
Native Courts System in Sabah: Will it Continue to Survive?

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ABSTRACT: Native courts system is a unique feature of Sabah legal system. It serves as a mechanism for settling disputes concerning breach of customary law among the natives in the state. Sabah, which was previously known as North Borneo, was a British protectorate from 1881 until 1946. The British North Borneo Company at that time recognized native customary law and rendered formal recognition to it, as stated in Article 9 of the Royal Charter. Prior to Sabah gaining its independence from British, administration of the native law was based on the native courts presided by native chiefs, elders and the village headmen. The court received its first official title in Village Administration, Proclamation V of 1913. When Sabah joined Sarawak and Malaya to form Malaysia in 1963, the courts system continues to become an integral part of the state legal system. And pursuant to the Federal Constitution of Malaysia, native courts, and the enforcement of native customary law are considered as state matters to be regulated by state legislation. Now, the courts system is governed by Sabah Native Courts Enactment 1992. It is contended that native courts system is an important part of the judicial system in Sabah as 75 per cent of natives bring their matters to native courts, instead of the common courts. Thus, this paper will examine the native courts system, discuss some of the emerging issues in the system, and finally provides the answer as to whether the native courts system will continue to survive in the modern world.

KEYWORDS: *Native Court, Native Courts System, Native of Sabah, Native Customary Law*

INTRODUCTION

Definition of Custom and Native Customary Law

Custom is defined as usual, generally accepted and the long-established way of behaving or doing things.¹ It is a practice followed by people of a particular group or region.² Legally, the term custom is described as long established practice considered as unwritten law.³ Native customary law refers to law of the local people developed and handed down by a recognised native authority from time immemorial.⁴ It is said that native customary law is the true culture, where it has grown up from the common people, it is not something that has been imposed from above, development in a community will be accompanied by inherent changes in its customs.⁵

Custom as a Source of Law

A German jurist and legal historian, Friedrich Karl von Savigny introduced the concept of the *Volksgeist*, or "the spirit of the Volk." He explains that law is the unique creation of a race, a

¹ A S Hornby (1994) *Oxford Advanced Learner's Dictionary*, Oxford: University Press, at page 294

² Retrieved on 04.05.2014 from <http://www.thefreedictionary.com/custom>

³ L.B. Curzon (2010) *Dictionary of Law*, Sixth Edition, Petaling Jaya: International Law Book Services, at page 115

⁴ Phelan, Peter R, (1993) *Native Law in Sabah*. In Syed Ahmad Idid bin Syed Abdullah Idid (Ed), *Native Court and Customary Law of Sabah (with Cases and Decisions)*, Kota Kinabalu: Sabah Government Printer, at page 87

⁵ Phelan, Peter R, (1993) *Native Law in Sabah*. In Syed Ahmad Idid bin Syed Abdullah Idid (Ed), *Native Court and Customary Law of Sabah (with Cases and Decisions)*, Kota Kinabalu: Sabah Government Printer, at page 88

people, a *Volk*. And thus, there is a need to understand the interrelationship between law and people.⁶ It is first developed by custom and popular acceptance, next by judicial decisions everywhere, therefore, by internal silently operating powers, not by the arbitrary will of the law-giver." Combining historical knowledge of the law with a conceptual, systematic understanding of how rules interrelate with one another and the whole, jurists separate what still has validity from that which is lifeless "and only belongs to history," arriving thereby at a "living customary law."⁷ Legal jurists are divided on the issue whether custom is a valid source of law. Nevertheless, many legal systems in the world today has recognised custom as one of its sources of law such as the Romano-Germanic Family and the Common Law.

Malaysian legal system is one of the legal systems, which recognises custom as one of its sources of law. However, it is argued that, there is no customary law of general application in the country. It is contended that the customary laws that survive to date are the Malay customary law, Chinese customary law, Hindu customary law, Orang Asli customary law and native customary law, which is mainly applicable to the non-Muslim indigenous communities in Sabah and Sarawak.⁸ And the focus of this paper is on the Native customary law and the Native courts system in Sabah.

Native Customary Law in Sabah

Sabah is a Malaysian state that is located on the northern part of Borneo. With a total land mass of 76,15 square kilometres, Sabah is Malaysia's second largest state after Sarawak.⁹ One of its most distinctive features is its ethnic diversity. Official census records 32 ethnic groups, with the Kadazandusuns forming the largest indigenous ethnic groups, followed by the Bajaus and the Murut.¹⁰ Interestingly, native customary law has been part of life of the natives in Sabah and is therefore a living entity in itself.¹¹ It is evident that the unique feature of the legal system of Sabah is the existence and recognition of the native customary law within the State law and the Federal law.¹² Article 161A of the Federal Constitution provides for the special position of natives of Sabah and Sarawak. Further Ninth Schedule, List IIA – State List, clearly indicates that matters in relation to native law and custom of the States of Sabah and Sarawak fall under the jurisdiction of each States.

