

Review Article

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Native Customary Rights: Does It Hold the Future of Sarawak's Natives?

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Abstract

This article presents an overview of the Native Customary Rights to forests and its role in protecting the future of native people of Sarawak, Malaysia. The native people have had a long history and strong relationship with their forests. Existing documents and studies have been critically reviewed and analyzed in order to elaborate the Native Customary Rights which are critical to the native people of this region. To have a better understanding on Native Customary Rights, it is important to answer three related questions: (i) Who is a native of Sarawak, (ii) What is 'custom', and (iii) What is the nature of 'rights'? The roles of Native Customary Rights for economic, political or social reasons, operate through informal rules embedded in the natives' customs and traditions. These rules have never been codified into formal laws because the *adat* system merely functions to manage the human relations which are tied to culture thus making it difficult to codify the culture into laws. It is evident that there are several issues underlying the development of Native Customary Rights: (i) Native Customary Rights are considered as inferiority to those of the State, (ii) the issue of over-shadowing of traditional laws by the colonial rule and the current statutory laws and, (iii) projects and land schemes involving the Native Land. It is understood that the challenges of promoting Native Customary Rights are daunting task; however, the constitutional laws need to carefully revise to provide a better future for the natives.

Key Words: indigenous people, legislation, Sarawak, traditional system, *adat*

Introduction

Globally, there are over 800 million native people living and depending on the forests and they have utilized their rights under both the customary and statutory laws (RRI and ITTO 2009). However, the native people's rights to the forests are threatened by the fact that they do not have any secure tenure over these forests areas and their access and use to the forests (RRI and ITTO 2009). This may be due to the fact that the forests are majorly being managed by government, as the legal owner and manager of the forest (Dahal et al. 2011) and the topic of Native Customary Rights (NCR) has always been left out to give way to the

development processes (Chao 2012).

The topic of NCR and traditional tenure systems have always been shallowly discussed (Corbera et al. 2011). There are only two major conflicting concerns that have always been involved in the discussions on this matter. The first is the concern of management and sustainability of resources that leads to focus on the Common Property Resources (CPR) (Howard and Nabanoya 2007). However, the CPR deliberations are thought to ignore the natives' right to plants (Howard and Nabanoya 2007). The second concern is that the Intellectual Property Rights (IPR) and its roles in protecting the NCR (Howard and Nabanoya 2007). Thus, this review article presents an overview of the NCR

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in the state of Sarawak, Malaysia and its roles in protecting and guaranteeing the future of the native people. In this regard, this study aims to attain the following objectives:

- i) To make a historical review and analysis of the NCR in the Sarawak State of Malaysia.
- ii) To gain a full understanding on these rights and to find the gap on the ability of NCR to protect the rights of natives.
- iii) To understand the past and present system of land tenure in Sarawak.
- iv) To find the role of NCR to the natives and issues to be

addressed in developing the NCR.

Literature Review

Historical Perspectives

Sarawak has a long history of governance and this long history has shaped the lives of the people of Sarawak (Baer 2012). There are 38 sub-ethnic groups of native people with a total population of about 1,809,856 in Sarawak (Table 1). Major ethnic groups are *Iban*, *Bidayuh*, *Kayan*, *Kenyah*, *Kelabit* and *Lun Bawang* (Department of Statistics

