

## Native Customary Rights Land: Indigenous Perspectives

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### ABSTRACT

Indigenous perspectives on natives' customary rights to land are often marginalised in the development discourse in Sarawak. This paper argues that it is important for us to understand how indigenous communities claim customary rights to their territorial domain based on their *adat* that existed even before the Brooke administration in the mid-19<sup>th</sup> century. The state's policies concerning land tenure and resource use systems in Sarawak have dramatically changed since the 100-year Brooke administration, followed by the British colonisation, and the eventual independence of Sarawak within Malaysia in 1963. These changes have directly impacted the different indigenous communities' customary land tenure systems in Sarawak.

*Keywords: Adat, land, rights, territorial domain, Sarawak*

### INTRODUCTION

This paper briefly explains the land tenure and resource use systems among the indigenous communities in Sarawak, particularly pertaining to the creation of their customary rights. Land tenure systems in Sarawak have already been established long before the arrival of the Brookes in the 1840s. Indigenous communities establish this tenure system based on their local customs or *adat* of that river or longhouse localities. Their customs that govern the creation of customary rights over the land and its resources stem from their knowledge of the area, primarily based on the history and different levels of forest fallow. In this paper, I highlight the relationship between *adat* and land tenure, the significance of *pemakai menua* and *pulau*, and lastly, the Penan resource use systems.

### *Adat and Land Tenure*

The *adat*<sup>1</sup> is the guiding principle with regard to rights to establishing a village territorial domain, individual acquisition of land for cultivation, boundary and inheritance. The territorial domain

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<sup>1</sup>A. J. N. Richards (1992) defines *adat* as a “way of life, basic values, culture, accepted code of conduct, manners and conventions”. Eric Jensen (1974) observes that *adat* involves an indigenous “system of agriculture”. The Malaysian Criteria and Indicators for Forest Management Certification [MC&I (2002)] defines *adat* as “native customs which include way of life, basic values, system of belief, code of conduct, manners, conventions and cultural practices according to which indigenous society is ordered”.

held by a distinct longhouse is known in Iban as *pemakai menua*<sup>2</sup> and includes farms, gardens, old longhouse sites, fruit groves, cemetery, water and forest within a defined boundary (*garis menua*) (Lembat, 1994). Boundary is an important point of reference when a dispute arises between groups or individuals. The process of creating *pemakai menua* involves the ceremony of *panggul menua*.<sup>3</sup> When the Brookes established a government in Sarawak in 1841 this system of land tenure had long been in existence. During the one hundred years of Brooke rule this system of land tenure was maintained and practiced in the Native Courts.

*Tanah umai* include all lands that are cultivated as farms, gardens, and fruit groves. It also includes land left fallow, widely known in Sarawak as *temuda* (see below). As a general rule the household within the village that first felled the forest secures rights over specific pieces of land. These rights are heritable, passing down from one generation to the next of household members. It is on specific plots of land within the *pemakai menua* that households make their rice farm or cash crop gardens. Individual plots are marked by natural boundaries (*garis umai*) such as streams, watersheds, ridges and permanent landmarks.

*Temuda*<sup>4</sup> refers to farming land left fallow on which there are secondary growths. As a rule, the household that first felled the primary forest secures cultivation rights to the *temuda*. However, when a *temuda* plot is under forest-fallow, any longhouse member is free to take firewood from it, or cut bamboo, cane, or gather shoots, wild fruits, edible leaves, fungi, tuber, or other uncultivated stuffs, without necessarily consulting the members of the household having cultivation rights over the land. There are various classifications of *temuda*, indicating its age<sup>5</sup>. It should be noted that forest-fallow no matter how long it lasts is a form of land management system practiced by the Dayak communities.

Fruit groves are an important aspect of indigenous resource tenure. The best example is *mawang* which in the Bidayuh Bukar-Sadong dialect refers to 1) a fruit garden or orchard and 2) abandoned old settlement sites with various types of fruit trees growing around them (Ridu, 1994).

*Mawang* can be established on a communal or individual land. An individual who plants a fruit tree on a communal land establishes rights to it and those rights are inheritable by his descendants, but rights to the land resides with the community. Members of the community may collect fruits from the tree, but only with permission of the planter or his descendants. Failure to do so will render the person liable to provide *pingasung*, a form of restitution for a breach of the *adat*.