The court received its first official title in Village Administration, Proclamation V of 1913.¹³ Clause 10 of the Administration Proclamation V of the 1913 states:

*In every District, a Native Court shall be constituted which shall consist of all the Chiefs within the District and such Headmen as may, from time to time, be empowered by the Resident to attend and adjudicate in a Native Court beyond the limits of his District.*¹⁴

Native Courts System in Sabah

After independence, the State Government of Sabah took an initiative to form Sabah Bumiputera Affairs Unit (Unit Hal Ehwal Bumiputera). This unit was responsible for overseeing customs, disputes and administration run by the native courts. And from 1999 onwards, this

⁶ Neetij Rai: *Basic Concept of Savigny's Volkgeist*. Retrieved on 01.05.2014 from www.academia.edu/428817/BASIC_CONCEPT_OF_SAVIGNYS_VOLKSGEIST

⁷ Savigny: *The Volkgeist & Law* | LAWMAN.CO.NR. (n.d.). Retrieved 01.05.2014 from <http://lawmanblog.blogspot.com/2012/08/savigny-volkgeist-law.html>

⁸ Wan Arafah Hamzah (2009) *A First Look at the Malaysian Legal System*, Shah Alam: Oxford Fajar, at page 175

⁹ Ramzah Dambul, Marja Azlima Omar, Sabihah Osman (Eds) (2010) *Sabah Priority Issues, Setting The Course for Change*, Kota Kinabalu: Universiti Malaysia Sabah, at page 1

¹⁰ *Ibid* no.9

¹¹ Jumin J. Masuling (1998, December 28). Several Issues Surround Appointment of Native Council Official, *New Straits Times (Malaysia)* National News analysis, at page 2

¹² Peter R. Phelan (2003) *The Traditional Legal System of Sabah*, Kota Kinabalu: Pusat Kajian Borneo, at page 1

¹³ *Ibid* no. 12

¹⁴ Woolley and the Codification of Native Customs in Sabah (n.d.). Retrieved on 14.07.2014 from http://www.nzasia.org.nz/downloads/NZJAS-June09/12_Wong_3.pdf

Unit had been upgraded and transformed into Sabah Native Affairs Council (Majlis Hal Ehwal Anak Negeri Sabah), a statutory corporation, pursuant to Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998.¹⁵ The main objectives of the Council are, to advise the State Government on all matters pertaining to the native system of personal law and *adat* in Sabah, to examine various *adat* of the natives and to review from time to time the customary laws of the natives.¹⁶ The Council comprises of a President,¹⁷ the State Secretary¹⁸ the State Attorney-General;¹⁹ the Permanent Secretary of the Ministry of Local Government and Housing;²⁰ a Secretary²¹ and six other members who have special knowledge of the customary laws and *adat* of the natives of Sabah.²²

A secretariat was also formed to assist the Council. The secretariat is known as *Pejabat Hal Ehwal Anak Negeri Sabah*. The office is responsible for running and managing native affairs in the state. All these governing bodies of native customary law, namely the Sabah Native Affairs Council, Pejabat Hal Ehwal Anak Negeri Sabah, and Native courts are put under the direct control of Minister of Local Government and Housing of Sabah.²³ Meanwhile, the State Public Service Commission is responsible for the appointment of headmen, Native chiefs and District chiefs. Ironically, in most cases, the appointment of the native courts officials is done by recommendation of State Assemblymen. To date, there is no institution to check the credentials or to test the competency of the candidates for the administrative positions. Therefore, based on this scenario, it can be said that there is a lack of clarity regarding the authoritative body responsible for the administration of Native courts in Sabah.

Sources of Native Customary Law

Presently, native customary law continues to be administered by the Native courts established under the Sabah Native Courts Enactment 1992, which replaced the Native Courts Ordinance 1953.²⁴ Section 3 of the Native Courts Enactment 1992 provides that the *Yang DiPertua Negeri* of Sabah has the power to establish Native courts. At the moment, Sabah has 32 Native courts with a total of 2,981 local chieftains comprising District Chief (43), Native Chief (172), Assistant Native Chief (406) and 2,360 village headmen.²⁵

Sources of native customary law comprise of statutes, ordinances, proclamations, enactments and rules which incorporated and legalized native customs; written collections of native laws known as codes, past court cases and unrecorded oral tradition.²⁶ However, whether there is any hierarchy to the sources of native customary law in Sabah is still unknown. Currently, a case that is heard in a native court originates at village level. If an individual feels that he has a just claim or that he has been injured under the practice of customary law, he usually brings his grievance to the headman of the village.²⁷ If one or both of the parties are not satisfied with the ruling by the headman, then the issue is taken to the native court.