Table 1. Sarawak's Native Population Distribution by District and Ethnicity

Division	Malay	<i>Iban</i>	<i>Bidayuh</i>	<i>Melanau</i>	Other natives	Total
Kuching	213,011	65,105	74,147	3,810	8,152	364,225
Bau	4,095	1,376	36,280	89	372	42,212
Lundu	11,203	4,344	11,679	79	221	27,526
Samarahan	40,737	18,263	5,812	715	2,103	67,630
Serian	10,799	14,404	52,886	153	500	78,742
Simunjan	20,491	14,776	347	83	235	35,932
Sri Aman	16,418	37,666	457	154	379	55,074
Lubok Antu	806	24,164	146	31	155	25,302
Betong	35,917	21,293	195	148	177	57,730
Saratok	17,941	23,488	216	127	146	41,918
Sarikei	9,192	18,559	456	3,933	594	32,734
Maradong	4,450	12,322	217	1,489	282	18,760
Daro	2,319	3,687	72	20,750	439	27,267
Julau	245	14,504	59	60	94	14,962
Sibu	24,110	67,237	1,758	14,250	3,333	110,688
Dalat	460	1,619	51	14,297	572	16,999
Mukah	2,851	11,910	324	17,543	1,380	34,008
Kanowit	1,121	23,469	84	253	234	25,161
Bintulu	20,036	72,809	2,225	17,029	111,421	223,520
Tatau	959	18,176	135	1,547	3,025	23,842
Kapit	2,067	45,405	301	741	2,156	50,670
Song	719	17,812	68	158	224	18,981
Belaga	895	3,935	136	285	23,325	28,576
Miri	52,954	85,026	3,727	9,012	31,704	182,423
Marudi	4,673	20,010	373	273	28,870	54,199
Limbang	12,996	11,923	365	250	13,541	39,075
Lawas	12,771	1,079	111	190	17,596	31,747
Matu	625	2,714	36	12,148	397	15,920
Asajaya	26,032	2,593	177	63	48	28,913
Pakan	125	14,423	26	39	136	14,749
Selangau	549	19,267	94	198	263	20,371
Total	551,567	693,358	192,960	119,897	252,074	1,809,856

Source: Department of Statistics Malaysia, 2010.

Malaysia 2010; Vaz 2012). The customary law or locally known as the *adat* system has existed even long before the sultanate¹⁾ of Brunei and it has been used as the basis of traditional law making systems and traditional land tenure systems (Ngidang 2005). The native people preferred the *adat* system more because it has more governed their lives compared to the different law systems used due to the multiple power shifts (Ngidang 2005).

The long history of governance in Sarawak has directly affected the native people's lives especially in terms of their rights towards the forests (Ngidang 2005). The power shifts from the sultanate of Brunei to the Brooke regime (1841-1946) and later, the British colonial (1946-1963), show that the interest towards the native people and the protection of their rights grow simultaneously (Kershaw 2011). The NCR has had evolved over near one and half centuries since the first Rajah²⁾ James Brooke in 1841 (Ngidang 2005). The introduction of the dualistic economy by the Brookes, in which, the commercial agriculture and mining for the Chinese immigrants and the subsistence economy for the natives, shows that the Brookes did not intend to interfere in the natives' way of life and recognized the rights of the natives accordingly (Rubis 2008). The Brookes' policy also has created a legal pluralism, which defined and categorized the land tenure systems into two; one was based on native customary law or *adat* and the other was a codified land system (Fox et al. 2009). The land tenure system based on the *adat* was created to preserve the traditional land use and farming systems within the natives whereas, the codified land system legally recognized the private land ownership and supported the commercialization of agriculture (Fox et al. 2009). However, the Brookes have never translated the native customary law into the formal land law (Cramb and Wills 1990).

The post-war British Colonial Government (1946-63) introduced Land Code 1958, which has become the attrib-

ute of the colonial legacy in Sarawak (Fox et al. 2009). This Land Code has a similarity with the Brookes' policy in allowing the co-existence of both the codified land rights and customary land tenure, thus, showing that the customary rights were still recognized after the Rajahs (Fox et al. 2009). This Land Code also has reflected the legacy of the Brookes (Cramb 2007). The dualistic systems of land holding of one were regulated by the State and one by the customary law is similar for every colonized country (Joireman 2008). There has been a massive change in the administrative system during the colonial rule as the keynote of the colonial policy was to bring about economic transformation through the exploitation of the natural resources of the territory whether of mineral, agricultural, or forest origin (Kaur 1998). During this period, the natives were given minimum financial assistance, although there was no intention of revolutionizing the natives' territory (Kaur 1998).

Up until now, several colonial legislations have been adopted and re-modified in the current legislation (Bulan 2005). One of the legislation is the Land (Classification) Ordinance 1948 which classifies the land into following categories (Bulan 2005; Cooke 2005b):

- (a) Mixed Zone Land (land which may be held by any citizen without restriction),
- (b) Native Area Land (land with a registered document of title but to be held by natives only),
- (c) Native Communal Reserve (declared by the Order of the Governor in Council for use by any native community, regulated by the customary law of the community),
- (d) Reserved Land (reserved for public purposes),
- (e) Interior Area Land (land that does not fall within the Mixed Zone), and
- (f) Native Customary Land (land in which customary rights, whether communal or otherwise, have been created).

