Law on Native Customary Land in Sarawak

JC Fong

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"This book serves to provide a better understanding on the evolution of native customary law on land and forests in Sarawak and, what, under the laws of the State, constitutes native customary rights and the extent and nature of such rights. It is an invaluable guide on this area of the Law for everyone participating in the development and economic transformation of Sarawak and its peoples"

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FOREWORD FROM THE RIGHT HONOURABLE CHIEF MINISTER OF SARAWAK
PEHIN SRI HAJI ABDUL TAIB MAHMUD
S.B.S., D.K. (JOHOR), D.K. (PAHANG), D.P., P.S.M., S.P.D.K., S.U.M.W., S.S.D.K., S.S.A.P., D.G.S.M., D.P.P.N., S.S.S.A., S.P.M.T., KT. W.E. (THAILAND), KEPN (INDONESIA), S.P.M.B. (BRUNEI), K.O.U. (KOREA), AO (AUSTRALIA), P.C.D.

This is the second book from the author, YBhg. Datuk J. C. Fong, who has always been willing to share his knowledge of the Law, acquired through long years of practice, with his peers in the legal profession and the people of this Country.

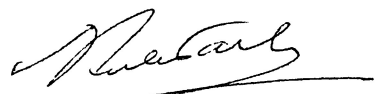
The Land Law of Sarawak combined the fundamental principles of the Torrens System which guarantees indefeasibility of title or ownership of land, and the customary laws of our native people which recognize rights to land created or acquired through well-established customs and usages. Whilst reference or research materials on the Torrens System are readily available, there is a scarcity of legal text and reference materials on native customs, recognized by the Laws of Sarawak, for the creation of native customary rights over land. This Book is a useful reference for those who desire to acquire a deeper knowledge of our law on native customary land.

The State of Sarawak is undergoing rapid transformation from a rural, agricultural economy at the time of Malaysia Day, to a high income, modern economy. Hence, more and more native customary land would inevitably be required for development, or the natives themselves would have to put their land, often their most valuable asset, to better or higher economic utilization in order to realize their optimum potentials and returns. Therefore, it is important that there should be a better understanding of the law relating to native customary land, especially how the laws relating thereto have evolved since Sir James Brooke began his rule over Sarawak in 1841 until the enactment of the Land Code in 1958, and the mode and circumstances whereby such rights may be legitimately created, acquired, inherited or transferred. A better knowledge and appreciation of our native customary laws will avoid disputes and misunderstanding amongst the natives themselves as well as between the natives and the authorities having responsibilities to implement government development policies, programmes and initiatives affecting native customary land.

The publication of this Book is, therefore, timely and most welcome, as it sets out with clarity the development of the laws on native customary rights since 1841 and undertakes a review of all the relevant Orders and legislations made either by the Rajah or the Council Negri on native land, and some statutory instruments which gave legal effect or recognition to native customs, such as the Tusun Tunggu.

The Government acknowledges that the practice of native customs may need to change with the advent of new economic and social conditions. But, it is imperative that there ought to be a clear understanding of the native customary laws and the philosophy and principles which underpinned such laws or customs, before seeking the consensus of the various native communities on whether the practice of any customs ought to continue or has become obsolete, or what laws should be passed, upon reaching such consensus, to modify the practice of any customs in a manner that best suits or safeguards the natives' own economic interests and aspirations, whilst, at the same time, preserving their cherished cultural traditions.

I am confident that this Book will not only enrich the legal literature in this Country, but also serve as a very useful guide for all those who practise in this area of the Law as well as those who are involved in, or affected by, the development of native customary land in Sarawak.



[PEHIN SRI HAJI ABDUL TAIB MAHMUD]
Chief Minister of Sarawak

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MAHKAMAH PERSEKUTUAN
MALAYSIA

CHIEF JUSTICE
FEDERAL COURT
MALAYSIA

FOREWORD
From
THE CHIEF JUSTICE OF MALAYSIA
TUN ZAKI BIN TUN AZMI

This Book covers a topic which has lately attracted local as well as global interest, that is native rights to land. The recent increase in the number of court cases involving claims by indigenous peoples to rights over land, particularly in Sarawak, bears testimony to the attention that has been given to native land rights.

