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REVIEW ARTICLE

Jurisdiction of the Native Courts in Sabah

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ABSTRACT

The Native Courts in Sabah are established under the Native Courts Enactment 1992. The courts serve as a crucial institution for administering justice within the native communities of the state. The jurisdiction of Native Courts in Sabah is designed to uphold and administer native customary law. These courts have the authority to adjudicate matters among others, breach of customary law, land disputes, inheritance, marital issues and adoption. This paper explores the scope of jurisdiction exercised by Native Courts. It highlights the importance of these courts in preserving natives' rights and also discusses the legal issues pertaining to the jurisdiction of the courts, and proposes suggestions to address the legal issues. Ultimately, this study illustrates the significance of Native Courts in fostering social cohesion and safeguarding the balance between tradition and modernity, ensuring that justice is served in a manner that resonates with the values of the native populations in Sabah.

Contribution/Originality: This paper contributes to the existing literature on native courts by exploring the native court system in Sabah. Although the Native Courts Enactment 1992 clearly outlines the jurisdictions and powers of the native courts, the laws are not sufficient to address certain issues, for example, the absence of proper procedures governing matrimonial matters of the natives.

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1. Introduction

Section 3(1) of the Native Courts Enactment 1992 provides that the *Yang DiPertua Negeri* of Sabah has the power to establish native courts in the state. A case that is heard in a native court originates at the 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 (Phelan, 2003). 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. The native court is divided into a three-tier structure consisting of the Native Court, the District Native Court and the Native Court of Appeal. Every level of courts consists of three members. Under section 3(2) of the Sabah Native Courts Enactment 1992, each native court consists of three Native Chiefs or Headmen resident within the territorial jurisdiction. Section 6(1) of the Native Courts Enactment 1992 states that the native court has jurisdiction over cases arising from breach of native law or custom relating to betrothal, marriage, divorce, nullity of marriage and judicial separation; adoption, guardianship or custody of infants, maintenance of dependents and legitimacy. However, the native court does not have jurisdiction over an offence under the Penal Code, marriage or divorce regulated by the Law Reform (Marriage and Divorce) Act 1976 and the Registration of Marriages Ordinance 1952 and land matters. Further, Section 9 of the Native Courts Enactment 1992 provides that the native court also does not have jurisdiction over breach of the Islamic Family Law Ordinance 1991, and any criminal or civil case within the jurisdiction of any of the Syariah Courts constituted under the Syariah Court Ordinance 1991. This paper examines and discusses the jurisdiction of the native courts and the relevant legal issues the courts face.

2. Literature Review

Knaup (1971), reveals that in Sabah, the customary laws were recognised and preserved since the British colonial time by recognising the local headman or native chief as a government official and by giving the native law its place within the legal framework (Knaup, 1971). In the earlier writings in the 1970s, she discussed the historical background of native customary law in East Malaysia. She commented that traditionally most disputes arising among the people in the tribes and villages of Asia had been settled through the processes of customary law, a body of unwritten rules and customs handed down from generation to generation which govern men's relationships with each other. Hun Hoe (1973) stressed that native customary law plays an essential role in East Malaysia as it regulates the way of life of the natives. According to the writer, until the Native Courts Ordinance 1953 was enforced in Sabah, the application of *Adat* law was openly interpreted by the local Native Courts based on the general guidelines of the Woolleys' Codes and the respective Court's interpretation of the then-presumed existing *adat*.

Knaup (1971) argued that conflict of laws and jurisdiction is a problem as no absolute standard has yet been defined to determine whether an offence is a violation of native law or state law and which court should settle the dispute. Besides, Goh (2006) discloses that the native courts apply customary laws to resolve disputes over inheritance, alimony, land, fights and even sexual offences. He further stated that the system was introduced under the British to give structure to the customary laws Sabah natives have long lived by, but he emphasised that opinions are divided over the jurisdiction of the native courts. With regards to this issue, Article 74, Article 75 and Ninth Schedule, List I, Federal List of the Federal Constitution must be referred to.

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Article 74 of the Federal Constitution states the subject matter of federal and state laws. Article 75 states that if any state law is inconsistent with federal law, the federal law shall prevail. Ninth Schedule, List I, Federal List states that criminal law falls under federal laws. By reading the above provisions of laws, it can be concluded that there exists a conflict between the state law and federal law here with respect to the jurisdiction of the native courts in Sabah. Some literature reveals that native courts in Sabah do hear sexual offences cases such as incest and criminal defamation, which fall within the jurisdiction of the civil courts.

Hun Hoe (1973) stressed that an offence arising out of a breach of native law and custom may at the same time infringe the Penal Code. Where parties belong to the same community, no problem will arise as they are subject to the corresponding native system of personal law. He highlighted that the difficulty arises when one of the parties is a non-native, and the native court decides to assume jurisdiction (Hun Hoe, 1973). However, he did not discuss or provide any suggestions or solutions on how to solve this problem.