The Land Code 1958 (Chap 81) then specified the acquisition of the NCR by the natives. Although the land tenure systems have had a long history in Sarawak, the post-independence era of NCR to land or the present land tenure systems will be used as a point of reference for this article as to gain a thorough understanding on the roles of NCR towards the future of the native people (Haarlov-Johnsen et al. 2008).

1) Sultanate (precede by an article) is a country that is ruled by a sultan or the period during which a sultan rules.

2) Rajah is a title given by the Sultan of Brunei to James Brooke as a ruler or chief in Sarawak in the 1841. As a reward for helping the Sultanate of Brunei fight piracy and insurgency among the indigenous peoples, he was granted the landmass of Sarawak in 1841 and received independent kingdom status. The last Rajah of Sarawak was Charles Vyner Brooke.

Definition of Native Customary Rights to Land

Land is frequently referred as a 'real property', which means a property that is fixed and cannot be removed and the ownership to land is more likely to be centered on the rights towards the economic development and the control of important resources on it (Donnelly undated). A right to a piece of land by an individual can be categorized into two viz., the informal law of NCR to land and the formal law of a constitution (Fox et al. 2009). Land tenure is not a static characteristic of the land as the existing land tenure is continually challenged, modified and recreated along the time (Gyamtscho et al. 2006). This is totally dependent on the societal consensus for its recognition (Campbell et al. 2006). This article focuses only on the NCR to land as to get an understanding on its roles towards the future of the natives in Sarawak. Hence, to get a full understanding on NCR to land, it is very important to know the definition of this term (Fong 2011). A reference to the relevant State laws should be made when it comes to determining the definition of NCR (Sarawak 2004). NCR to land is a system, which recognizes the rights of the native people to occupy and use the land (Sarawak 2004). The term 'customary rights' implies a smaller fraction of the long existing 'customary practices', happen inside and around the forests which later was written into law and policy (Peluso and Vandergeest 2001). Fong (2011) suggested that, to have a better understanding on what is NCR, it is important to answer three related questions:

- (a) Who is a native of Sarawak,
- (b) What is 'custom', and
- (c) What is the nature of the 'rights'?

Native of Sarawak

Most natives in South and Southeast Asian countries continue to have little influence over the establishment and development of the national law and legislation (Lynch 2006). Thus, it is important to know, who these natives are and how their cultures influence the national policy making system. The native people of Sarawak can be divided into two types according to their homeland namely, the coastal people (the Malay and the *Melananu*) and the inland people (the *Dayak*) (Kaur 1998). The earliest statutory definition for 'Native' as stated in the Rajah Order No. VIII, 1920

(1920 Land Order) is: 'A Native means a natural born subject of His Highness the Rajah' (Fong 2011). The definition of 'Native' is then modified in the Land Ordinance 1931 due to its vague definition and the new definition mentioned that the 'Native' means a natural born subject of His Highness the Rajah of any race and is now considered to be indigenous to the State of Sarawak, as set out in Schedule B in this Order (Fong 2011).

The later definition provided in the Article 161A (6) (a) of the Federal Constitution of Malaysia, highlights a clearer definition of 'Native' in relation to Sarawak (Fong 2011). According to this Article, the 'Native' of Sarawak is a person who is a citizen and either belongs to one of the races specified in Clause (7), deemed as indigenous to the State or is of mixed blood derived exclusively from those races (Fong 2011; SUHAKAM 2011). Article 161A (7) of the Federal Constitution of Malaysia and Section 3 of the Sarawak Interpretation Ordinance (Cap. 1 1958 Ed.), further highlights the races in Sarawak that are to be considered as indigenous (SUHAKAM 2011). The races to be treated for the purpose of the definition of 'Native' in Clause (6) as indigenous to Sarawak are the *Bukitans*, *Bisayahs*, *Dusuns*, *Sea Dayaks*, *Land Dayaks*, *Kadayans*, *Kalabits*, *Kayans*, *Kenyahs* (including *Sabups* and *Sipengs*), *Kajangs* (including *Sekapans*, *Kejamans*, *Lahanans*, *Punans*, *Tanjongs* and *Kanowits*), *Lugats*, *Lisums*, *Malays*, *Melanaus*, *Muruts*, *Penans*, *Sians*, *Tagals*, *Tabuns* and *Ukits*' (SUHAKAM 2011).