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<sup>2</sup> The same concept is known as *torun tana kupuo* in Bidayuh, *tana' sengayan* in Kayan, *tana' kanan* in Kenyah, *tana' bawang* in Lun Bawang and Kelabit, *tana' pengurip* in Penan etc. In this presentation, Iban terms or terminologies are used; where terms or terminologies from other communities are used, these will be indicated.

<sup>3</sup> *Panggul menua* refers to the ritual ceremony performed to mark the opening of a territory for settlement, farming, and other activities.

<sup>4</sup> Known as *talun* in Kayan Belaga and Western Penan, *jekau* in Kenyah and Eastern Penan, *amug* in Lun Bawang and Kelabit etc.

<sup>5</sup> For example, Adet Kayan-Kenyah 1994 classifies *temuda* as *ba'e* if the secondary growth is one year old, *talun uk* 8-15 years, *talun aya'* 16-25 years, and *talun gang* 25 years and above.

Where an individual plants fruit trees on his own land, he establishes rights over both the trees and land. If at a later stage, there are more than one descendant investing their labour in the maintenance of the *mawang*, each will have equal rights of access to the fruits. If one of the descendants collects and sells the fruits without informing the others, he will lose rights to collect the fruits in the next season. If one of the descendants moves to another village through marriage or migration, he will lose rights to both the fruit trees and land.

*Tembawai* are old longhouse sites which have been abandoned but contain various types of fruit trees. The person who planted the fruit tree on the *tapak bilik* (family apartment lot) and his descendants retain rights to it, but rights to the land are held by the community.

Another important category of land is *pendam*, a designated community cemetery for the longhouse or village. It is located within the *pemakai menua* and is established with appropriate rituals on land held in common by the community concerned. Rules pertaining to a cemetery are clearly explained in the codified *adat* of the different Dayak communities, and the violation of any of the rules is dealt with by the appropriate sections of the *adat*. For instance, there are rules which prohibit the cultivation or development of land designated as cemetery.

*Pulau* (also referred to as *pulau galau* or reserved forest) is an area of primary forest outside the cultivated area, but within the *pemakai menua* of the longhouse. *Pulau* is normally owned by the community. Rights to it reside with the community that owns it. People from other longhouses may hunt, collect wild vegetables and uncultivated foodstuffs or cut bamboo, cane and creepers in the *pulau*, but may not extract timber or climb fruit trees where exclusive rights to these resources rest with the longhouse community that owns it.

*Pulau* can be broadly divided into 1) *pulau papan*, *pulau ban* and 2) *pulau buah*. *Pulau papan*, *pulau ban* provides the longhouse essential items such as timber for house construction and for building boats, jungle vegetables, rattan and other jungle produce. It is a hunting ground for the community as well as an important water catchment.

Within the *pulau papan*, *pulau ban* area, individuals during the pioneering days had stake their claims over rights to a number of different trees. These included *kayu ban* (timber), especially *teras* or *belian* (ironwood), *engkerebai*, fruits of which are used to produce dyes, *engkabang* and other oil-yielding trees, *tekalong*, bark of which is used to make bark cloth and carrying straps, and *tapang* which provide a place for bees to produce honey.

Claims to trees were created in two ways. Firstly, the first person to find a tree claimed it by clearing the undergrowth around its base. When this act was drawn to public attention, the claimant established exclusive rights over the tree. Such rights are inheritable and passed down to the descendants of the claimant. Secondly, a tree was planted, and the planter established rights to it which are inheritable by his future descendants. All descendants of an original tree finder or planter share rights of harvest of its fruits. These rights extend to their husbands, wives and other household members (see Sather, 1990).

*Pulau buah* is a fruit grove which contains different types of trees, growing wild or planted. Claim to fruit trees are created in similar way as claims to other trees discussed earlier, and rights of inheritance follow the same principle as those of tree tenure.

