



## Preserving Indigenous Customary Law in Sabah: The Role of Native Courts in a Plural Legal System

LENNY JAMES MATAH<sup>1,2</sup>, RAFIDAH@MALISSA SALLEH<sup>2</sup>, AZHANI BINTI ARSHAD<sup>1</sup>

<sup>1</sup>Faculty of Law, Universiti Teknologi MARA (UiTM), Shah Alam, Selangor, Malaysia

<sup>2</sup>Faculty of Law, Universiti Teknologi MARA, Sabah Branch, Kota Kinabalu Campus, Sabah, Malaysia

Email: [lenny442@uitm.edu.my](mailto:lenny442@uitm.edu.my); [rafidah632@uitm.edu.my](mailto:rafidah632@uitm.edu.my); [azhani\\_arshad@uitm.edu.my](mailto:azhani_arshad@uitm.edu.my)

### Abstract

Indigenous customary law constitutes an integral component of Sabah's legal pluralism and embodies the cultural identity, traditions, and social values of its indigenous communities. Within this plural legal framework, the Native Courts function as a specialised institution entrusted with the administration and preservation of customary law through the adjudication of disputes involving indigenous customs and practices. Despite their continued legal recognition, the role of the Native Courts in safeguarding indigenous customary law faces increasing challenges arising from socio-economic transformation, modernization, legal uncertainty, jurisdictional limitations, and the growing interaction between customary and civil legal systems. These developments raise important questions regarding the effectiveness and future relevance of the Native Court system in preserving Sabah's indigenous legal heritage. This paper examines the role of Native Courts in preserving indigenous customary law in Sabah within the broader context of Malaysia's plural legal system. The study adopts a doctrinal legal research methodology involving the analysis of primary legal materials, including the Native Courts Enactment 1992, related subsidiary legislation, judicial decisions, and constitutional provisions, together with secondary sources such as academic writings, government reports, and policy documents. Through qualitative content analysis, the paper identifies the principal legal and institutional challenges affecting the administration of indigenous customary law and evaluates potential measures for strengthening the effectiveness of the Native Court system. The paper argues that Native Courts continue to play a significant role in preserving indigenous customary law and cultural heritage in Sabah. However, continuous legal and institutional reforms are necessary to enhance their consistency, capacity, and legitimacy within Malaysia's evolving plural legal order. The study contributes to ongoing discourse on indigenous justice, legal pluralism, and the preservation of local cultural heritage in Sabah.

**Keywords:** Native Courts; Indigenous Customary Law; Sabah; Legal Pluralism; Indigenous Justice.

### Abstrak

Undang-undang adat masyarakat pribumi merupakan komponen penting dalam sistem perundangan plural di Sabah dan mencerminkan identiti budaya, tradisi serta nilai sosial masyarakat pribumi. Dalam sistem perundangan yang bersifat plural ini, Mahkamah Anak Negeri berfungsi sebagai institusi khusus yang dipertanggungjawabkan untuk mentadbir dan memelihara undang-undang adat melalui penyelesaian pertikaian yang melibatkan adat dan amalan masyarakat pribumi. Walaupun Mahkamah Anak Negeri terus diiktiraf dari sudut perundangan, peranannya dalam memelihara undang-undang adat masyarakat pribumi kini berhadapan dengan pelbagai cabaran akibat perubahan sosioekonomi, proses pemodenan, ketidakpastian undang-undang, bidang kuasa yang terhad serta hubungan yang semakin rumit antara undang-undang adat dengan sistem perundangan sivil. Perkembangan ini menimbulkan persoalan penting mengenai keberkesanan dan kepentingan Mahkamah Anak Negeri dalam memelihara warisan perundangan masyarakat pribumi di Sabah. Kajian ini bertujuan untuk mengkaji peranan Mahkamah Anak Negeri dalam memelihara undang-undang adat masyarakat pribumi di Sabah dalam konteks sistem perundangan plural Malaysia. Kajian ini menggunakan metodologi penyelidikan perundangan doktrinal melalui analisa terhadap bahan perundangan utama yang merangkumi Enakmen Mahkamah Anak Negeri 1992, perundangan kecil yang berkaitan, keputusan kehakiman serta peruntukan Perlembagaan Persekutuan. Kajian ini turut menganalisa sumber kedua seperti buku, artikel jurnal, laporan kerajaan dan dokumen dasar yang berkaitan. Analisa kandungan secara kualitatif digunakan untuk mengenal pasti cabaran perundangan dan institusi yang mempengaruhi pentadbiran undang-undang adat serta menilai langkah-langkah yang boleh diambil untuk memperkukuh keberkesanan Mahkamah Anak Negeri. Kajian ini mendapati bahawa Mahkamah Anak Negeri terus memainkan peranan penting dalam memelihara undang-undang adat dan warisan budaya masyarakat pribumi di Sabah. Walau bagaimanapun, pembaharuan dari aspek perundangan dan institusi perlu dilaksanakan secara berterusan bagi meningkatkan ketekalan, keupayaan dan kewibawaan Mahkamah Anak Negeri dalam melaksanakan fungsinya dalam sistem perundangan plural Malaysia yang sentiasa berkembang. Kajian ini diharapkan dapat menyumbang kepada wacana mengenai keadilan masyarakat pribumi, perundangan plural serta usaha memelihara warisan budaya tempatan di Sabah.