¹⁵ Retrieved on 11.05.2014 from <http://www.sabah.gov.my/press/docs/1999000514.htm>

¹⁶ Section 4(1)(b) and (c) of the Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998

¹⁷ Section 6(1)(a) of the Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998

¹⁸ Section 6(1)(b) of the Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998

¹⁹ Section 6(1)(c) of the Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998

²⁰ Section 6(1)(d) of the Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998

²¹ Section 6(1)(e) of the Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998

²² Section 6(1)(f) of the Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998

²³ Retrieved on 13.05.2014 from <http://www.sabah.gov.my/main/ms-MY/Home/GovernmentStructure>

²⁴ Chapter Three: Other Courts with Specialised Jurisdictions (n.d.). Retrieved on 14.07.2014 from http://www.aseanlawassociation.org/papers/Malaysia_chp3.pdf

²⁵ Emin Madi (1998, 4th May) Native Courts Part and Parcel of Non-Muslim Bumiputera Culture Malaysia General News. Retrieved on 12.06.2014 from <http://www.lexisnexis.com/ap/academic/>

²⁶ Peter R. Phelan (2003) *The Traditional Legal System of Sabah*, Kota Kinabalu: Pusat Kajian Borneo, at page 7

²⁷ Peter R. Phelan (2003) *The Traditional Legal System of Sabah*, Kota Kinabalu: Pusat Kajian Borneo, at page 33

Structure and Jurisdiction of the Native Courts

The native court is divided into of a three-tier structure consisting of the following;



The lowest rung is the native court. A native court consists of the District chief as the presiding member and two other members who are Native chiefs or headmen.²⁸ Next in the hierarchy is the District native court. A District native court shall consist of the District officer of the district as the presiding member and two other members who shall be District chiefs or Native chiefs.²⁹ Final appeals lie to the Native court of appeal. The Native court of appeal consists of a Judge as President, and two other members who are the District chiefs or Native chiefs.³⁰ The term 'judge' is defined by Section 2 of the Enactment 1992 as a Judge of the High Court.

A native court is empowered to administer and enforce only the native customary law and custom prevailing in the area of the jurisdiction of the court. Section 6(1) of the Native Courts Enactment 1992 states the original jurisdiction of the courts, which covers the following areas:³¹

- cases arising from breach of native law or custom in which all the parties are natives;³²
- cases arising from breach of native law or custom, religious, matrimonial or sexual, if the written sanction of the District Officer acting on the advice of two Native Chiefs has been obtained, where one party is a non-native;³³
- cases involving native law or custom relating to betrothal, marriage, divorce, nullity of marriage and judicial separation;³⁴
- adoption, guardianship or custody of infants, maintenance of dependants and legitimacy;³⁵
- gifts or succession testate or intestate;³⁶ and
- other cases if jurisdiction is conferred upon it by this Enactment or any other written law.³⁷

The native court does not have jurisdiction over the following matters;

- any proceedings in which a person is charged with an offence in consequence of which is alleged to have occurred
- an offence under the Penal Code
- any proceedings concerning marriage or divorce regulated by the Law Reform (Marriage and Divorce) Act 1976 and the Registration of Marriages Ordinance 1952, unless it is a claim arising only in regard to bride-price or adultery and founded only on native law
- any proceedings affecting the title to or any interest in land which is registered under the Land Code

²⁸ Section 3(2) of the Native Courts Enactment 1992

²⁹ Section 4(2) of the Native Courts Enactment 1992

³⁰ Section 5(2) of the Native Courts Enactment 1992

³¹ Section 6(1)(a) of the Native Courts Enactment 1992

³² Section 6(1)(a) of the Native Courts Enactment 1992

³³ Section 6(1)(b) of the Native Courts Enactment 1992

³⁴ Section 6(1)(c)(i) of the Native Courts Enactment 1992

³⁵ Section 6(1)(c)(ii) of the Native Courts Enactment 1992

³⁶ Section 6(1)(c)(iii) of the Native Courts Enactment 1992

³⁷ Section 6(1)(c)(iv) of the Native Courts Enactment 1992

- any case involving a breach of native law or custom if the maximum penalty which is authorized to pass is less severe than the minimum penalty prescribed for such offence
- cases arising from the breach of Ordinan Undang-Undang Keluarga Islam 1991 and rules or regulations made thereunder, or the Malay custom of Sarawak
- any criminal or civil matter within the jurisdiction of any of the Syariah Courts constituted under the Ordinan Mahkamah Syariah 1991³⁸
- any proceedings taken under any written law in force in the State³⁹

Further, section 9 of the same Enactment, makes it clear that the native court does not have any jurisdiction in any matter which falls within the jurisdiction of the Syariah courts or the civil courts.⁴⁰ In terms of sentencing, the native courts have the power to impose fine,⁴¹ order imprisonment,⁴² award both fine and imprisonment⁴³ and inflict any punishment authorised by native law or custom not being repugnant to natural justice and humanity. However, the native court judge shall impose no sentence of imprisonment, without the endorsement by a Magistrate.⁴⁴

Four Emerging Issues in the Native Courts System

Native court is considered as an important part of the judicial system in Sabah as 75 per cent of natives bring their matters to the Native courts, instead of the common courts.⁴⁵ In this paper, four issues, which I perceive upsets the existing court system will be discussed, namely:

- First issue: Who is a native of Sabah?
- Second issue: Conflict of jurisdictions and choice of forum,
- Third issue: Whether Native court is a court subordinate to the High Court, and
- Fourth issue: Appointment of Headmen and Native Chiefs.