Fruit trees, as we have noted, are commonly planted in the longhouse precinct, usually behind the planter's apartment. Rights over such fruit trees continue to be recognized in former longhouse sites which serve as community fruit-tree reserves. During the pioneering days, fruit

trees were also planted at the riverside forest corridors and in the *pulau* area. These fruit trees serve not only as evidence of the planter's rights to the trees or plots of land, but also the community rights to a particular area which is next to a neighbouring longhouse or village.

### ***Pemakai menua and Pulau***

With the introduction of the Sarawak Land Code (Cap. 81) (1999 [1958]), one often used interpretation of what constitutes native customary rights land is confined to cultivated land. According to this interpretation, the first person to fell an area of land before 1958 for the purpose of cultivation secures rights to the land, and it is inheritable by succeeding generations of heirs. The mere act of felling trees and clearing the land for cultivation secures rights of access and ownership. According to this interpretation, *pemakai menua* and *pulau* do not constitute a customary rights land, since they are not cultivated. *Pemakai menua* and *pulau* are now a matter of intense debate both outside and inside the court of law.

*Pemakai menua* and *pulau* are not cultivated for various reasons. They are preserved for the purpose of hunting and gathering, to provide the much-needed timber for building houses and boats, and to act as an important water catchment. Indigenous peoples are clear on what *pemakai menua* and *pulau* mean. Researchers, scholars, and government officials researched the subjects to understand their significance.

In his Iban Dictionary, Richards (1992) defines [*pemakai*] *menua* as an “[area] of land held and used by distinct community, [especially] longhouse (RUMAH), [including] house, farms, garden, fruit groves, cemetery, water, and all forest within half a day's journey.” In a published report to the government, he describes *pemakai menua* as an area that “includes besides farms and gardens, the water that runs through it and the forest round about it to the extent of half a day's journey” (Richards, 1961).

Ngidang (2005) defines *pemakai menua* as “a territorial domain of a longhouse community where customary rights to land resource was created by pioneering ancestors.” He explains territorial domain as “a specific land area, where indigenous peoples carry out their subsistence activities such as hunting and gathering, farming and earning their livelihoods from generation to generation” (Sarawak Land Code, 1999 [1958]).

Lembat's (1994) definition of *pemakai menua* is similar to that of Richards as “an area of land held by a distinct longhouse or village community, and include farms, gardens, fruit groves, cemetery, water and forest within a defined boundary (*garis menua*). With regard to *pulau* it is an island or copse of trees within the *pemakai menua*. It is not cut for cultivation, but reserved as a primary forest by a community to ensure a steady supply of natural resources like rattan and timber as well as to act as water catchment.

Key ideas running through these definitions are indications of ownership and utilization of areas called *pemakai menua* and *pulau*. The Sarawak Land Code (Cap. 81) (1999 [1958]) does not make specific reference to *pemakai menua* and *pulau*, but Section 5 (2) of the same Land Code provides various “methods by which native customary rights may be acquired” as shown below:

- (a) the felling of virgin jungle and the occupation of the land thereby cleared;
- (b) the planting of land with fruit trees;
- (c) the occupation or cultivation of land;
- (d) the use of land for a burial ground or shrine;

- (e) the use of land of any class for rights of way; or
- (f) any other lawful method.

Therefore, by virtue of Section 5 (2) (f) of Sarawak Land Code (Cap. 81) (1999 [1958]), *pemakai menua* and *pulau* in fact constitute native customary rights land. In the case of *Nor Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (2001), the Judge amongst others concluded that “Thus far, the native customary rights of an Iban to do the things associated with the terms *temuda*, *pulau*, and *pemakai menuoa* have not been abolished. They have survived through those Orders and Ordinances” (Chin, 2001:797).

The natives of Sarawak have rights to land ownership they felled, cultivated or acquired by any other lawful method before 1958. These rights of ownership have not been replaced by user rights given mostly to groups rather than individuals as erroneously believed by certain quarters but are enshrined in the Sarawak Land Code (Cap. 81). The character of proprietary interest of native people in their land is not limited to usufructuary right but right of ownership acquired in law and not based on any document of title. This right is endorsed by two court cases *Nor Nyawai & ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (2001) and *Superintendent of Lands & Surveys, Bintulu v. Nor Nyawai & Ors* (2005).