The terms 'native' and *bumiputera* are often used interchangeably however, the term *bumiputera* is a complex term and it sometimes creates misunderstanding as the definition of this term is 'the sons of the soil' (Cheah 2003). For this reason, the term *bumiputera* refers to the native people of the country, including the Malays as well as the aborigines and the natives of Sabah and Sarawak (Cheah 2003). As for the case of the native in Sarawak, the term *Dayak* has been used to refer to the *bumiputera* people (Masum and Jawan 2003). This term as stated in Article 161A (7), originates from the colonial rule in the nineteenth and twentieth centuries, in which it refers to the non-Malay natives (the *Iban* and the *Bidayuh*) during the era of the Rajahs and during the post-colonial period, this term has evolved as a collective indication for the *Iban*, *Bidayuh*, *Orang Ulu* and other non-muslim native groups (Masum and Jawan 2003). But to-

day, the term *Dayak* is used to refer to the *Iban* and *Bidayuh* while the other native groups are called *Penan* or *Orang Ulu* (Baer 2012).

Native customs and native customary laws

The traditional governance system or *adat*, is used to describe a body of customary rules or laws which is similar to 'Native Customary Law' or NCR (Colchester et al. 2007). This system protects the rights of the natives' towards their lands (Colchester et al. 2007). The natives' affairs have been regulated by these *adat*, a body of beliefs, social norms, customary laws and traditional practices, for generations (Toh and Grace 2005). *Adat* also provides laws on land ownership and control, regulation of land sharing, inheriting, creation and losing of rights and transfer of rights among the community members (Bulan 2005; Toh and Grace 2005). The native customs in the present day, define the content of the native title and it is also has been part of the law of Malaysia and is protected under the Federal Constitution because it embodies and protects the relationship between natives and their land in which, the relationship underlies the spiritual, cultural, economic and social existence of the natives (SUHAKAM 2011). However, not all customs form part of the 'Law' which is mentioned in the Federal Constitution of Malaysia as:

'Law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof (Fong 2011).

Nature of Native Customary Rights

The nature of NCR in Sarawak has changed severely ever since the first Rajah (Bulan 2005; Fong 2011). The first Rajah, James Brooke, suggest that the 'rights' of the land occupied by the natives as the 'indefeasible right', in which, it meant that the new sovereignty have to accept that, natives who were already occupying that particular land are the lawful owners or proprietors of that land (MacKay 2002; Bulan and Locklear 2008; Rubis 2008). Other people including non-natives could not interfere with the land already occupied by the natives and any lands in Sarawak that are unoccupied would be considered as the property of the Government (MacKay 2002; Bulan and Locklear 2008; Rubis 2008).

The introduction of the Court Order V of 1898 by the Second Rajah later states that, the land held under the customary tenure could not be treated as the 'registrable interests' (Hooker 1999; Fong 2011). It was only later, in the 1920 Land Order that provisions were made for registration claims to land or trees made under the customary laws (Ngidang 2005; Bulan and Locklear 2008; Fong 2011). The Order recognized the natives' rights to land under the customary tenure, even without title or registration (Ngidang 2005; Bulan and Locklear 2008; Fong 2011).

Part IX of Land Ordinance (Cap. 27) states that, the Native land reserves may be made in the prudence of the Superintendent and published in the Government Gazette and no ownership of land should be given to other people besides the community or individual holder (Vaz 2012). The Ordinance also recognized the land categorized as the Native Holdings as the Government was required to pay compensation to the natives when such land is required for public purposes (Fong 2011). Section 67(1) and Section 68 of the Land Settlement Ordinance 1933 later provides (Cramb and Wills 1990; Fong 2011):

67(1) Claims to land based upon native customary rights shall be heard and decided by the Settlement offices in the course of settlement.

68(1) If a native establishes a native customary right on any land, the Settlement Officer may at his discretion –

(a) issue a title in respect thereof or, with the consent of the native, to other land, or

(b) pay the native compensation money therefore.