In one controversial case, *Haji Laungan Tarki bin Mohd Noor v. Mahkamah Anak Negeri Penampang* [1998] 2 MLJ 85, the appellant had been convicted and sentenced by the Penampang Native Court to one month's imprisonment for the offence of slander or making false and defamatory allegations against one James Ligunjang. He applied for leave for an order of certiorari to quash the decision. The learned judge of the High Court refused leave under Order 53 of the Rules of the High Court 1980 (now Rules of Court 2012), and his grounds of decision stressed the elaborate appeal provisions contained in the Native Courts Ordinance. On appeal from a dismissal of an application at the High Court, the Supreme Court allowed the appeal quashing the decision of the Native court. It was held that the Native Court was in excess of jurisdiction when it imposed the sentence of imprisonment, where the court maintained that such punishment could only be authorized by federal legislation. The Supreme Court, in the above case, envisaged the excess of jurisdiction by the Native Court in trying a case of criminal defamation, which ought to have been tried under the Penal Code.

Hun Hoe (1973) highlighted that in *Re James Lee Kui Wah* the High Court decided that the Native Courts had no jurisdiction to try offences which fell under the Penal Code coming within the jurisdiction of the civil courts. It is essential to look at the judgment of A.J. Ainsley C.J. in *Re James Lee Kui Fah* (1954) regarding this matter:

> *To return to my first problem, I do most readily concede that the Native Courts Ordinance seek to fence in the administration of justice by Native Court…. This Court will not, and indeed cannot assume powers of an appellate court where native courts are concerned. It would be wrong for this court to correct an error of customary laws by way of certiorari even though it was alleged that the error was apparent on the face of the adjudication. To my mind also an allegation that there was a denial of natural justice would be well within the competence of the various native appellate courts, and would be better left to their determination… Where, however, questions of jurisdiction arise, and such question are to be answered by the construction of Ordinances, the remedy of certiorari, if it is available can clearly of the greatest value. The Native Court of Appeal for all its impressive constitution is not ideally suited to answer questions which turn on the construction of written laws, and I strongly doubt whether it was even intended. Appeals lie to that court, as of right, upon*

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> *questions of native law and custom only. Mixed questions of law and fact may be brought to the Native Court of Appeal by leave of the Resident only. It is not at all clear how a question of jurisdiction which does not depend upon native law and custom, can reach the Native Court of Appeal at all.*

Syed Idid (1993) added that the same incident might be a crime or/and an offence transgressing the native customary law, for example, when a natural father rapes his daughter. He gave an example, where the Penampang Native court heard a case of such kind and decided that it was incest and imposed a "fine" of seven buffaloes and seven pigs (worth RM6,000). The man could not pay and was then jailed for 31 months. If he had been able to pay, he would have gone away a free man, whereas if he had been convicted of the same offence in the civil courts, he would have been put in prison for a maximum of five years and subjected to caning (Syed Idid, 1993). Rosnah Abdul Rashid who was the Papar Member of Parliament (as she was then) stressed that the native court should only hear cases relating to customary law such as those involving divorce and customary land rights while sexual offences were considered as a serious crime to be dealt with under the Penal Code (BERNAMA, 2005).

According to section 376 of the Penal Code, the penalty for rape is a maximum jail term of 20 years, and the offender is also liable to whipping. The Consumer Association of Sabah (CASH) has expressed its full support for this punishment. The President of CASH, Patrick Sindu, said that rape is a serious crime as it involves the dignity of the victims, and as such, the offender deserves a heavy penalty (BERNAMA, 2005). However, he did not discuss the right forum to decide the case. Tombung (2005) reported that the Sabah Muslim Women Lawyers Association (SALWA) believes that native courts have no jurisdiction to hear cases involving rape and incest. The Sabah Women's Advisory Council (MPWS), concurred with SALWA's view and also agreed with the Assistant Minister of Community Development and Consumer Affairs, Jornah Mozihim who said the punishment meted out by the native court is minimal and does not act as a deterrent. She commented that merely using the buffalo to settle a rape case only allows potential perpetrators to take advantage of innocent village girls (Tombung, 2005).

Bakri Zinin, an acting Sabah Police Commissioner is reported to have said there should be a clear line drawn between what the native courts can deal with and what they should not (Goh, 2006). He stressed out that serious crimes need to be handled by the police whereas in the old days, when there were no law enforcement agencies people turned to the village elders, but that's no longer applicable (Goh, 2006). Nevertheless, Kota Kinabalu Native High Court Judge and District Native Chief, William Majimbun counter-argued that under the Native Court Enactment, there are clauses on sexual offences, stating the nature of the offences and the penalties. This means the native court has the power to hear such cases (Goh, 2006). Also, Arfah Hamzah Wan (2011) contends that native customary law is only applicable to the non-Muslim indigenous communities in Sabah and Sarawak. However, there are cases where the parties involved are Muslim, and being tried by the native courts (Derim, 2005). The provision of law through Section 9 of the Native Courts Enactment 1992 stipulates that the native court does not have jurisdiction on Muslim Natives. Derim (2005) suggested, among others, that to avoid such conflict in future the society needs to be briefed and made to understand the separate jurisdiction of both the Native court and the Syariah court.