**Kata Kunci:** Mahkamah Anak Negeri; Undang-Undang Adat Masyarakat Pribumi; Sabah; Perundangan Plural; Keadilan Masyarakat Pribumi.



## Introduction

Sabah has a distinctive legal system in which statutory law operates alongside native law and custom. Indigenous customary law forms an important part of this legal system, particularly in matters concerning the social and cultural practices of Sabah's indigenous communities. Its importance is not confined to the regulation of customary practices, as native law also reflects the traditions, values and collective identity of the communities from which it originates. Salleh (2021) identifies native law as one of the recognised sources of law in Sabah, where it continues to govern matters involving indigenous communities. The position of native law and custom in Sabah is also recognised within the Federal Constitution. The Ninth Schedule, List IIA, Item 13 places native law and custom within the State List for Sabah and Sarawak. It includes matters concerning the determination of native law or custom as well as the constitution, organisation, procedure, jurisdiction and powers of Native Courts (Federal Constitution, Ninth Schedule, List IIA, Item 13). The constitutional arrangement therefore provides the basis for Sabah to administer matters of native law and custom through its own legal institutions. The Native Courts are principally governed by the Native Courts Enactment 1992, which regulates their constitution, organisation, jurisdiction, powers and procedures. The Enactment is supplemented by the Native Courts (Native Customary Laws) Rules 1995 and the Native Courts (Practice and Procedure) Rules 1995. Together, these laws provide the statutory framework within which native law and custom are administered in Sabah.

Within this framework, the function of the Native Courts is not limited to settling disputes. Their application of customary norms in cases brought before them enables native law to remain part of contemporary legal practice. The involvement of Native Chiefs and others familiar with local customs also allows customary knowledge to be considered in the adjudication of disputes. In this way, the Native Court system provides an institutional setting for the continued application and transmission of native law. Salleh (2021) similarly observes that the administration of native law through the Native Courts remains an important feature of Sabah's legal system. The continued administration of customary law, however, is accompanied by a number of difficulties. Changes in social and economic conditions may affect customary practices and the transmission of customary knowledge between generations (Salleh et al., 2019). The diversity of indigenous communities in Sabah further means that customs may differ according to community and locality, while some customary practices remain dependent on oral knowledge rather than formal written records (Rena & Dahlan, 2024). These circumstances may complicate the identification and consistent application of particular customs. Questions of jurisdiction present a further difficulty. Section 9 of the Native Courts Enactment 1992 excludes matters that fall within the jurisdiction of the Civil Courts or Syariah Courts. Disputes involving native law and custom may nevertheless arise alongside issues governed by other branches of law, making the boundaries between the respective jurisdictions particularly important. Existing studies have also drawn attention to problems concerning the documentation of customary law, jurisdiction and the institutional administration of Native Courts in Sabah (Rena & Dahlan, 2024; Salleh, 2020).

Against this legal and institutional background, this paper examines the role of Native Courts in the preservation of indigenous customary law in Sabah within Malaysia's plural legal system. It employs doctrinal legal research based on constitutional provisions, the Native Courts Enactment 1992, relevant subsidiary legislation and judicial decisions, supported by academic literature and other secondary materials. The analysis focuses on the legal and institutional challenges affecting the administration and preservation of customary law and considers measures that may strengthen the Native Court system. In doing so, the paper considers how Native Courts may continue to preserve indigenous customary law while operating within Sabah's contemporary legal and social environment.

## Indigenous Customary Law and Legal Pluralism in Sabah

Legal pluralism provides a useful basis for understanding the position of indigenous customary law in Sabah. It recognises that more than one body of law or normative system may operate within the same society. In Sabah, native law and custom exist alongside the civil and Syariah legal systems, although each operates within its respective legal and jurisdictional boundaries. Native law is therefore not merely a collection of social practices but forms part of the broader legal order of the State (Salleh, 2021). The character of customary law differs from that of legislation enacted by the State. It develops from customs and practices observed and accepted within particular communities and may be preserved through oral traditions, community practices and the knowledge of customary authorities. Consequently, its content is not necessarily found in a single written source. Salleh (2021) and Salleh et al. (2024) describe native law in Sabah within this continuing customary setting, where its application remains closely connected to the communities from which the relevant customs originate. The formal position of native law and custom is reflected in the Federal Constitution. Under the Ninth Schedule, List IIA, Item 13, native law and custom are matters within the legislative competence of Sabah and Sarawak. The provision includes the determination of matters of native law or custom and matters concerning the constitution, organisation, procedure, jurisdiction and powers of Native Courts (Federal Constitution, Ninth Schedule, List IIA, Item 13). Customary law in Sabah therefore operates within a constitutionally recognised legal framework rather than solely through informal community practice.