First Issue: Who is a Native of Sabah?

According to Sabah Native Affairs Council (Majlis Hal Ehwal Anak Negeri Sabah), less than 50% of Sabah's population is comprised of natives. Sabah's population stands at 3.1316 million, including the Malays (and their sub-ethnic groups), Chinese, Indians, Natives (most widely-known, the Kadazandusuns) and others. The natives number 1.4858 million throughout the state of Sabah. The Kadazandusuns account for 551,300, Bajaus 423,100, Murut 104,300 and other natives 407,100 of the population.⁴⁶ Since native customary law only applies to natives, it is crucial to determine who is a native of Sabah, in order to avoid any misinterpretation of the said term.

Article 161A(6) of the Federal Constitution states that in relation to Sabah, native means a person who is a citizen, the child or grandchild of a person of a race indigenous to Sabah, and was born whether on or after Malaysia Day or not, either in Sabah or to a father domiciled in Sabah at the time of the birth. This definition is similar to Article 41(10) of the Constitution of the State of Sabah. Unlike the definition of native of Sarawak, which listed down some of the races to be treated as indigenous,⁴⁷ the terms 'of races indigenous to

³⁸ Section 9 of the Native Courts Enactment 1992

³⁹ Retrieved on 04.06.2014 from http://www.aseanlawassociation.org/papers/Malaysia_chp3.pdf

⁴⁰ Syariah courts refer to Islamic religious courts established under any State law. And civil courts refer to the Supreme Court, the High Court and the Subordinate Courts established under the Federal Constitution and federal law.

⁴¹ Section 10(1)(a) of the Native Courts Enactment 1992

⁴² Section 10(1)(b) of the Native Courts Enactment 1992

⁴³ Section 10(1)(c) of the Native Courts Enactment 1992

⁴⁴ Section 11 of the Native Courts Enactment 1992

⁴⁵ Sabah Courts Plan to Produce Guidebook for Native Court (7 July 2010) *Bernama The Malaysia National News Agency*. Retrieved on 12.09.2013 from <http://www.lexisnexis.com/ap/academic/>

⁴⁶ Natives Of Sabah, About Sabah.com - Sabah Travel and ... (n.d.). Retrieved on 18.06.2014 from <http://aboutsabah.com/sabah-news/natives-of-sabah/>

⁴⁷ Refer to Article 161A(7) of the Federal Constitution. However, Ramy Bulan in her research entitled "Native Status Under the Law" in *Public Law in Contemporary Malaysia*, Longman, 1999, p.248-292

Sabah' are nowhere defined in the Federal Constitution. Therefore, it is vital to refer to the Interpretation (Definition of Native) Ordinance 1952 for the definition of native. Section 2(1) of the Interpretation (Definition of Native) Ordinance 1952 defines the term "native" as meaning either –

- (a) any person both of whose parents are or were members of a people indigenous to the Sabah; or
- (b) any person ordinarily resident in Sabah and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a); or
- (c) any person who is ordinarily resident in Sabah, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people or of a people indigenous to the State of Sarawak or the State of Brunei, has lived as and been a member of a native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63
- (d) any person who is ordinarily resident in Sabah, is a member of a people indigenous to the Republic of Indonesia or the Sulu group of islands in the Philippine Archipelago or the States of Malaya or the Republic of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63

Interestingly, one may also apply to the native court to be declared as native of Sabah by virtue of Section 3(1) of the said Ordinance. This indicates that the native court has the power to declare that a person is indeed a native, although such declaration is subject to review and appeal to the District officer or a Board of officers appointed by the Yang di-Pertua Negeri.⁴⁸ In *Liew Siew Yin v. District Officer, Jesselton*⁴⁹ the claim to be classified as a native was refused on the ground that the plaintiff did not live as a member of a native community. He was married according to Chinese custom, had given his children Chinese names, and had never paid the poll tax. He lived in a mixed community, part native and part Chinese. While refusing his application, the court said if he 'should elect to take up residence in a native community and renew his application, it would receive favourable consideration'...The noteworthy point about this decision, is that the definition of native in the Interpretation (Definition of Native) Ordinance refers to both way of life and to descent, and on these criteria the applicant was held not to qualify.⁵⁰

In a later case, *Ong Seng Kee v. District Officer, Inanam*⁵¹ the same two criteria were considered but here the application succeeded, mainly because local native officials gave evidence that, so far as they were concerned, the applicant had always been considered locally to be a member of the native community. This was despite the fact that some of his children had been given Chinese names and attended Chinese schools.