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3. Methodology

This is non-doctrinal legal research of qualitative in nature. It is empirical legal research that employs several methods to generate data relevant to existing legislations, the result of interviews, and the researcher's observation which is valuable in assessing and evaluating the existing laws and procedures of administering native law in Sabah. The manual analysis of the data will be done by examining the existing primary and secondary materials including interviews, data obtained by the researcher's observation, statutory provisions, case laws and other legal and non-legal literature relating to the jurisdiction of the native court in Sabah. An analysis of the relevant applicable statutes and cases related to the jurisdiction including but not limited to the Federal Constitution, Native Courts Enactment 1992 Native Courts (Criminal Jurisdiction) Act 1991 is made to suggest necessary proposals to solve the legal issues.

4. Discussion and Results

4.1. Native Laws and Native Courts in Sabah

The Sabah State Legislative Assembly passed a bill entitled Native Courts Enactment on 23rd March 1992, and the Enactment was gazetted to come into force on 1st April 1993. The introduction of Native Courts Enactment 1992 was a significant milestone in the history of native law in Sabah. This is the main legislation that handles matters pertaining to native law and native courts in Sabah, which superseded the Native Court Ordinance 1953. Some of the significant changes introduced by the Native Courts Enactment 1992 are as follows:

i) The responsibility for establishing a native court now rests with the Yang di-Pertua Negeri, instead of the Resident and the State Secretary. This is clearly stated in section 3 of the Native Courts Enactment 1992. It is stated in article 41(1) of the State Constitution of Sabah that the Yang di-Pertua Negeri is responsible for safeguarding the special position of the Natives.
ii) The word *Imam* (a leader in Islamic religion) in the Native Courts Ordinance 1953 is omitted. This is because according to section 9 of the Native Courts Enactment 1992, Native Courts have no jurisdiction to hear matters that fall under the jurisdiction of the Syariah Court in Sabah. However, it should be noted that Muslim natives can still go to the Native Court for matters relating to native law and customs. For example, in the case of *Jijat Bin At v Kahar Saan* (NCA No. 04 of 1991) both parties are Muslims, and they submitted their case to the Native Court in Tuaran. The case relates to a claim for that the respondent had agreed not to seek maintenance herself before the District *Imam* who had pronounced their divorce. The District Officer ordered the appellant to pay maintenance of the child in the sum of RM40.00 every month and to pay the arrears of the maintenance. The appellant, being dissatisfied with the decision, appealed to the Native Court of Appeal. Upon Appeal, the case is to be referred to the Syariah Court, and the decision of the Native Court is set aside since both parties are Muslims.
iii) No examples of cases involving native law and custom were provided in past ordinances, but the new enactment of 1992 enumerates cases relating to
    a) Betrothal, marriage, divorce, nullity of marriage and judicial separations (Section 6(1)(c)(i) of the Sabah Native Courts Enactment 1992);
    b) adoption, guardianship or custody of infants, maintenance of dependents and legitimacy (Section 6(1)(c)(ii) of the Sabah Native Courts Enactment 1992);

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c) gifts of succession testate and intestate (Section 6(1)(c)(iii) of the Sabah Native Courts Enactment 1992).

Furthermore, section 6(2) of the Native Courts Enactment 1992 attempts to remove the uncertainty of jurisdiction of the native courts that existed in the Native Courts Ordinance 1953. The said provision states that:

The Native Court shall exercise jurisdiction in respect of cases referred to subsection (1) where:
a) the cause of action arose, or
b) the breach is alleged to have been committed; or
c) the facts on which the proceedings are based exist or alleged to have occurred as may be appropriate, within the territorial jurisdiction of the court

Before the 1992 Enactment, there has been some doubt under the repealed Ordinance as to which Native Court in a locality, a cause or matter may be commenced by a party. Thus, to clarify this doubt, the above provision, section 6(2) of the Native Courts Enactment 1992 has been enacted. It should also be noted that one of the new provisions introduced by the 1992 Enactment concerns legal representation in court. In the previous law, i.e. Native Courts Ordinance 1953, there was a provision to bar advocates from appearing in a native court as provided under Section 16 of the Sabah Native Courts Ordinance 1953. The rationale for such exclusion was because of the informal nature of the hearing, which was more conciliatory than adversarial. In the new Sabah Native Court Enactment 1992, section 27(1) states,

> *No advocate shall appear for any party in any proceedings before a Native Court or before the District Native Court, but an advocate may appear for any party in any proceedings before the Native Court of Appeal:*
>
> *Provided that no advocate shall appear for any party in any proceedings before the Native Court of Appeal unless the advocate is duly registered as a Native Court of Appeal advocate following the prescribed procedure.*

According to the above provision, an advocate is allowed to appear before the Native Court of Appeal, but not before the Native Court and District Native Court. The reason for allowing such representatives is that the proceedings in the Native Courts become more formalised with the introduction of proper procedure and the native law and custom become an established part of our system. Thus, the participation of advocates in the administration of justice according to the native law or custom will not only enrich the jurisprudence of native law but will also ensure that the rule of law prevails.