In Malaysia, although the land law is based on the Torrens System, native rights or title created or acquired through the practice of native customs, are also recognized. However, not much has been written on the native customary law relating to the native ownership of land. The publication of this Book is both timely and necessary.

This Book provides an indepth analysis of the development of the laws and customs in Sarawak which would be of invaluable assistance to lawyers and judges handling cases involving native customary rights to land. An expeditious disposal of these cases requires a good understanding of the relevant native customs and laws, and this Book should serve to achieve this objective.

Though much of the Book relates to the laws in Sarawak, it also deals with the application of the common law and influence of international customary law, on native rights to land in Malaysia. These are subject matters which will be of interest to the legal profession throughout the Federation.

Books on local laws help to improve knowledge of, and promote understanding in, our laws. I am glad the author has been able to produce yet another Book to enrich the legal literature of this Country. I hope the author's commendable efforts will motivate others to share their legal knowledge by publishing books and commentaries on our statutory and customary laws and the decisions of our Courts.

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Preface

Generally, Malaysians have, understandably, an emotional attachment to their land. To many, land has a sentimental value, not measurable in monetary terms. However, the "sentimental value" of land cannot be, and has never been, recognised as a factor in the assessment of its market value. The Federal Court in *Superintendent of Lands & Surveys Sarawak v Aik Hoe & Co Ltd*[1] referred with approval to the following passage of a Privy Council judgment by Lord Romer in *Vyricheria Narayana Gajapatiraju v the Revenue Divisional Officer, Vizagaparam* [1939] AC 302 at 312 (a land acquisition case):

> The land, for instance, may have for the vendor a sentimental value far in excess of its "market value". But the compensation must not be increased by reason of such consideration.

Hence, it is not surprising that any issue associated with rights or ownership of land would normally generate profound public interest and intense debate. Issues or concerns over rights or ownership of native customary land, which are untitled and unsurveyed, are, indeed, no exception.

For the natives in Sarawak, their land is generally associated with their cultures, traditions and, many have argued, a source of their livelihood. Some claimed the land belonged to them and their forefathers since time immemorial. Because land, and the resources like forest produce which come from the land, forms such an important and integral part of the lives and cultures of the native people, that this book is written, to trace the history of the development of the law on native customary rights to land, the nature of these rights, the extent of transferability and inheritance of such land, and how these rights are to be determined and have been protected by the relevant laws.

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1 [1966] 1 MLJ 243. See also *Kui Yuk Chai & Anor v Superintendent of Lands & Surveys, Sarikei Division* [2002] 8 CLJ 540.

AJN Richards in his book, *Land Law and Adat*[2] recalled this conversation with a native chief:

> When travelling in the Ulu Deloh, I asked a Penghulu who owned the land. After some discussion his reply was the God owned the land, the people who used it gained the right to it by clearing it and obeying their customs.

This story illustrates the natives' traditional perception on land — that which is made available or rendered to them by the Almighty for their use in accordance with their customs. This traditional view does not necessarily correspond with the laws made since the early days of the Rajahs, which defined, regulated and, to great extent, restricted or modified native customs and rights over land, specified the areas or zones where native rights may be created, acquired or exercised, and in some cases, the limits or extent of these rights, as well as the circumstances whereby such rights may be extinguished or terminated by the Authorities.

There has been what is aptly described as a "perception gap"[3] amongst the natives as to what the law recognises as rights to land and the practice of their customs or traditions which they deem to have given them the rights to the land or the forests from which they gather jungle produce for domestic use, roam, hunt and forage for food. Indeed, as explained in this Book, not all customs practised by the natives create rights over land. This is noted by the Report of the Land Committee in 1962[4] as follows:

> ... and there is also little difficulty where rights had under native law and custom amount to, or can be deemed to amount to, full ownership. The difficulties really begin where the rights cannot be considered to amount to full ownership. It is obvious, for example, that the right to collect forest produce out of virgin forest cannot be held to confer rights of ownership on those who exercise the right. ...

2 Published in November 1961. The author, AJN Richards, was a senior officer in the British Colonial Government and has wide knowledge and experience in the Land System of Sarawak.

3 See Foreword by Datuk Dr Denison Jayasooria, Commissioner for Human Rights to publication "Legal Perspective on Native Customary Rights in Sarawak" – Report by Dr Ramy Bulan and Amy Locklear for Human Righs Commission of Malaysia (2008).