Religion, however, does not appear to be a criterion in the determination of the status of native.⁵² The Native court in *Haji Mohd Nasaruddin bin Abdullah*⁵³ ruled that a religion was not an ingredient required by the Ordinance. Remarkably, even a person from the peninsula

found that some indigenous groups like the Melanau, Kayan, Kelabit, Lun Bawang, Punans and Selaku are missing from the Article 161A(7) enumeration.

⁴⁸ Section 3(3) of the Interpretation (Definition of Native) Ordinance 1952

⁴⁹ Native Court of Appeal No. 2 of 1959, Lee Hun Hoe, Justice Datuk (1973) *Cases of Native Customary Law in Sabah (1953-1972)* Kota Kinabalu: Government Printing Office

⁵⁰ M.B. Hooker (1980) *Native Law in Sabah and Sarawak*, Singapore: Malayan Law Journal Pte Ltd at page 69

⁵¹ Native Court Appeal No. 28 of 1959, Lee Hun Hoe, Justice Datuk (1973) *Cases of Native Customary Law in Sabah (1953-1972)* Kota Kinabalu: Government Printing Office

⁵² Wu Min Aun (1990) *The Malaysian Legal System*, Second Edition, Kuala Lumpur: Longman at page 185

⁵³ Case No. 173/75, Kota Kinabalu Native Court

can become a native, as long as he fulfills the requirement stated in the Ordinance. In the case of *Datuk Syed Kechik bin Syed Mohd v Government of Malaysia & Anor*⁵⁴ the applicant, a Malaysia citizen by operation of law, was assigned to Sabah in 1965 as a political secretary. In 1967, he applied for and was granted an entry permit to remain permanently in the state pursuant to Section 10 of the Immigration Act 1959/63. He later applied to the native court of Kota Kinabalu for a declaration of his status as "Anak Negeri" Sabah and was admitted to that status. When he came to realise that he might be expelled from the state, he applied for a declaration that being a person of Sabah, he could not be deprived of his right to stay.⁵⁵ The Federal Court held that he rightly was a person who belonged to the state, and that position was reinforced by the declaration of the native court that he was a native. Lee Hun Hoe CJ (Borneo) held that:

The significance of the declaration made by the native court that the appellant is an 'anak negeri' of Sabah should not be overlooked. Such a declaration would only be made if the applicant were able to satisfy the court of his being a member of a people indigenous in Malaysia, his residence in Sabah, his living as a member of a native community for a continuous period of five years immediately prior to his claim and of his good character. Furthermore, another consideration was that his stay was not limited under the Immigration Ordinance. Section 3(2) of the Ordinance makes clear that the native court shall have exclusive jurisdiction to entertain and determine such application and to make such a declaration...

It should be noted that the above cases were decided based on the Native Courts Ordinance 1953. However, even after the implementation of the new Native Courts Enactment 1992, which replaced the 1953 Ordinance, the issue remains unsettled. In the case of *Masbaka Bin Hj Hassan & Ors v. The Government of Malaysia & Ors*,⁵⁶ the High Court held that neither the Interpretation (Definition of Native) Ordinance nor the Constitution of Sabah defines what is meant by "people indigenous to Sabah." Article 161A(6)(b) of the Federal Constitution also does not define the term people or native indigenous to Sabah. In this case, the Plaintiffs claimed to be natives of Sabah by ethnic origins and brought an action against the Defendants, which had demolished their houses on the State land. The court established that none of the Plaintiffs testified that both of their parents are or were members of a people indigenous of Sabah. Further the court held that because a person is a Kadazan or a Bugis that therefore both of his parents must be Kadazan or Bugis and belong to a race or people indigenous to Sabah, bearing in mind that mixed marriages are common and normal in Sabah. Thus, it is not sufficient under paragraph (a) for a person to be defined as native if only a parent is or was a member of a people of indigenous to Sabah. The burden is on the Plaintiffs to prove that they are natives of Sabah in accordance to the laws of Sabah. They have failed to do so under section 2(1)(a) of the Interpretation (Definition of Native) Ordinance. Section 2(3) of the Ordinance provides that no claim by any person to be a native by virtue of the provisions of paragraphs (b), (c) and (d) of subsection (1) shall be recognized as valid unless supported by an appropriate declaration made by a Native Court under section 3 of the Ordinance. The court held that none of the Plaintiffs had exhibited any such declaration or certificate made by a Native Court in accordance to Section 3 and therefore none of the Plaintiffs has proved that they are natives as defined in section 2(1)(b), (c) and (d) of the Ordinance.