Based on the above Figure 1 (Salleh, 2022) a Native Court consists of the District Chief as the presiding member and two other members who are Native Chiefs or Headmen residents within the territorial jurisdiction of such Native Court. Next in the hierarchy is the District Native Court. A District Native Court consists of the District Officer of the district as the presiding member and two other members who shall be District Chiefs or Native Chiefs. 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 shall be District Chiefs or Native Chiefs to be appointed by the Minister to be members of such court.

The Native Court in Sabah is divided into a three-tier structure as in the following Figure 1.

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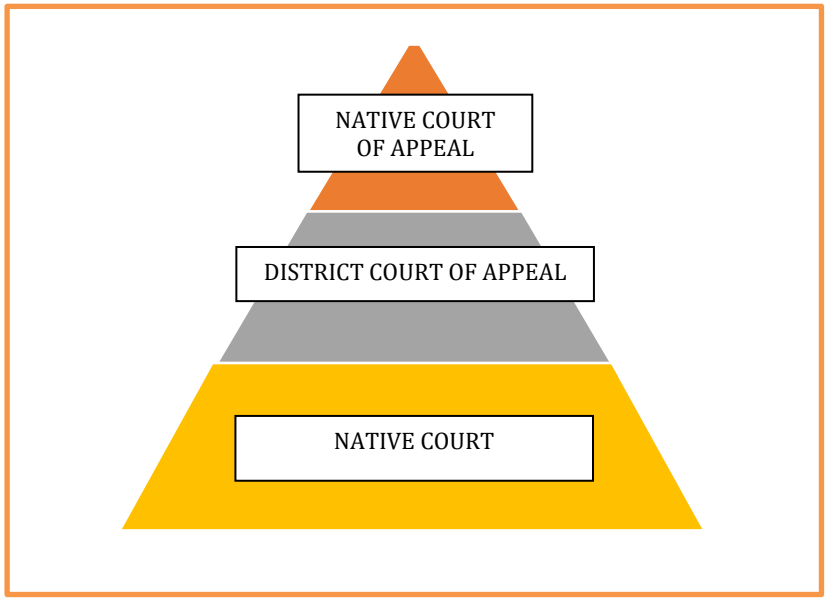
Figure 1: Hierarchy of Native Courts in Sabah



4.2. Composition of the Native Courts

The Native Courts system has a total of 3,715 local chieftains comprising 45 District Chiefs, 203 Native Chiefs, 591 Assistant Native Chiefs, 2,724 village headmen and 154 *Ketua Masyarakat Cina*. Every level of courts consists of three members (Gindok@Ginduk, 2018). According to section 3(2) of the Sabah Native Courts Enactment 1992, each Native Court consists of three Native Chiefs or Headmen resident within the territorial jurisdiction.

Generally, the Native courts' personnel perform two functions, namely as judges to interpret customs and as part of the delivery system to implement the government's functions and duties (Jabatan Percetakan Kerajaan Negeri Sabah, 1992). For example, a District Chief is a government official. He is also the chairman of the local community leaders in the area. His duties and roles encompass the administrative and customary aspects of the natives. He is also responsible for ensuring that all community leaders abide by all instructions and government policy that are communicated through the Deputy President of the Municipal council or district officer. Apart from the above duty, a District Chief is also responsible for providing guidance and monitoring the Native Chiefs, Assistant Native Chiefs and Headmen in carrying out their duties. He is also responsible for preparing and dividing the duties to all district heads, Native Chiefs, Assistant Native Chiefs and headmen.

In terms of the law, the District Chief is a member of the Native Court who usually hears and settles cases involving the natives. The duties are as follows:

i. Receiving complaints regarding the demands and problems of the native law and customs
ii. Performing an interrogation
iii. Provide a docket
iv. To set a trial day
v. Issuing of summons to the accused party
vi. Carry out trial
vii. Give sentences, and

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viii. Checking and signing Docket

A Native Chief is the leader of a tribe in a district, so there can be more than one Native Chief in one district based on the number of tribes that exist in that locality. A Native Chief has to work together with the District Native in carrying out administrative tasks and the practice of the customs of the natives. He is to assist the District Native in improving the service quality of the Assistant Native Chiefs and Headmen. The duties are similar to the District Chief. Among the duties and responsibilities of the Native Chief are, receiving complaints regarding the demands and problems of the native law and customs, performing an interrogation, providing a docket, setting a trial day, issuing a summons to the accused party, carrying out a trial, giving sentences, and checking and signing docket.

