

**NATIVE CHIEFS' OBSERVATION AS A NEW APPROACH IN SOLVING
THE CONFLICT OF JURISDICTIONS IN THE ADMINISTRATION OF
JUSTICE: A CASE STUDY OF THE NATIVE COURTS OF KOTA
KINABALU AND PENAMPANG, SABAH**

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5. Report

5.1 Proposed Executive Summary

Native law is administered by the Native courts established under the Sabah Native Courts Enactment 1992, which replaced the Native Courts Ordinance 1953. One of the problems faced by the courts is the conflict between the Native law and the Penal Code, in particular cases of rape and incest, where the choice is given to the victim, whether or not to have the rape or incest cases to be heard by the civil court or the Native court.

This conflict of jurisdiction receives different responses from legal practitioners, the Native Chiefs and some of the NGOs. The Sabah Muslim Women Lawyers Association (Salwa) believes that Native Courts have no jurisdiction to hear cases involving rape and incest. The former Chairperson of the Sabah Women's Advisory Council (MPWS), Datuk Noni J. Said also endorsed Salwa's view. She also concurred with Assistant Minister of Community Development and Consumer Affairs, Jornah Mozihim who said punishment meted out by the Native Court is minimal and does not act as a deterrent. By simply using the buffalo to settle a rape case only allows potential perpetrators to take advantage of innocent village girls.

This research aims to critically analyse the conflict of jurisdictions and other problems in the administration of the Native law and to make recommendation that would address legal problems in the administration of the Native Law. The research will be a qualitative research, where semi-structured interviews will be conducted with relevant respondents.

It is expected that the outcomes of the research will contribute to the literature and enhance legal knowledge on the conflict of jurisdictions and other problems in the administration of Native law, and benefit the policy makers to review its existing laws into a more comprehensive framework in enhancing the administration of the Native law in Sabah.

It is expected that the outcomes of the research will contribute to the literature and enhance legal knowledge on the conflict of jurisdictions and also the role of the Native Chiefs in the administration of justice, and benefit the policy makers to review its existing laws into a more comprehensive framework in enhancing the administration of the justice in Sabah.

5.3 Introduction

Native law is the law of the local people developed and handed down from time immemorial. Native Law and custom is part of the life of the people and is therefore, a living thing in itself¹. An interesting feature of the legal system of Sabah is the existence and recognition of native customary law within the State Law and Federal Law². Native customary law in Sabah is based on local tradition and received its first official recognition under conditions that were very different from those of today³.

Native law is administered by the Native courts established under the Sabah Native Courts Enactment 1992, which replaced the Native Courts Ordinance 1953. Section 3 of the Native Courts Enactment 1992 provides that the *Yang DiPertua Negeri* of Sabah has the power to establish Native Courts at such places, as he or she may deem fit. Presently, each of the districts in Sabah has its own Native court⁴. The sources of Native Law comprise of statutes or ordinances or proclamations or enactments and rules which incorporated and legalized native customs; written collections of native laws known as codes, past court cases and unrecorded oral tradition⁵.

As to the written collections of native laws known as codes, all started between 1936 and 1939, when the North Borneo Company Administration published a series of six booklets describing various aspects of the customs of three of North Borneo's main non-Muslim ethnic groups: the Dusuns, the Muruts and the Kwijau. All six booklets, published as Native Affairs Bulletins No. 1-6, covered the customs of these people. The bulletins were written and compiled by G.C. Woolley, a Government Commission of Lands⁶

¹ Stephen R. Evans, *Guide for Sabah Native Courts*, Keningau: Borneo Literature Bureau, 1967, p. vii

² Peter R. Phelan, *The Traditional Legal System of Sabah*, Kota Kinabalu: Pusat Kajian Borneo, 2003, p. 1

³ Peter R. Phelan, *The Traditional Legal System of Sabah*, p. 2

⁴ In Sabah, there are 24 districts with an average area of 1,186 square mile (3,072 square km) per district.

⁵ Peter R. Phelan, *The Traditional Legal System of Sabah*, p. 7

⁶ Danny Wong Tze Ken, "Woolley and The Codification of Native Customs in Sabah", (June 2009) *New Zealand Journal of Asian Studies* 11, 1 87-105