Thus, it is concluded that of the four definitions of native under Chapter 64 of the Interpretation Ordinance, only Section 2(1)(a) is qualified to obtain the native status automatically. Those who fall under Sections 2(1)(b), 2(1)(c) and 2(1)(d) must get approval from the native court. In response to this issue, the State Government of Sabah has prepared

⁵⁴ [1979] 2 MLJ 101

⁵⁵ Wu Min Aun (1990) *The Malaysian Legal System*, Second Edition, Kuala Lumpur: Longman at page 185

⁵⁶ [2010] MLJU 1632

a draft on the Native Definition Enactment in 2003.⁵⁷ The authority concerned also formed Sabah Ethnic Study Committee, which comprised the Sabah Museum Department, Sabah Native Affairs Department, Sabah Native Court, Sabah Kadazandusun Cultural Association, Sabah Cultural Board and Sabah Attorney-General's Office to further fine-tune of the draft. Nevertheless, the Local Government and Housing Minister Datuk Hajiji Noor (the then) said no time frame has been set to complete the effort to put in writing the definition of the term "native" (*Anak Negeri*). According to him, because of the sensitivity of the issue, he said it would take a long time for the matter to be settled. The privilege of natives to own land was an issue that has caused many cases of power abuse and fraud in the issuance of *Sijil Anak Negeri* (native certificate) in the past. Because of this reason, he said the then Berjaya Government froze its issuance on April 29, 1982.⁵⁸ Until the said Native Definition Enactment comes into existence, the problem in relation to "who is a Native of Sabah" continues to become one of the issues, which upsets the smooth administration of native customary law by the native courts in Sabah.

Second Issue: Conflict of Jurisdictions and Choice of Forum

Section 9 of the Native Courts Enactment 1992 clearly specifies that native courts have no jurisdiction in respect to matters within the jurisdiction of the Syariah courts and civil courts. Nevertheless, there are instances where the Native courts have entertained cases outside of their jurisdiction, for example cases of sexual offences and criminal defamation. An important case to elaborate this point is the landmark case of *In Re James Lee*.⁵⁹ The case involved a prosecution for attempted rape and the applicable legislation concerned the Penal Code, the Criminal Procedure Code and the Native Court Ordinance. The court decided that the High Court may issue an order of *certiorari* by virtue of the Application of Laws Ordinance to the Native courts, which are created by statute and not by custom since *certiorari* is the most appropriate remedy where question of jurisdiction arises involving the construction of ordinances. Further, the Court held the Criminal Procedure Code confers no jurisdiction on the Native courts and there is no ordinance, which confers jurisdiction upon the Native courts to administer justice under the Penal Code and where an act is at once an offence under the Penal Code and a breach of native law or custom it is the law that a person who commits an act contrary to the provisions of the Penal Code shall be punished under the Code and not otherwise.

This is a judgment of the High Court and it sets out clearly the limitation of Native Court jurisdiction. It is the leading case on the subject in Sabah.⁶⁰ Even so, one may be caught by surprise when he reads the Native Court (Native Customary Laws) Rules 1995. Part III of the 1995 Rules, listed down four types of sexual offences, in which the native courts have jurisdiction to hear. The offences are incestuous act,⁶¹ illicit intercourse between relations,⁶² illicit intercourse between unmarried persons,⁶³ and illicit intercourse in farm or field.⁶⁴ All these sexual offences are considered as breaches of native customary law and native courts claim jurisdiction over such matters. Clearly, similar offences are meted out in the Penal Code. Hence a conflict arises.

⁵⁷ Defining 'native' to take time, Daily Express Newspaper ... (n.d.). Retrieved on 06.07.2014 from <http://www.dailyexpress.com.my/print.cfm?NewsID=79268>

⁵⁸ Reported in Daily Express Newspaper on Friday, September 23, 2011, retrieved on 06.07.2014 from <http://www.dailyexpress.com.my/news.cfm?NewsID=79268>

⁵⁹ High Court at Tawau, No. M/6 of 1962, Lee Hun Hoe, Justice Datuk (1973) *Cases of Native Customary Law in Sabah (1953-1972)* Kota Kinabalu: Government Printing Office at page 37

⁶⁰ M.B. Hooker (1980) *Native Law in Sabah and Sarawak*, Singapore: Malayan Law Journal Pte Ltd at page 75