The assistant Native Chief is also a leader of a tribe in a district. He is responsible for taking care of and monitoring Headmen in his assigned community. He is also accountable for conveying any customs practised by his tribe when required by the District Chief and Native Chief. Further, he is to assist both the District Chief and Native Chief in a trial. The village headman is responsible for ensuring that natives live peacefully, and that there is a neighbourhood spirit that leads them to a brighter life. He is also responsible for maintaining the customary practices of the natives. He is allowed to accept complaints, hear and settle any cases arising from breach of customary practices. In the event, that the village headman is facing any difficulty in deciding cases among the natives, he must get in touch with the Native Court's members, i.e. the Native Chief and the District Chief. There is no specific qualification to be appointed as the courts' personnel. They are politically appointed, although, it is stated in Section 2 of the Native Courts Enactment 1992, that the appointment of Headman, Native Chief and District Chief is made by the State Public Service Commission. In most cases, the selection of the native courts' officials is made by the recommendation of State Assemblymen (Gindok@Ginduk, 2018).

4.3. Jurisdictions and Powers of Native Courts

The Native Courts Enactment 1992 consists of 31 sections and is divided into six parts, as follows:

Part I: Interpretation provisions
Part II: Constitution and Organisation of Native Courts
Part III: Jurisdiction and Powers of Native Courts
Part IV: Revision and Appeal
Part V: Procedure of Appeal
Part VI: General provision

Part III of the Native Courts Enactment 1992 states the jurisdiction and powers of native courts. Every Native Court will exercise original jurisdiction to the extent set forth and subject to the provisions of the Sabah Native Courts Enactment 1992 to hear, try, determine and dispose of the following cases:

(1) Cases arising from breach of native law or custom in which all the parties are natives as stipulated in Section 6(1)(a) of the Native Courts Enactment 1992. In the case of *Dindim v. Sikin v Majangkil Bin Gutok (Native Court of Appeal, No.4 of 2009)* the respondent, who was the plaintiff in the Native Court, claimed for "*adat rungkang"* against the appellant alleging that the appellant had refused to take care of her husband when he was unwell. The respondent further claimed that the

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appellant's husband was sent to his house by her son to be taken care of by him and that he had done so for one year without the appellant ever visiting him there. The respondent claimed that although he is the biological son of the appellant's husband, as the wife, the appellant should be the one to take care of him. The appellant disagreed and said that she and her husband had divorced. She further claimed that her son had sent her husband to the respondent's house without her knowledge. The Native Court found in favour of the respondent and ordered the appellant to pay a fine for "*adat rungkang*" in the form of 1 cow or RM500.00 to be paid to the respondent, or in default, 1 month imprisonment. The appellant was also advised to take back her husband for her to be taken care of. The appellant appealed to the District Native Court, which affirmed the decision of the Native Court. The appellant further appealed to the Native Court of Appeal. The appeal was allowed. Richard Malanjum CJ held that,

> *Having a look at the notes of the proceeding and the decisions of the Native Court and the District Native Court, it is our view that the most important issue is whether the Appellant had really breached the "adat rungkang." It must be considered that the Respondent is the son of the Appellant's husband, Gutok from his first wife. After having a look at all the evidence and listening to both parties, we are in doubt as to whether the Appellant did indeed breach the "adat rungkang" as alleged. We find that her reasons for not being able to take care of her husband are reasonable. Therefore, we are of the unanimous view that this appeal should be allowed. The decision of the Native Court and the orders made thereto are therefore set aside.*

(2) Section 6(1)(b) of the Native Courts Enactment 1992, which is 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 to the institution of the proceedings, where one party is a non-native. In the case of *Nancy Kual v. Ho Thau On* [1994] 1 MLJ 545, the plaintiff, a native of Sabah and the defendant, a Chinese, underwent a tea ceremony to celebrate their marriage according to Chinese customs, on 5 May 1990. The plaintiff and defendant cohabited as wife and husband. On 24 June 1990, the plaintiff and the defendant underwent another celebration of their marriage, this time, according to the customs of the Kadazan Tatana. The plaintiff and the defendant continued to cohabit until they experienced domestic problems. The defendant then left the matrimonial home. What then followed were meetings between the plaintiff and the defendant with the native court. At one meeting, the defendant, on being shown the photographs of the marriage, replied, *'Itu main- main sahaja'* ('that was merely a playful thing'). The plaintiff and the defendant did not register their marriage under the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as "the Act").

The issue, in this case, is whether, in view of section 5(4) of the Act read with section 3(1) thereof, a marriage solemnized under native customary law and not registered in accordance with the provisions of the Act between a non-native (the defendant) and a native (the plaintiff) is valid. The counsel for the plaintiff contends that the marriage is valid despite its non-registration. She quotes section 3(4) that the Act does not apply to any native of Sabah, and the plaintiff is a native. But the defendant is not. Hence the difficulty that both counsels meet in their attempt to resolve the claim. The defendant, in his defence, merely states that he is '… by race, a pure Chinese'. The court was told that there are many couples in similar circumstances in Sabah.