68(2) Rent in respect of titles issued under subsection (1) (a) shall be payable in the second and subsequent years: Provided that no rent shall be chargeable in respect of land over which a customary right under paragraph (a) or (c) of section 66 has been established.

The extract of Section 67(1) and 68 of the Land Settlement Ordinance had been included under the Section 18 and 84 of the Land Code (Fong 2011). Section 6 of the Land Code classifies the land over which rights have been created or acquired through exercise of NCR and which are untitled and fall within the definition of 'State Land', as the Interior Area Land or the Native Communal Reserve (Bulan 2005; Fong 2011). The land however, shall continue to be State Land until a document of title has been issued as stated in the section 5(2)(i) of the Land Code

(Bulan 2005; Fong 2011).

The Article 13(1) of the Federal Constitution also provides that no one can't deny property except in accordance with the law and Article 13(2) provides that 'no law shall provide for compulsory acquisition or use of property without adequate compensation' (Fong 2011). Therefore, although the NCR to land have been described as the permanent rights, such rights may be annihilating according to the law and on payment of compensation (Fong 2011).

The Study Area

Sarawak is one of the 13 States in Malaysia and is the largest State in Malaysia, that covers a total area of 124,449 km². This State is located in the Borneo island (between latitude 0° 50' and 5° N and longitude 109° 36' and 115° 40' E) with a tropical climate, which is warm and sunny throughout the year (State Planning Unit 2012). This State is divided into nine administrative Divisions and the main capital is Kuching (State Planning Unit 2012). Two-third of its population is native people with different races, ethnicity and cultures (Department of Statistics Malaysia 2010) (Fig. 1).

Research Method

Past and current documents related to the NCR and

land rights of the natives in Sarawak have been critically reviewed and analyzed in order to gain a full understanding on the NCR and to find the gap on the ability of NCR to protect the rights of natives. It is necessary to understand the past and present system of land tenure in Sarawak in order to find solution to the existing conflicts between the higher authorities and the local communities (Long et al. 2003). Content analysis was applied to analyse the documents. The research method was summarized in Fig. 2.

Results and Discussions

Roles of Native Customary Rights to the Natives

Land and its natural resources play an important role in the natives' livelihood. It is difficult to separate the idea of the relationship (Daes 2000) or the 'symbiotic bond' (Basnet 2009) between these two elements. With regard to this relationship, there is a need to maintain and manage the land and its resources in a sustainable manner and to respect and protect the natives law.

Nowadays, NCR only operates within the community and has little or no functions in the current legal system. The definition of *Adat* states that it is a mean to maintain the law and order among the community and until today, it is still widely practiced among the community especially, the *Dayak* community in which, it constitutes an informal restriction that regulates and structures the social relations

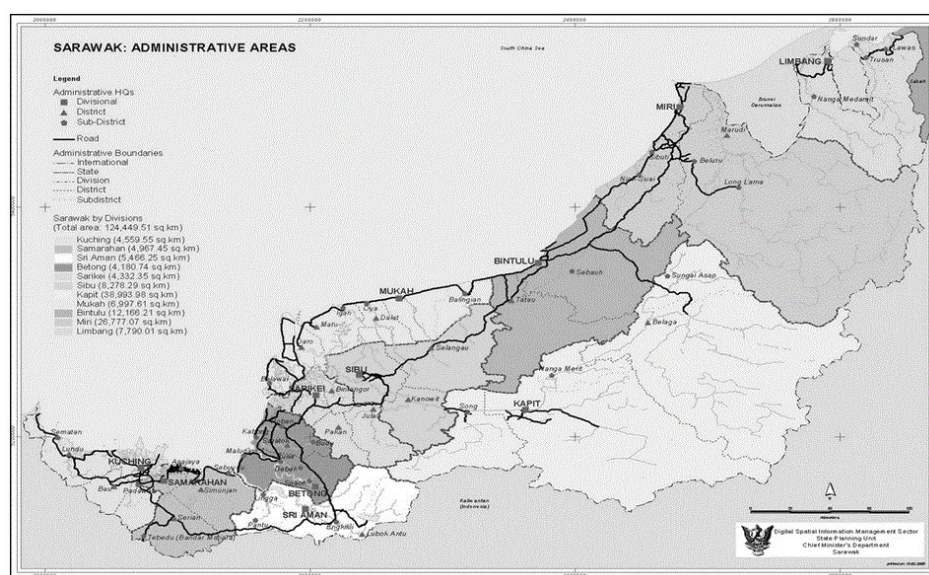


Fig. 1. Map of the study areas (Source: Timberland 2011).