4 See paragraph 122 at p 43.

This book will analyse what precipated this perception gap. How this perception gap is to be overcome is, of course, a matter for the policy and law makers and the function of the Majlis Adat Istiadat Sarawak.[5] Nevertheless, because "native customary law" has been given a specific statutory definition,[6] it is important to appreciate that not all native customs may come within that statutory definition.

The over-arching objective of this book is, therefore, to promote a better understanding and awareness of the law on native customary rights over land by tracing the evolution and development of the law, and spelling out clearly what the law on this subject is before and after January 1, 1958 and how the courts, through the decades, have determined what "native customary rights" or "native customary land" to be; and to conditions or constitutional requirements which must be fulfilled should Executive action be taken to terminate or extinguish such rights.

This book will explore the reception and influence of the common law on native rights to land in Sarawak particularly, and also, in the rest of Malaysia, as well as, to make a genuine attempt to critically examine the decisions in some classic Commonwealth cases, like *Mabo (No 2)*,[7] and the principles of common law enunciated by those cases, in reference to recognition and protection of native titles to land acquired prior to change of sovereignty – in the case of Sarawak, when the 1st Rajah, Sir James Brooke was "handed" the Government of Sarawak in 1841. The examination of this area of the law necessarily involves consideration of the Laws of Sarawak Ordinance 1928, the Application of Laws Ordinance and the Civil Law Act 1956 which govern the application of English common law and rules of equity in Sarawak and in Malaysia.

The issue of applying international customary law to native land rights will be discussed, but such discourse must be in accord with the generally accepted norm that (a) international customary law does not automatically become part of Malaysian law in the

5 This is a body established by the Majlis Adat Istiadat Sarawak Ordinance (Ord. 5/1977) to, inter alia, study, review, codify and to recommend legal recognition of Native Adat (customs) for approval of the Government.
6 See s 2 of the Land Code on definition of "customary land".
7 *Mabo v Queensland (No 2)* (1991-1992) CLR 1.

absence of legislation which adopts such law as part of Malaysian law, and (b) international customary law, as applied in the United Kingdom as part of the common law, is applicable to Malaysia or the States of the Federation, to the extent it is not contrary to Malaysian laws (State and Federal) and public policy.[8]

This Book is not intended to generate arguments on what native customary laws in Sarawak ought to be. The law, statutory, customary and case laws referred to in this Book are intended to give better insight into this interesting but rather difficult area of the law, and to give a critical but constructive review of the judgments, past and recent, on this subject. Even if there is a genuine pressing need to change, reform or modify the law, it is essential to know correctly what this law is. This clear knowledge and understanding of the law should be the platform for consideration whether or what the changes, reform or modification of native customary law should be made, and the impact any such changes, reform or modification will have on society, economically, politically and culturally.

I am motivated and inspired to author this Book by Ministers, legislators, former colleagues in the State Government of Sarawak, and members of the Sarawak Bar, who felt that a better understanding of the complexity of the laws and customs related to native customary land is needed, if the current arguments on, and gaps in understanding of, what is "native customary law" or "native customary land" is to be resolved. When there is a clear understanding of what the law is, then the emotional debates, at times, tainted with pretty strong political undertones, can be avoided so as to pave the way for a pragmatic, constructive and rationale solution to address the natives' claims or desire for secured ownership of their land and a change in their approach to obtaining land needed for their economic and social advancement.

It is my genuine hope that this Book will provide guidance to practitioners, judicial officers, public officers, forest concessionaires, land and plantation developers to achieve a better understanding

8 See Paper presented by Abdul Ghafur Hamid @ Khin Muang Sein entitled "Judicial Application of International law in Malaysia: A critical Analysis" at the 2nd Asian Law Institute (ASLI) Conference on May 26-27, 2005.

of the law on native customary tenure in Sarawak and that disputes and misunderstandings over this emotional or sensitive subject-matter can be resolved through better respect and compliance with the relevant laws and customs or a fairer and more equitable implementation thereof, especially as the natives' rights to what is said to be as their "ancestral" land, has been equated with or viewed as akin to their human or constitutional rights.