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They participated in the ceremonies and rituals but did not register. The following situations spring to mind:

(a) *A Muslim marrying another Muslim. In such a case, their marriage must be governed by the Syariah Law (section 3(3)) notwithstanding that one is, or both are natives. For the present reckoning, there is no such liaison as that of a non-Muslim marrying a Muslim for the purpose of our discussion. This is due to the fact that before a non-Muslim can marry a Muslim, he or she must first embrace Islam. Then as a Muslim, he or she is permitted to go through the marriage ceremony, which is solemnized by a Kadi.*
(b) *A non-Muslim native marrying another non-Muslim native – if their marriage is governed by the native customary law, then the Act does not apply (section 3(4)). The law does not, it seems to me, prohibit a native of any religion (except Islam) from marrying another native of the same or any other religion (except Islam) or from contracting a marriage under the native customary law.*
(c) *A native marrying a non-native who may be a Malaysian or a foreigner.*

The third scenario describes the case as the plaintiff is a native and the defendant, although a Malaysian, is not a native. While the plaintiff is clearly a native, the Act can only be taken as not applying to her if the court accepts that her 'marriage is governed by native customary law'. There is no difficulty if both she and the defendant are natives, but sadly this is not the case. Section 3(4) of the Act seems to put a question mark on the defendant's role and capacity as he is a non-native. According to the counsel for the defendant, the defendant's part in the ceremony makes the marriage void as the word 'race' in section 5(3) of the Native Courts Ordinance or section 6(3) of the 1992 Enactment refers to the sub-groups within the natives and not race as referring to Chinese, Malays and others. However, the judge, in this case, opined that it seems that the matter is still caught by section 6(1)(c) of the 1992 Enactment.

Syed Ahmad Idid J stated;

> *Can it be valid, or should the court rule it as void? Section 3(4) says that the Act does not apply to natives of Sabah whose marriages and divorces are governed by native customary law, and the plaintiff's marriage was so governed. Should the fact that the defendant is not a native matter? I should think not. He decided to marry a native and observed the rites and customs of the woman. He cannot make tracks and then retract. Section 6(1)(b) of the 1992 Enactment (which is similarly worded as in s 5(1)(b) of the Native Courts Ordinance (No 6 of 1953) ('the 1953 Ordinance') ('now repealed) provides that the native court can exercise jurisdiction to hear, try, determine and dispose of cases arising from breach of native law or custom, religious, matrimonial or sexual … where one party is a non-native (s 6(1)(b) of the 1992 Enactment) or where one party is a native (s 5(1)(b) of the 1953 Ordinance). The legislators seem unsure when they use the words non-native and native. Either description seems to be immaterial in this context. One can say the glass is half-full or half-empty. Perhaps in an appropriate case where there may be more than two parties, one or the other of the descriptions may change the course of arguments but not so in today's case.*

Thus, the court granted the order applied for by the plaintiff and declared that she was the legal wife of the defendant. The court further stated that although one of the parties here is non-native, the court was of the opinion that the marriage which both

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the defendant and plaintiff went through, according to the Kadazan Tatana custom, is to be recognised as valid. The present marriage was contracted in a form required or permitted by the law of the country where it was contracted, i.e. according to the native customary law in Sabah.

(3) Section 6(1)(c) of the Native Courts Enactment 1992: cases involving native law or custom relating to:
   (a) betrothal, marriage, divorce, nullity of marriage and judicial separation;
   (b) adoption, guardianship or custody of infants, maintenance of dependants and legitimacy;
   (c) gifts or succession testate or intestate; and

(4) Other cases if jurisdiction is conferred upon it by the Enactment or any other written law.

According to Section 6(2) of the Native Courts Enactment 1992, the Native Court will exercise jurisdiction in respect of the cases under heads (1) to (4) above where the cause of action arose or the breach is alleged to have been committed; or the facts on which the proceedings are based exist or are alleged to have occurred, as may be appropriate within the territorial jurisdiction of the court.

In terms of sentencing, Section 10(1) of the Native Courts Enactment 1992 clearly stated that the native courts have the power to impose fines, order imprisonment, award both fine and imprisonment and inflict any punishment authorised by native law or custom not being repugnant to natural justice and humanity. However, it should be noted that the native court judge shall impose no sentence of imprisonment, without the endorsement by a Magistrate as provided under Section 11 of the same Enactment.

4.3.1. Native Courts (Criminal Jurisdiction) Act 1991

This Act confers on the native courts of the States of Sabah and Sarawak jurisdiction in respect of offences. It consists of three provisions only namely Section which relates to short title, Section 2 on the conferment of criminal jurisdiction and Section 3 on the validation of previous offences that had been tried before the commencement of this Act. According to Item 13 in List IIA of the Legislative Lists in the Ninth Schedule to the Federal Constitution, the jurisdiction of the native courts of the States of Sabah and Sarawak shall not include jurisdiction in respect of offences except in so far as conferred by federal law. Criminal law is one of the examples of federal law, and thus, native courts do not have any jurisdiction to hear criminal cases. However, Part III of the Natives Courts (Native Customary Laws) Rules 1995 states that sexual offences such as incest and illicit intercourse are considered a breach of customary law. According to these legal provisions, the native courts have jurisdiction to hear these sexual offences.

