will center on how NCR has developed under the native law, common law, and statutory framework, particularly on the conflicts between the traditional notions such as *pemakai menoa* and cut-off dates as limited by state laws. The analysis of the landmark judicial rulings, (Nyawai, 2001) and (2017), reveals the so-called enforcement gap when the legal recognition of something on paper does not appear to be effectively protected in reality.

In addition to the doctrinal research, the paper employs a comparative methodology, by analyzing the Australian native title system. Australia is chosen as the main comparator due to the long influence of its courts on the jurisprudence of Malaysian indigenous land rights, and their common law that indigenous land rights are pre-existing and not created by the state. This discussion is not supposed to imply the wholesale importation of overseas law but is, instead, a measure of how Australia has dealt with such issues as the demonstration of rights and the application of expert institutions. In particular, the paper examines how the Native Title Act 1993 of Australia works, its mediation procedures and its National Native Title Tribunal as a way to derive practical lessons which can be applied in altering the Sarawak institutional system of land management.

### Principles and Legal Basis of NCR.

Native Customary Rights (NCR) in Sarawak have a deep-rooted connection to *adat*, or customary law, which is a legal and cultural heritage, which predates the advent of colonial or statutory systems. The tenure of land among the indigenous people is a complex communal type which goes beyond individual ownership of the land. At the heart of this system is the *pemakai menoa* which is the overall territorial area of a longhouse community including important resources which include farms, water sources and ancestral locations. In this domain, there are certain types of land use, including *temuda*, or cultivated land that is abandoned to restore its fertility, and *pulau galau*, or areas managed by the community as forest hunting ground, timber and resource management.

These rights are mostly governed by statute, via the Sarawak Land Code (SLC). Section 5 of the Code is the primary means to identify the establishment of NCR and it is based on the procedures like the clearance of virgin jungle, settlement, or planting fruit trees. Importantly, this section uses the word any other lawful method which theoretically has made it possible to accommodate more extensive claims made such as *pemakai menoa* but this has been a matter of legal argument. In spite of these recognitions, the SLC is very restrictive with a definite cut-off date that is 1 January 1958. Rights asserted after this date are usually subject to a particular permit under Section 10, which severely constrained the growth of customary tenures. Although Section 6 and Section 6A give the option of Native Communal Reserves and communal titles, the large evidentiary and procedural onus on the indigenous communities remains a barrier to the protection of these territorial rights in practice.

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## Judicial Development: Growth and Limit.

Native Customary Rights (NCR) development in the judicial system of Malaysia is a complicated process of transformation of what used to be widely acknowledged into what is now restricted. The judiciary of Malaysia has traditionally contributed greatly towards recognizing that the indigenous land rights are not concessions the state makes to the indigenous people but rather already existing rights, which have been entrenched in the traditions of law and custom. In a period of powerful expansionary ruling, Malaysian courts extensively relied on foreign common law cases, including the Mabo (No 2) of Australia and Calder of Canada. The case law such as in Adong, Sagong Tasi and Madeli Salleh established that the common law venerates the validity of native title except when such has been explicitly extinguished by a legislative statute. It is important to note that the case of (Nyawai, 2001) elucidated the legal status of Iban people, which strengthened their right to ancestral land claim on the basis of traditional adat.

Nevertheless, this gradual trend has been experiencing a major change towards a more restrictive stage in the past few years. The decision of the Federal Court in (2017) was a pivot point as it restricted the area covered by NCR to those areas that demonstrate physical evidence of settlement, clearing and cultivation. This ruling in effect denied the legitimacy of broad-territorial ideas like pemakai menoa (territorial domains) and pulau galau (communal forest reserves), as legally binding customary rights. There is therefore an unresolved tension between the previous common law principles that had led to indigenous sovereignty and a more rigid approach to statutory interpretation to which formal land codes are of greater importance. This judicial ping-pong game of development places many communities in an exposed state, with legal safeguarding of their heritage being frequently pegged on increasingly narrow technical definitions.

## CASE ANALYSIS AND DISCUSSIONS

### The Enforcement Gap: The (Tebari, 2018) Lesson.

The example of (Tebari, 2018) v. Superintendent of Land and Survey can be viewed as a bright example of the modern enforcement gap that does not allow defending Native Customary Rights in Sarawak. One of the main challenges identified during this litigation is that the huge use of oral history does not always stand up to high standards of the law when faced with inconsistent technical information. Here, the lineage of the plaintiff of constant cultivation since 1958 was brought down squarely by aerial photographs taken in 1948 and 1958 which indicated that little of the acreage had been cleared. This discrepancy between old testimony and scientific documents is a very vulnerable gap to indigenous claimants in a system that values historical imagery over oral memory.

Moreover, the case revealed serious technical and procedural obstacles, which present disproportionate impact on the indigenous population. The lack of technical rigor in many NCR claims is an impediment especially in the mapping of communities. In (Tebari, 2018), the map prepared by the claimant was denied since it was not done by a surveyor who was licensed, which is a wider concern that informal mapping is not legally viable to determine the boundary of the land. Also, strict procedural policies, like time-bars against challenging government settlement schemes, commonly deny communities a chance to challenge decisions that encroach upon their customary lands. These failures indicate that unless the means of professional surveying and more adaptable procedural framework are made available, legal recognition is still mostly unreachable to the very people it is meant to protect.