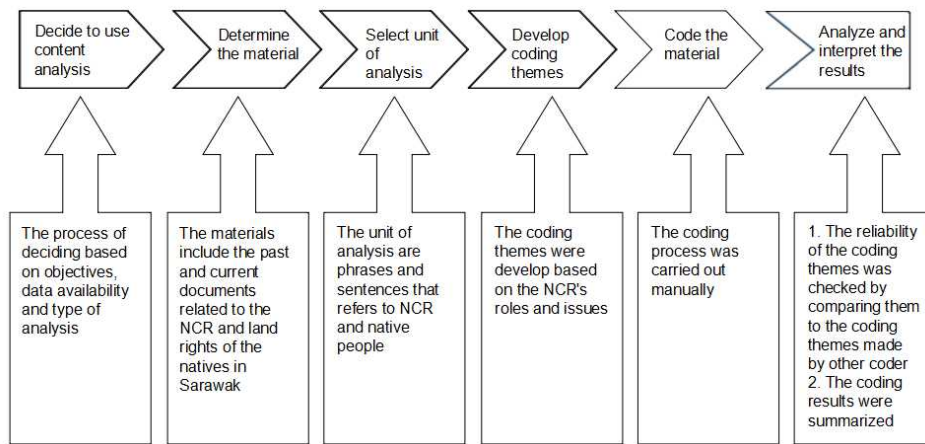


Fig. 2. Procedures of content analysis.

within these community (Colchester et al. 2007). The most important aspect of the *adat* system is the definition of the rules of access, rights of ownership to land and other natural resources and resources utilization and management in a sustainable manner (Colchester et al. 2007). The main principle in the NCR lies within the community and the rights to land by an individual or family, earned through inheritance, clearance, occupation and utilization, are nested in the fundamental rights of the community (Colchester et al. 2007). The roles of Native Customary Rights for economic, political or social reasons, operate through informal rules embedded in the natives' customs and traditions, and these rules have never been codified into formal laws (Cramb and Wills 1990; Ngidang 2005). This may be due to the reason that the *adat* system merely functions to manage the human relations which are tied to culture and thus, making it difficult to codify the culture into laws (Cramb and Wills 1990; Ngidang 2005). The understatement of NCR in the current legal systems has made it difficult for the community to exercise their rights.

Although the native people have been exercising their NCR long before the Rajahs or colonial, the present land legislation in Sarawak only recognizes the NCR that have been created prior to 1958. Due to this, the natives face a major problem in reclaiming their rights towards the forests even though they have long cleared and cultivated the land, before the 1958. Besides that, although the present land law helps to protect and restrict the customary land rights by limiting the areas in which the non-natives could acquire title to land, but at the same time it excludes the natives from

remaining areas of primary forest (Cramb 2007). In addition, although the local people are allowed to administer their customary rules on their customary lands, however, they were limited to farming, harvesting and gathering of their cultivation and did not include the land ownership rights (Fox et al. 2009). Anybody attempting to acquire customary rights without permission was considered to be an unlawful occupation of State land. Cramb (2007) argues that the Land Code can be seen as to not explicitly recognize the NCR as it gives priority to the registration of individual title to land. These examples show that the NCR could not fully guarantee the native rights to land due to the restrictions in the present legal system.

Although the the NCR has been recognized in the present land legislation in Sarawak, there is always a restriction on the extent of the exercise of the NCR. There are also problems lying with the legibility of NCR as the full extent and stature of rights are often not well-defined. This resulted in susceptibility towards encroachments, destructions and conversions of the land classifications functions (Friends of the Earth 2007).