Although the Appeal Court of Malaysia overturned the decision of the High Court of Sabah & Sarawak in favour of the Superintendent of Lands & Surveys, Bintulu, it upheld the lower court decision on native rights of ownership to the land they acquired under customary rights. The relevant parts of the decision of the Appeal Court of Malaysia are quoted from page 571 of the 2005 Current Law Journal (Malanjan et. al., 2005:571):

- a. that 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;
- b. that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation are only relevant to determine how much of those native customary rights have been extinguished;
- c. that the Sarawak Land Code “does not abrogate whatever native customary rights that exist before the passing of that legislation”. However, natives are no longer able to claim new territory without a permit under s 10 of that legislation from the Superintendent of Lands & Surveys; and
- d. that although the natives may not hold any title to the land and may be termed licensees, such licence “cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws, and this is after payments of compensation”.

Rights to a piece of land is lost if it is transferred to another person, for example a sibling, a cousin, or a relative. It can also be lost if the person moves to another village through marriage or migration (*pindah*).<sup>6</sup> If a person *pindah* from the longhouse, rights to his customary land will

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<sup>6</sup> Adat Iban (1994) stipulates that a person who moves from one longhouse to another “shall be deprived of all rights to untitled land or any customary land that has not been planted with crops and all such land shall be owned in common by the longhouse.”

either go to the community or he can transfer such rights to a sibling, a cousin or a relative who will in turn provide him with *tungkus asi*.<sup>7</sup>

In his *Sarawak Land Law and Adat* report to the colonial government Richards (1961:34) says that “When Government wishes to acquire land, the land must be surrendered by the right holder, and compensation is payable by the Government”. Richards (1961:34) is considered the most knowledgeable among the peers of his time on matters pertaining to native customary rights land, and this knowledge encompasses his understanding of the native relationship to the land and feeling for it as shown below:

The people’s view is that they should not claim compensation if the land surrendered is to be put to use for obvious and fairly immediate benefit to themselves and their neighbours. However, they dislike surrendering or being required to surrender land, with or without compensation, when it is to be allocated to people they regard as outsiders. In their view, when land is required for outsiders, either they should be permitted to sell it themselves direct, or Government, who may wish to survey and organize the allocation, should pay them the full market value that they could get by private dealing: they would then receive a price that would be higher where the position of the land and access to it are better, for they also should share in the profit to be had from such accident.

### **Penan resource tenure**

The Penan are traditionally a nomadic people. Although no more than 400 individuals are still nomadic, the majority of them have only settled down in the 1970s. In most cases, these settled Penan are settled only in name, as a large number still depend on the forest for food and economic activities. Whether nomadic or settled, their relationship with the land is quite different from the other indigenous communities in Sarawak. Traditionally, the Penan do not cut the forest to establish customary rights to the land. Instead, they establish rights to resources within the territory they occupy. To appreciate the Penan relationship with the landscape, it is helpful to look at their nomadic lifestyle and how that relationship with the land is maintained when they settled down.

Nomadic Penan live in lean-tos, they call *lamin*<sup>8</sup>. When they move, new *lamin* are built, and the former *lamin* site is referred to as *la’a*<sup>9</sup>. *La’a* are not forgotten, they are frequently visited, and in the *circular* migration of a nomadic band a new *lamin* may be built at a former site or close to it. It should be noted that the term nomadic is in some ways misleading as their migration over the same territory is *cyclical*, returning to previously harvested areas that have regenerated, in other words, the same resource site may be occupied more than once within the life of an individual.

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<sup>7</sup> *Tungkus asi* (lit. bundle of cook rice) refers to the token provided by the recipient to the person who on account of his moving from the longhouse to another transfers rights of his customary land to the recipient.

<sup>8</sup> *Lamin* refers to any dwelling place; it also refers to a nomadic camp comprising several family huts or lean-tos.

<sup>9</sup> *La’a* (or *laa lamin* in Western Penan) refers to a former site of a *lamin tana’* or nomadic camp. A *lamin* may be occupied from a period of several weeks or months depending on the amount of food resources in the surrounding area. During that occupation Penan would have eaten all sorts of fruits and seeds thrown all over the camp. When these seeds become fruit trees, ownership resides with the group as a community. These trees also help future generations identify former *lamin* sites or *la’a* or *laa lamin* occupied by their ancestors.