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About the Author

JC FONG obtained his Bachelor of Laws (Hons) Degree from the University of Bristol, England in June 1971. He was called to the English Bar by the Honourable Society of Lincoln's Inn in November 1971 and to the Sarawak Bar in January 1972.

He practised as an advocate under the firm of Reddi & Co, Kuching from January 1972 till July 1992. In August 1992, he was appointed State Attorney-General, Sarawak, being the first person to be appointed to that position from the Sarawak Bar.

He served as State Attorney-General until December 31, 2007. Thereafter, he was retained by the State Government of Sarawak in an advisory capacity and to appear as Legal Counsel for the State in cases involving the Sarawak Government and its officers. He also continues to serve as a nominee of the State Government in a number of companies in which the Government has equity interests.

In the field of education, the author is a member of the Board of Management of St Joseph's School, Kuching, a member of the Board of University of Malaysia Sarawak (UNIMAS), a member of the Board of Curtin (Malaysia) Sdn Bhd and Curtin University Council (Miri Campus).

As a practising Advocate and later, as State Attorney-General and State Legal Counsel, he appeared in a great number of well-known cases covering administrative, constitutional, land, forestry, company, banking, contracts and arbitration laws.

He is the author of *Constitutional Federalism in Malaysia* published by Sweet & Maxwell Asia in August 2008.


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Chapter One

Native Rights to Land in Sarawak: A Historical Prospective

1.1 Sarawak, as a political and geographical entity, emerged only in 1841 when Sir James Brooke was handed the government of the country by the Raja Muda Hashim, the Governor and representative in Sarawak of the Sultan of Brunei. By an Instrument of Transfer, the Raja Muda Hashim transferred to James Brooke, "the Government of Sarawak together with the dependences thereof its revenues and all its future responsibilities". James Brooke in return gave an undertaking that "the laws and customs of the Malays of Sarawak shall forever be respected."[1] In 1846, the Sultan of Brunei gave an outright grant of Sarawak to James Brooke under a "Grant by Sultan Omar Ali of Province of Sarawak to James Brooke as sovereign".[2] In the context of the law relating to pre-existence of native rights over land, 1846 must be regarded as the year when James Brooke formally acquired sovereignty over Sarawak, although he was, in 1842, appointed as "representative" of the Sultan and "in that capacity to govern the province of Sarawak."[3]

1.2 Historically, in 1846, James Brooke did not exercise sovereignty over the whole area of present-day Sarawak. The original grant of 1846 only covered the territory from "Cape Datu to the mouth of the Samarahan River" – which seems to be the areas now under the Kuching Division and coastal areas of Samarahan. Further grants were given by the Sultan in 1855, 1861, 1862, 1884 and 1885[4] and these grants covered the following districts:

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1 See Transfer by Pengeran Muda Hashim of Government of Sarawak – published in Vol. VI, Laws of Sarawak (1958 Revised Edition) at p 3.
2 See Vol. VI, Laws of Sarawak (1958 Revised Edition) at p 7. This Grant was confirmed on August 24, 1958. See Vol. VI, Laws of Sarawak (1958 Revised Edition) at p 8.
3 See Vol. VI, Laws of Sarawak (1958 Revised Edition) at p 5.
4 See Vol. VI, Laws of Sarawak (1958 Revised Edition) at pp 10-31.

1855[5] – Rajang, Kalaka, Serebas, Lingga, Sakarang, Sadong & Samaharan.

6.09.1861 – Samarahan River to Cape Kedurong.

13.06.1882 – Baram District.

12.12.1884 – The coasts from Cape Puan to the East of the River Trusan as far as the mouth of the River Bumbum, with all tributaries and the main river of the Trusan.

31.05.1885 – Coast districts from Cape Kedurong to the east side of the mouth of the Baram as far as Plai Bay, together with all the rivers between Cape Kedurong and Plai Bay and all the districts therein.

Then, in 1904, a transfer of the Lawas-Trusan District by the British North Borneo Company completed the geographical area of Sarawak of 124,449 sq. km,[6] with a length of 740 km and width of 257 km — approximately the size of Peninsular Malaysia.