⁶¹ Rule 8 of the Native Courts (Native Customary Laws) Rules 1995

⁶² Rule 9 of the Native Courts (Native Customary Laws) Rules 1995

⁶³ Rule 10 of the Native Courts (Native Customary Laws) Rules 1995

⁶⁴ Rule 11 of the Native Courts (Native Customary Laws) Rules 1995

In relation to choice of forum, I refer to the case of *Abdul Latiff Avarathar v. Lily Muda*.⁶⁵ In this case, the appellant and respondent were divorced in the Native Officer's Court in 1974. The court also ordered all properties acquired during the marriage (*harta sepencarian*) to be divided between the parties in the proportion of one-third to the respondent and two-thirds to the appellant. The appellant did not proceed with the appeal against the decision of the native officer's court but instead brought an action in the High Court. The High Court stayed the proceedings pending the outcome of the appeal against the decision of the native officer's court. The appellant appealed to the Federal Court. The issue before the Federal Court was whether the High Court judge had properly exercised his discretion to stay all proceedings. The Federal Court held that since the matter had not been finally settled by the native courts, the High Court judge had properly exercised his discretion and therefore the Federal Court had no reason to interfere with the exercise of the discretion to stay all proceedings. Based on the above case, apart from the jurisdiction issue, it can be concluded that a rather more serious problem is choice of forum. A native can submit his case to either courts, the civil courts or native court based on his preferences. So far, there is no specific provision to govern this matter.

Third Issue: Whether Native court is a court subordinate to the High Court

This issue was discussed in the case of *Ongkong Anak Salleh v. David Panggau & Anor*.⁶⁶ The court noted that 'subordinate court' was defined under section 3 of the Courts of Judicature Act 1964, and that for Sarawak and Sabah, these were the Sessions Courts and the Magistrate's Courts. The court held that:

The native courts are purely a creature of statute...their jurisdictions clearly defined by the legislature and the powers of the courts are strictly limited. In short, the native courts including the District Native Court are statutory courts established not by Federal Law but Sarawak State law. They administer a system of laws entirely different from that of the High Court and the subordinate courts in Sarawak. There is no right of appeal from a decision of the District Native Court to the High Court...In my opinion, a court cannot be said to be subordinate to the High Court unless the High Court exercises supervisory power over it.⁶⁷

Based on the above judgment, native court was held as not a subordinate to the High Court. However in *Haji Laungan Tarki bin Mohd Noor v. Mahkamah Anak Negeri Penampang*,⁶⁸ the Supreme court decided otherwise. The court held that the jurisdiction of the High Court to grant an order of *certiorari* is supervisory in character and is exercisable over all inferior tribunals. The Native courts are creature of statute and the High Court can exercise control over Native Courts through the prerogative writs.⁶⁹ This was the law until the Native Court Enactment 1992 replaced the Native Courts Ordinance.

In one of a recent case, *Lynawati binti Abdullah v. Abang Sukori bin Abang Haji Gobil & Ors*⁷⁰ the court stated an opinion that the law in the case of *Haji Laungan* is outdated and against the development in the law, its *ratio* can no longer be applied. The court further stated that the law applicable at the time *Haji Laungan's* case was decided was the Native Courts Ordinance of Sabah (Cap.86). In its place now is the Native Courts Enactment of 1992, which has comprehensive and clear provisions on the breaches of customary law together with their prescribed penalties. Moreover, the constitution of the Native Court of Appeal under the Sabah Enactment has made it on par with the High Court for it provides that a Judge of the High Court or a person appointed to perform the functions of one sits in it provides that a Judge of the High Court or a person appointed to perform the functions of one sits in it and he is assisted by two District Chiefs or Native Chiefs. Given the constitutions of the Native Court of Appeals in both States, these appellate courts are not 'inferior courts' upon which

⁶⁵ [1982] 1 MLJ 72

⁶⁶ [1983] 1 MLJ 419

⁶⁷ [1983] 1 MLJ 419, per Seah J, at page 422

⁶⁸ [1988] 2 MLJ 85

⁶⁹ [1988] 2 MLJ 85, Hashim Yeop Sani SCJ, at page 90: see section 28 of the Ordinance

⁷⁰ [2013] MLJU 296

the High Court could exercise its supervisory power under judicial review. Granted that the subordinate Native courts are inferior courts, it would surely defeat the very purpose of having a Native Court of Appeal, if every dissatisfied native litigant as the subordinate court level could run to the High Court for judicial review. It would even render its function otiose if this is allowed and laws clearly must never be legislated in vain.

Further, the court held that the Supreme Court in Haji Laungan's case quoted page 70 of Hickling's book, *Malaysian Law* in which the learned author justified the control of the High Court over Native courts by saying that such a control is important since it is essential to have one supreme authority in any field of human activity. An English history illustrates, continues the learned author, two systems of courts with parallel authority cannot exist together in harmony. The court begs to differ with this opinion by saying that it is disrespect and meddling in each other's jurisdiction which would bring disharmony, not the mere existence of another system of courts because each court system is administering laws peculiar to itself which, the other is not well-versed in or trained. Thus, when the laws are properly legislated to define the constitution, powers and jurisdictions of each court system and mutual respect is accorded by one to the other, all three can co-exist and operate within their own spheres of influence under the judicial landscape of the country. Based on the above argument, the High Court dismissed the application.

Fourth issue: Appointment of Headmen and Native Chiefs.