The deletion of the cultural component in Section 5(2) of the Land Code in the Land Code Amendment Bill of 2000 also has resulted in malfunctioning of the legal pluralism idea because once culture was removed from the Land Code; native people had to provide evidence of physical occupation using legal documents, maps, and other instruments. The deletion of cultural component has complicated the community's effort to register the NCR to land due to lack or unavailability of these instruments. The claim of NCR is

also quite challenging given that most of the witnesses of the pioneering practices are gone (Fox et al. 2009). Till date there is only a few parts of NCR to the land have been registered in Sarawak (Ichikawa 2007). Therefore, the Land Code Amendment Bill 2000 allowed the Government to take the unregistered large areas of fallow land from the community in order to provide land for the large-scale oil palm plantations (Fox et al. 2009). Additionally, this land code has paved a way in the Government's efforts in gaining more land for the oil palm plantations as land is to be legally defined, alienated and sold for the success of agricultural projects (Kaur 1998). The present laws including the Land Code and other amendments then can be considered to be a disadvantages to the NCR. They could not guarantee and protect the NCR (Rachagan 2009).

Though NCR plays an important role in managing and protecting the native rights, it is also important for the natives to learn about the constitutional provisions as there is a huge gap between what is written in legal documents and what the natives think they know through the native customary laws (Haarlov-Johnsen et al. 2008). The knowledge on NCR itself cannot guarantee the native future in protecting and preserving their rights because NCR does not provide a strong legal basis as compared to the constitutional laws. There is also a need to review the formal laws that do not threaten to alienate the land and the natives living within the land (Moran et al. 2002).

Issues in Developing Native Customary Rights

The issue of NCR has been acknowledged in the UN General Assembly in 2007 and consequently, the UN Declaration on the Rights of Indigenous People has been adopted in that Assembly (Jayasooria 2008). Article 26 of this declaration requires the States to give legal recognition

and protection to the native lands regarding the native customs, traditions and traditional land tenure systems of the native people concerned (Jayasooria 2008). In this regard, Malaysian Government also has adopted the declaration in its Federal Constitution. Although the UN Declaration is being adopted in the Federal and State constitutions, Sarawak is not paying attention to another international law, which is the Free, Prior and Informed Consent (FPIC³). Within Sarawak, a truly FPIC process is not in practice because the voice of the native people in this State is still being ignored and they are often being ignored of in development plan or management process (Rubis 2008).

There are also many rural native people who are still unable to exercise their rights to self-determination of their land and resources (Abdullah 2006). The most severe case that can be used as an example of this statement is the *Penan* community in the Eastern side of Sarawak. The issuance of logging concessions in the native lands to logging companies has threatened the *Penan's* land, livelihood and traditions. Countless efforts such as protests, blockades and civil actions have been carried out by the community, with the support from the Non-Governmental Organizations (NGOs), in approaching the authorities to stop the logging and land uses change within the native land but has resulted in vain due to continual refusal of the State Government to recognize the *Penan* community's rights to land (Yong 2010).

The unsuccessful efforts of the native communities fight for their NCR is mainly caused by the conflicting interest between the Government and the community. The State tends to lease out the forest to the private companies for a greater financial gain without considering the effects of this action that are posing threats to the loss of land and valuable resources of the native community. The small population size, lack of political power among the native people and also the lack of specific Ministry or Department to deal with the native affairs are the major causes behind these unsuccessful stories (Jayasooria 2008). Besides, the reluctance to provide funds and failure to notice of big organization such as the UN REDD Programme to support the recognition of the native people also have been a big contributor to this unsuccessful story (Griffiths 2008).

Although the recognition of the NCR in Sarawak is a positive step taken by the State Government, Native Cus-

3) Free, Prior and Informed Consent (FPIC) is one of the basic rights given to the indigenous people who have established their distinct cultures, settlements and civilizations in countries across the world, long before the formation of the present nation. FPIC acknowledges two basic facts regarding the indigenous people, which are; firstly, the indigenous people have always had and still have rights over their lands, territories and resources and secondly, the indigenous peoples have the right to establish their own direction, priorities and processes of development and lifestyles (Rubis 2008).

tomary Rights are considered as inferiority to those of the State (Xanthaki 2003). Thus, the State can restrict or extinguish the NCR at their will. The recognition was only a minor compromise to the larger process of converting all 'unoccupied land' or the untitled land to State land (Cooke 2005a). With a powerful State control over land, the NCR to land will gradually lose its authorities and power to protect and preserve the native rights. Supposedly, securing the human rights is the duty of the State and other parties are responsible to respect such rights (De Man 2012). If the State being the highest authority continues to ignore her duty, the native people of the region will be struggling for their existence. The issue of over-shadowing of traditional laws by the colonial rule and the current statutory laws also may influence the development of NCR.