Furthermore, based on Section 2 of the Native Courts (Criminal Jurisdiction) Act 1991 which came gazette on 12th September 1991 and came into operation on 13th September 1991, it is clearly stated that the native courts have powers to hear cases where the offences are punishable with imprisonment for a term not exceeding two years or with a fine not exceeding five thousand ringgit or a combination, provided that such jurisdiction shall not be exercised in respect of such offence which is also an offence under the Penal Code.

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4.3.2 . Native Family Law - Section 6(1)(c)(i) of the Native Courts Enactment 1992

The native court also deals with family law matters. Section 6(1)(c)(i) of the Native Courts Enactment 1992 states that native courts have original jurisdiction to hear cases involving native law or custom relating to betrothal, marriage, divorce, nullity of marriage and judicial separation. One will notice that the provision is too general. There is no specific provision in the 1992 Enactment, which lays down the procedure on how to govern family matters.

To highlight this issue, it was reported in one the local newspapers, Daily Express (2012) that there was one native family in Keningau, Sabah, whose mother passed away. Later, out of nowhere, a Chinese man from Peninsula appeared and claimed to be the deceased's husband. He presented a Marriage Certificate issued by one native court in Sabah to back his claim. The children of the deceased went to the native court to lodge a complaint on this matter. The Keningau Native Court made a ruling that the marriage certificate be cancelled but at the same time allowed the man to stay in the deceased house and take away almost everything from the deceased's children (Daily Express, 2012). Thus, it is submitted that the root cause of this problem is the issuance of a marriage certificate according to the whims and fancy of the native court staff.

Concerning matrimonial matters, generally, matrimonial matters of non-Muslims in Malaysia are governed by the Law Reform (Marriage and Divorce Act) 1976 which includes the native of Sabah as enumerated under section 3(4) of the Law Reform (Marriage and Divorce) Act 1976. It is reported in Daily Express (2014) that although it is applicable to all Malaysians and non-Muslims, for natives of Sabah and Sarawak and the Orang Asli of West Malaysia, the option available to them is either civil marriage or married under '*adat.* Section 3(4) of the Law Reform (Marriage and Divorce) Act 1976 states that this Act shall not apply to any native of Sabah or Sarawak or any aborigine of Peninsular Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom unless—

(a) he elects to marry under this Act;
(b) he contracted his marriage under the Christian Marriage Ordinance [Sabah Cap. 24], or
(c) he contracted his marriage under the Church and Civil Marriage Ordinance [Sarawak Cap. 92].

Taking into account the lack of provisions in the Native Courts Enactment 1992 that govern matrimonial and/or family matters, it is suggested that a marriage between a native and a foreigner should not be allowed in the Native Court, in order to protect the parties.

Another issue that may arise relating to the acquisition of property during the marriage, which may include non-customary land, for example, when parties purchase property in other states in Malaysia. Hence, which law would govern such a case? Would the order granted by the Native Court be enforceable to other states? It is therefore humbly proposed that marriages must be registered under the Native Courts Enactment 1992 or the Law Reform (Marriage & Divorce) Act 1976, as the case may be. The registration under the Enactment is deemed to be valid and registered under the Law Reform (Marriage & Divorce) Act 1976. By doing this, it will allow the parties to resort to either body to dissolve their marriage and claims for ancillary reliefs. In the event, parties of the marriage would have options whether to submit to the jurisdiction of the Native Court or Civil Court in settling their matrimonial disputes or claiming rights. The order or judgment given by the

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native court shall be deemed to be a valid and enforceable one as given by the civil court and entitled to be endorsed or effective for the purpose of the registration as provided under section 420 of the National Land Code or Customary Tenure Enactment of Negeri Sembilan.

Thus, it is concluded that the Native Courts Enactment 1992, is not comprehensive in terms of the law and procedure relating to matrimonial/family matters. Hence, such law should incorporate the relevant provisions namely, the constitution, establishment and organisation of the Native Courts of Sabah, and its jurisdiction and powers procedures for marriage and divorce in terms of regulations for solemnisation ceremony and registration. The native marriage law should be comprehensive, including important clauses on marital matters such as basic necessities, ritual, registration, marriage certificate format, penalty and others—only a minor provision on customary native marriage available in the Native Courts Enactment 1992. Even worst, the procedure varies from district to district without uniformity.

4.3.3. Section 9 of the Native Courts Enactment 1992

According to Eggleston and Moulton (1976), religious beliefs and customary legal law are both meshed within Aboriginal society. It is stated in section 9 of the Native Courts Enactment 1992, that native courts have no jurisdiction in respect of matters within the jurisdiction of the Syariah. The Native Chiefs Conference held on November 13, 1960, agreed that Islamic law had, to varying degrees, become part of native customary law and that specific references to Islamic law, other than Islamic marriage and divorce, should, as far as possible and as far as the natives were concerned, be deleted from law. It was also agreed that non-native Muslims should no longer be subjected to native court jurisdiction. The conference wished, however, to retain the provision whereby the native court could exercise jurisdiction (with the consent of the District Officer in each case) overall non-natives in cases arising from the breach of Native Law or custom, religious, matrimonial or sexual when one party is a native.