### Comparative Analysis: Native Title System in Australia.

Australia is the best jurisdiction to compare with the Malaysian scenario since the two jurisdictions have the basic common law principle that indigenous land rights are prior interests established by the legal system, and not newly established rights created by the state. This common law basis has enabled the courts of Malaysia to often resort to Australian jurisprudence, including the seminal Mabo (No 2) case, to inform local interpretations of native title.

In addition to the judicial theory, the Native Title Act 1993 in Australia provides a valuable model of practical application by virtue of its construction of a specialized statutory framework. This system employs the mediation, agreement-making, and the National Native Title Tribunal in solving claims to offer the technical and institutional support that Sarawak is currently lacking. The Australian experience, however, provides a crucial lesson as well, namely: it is not enough to have judicial recognition. Even important legal wins would be susceptible to the administrative narrow readings or restrictive legal reforms without regular legislation support and executive willingness to enforce.

## RECOMMENDATIONS A SPECIALIST NCR FORUM

In order to close the current enforcement gap, Sarawak must shift towards having a specialized Native Customary Rights (NCR) forum. This would be achieved by either coming up with a new tribunal which is specifically designed to perform the same function or by enhancing the Native Court system greatly. As an alternative to the argument about the excellence of an entirely new system, a more viable solution is that there be a specialist NCR division of an enhanced Native Court that is backed by legally trained adjudicators and technical employees. This forum ought to have a first instance jurisdiction over primary NCR disputes, including the fact that they have separate individual and communal claims. Its mandate would be to have boundaries, by oral history and community mapping, to resolve land interference, and to provide channels towards native communal titles under the Sarawak Land Code of Section 6A.

Such a forum composition is paramount due to the fact that NCR disputes are an intricate confluence of law, custom, and technical evidence. Thus, the forum needs to shift to a multidisciplinary approach as opposed to the generalist judicial model. It must be chaired by legally qualified members who are knowledgeable in land law, in cooperation with adat (customary law) assessors. Moreover, the forum has to have access to qualified professionals, including licensed surveyors, anthropologists and historians. This wide range of experience means that law professionals will not fail to account for cultural peculiarities, and traditional specialists will be provided with the assistance to balance the traditional knowledge with the official land registers.

It is also necessary to have procedural and remedial reforms to make the system accessible and culturally respectful. The court of law is supposed to use the flexibility of evidentiary rules that are more respectful of traditionally ignored evidence, including family documents, fruit trees and consecrated graves. The forum ought to be empowered to order independent site tests and surveys to ease the load on indigenous claimants. Also, the requirement to mediate on intersecting boundaries and compensation issues early would provide a more organized and quicker alternative to the long legal battles. Above all, the forum should be given the mandate to issue substantial remedies such as official declaring NCR, re-survey orders and temporary protective orders to ensure the status quo. The reform would convert NCR into a reality that is legally guaranteed, by emphasizing significant justice instead of technicality.

## CONCLUSION

In order to resolve the longstanding enforcement gap in Sarawak, the state ought to set up a special Native Customary Rights (NCR) forum, either as a stand-alone tribunal, or a greatly strengthened division of the current Native Court system. This suggested forum should have first-instance jurisdiction to establish the presence of individual and communal claims, establish boundaries and adjudicate on issues of land intrusion or compensation. Since the cases of NCR involve the intricate combination of the customary law, historical evidence, and technical data, the composition of the forum should be multidisciplinary instead of the generalist judicial officers. It must be chaired by members legally qualified with a background in land law, assisted by adat assessors knowledgeable in native custom, and with direct access to technical expertise, including licensed surveyors, anthropologists, and historians. This participatory strategy makes sure that the cultural subtexts are not violated but are in tandem with the official land administration databases and that a system of tenure where legal representatives would otherwise fail to recognize the inherent spiritual and ancestral aspects of native tenure is maintained.

Moreover, extensive procedural and remedial reforms are necessary to change NCR into a formal right into an enforceable interest. It is necessary that the forum may apply flexible evidentiary principles that acknowledge

oral histories, community knowledge and tangible indicators such as fruit trees or sacred burial places, which tend to be not accepted in traditional litigation. In order to reduce the high burden of proof which is at present imposed on indigenous people, the forum must be empowered to order independent site checks and surveys instead of requiring claimants to present sophisticated technical evidence themselves. Remedial powers should be strong to allow the forum to make official pronouncements of NCR, provide temporary protective orders to preserve the status quo and instruct other land bodies to issue communal titles based on Section 6A of the Sarawak Land Code. This specialist forum would offer a more approachable, culturally relevant and accurate means of defending the territorial heritage of the indigenous people of Sarawak by placing a heavy emphasis on substantial justice rather than blind adherence to technicality and by adopting an active approach to managing cases such as early mediation of boundary overlaps.

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