1.3 Prior to the Brooke era, Sarawak was under the suzerainty of the Sultan of Brunei, then one of the most powerful rulers in the island of Borneo, whose authority extended over the territory which is now known as East Malaysia and Brunei. Under this suzerainty, there is very little written record of existing land rights.[7]

1.4 However, before the advent of the Brooke rule, there had been for centuries, in Borneo and the eastern Archipelago, a system of land tenure based upon customs of the native people. This body of customs is known by the generic terms "Indonesian Adat". Within Sarawak itself, the term "adat", without qualification, is used to describe this body of customary rules or laws; the English equivalent expression for this term is "native customary law" or

5 This Grant was written on the twelfth day of the month of Shawal on the night of Thursday at 12 o'clock in the year 1271 (AD 1855).

6 Equivalent to 12.4 million hectares. See p 5 of Terminal Report on Forestry Development Project Sarawak by FAO of UN in July 1982.

7 Land Law in Sarawak by Dato Peter Mooney at p 239 in The Centenary of the Torrens System in Malaysia, edited by Tan Sri Datuk Prof. Ahmad Ibrahim and Judith Sihombing.

"native customary rights". However, where these rights relate to land, the expression normally assigned is either "native customary tenure" or "native customary rights over land".[8]

1.5 Prior to his arrival to Sarawak, Sir James Brooke wrote a Prospectus, ostensibly to raise public interest and awareness of his undertaking — to embark on an expedition to Borneo, in particular to the British Possession of Marudu Bay, from Singapore.[9] The full text of his Prospectus was later published in 1853 in "*The Private Letters of Sir James Brooke*".[10] Therein, the First Rajah wrote:

> For these and many other causes which readily occur it would seem, that territorial possession, is the best, if not the only means, by which to acquire a direct and powerful influence in the Archipelago, but any government instituted for the purpose must be directed to the advancement of the native interest and the development of native resources, rather than by a flood of European colonisation, to aim at possession only, without reference to the indefeasible rights of the Aborigines.

1.6 The above passage of his writing shows Sir James Brooke acknowledged the territory which he had taken over as ruler, had been inhabited before his arrival, and the native communities have their own system of laws governing rights to, and ownership over land. His reference to "indefeasible rights" showed the Rajah's acknowledgement that these rights of the natives to the land could not be taken away by him from them each time upon his assumption of sovereignty over territories ceded to him by the Sultan of Brunei.

1.7 Indeed, the Rajah gave his early impression of native customs in 1840 when he wrote in his Journal as follows:

> The fruit trees about the kampong, and as far the jungle wound, are private property, and all other trees which are in any way useful, such as the bamboo, various kinds for making bark-cloth,

8 See *Land Administration in Sarawak* by AF Porter at p 10. See also *Superintendent of Lands & Surveys Miri Division & Anor v Madeli Salleh* [2007] 6 AMR 290 at 300; [2007] 6 CLJ 509 at 527.

9 See *Land Administration in Sarawak* by AF Porter at p 9.

10 Edited by John C Templer and published by Richard Bentley in London (in 3 volumes).

> the bitter kong ... and many others. Land, likewise, is individual property, and descends from father to son; so likewise, is the fishing of particular rivers, and indeed most other things ...[11]

The Rajah's approach to the rights of the indigenous people to the land, was consistent with modern-day judicial thinking as reflected by these words of Lord Denning. when delivering the Privy Council judgment in *Oyekan & Ors v Adele*:[12]

> The courts will assume the British Crown intends that the rights of property of the inhabitants are to be fully respected.

1.8 It would be re-called that when James Brooke was made Sovereign in 1846 and when his sovereignty was extended to subsequent areas, Sarawak was a very sparsely populated country. Not all land was occupied by the native population. The right of the new sovereign over land which was unoccupied has been clearly explained in the judgment delivered jointly by Deane J and Gaudron J in *Mabo (No. 2)*, where the learned judges held:[13]

> If there were lands within the Colony in relation to which no pre-existing native interest existed, the radical title of the Crown carried with it a full and unfettered proprietary estate. Put differently, the radical title and the legal and beneficial estate were undivided and vested in the Crown.

1.9 Thus, on the dates on which the Rajah assumed sovereignty over various territories or parts of Sarawak, all unoccupied land, or land not encumbered by pre-existence native rights, the Rajah,

---

11 See James Brooke's Journal, Vol. 1, p 210 – Borneo & Celebes. Cited by Ariffin FCJ (as he then was) in *Superintendent of Lands & Surveys Miri Divison & Anor v Madeli Salleh* [2007] 6 AMR 290 at 300; [2007] 6 CLJ 509 at 527.