Section 2 of the Native Courts Enactment 1992 defines the terms "Headman" and "Native Chief" as persons appointed by the State Public Service Commission. However, as I have mentioned in the earlier paragraphs that, in most cases, the appointment of the native courts officials is done by recommendation of State Assemblymen and there is no institution to check the credentials or to test the competency of the candidates for the administrative positions. Thus, this makes the appointment of the native courts' officials questionable. According to Peter R. Phelan (2003)⁷¹ if the foregoing account is a true portrayal of the administrators of native customary law, it is probable that the traditional system of native customary law will not survive unless action is taken. If the government wants to preserve the system of native customary law, it should ensure that headmen and native chiefs are not involved in politics and are free of political influence. To be effective in his judicial capacity each headmen and native chief should be seen to be neutral and impartial.⁷²

Another vital issue that needs to be considered, is the relevant academic qualifications of those appointed to the positions in the various levels of native customary law and *adat* administration.⁷³ Jannie Lasimbang,⁷⁴ suggested that the state government should appoint native court judges based on their knowledge of the local customs and traditions.⁷⁵ She added that such approach is essential to uphold the native court system and safeguard the rights of indigenous people.⁷⁶ She also suggested that it is better that the appointment of District chiefs and Native chiefs no longer be made based on political consideration in order to ensure that the Native courts institution continues to be respected.

CONCLUSION

Will the native courts system in Sabah continue to survive? Based on the ongoing study that I am conducting now, it is evident that many efforts have been taken by the authority

⁷¹ Peter R. Phelan (2003) *The Traditional Legal System of Sabah*, Kota Kinabalu: Pusat Kajian Borneo Yayasan Sabah at page 141

⁷² Peter R. Phelan (2003) *The Traditional Legal System of Sabah*, Kota Kinabalu: Pusat Kajian Borneo Yayasan Sabah at page 141

⁷³ Jumin J. Masuling (1998, 28 December) Several issues surround appointment of native council officials, *New Straits Times (Malaysia)* at page 2. Retrieved on 09.02.2014 from <http://www.lexisnexis.com/ap/academic/>

⁷⁴ A member of the Malaysian Human Rights Commission (SUHAKAM), representing the State of Sabah

⁷⁵ Malaysia: Native Court judges must be well-versed in customs, traditions, retrieved on 19.07.2014 from <http://www.asiapacificforum.net/news/malaysia-native-court-judges-must-be-well-versed-in-customs-traditions.html>

⁷⁶ Ibid no.75

concerned to improve the present courts system. However, there are still much to be done, in order to guarantee its survival. Kathianne Knaup wrote, and I quote:

The future of Native Law in Sabah depends upon how Sabah eventually solves the problem of her many legal cultures. Unifying and codifying the Native law are only the first step in this process. The major problem is how much fusion and integration should take place between Native law, other customary law, and state law. The adaptability and applicability of Native law to the changing economic and social conditions in Sabah will also determine the extent and form of its survival.⁷⁷

There are ample evidences, which prove that the native courts system is still relevant to the indigenous population in Sabah. To support this proposition, I refer to the statement made by the Chief Minister of Sabah, Datuk Seri Panglima Musa Haji Aman said in one occasion, that the native court institution in Sabah is still relevant and hence the government would be focusing on improving its system and administrative aspect. This was reflected by the groundbreaking ceremony of the Native Court Training Institute (ILMAN) in Penampang by the Prime Minister Datuk Seri Najib Tun Razak as well as the plan to build six more Native Courts throughout the State.⁷⁸

The call by the Chief Judge of Sabah and Sarawak, YAA Tan Sri Richard Malanjum for the setting up a Native Court Judicial Department in Sabah⁷⁹ is also an evidence to support the view that the Native court system is very much needed by the natives in the state. However, the Chief Judge said that some changes are needed in Sabah's native courts to ensure they remain respected and relevant. He added that for a start he proposed being more independent with a commission tasked to appoint qualified professionals such as lawyers to sit as judges in the Native Courts instead of those who were politically well connected.⁸⁰

Thus, it is my humble opinion that, the State government is doing its level best to preserve the traditional court system. The four issues discussed in this paper, namely the question of who is a native of Sabah, conflict of jurisdictions and choice of forum, whether native court is a subordinate court to the High Court, and the issue in relation to the appointment of headmen and native chiefs, are among the problems in the court system, bearing in mind that this list is not exhaustive. There are so many constitutional issues and legal issues in the native courts system that need to be addressed in assuring that the native courts system continues to play its role in the maintenance and development of the moral standards and the harmony of the people.⁸¹ Having said this, the answer is, yes, the native courts system in Sabah will continue to survive provided that proactive actions are taken by the authority concerned to improve the current system.

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⁷⁷ Kathianne Knaup, Native Family in Sabah, *St. Louis University Law Journal*, Vol.15:37 at page 257

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