Penan refer to the numerous *la'a* scattered across the landscape of their home river system area as their *uban*,<sup>10</sup> marks or footprints. When they refer to *la'a* as *uban*, they are talking about its cultural significance, past events, connections, relationships, and rights within an area and all that it encompasses. Nomadic Penan move within a home territory that could have, for example, river systems, as boundaries. As they migrate each band leaves traces through the *la'a*. Through years of migration, a band would have left numerous *la'a* over the landscape.

Surrounding the *lamin* or *la'a* is what the Penan call *tana' pengurip*,<sup>11</sup> the land that provides the essentials of life, food and other resources that they collect for barter trade or convert into handicrafts for domestic use or for sale. In the *tana' pengurip* Penan stake claim to forest resources such as wild sago, especially *Eugeissona utilis* species, rattan, fruit trees, *ketepe* (a wild rubber), various species of useful trees such as *tajem* trees (*Antiaris toxicara*) that provide poison for their blowpipes, trees to make blowpipes, to build boats, houses (for those who adopted the settled life) and to make coffin. Clusters of wild sago are called *birai uvud* and stands of rattan *birai wai*. These are two of the most important resources that Penan would stake a claim to. In the *la'a* may be found fruit trees growing from seeds that their ancestors ate. Such fruit trees become common property of the group and are inherited by its descendants. Ancestral graves may also be found in the *la'a*. All these serve as evidence of former occupation and of rights to the area and resources therein.

As the *tana' pengurip* was first utilized and taken care of by their ancestors, Eastern Penan sometimes refer to it as *tana' pohoo*<sup>12</sup>, or ancestral land, to which they are rightful heirs. Penan say that their *adet* (custom) is different from those of their neighbours, Kayan, Kenyah, Kelabit or Iban. Their neighbours cut the forest for cultivation and create what is known in Sarawak as native customary rights land. However, the Penan create *la'a* in the landscape and stake a claim to resources in areas they refer to as *tana' pengurip* or *tana' pohoo*. When groups of Penan settle down, part of the *tana' pengurip* or *tana' pohoo* is cultivated with food crops such as rice and cassava, sugar cane, fruit trees etc, and the remainder conserved for regeneration of resources such as sago, rattan and fruit trees to complement cultivated crops.

Each group of Eastern Penan refers to specific areas as *okoo bu'un* or place of origin, from the word *okoo*=place, *bu'un*=beginning. *Okoo bu'un* is used in a variety of situations. It is used to assert one's rights to a place one was born in; and one can trace one's ancestral roots to

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<sup>10</sup> When writing about *uban* in the case of Western Penan, Brosius (2001:38) says that: "In its broadest sense, *uban* refers to an empty place left behind by the withdrawal of an object or being. For instance, pig tracts are referred to as *uban mabui*, young men often speak of former lover as their *uban*, and an empty place in a hut left by someone who is away or has died is referred to as the person's *uban*. In the later case, and in reference to former *lamin* sites or other places where past events occurred, *uban* is an evocative and emotionally laden word." With regard to Eastern Penan, *uban* carries the same meaning as described by Brosius for the Western Penan. However, there are two other meanings of *uban* in Eastern Penan. First, it means "because", for example, *akeu be' omok tai Marudi uban be' pu'un ligit* (I can't go to Marudi because I don't have money). Second, it means "why", as in the following example, *uban ineu' kau be' tai Marudi?* (Why are you not going to Marudi).

<sup>11</sup> *Tana'* =land and forest, and *pengurip*, from the root word *urip*=life. *Tana' pengurip* can be defined as the land that provide food and other essential resources for survival, or foraging area. It conveys the same meaning as that of the Iban *pemakai menua* described earlier by Gerunsin Lembat (1994).

<sup>12</sup> Western Penan refer to this as *Tana'puu* or *tana' asen*.

other places and connect relationships and ties. When Penan speak of *okoo bu'un* they are making a statement about identity, sense of place and belonging.