12 [1957] 2 All ER 785 at 788.

13 (1991-1992) 175 CLR 1 at 86. Their Lordships went on to explain the common law position if there were pre-existing native rights over land on assumption of sovereignty as follows:

> On the other hand, if there were lands within a settled Colony in relation to which there was some pre-existing native interest, the effect of an applicable assumption that that interest was respected and protected under the domestic law of the Colony would not be to preclude the vesting of radical title in the Crown. It would be to reduce (31), qualify (32) or burden (33) the proprietary estate in land which would otherwise have vested in the Crown, to the extent which was necessary to recognise and protect the pre-existing native interest. ...

as sovereign, had unfettered and absolute title to all land in those areas. This principle is in line with the general rule under common law with regard to gaining title to land through occupancy. This rule was succinctly expressed by Blackstone, a distinguished jurist, as follows:

> Occupancy is the thing by which the title was in fact originally gained; every man seizing such spot of ground as he gained most agreeable to his convenience, *provided he found them unoccupied by any one else*.[14] (Emphasis added.)

1.10 As sovereign, the Rajah had the power to create or to extinguish private rights and interests in land within Sarawak. Brennan J in *Mabo (No. 2)* held:

> *Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory*. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become *liable to extinction* by exercise of the new sovereign power. The sovereign power may or may not be exercised with solicitude for the welfare of the indigenous inhabitants but, *in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power*."[15] (Emphasis added.)

1.11 Ian Chin J, in *Nor ak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*,[16] quoted the following passage from a Paper on "Indigenous & Tribal People: The Right to Live on Their Own Land":[17]

> A leading Australian constitutional text summarises the basic rule from *Mabo* decision as follows:
>
> > "The indigenous population had a pre-existing system of law, which along with the rights subsisting thereunder, would remain in force under the new sovereign except where specifically *modified or extinguished by legislative or executive action*."

14 See judgment of Brennan J in *Mabo v Queensland (No. 2)* (1991-1992) 175 CLR 1 at 45.

15 [1991-1992] CLR 1 at 63.

16 [2001] 2 AMR 2222; [2001] 6 MLJ 241.

17 This Paper was presented at the Commonwealth Law Conference held in Kuala Lumpur in September 1988.

This book examines the rather unique system of land held under native customary rights within the Torrens System which accords protection of proprietary rights to land based upon the registration of titles and of interests in land.

It provides a comprehensive account on the development of the law on native rights and ownership over land since the assumption of sovereignty, in the early 1840s, by the first Rajah of Sarawak, Sir James Brooke, over what are now the Kuching and Samarahan Divisions. Sarawak was, then, a sparsely populated country. However, the natives already had their own customs and land ownership tradition, based largely on Indonesian Adat which had been well documented in the Secretariat Circular No 12/1939.

The author carefully analyses what has received judicial recognition, that is, the common law "respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation" and considers whether the common law or international customary law creates rights for natives over areas which were not occupied by them or their forefathers, at the time when the Rajah assumed sovereignty over the respective regions of what is now modern Sarawak.

The law relating to creation, acquisition, dealings over, loss and extinguishment of native customary rights over land is set out in detail and with accuracy. The author also addresses the perception gap between what the natives view as practices or customs which enable them to claim rights to land, and the customs which the law recognises or have the force of law, for the purposes of creating or acquiring rights over land. What gave rise to this perception gap is explained, together with the pertinent point as to whether the civil courts have the jurisdiction to modify, discard or change well established native customs which the courts have a duty to take judicial notice of.

All the recent judgments relating to native customary land are analysed and their effect on native claims to land professionally scrutinised. The efforts by the State to develop native customary land, deemed valuable assets to the natives, to enhance their economic value and potentials, are considered in the last chapter.

This book will be of great interest to lawyers, owners and developers of native customary land and those who are keen to acquire more knowledge of the land system of the State of Sarawak or to understand how the laws passed by the Rajahs and later by the Legislature of Sarawak have restricted or set conditions for the creation and recognition of native customary rights over land.

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