The fast expanding logging activities inside the natives territories, dams' construction, agricultural schemes and so on have added to the long-list of encroachment into the native communal lands (Colchester et al. 2007; Jalong 2012). Through the years of post-independence era, the State Government has established several projects and land schemes involving the Native Customary Land. Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) is only one of the examples, used in this article, of the local Governments' effort to develop and manage the Native Customary Land in Sarawak. SALCRA was established in 1976 with an objective to develop the Native Customary Land 'for the benefit of the owners', with the authority to manage the local smallholder and develop the customary land through oil palm plantations (Cramb and Ferraro 2012). In the early years, SALCRA has benefited a lot of local smallholders and has improved the standard of living of the natives but eventually; the performance rate has been decreasing.

After years of performance analysis, it was found that, the Managed Smallholder approach is less efficient in terms of project net present value, aggregate net proceeds, aggregate stakeholder benefits, and revenue to Government. Besides the inefficiency in terms of the economic sectors, the SALCRA projects also resulted in losing control over NCR land and the natural resources by the natives, once their lands are surrendered to SALCRA (Sanggin and Mersat 2012). From the perspectives of natives, this project may be too costly if the results of the projects lead to loss of

ownership, loss of their autonomy and a more Government-dependent lifestyle (Cooke 2005b).

This has led to a question on, how effective do the land schemes planned by Government in befitting and protecting the natives' rights? When the law and policies in practice add up to the existing exploitation system, when it denies the rights of the native people, it is the practice that needs to be changed rather than the written law itself. The Governance approaches need to focus to the fundamental rights, institutional roles, policy and systems, where the decisions are actually being discussed, implemented and monitored (Cotula and Mayers 2009). It is in some way true that, the projects carried out by the Government can and able to benefit the natives especially, in the rural areas but these projects could not bring anything to protect and preserve the natives' rights in the long run.

Yong (2001) also has listed several other similar problems faced by the native people and local communities in all States in Malaysia. The problems are lack of information and policy decisions on forest management and certification, lack of awareness among the local communities due to very little resources in the local knowledge, little communications between the authorities and the local, and failure to involve local in planning and decision-making processes. These problems are also issues to failure in recognizing the native's rights and eventually lead to the exploitation of the native customary rights. Full, effective and meaningful par-

Table 2. Complaints received by SUHAKAM* relating to NCR

Issue	Water catchment	Encroachment	Ownership
2002	0	5	1
2003	0	4	6
2004	0	9	5
2005	1	20	11
2006	1	11	5
2007	2	12	7
2008	1	17	9
2009	1	17	7
2010	1	15	4
2011	0	4	0
Total	7	114	55

*The Human Rights Commission of Malaysia is known locally as SUHAKAM.

Adapted from SUHAKAM 2011.

ticipation of native people and local communities in all level of development process will guarantee the security of their rights. They should at least have little knowledge on what happens within and around their territories to protect their rights.

Nowadays, more native people have shift to legal aid in settling the conflicts of the encroachment of their native customary lands (Rachagan 2009). Table 2 shows the number of complaints received by The Human Rights Commission of Malaysia or locally known as SUHAKAM, relating to NCR matters starting from year 2002 till 2011.

The 'theory of access' stated that, to secure the native peoples rights to the forest and its resources, they should be given or have six types of access which are: i) access to technology, ii) access to capital, iii) access to markets, iv) access to knowledge, v) access to authority and, vi) ability to gain resource access through social identity (Egay 2007). This theory can be a baseline for law and policy making especially, when it involves the native people versus the State policies. This theory also can be used to overcome the issues of NCR, especially in Sarawak.

Conclusion

While a number of measures have been taken by the authorities to ensure the security of the native people's rights, it is clear that certain areas of human rights concern still remain as it was which obviously demands further review. The growing concern of the roles and issues in the NCR in protecting and preserving the native's rights are addressed in this article. The vulnerability of NCR, being heavily influenced by the constitution laws needs to carefully revise to provide a better future for the native. The challenges of promoting NCR are daunting but the native's future requires the joint efforts from all stakeholders either from the Government sector or from the non-Governmental sector. Even these efforts will fail in many areas but still it is worth trying.

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