Earlier on we mentioned that Penan would lay claims all sorts of resources in the *tana' pengurip*. This practice is known in Penan as *molong*. *Molong* is not only to lay a claim to a resource, but most importantly it means to foster it for the future. For example, when an individual *molong* a wild sago, he will extract the mature tree and conserve the bud for the future. They also rotate their harvest of sago from one clump to another such that it allows for regeneration of a previously harvested clump. Penan emphasize this point by saying that "if we don't *molong* the sago, and allow indiscriminate harvest, we will not have any more sago for the future." *Molong* has two obvious functions: it serves as a monitoring device to account for the quantity of resources in the forest where they exercise stewardship and prevent over-exploitation of resources.

When an individual *molong* a resource, a sago clump or a rattan stand, he places an *oroo* (mark or sign) on it to indicate 'ownership'. Such a mark or sign is known in Penan as *oroo olong* or 'claim sign'. Once an individual *molong* a resource, he is responsible for its upkeep and sustainable management. He also establishes exclusive rights to the resource. These rights are heritable and pass down from one generation to the next of household members. Other members of the community may harvest the resource with permission of the person who *molong* it. *Molong* can be done individually or communally; the basic principle is the same. Penan rights to the land and forest resources are thus established through *molong*, a form of resource tenure similar to the Iban tree tenure system described by Clifford Sather.<sup>13</sup>

The Penan have a word *tawai* that expresses in a particular way their sentiment to the landscape. *Tawai* is an expression of nostalgia, fondness and longing for the landscape, its wholeness and memory of events, important or inconsequential, that took place there, of group activities, of life in general, with food aplenty or not, successful hunt or not, sad times and happy times. *Tawai* binds the group and individuals to the landscape. Penan insist that *tawai* differentiates their relationship with the landscape from the way others relate to the same. For instance, a timber company and its workers do not have *tawai* for the land. Once they get what they want they leave, having no feeling for the place. The Penan feeling for the land is told and retold in *tosok* (oral narratives) to succeeding generations. It is also expressed in *sinui* (Western Penan) and *jajan* (Eastern Penan) sung for entertainment.<sup>14</sup>

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<sup>13</sup> See Clifford Sather (1990) where he says that claims to trees are created in two ways. First, the first person to find a tree claims it by clearing the undergrowth around its base. When this act is drawn to public attention, the claimant establishes exclusive rights over the tree. Such rights are heritable and pass down to descendants of the claimant. Second, a tree is planted, and the planter establishes rights to it which is inherited by his future descendants.

<sup>14</sup> *Sinui* is a popular tune sung by the Western Penan of Belaga District and Silat River, Baram District. Singing without instrumentation, the main singer sings an impromptu narrative in poetic rhyme that is accompanied by a form of choral 'harmony'. *Sinui* often expresses feelings of love, happiness, merriment, sadness, loneliness or grief in praise or remembrance of a person, an event or a landscape. The beauty of the sentiment expressed in rhyme and narrative is often equally matched by the vocal style. The incredible skill of the lead singer's improvised storytelling have no match in the modern or western musical world. The Eastern Penan *jajan* is sung by one person and lacks the poetic rhyme and harmony of the Western Penan *sinui*. Like *sinui*, *jajan* is a vehicle for an individual to express his or her feelings on any topic, including the landscape.



Penan argue that their rights and attachment to the land are more solid than the mere felling of trees to open up land for cultivation to create customary rights land. In their relationship with the landscape, they continue to visit hilltops and depression between and connecting two hills, sites of former nomadic camps (*la'a*) to collect fruits that grew out from former occupations. They also frequent clusters of wild sago, rattan stands and wild fruit orchards which they nurture in the vicinity of campsites. Man-made jungle tracks (*jalan toto*) are maintained with nicely resting places (*lasan*) creating a sense of 'kinship' with the environment.

## CONCLUSION

In this paper, I have outlined how different indigenous communities in Sarawak have established their customary rights to land, its resources, and delineation of their territorial domains (*pemakai menua* or *tana' pengurip* in Penan). As mentioned in this paper, land is not just about its physical features or the resources it contains. Land tenure systems according to their own *adat* governs the core of the indigenous communities' social organisation, political dynamics, economic livelihoods, household management, and even their religious beliefs. This is especially important as knowledge on the local customary rights to land and its resources can adjudicate the potential conflict between the state's land policies and local land governance.

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