In the case of *Application of Sipang bin Logong (Native Court of Appeal No 69 of 1959)* it involved a question of permission to marry and purported application of Muslim law. Here a stepfather and a stepdaughter were convicted of incest and refused permission to marry. However, the Native Court of Appeal was prepared to permit marriage provided that the man divorced his wife (the girl's mother) "according to Muslim law." In *Ariff v. Abdul (*N.C.A. No. 58/1958), the issue to be decided by the Native Court was, whether the claimant was an adopted or natural son. The evidence was inconclusive to some extent, but the main point of the decision is that court was prepared to allow a claim on the basis of "Muslim law and custom" where the latter recognised adoption for inheritance purposes.

Hun Hoe (1973) also pointed out another case which is *Haji Abdullah Bin Damar v. Rupah Bt Inal*, where the issue in the case concerned the application of the Native and Small Estates Ordinance (Cap 1), the Wills Ordinance (Cap. 158) and the Muslims Ordinance (Cap. 83). It was held that the native court had no jurisdiction in cases, which arise solely from breach of Muslim law and custom; its jurisdiction relates solely to native law and custom. These decisions all illustrate the difficulty of defining native law in opposition to Muslim law and custom. Even after the enforcement of Section 9 of the Native Courts Enactment 1992, the law still fails to solve some of the conflicting issues. It is suggested that this provision needs to be reviewed (Borneo Post, 2012).

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4.3.4 Do Native Courts have inherent power?

In the case of *Auto Dunia Sdn Bhd v Wong Sun Fatt* [1995] 2 MLJ 549, the court held that a court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contrary to or inconsistent with rules laid down by statute or adopted by usage. This inherent power may be used to hear any application or to make any order as may be necessary to prevent injustice or to prevent abuse of the process of the court, as stipulated in the Rules of the Federal Court 1995. Further, Order 92 rule 4 of the Rules of Courts 2012 provides the inherent power conferred on the court to make any order as may be necessary to prevent injustice or to prevent abuse of the process of the Court.

The inherent jurisdiction of the court as provided for in this provision is exercised as part of the administration of justice. The court had an inherent jurisdiction to do justice between the parties and apply such principles as were necessary or desirable for attaining such object and for giving a decision which was in conformity with the requirements of the social condition's community where the law was administered. It is procedural in nature and is not part of substantive law as discussed by *Malaysian Court Practice: High Court Practice* , 2015 or intended to alter substantive rights. The scope of this provision is very wide. Hence, it is invoked in an inexhaustible variety of circumstances. The court may exercise its inherent jurisdiction in respect of matters that are regulated by statute save for if it contravenes any statutory provision.

The position in Malaysia is as stated by Edgar Joseph, Jr J in *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, *.....it is clear that the inherent jurisdiction of the court includes all the powers that are necessary to fulfil itself as a court of law; to uphold, to protect and to fulfil the judicial function of administering justice according to the law in a regular, orderly and effective manner.* However, there are limitations in respect to such inherent power stated in the later Supreme Court case of *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178*....the rules cannot interfere with the exercise of the inherent power of the court so long as it deems it necessary to prevent any injustice or any abuse of its own process.* It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

But in the case of *Suppuletchimi a/p Karpaya v Palmco Bina Sdn Bhd* [1994] 2 AMR 1191, the above limitation has no rest due to a later decision which held that the inherent jurisdiction of the court could be exercised concurrently or as an alternative to the Rules of High Court (as it was then) which was framed to avoid any injustice. Further, in the case of *Indira Gandhi a/p v. Pengarah Jabatan Agama Islam Perak & Ors* [2018] 1 MLJ 525, the Federal Court held that civil courts are vested with inherent judicial powers. However, such inherent power is not provided for the Native courts. There is no provision about the inherent power in the Native Courts Enactment 1992. Further, based on Order 1 Rule 2 of the Rules of Courts 2012, it is clear that these Rules are only applicable to the Magistrates' Court, Sessions Court and High Court. Thus, it is submitted that in deciding matters especially dealing with native laws of general application, the Native courts must also enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process.

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5. Conclusion

In conclusion, the jurisdiction of Native Courts in Sabah represents a vital intersection of traditional governance and modern legal frameworks. These courts not only uphold the customs and practices of native communities but also play a crucial role in promoting social harmony and cultural preservation. There are issues about the jurisdictions of the native courts that need to be addressed by amending some of the provisions in the current laws, for example, criminal offences and also the need to enact new laws, i.e. the Native Family Law Enactment. This proposed law will tackle the issues relating to family matters. Strengthening the jurisdiction of the native courts will enhance access to justice for the native populations while fostering a deeper understanding of their unique legal traditions within the broader Malaysian legal landscape. Ultimately, this balance between tradition and modernity is key to ensuring equitable and culturally sensitive legal outcomes for all citizens of Sabah.

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