At the State level, this constitutional position is given institutional effect through the Native Courts established under the Native Courts Enactment 1992. Section 6 of the Enactment confers jurisdiction on the Native Courts over specified matters involving native law and custom, including cases arising from breaches of native law or custom (Native Courts Enactment 1992, s. 6). The Native Courts (Native Customary Laws) Rules 1995 further form part of the legal framework governing the application of customary law. The relationship between customary law and formal legal institutions is particularly significant in the context of legal pluralism. Bringing customary disputes before the Native Courts places customary principles within an established adjudicative process, while their substance remains derived from the customs of the relevant native communities. This relationship is not always straightforward. Sabah consists of diverse indigenous communities, and customary practices may vary according to community and locality. Some customs also continue to depend upon oral knowledge and community practice, which may create difficulties when their existence or content has to be established in a formal proceeding (Rena & Dahlan, 2024; Salleh, 2021). The position of indigenous customary law in Sabah thus involves both community-based custom and formal legal recognition. Its continued operation depends not only on statutory recognition but also on the ability of the Native Court system to identify and apply the relevant customs within the limits of its jurisdiction. This relationship between customary norms and formal legal institutions provides the context for examining the statutory framework, jurisdiction and functions of the Native Courts in Sabah.

### **Native Courts in Sabah: Legal Framework and Role**

The Native Court system in Sabah derives its present statutory basis from the Native Courts Enactment 1992. The Enactment provides for the establishment and organisation of the courts and defines their jurisdiction and powers in matters concerning native law and custom. There are three levels of courts recognised within this structure, namely, the Native Court, the District Native Court and the Native Court of Appeal (Native Courts Enactment 1992, ss. 3–5). The Enactment also provides for revision by the District Native Court and for appeals within this hierarchy (Native Courts Enactment 1992, ss. 16–18). The jurisdiction of the Native Courts is principally provided under section 6 of the Enactment. It extends to cases arising from breaches of native law or custom and to specified matters governed by native law or custom. These include matters relating to marriage, divorce, adoption, guardianship, custody, maintenance, legitimacy, gifts and succession (Native Courts Enactment 1992, s. 6). The jurisdiction conferred by section 6 is significant because it enables disputes concerning customary relationships and obligations to be determined within a court specifically established to administer native law and custom. Salleh et al. (2024) observe that the Native Courts continue to exercise jurisdiction over matters that are closely connected with the customary affairs of native communities in Sabah.

The Enactment also confers powers necessary for the exercise of this jurisdiction. Under section 10, a Native Court may impose the penalties prescribed for offences against native law or custom and, in other cases, make such orders as may be just and equitable in accordance with native law or custom. Section 12 further empowers the Court to order compensation in cash or in kind for a person injured or aggrieved by an act or omission constituting an offence against native law or custom (Native Courts Enactment 1992, ss. 10, 12). These provisions are important to the practical administration of customary law because the Native Courts are not confined to determining whether a custom has been breached; they are also empowered to provide remedies recognised within the statutory scheme. The Native Courts Enactment 1992 does not operate in isolation. Its provisions are supplemented by the Native Courts (Native Customary Laws) Rules 1995 and the Native Courts (Practice and Procedure) Rules 1995. Of particular relevance is Rule 58 of the Native Courts (Native Customary Laws) Rules 1995. Rule 58 preserves the inherent jurisdiction of the Court to make orders necessary to prevent injustice or an abuse of its process in cases involving native customary laws not expressly covered by the Rules but otherwise recognised under native customary law. This is particularly relevant in Sabah, where customary practices are not necessarily uniform across native communities and not every applicable custom is comprehensively expressed in written form. The jurisdiction of the Native Courts is, however, subject to statutory limits. Section 9 of the Native Courts Enactment 1992 provides that a Native Court has no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts or Civil Courts. The provision is important in determining the place of the Native Courts within Sabah's plural legal structure, particularly where a dispute involving native parties or customary practices also raises matters governed by civil or Syariah law. The limits of Native Court jurisdiction have also arisen before the Civil Courts. In *Haji Laungan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1998] 2 MLJ 85, the jurisdiction of the Native Court became an issue before the court. The case is relevant to the present discussion because it illustrates that the authority exercised by the Native Courts remains subject to the jurisdiction conferred upon them by statute. The existence of a customary element in a dispute does not, by itself, remove the need to determine whether the matter falls within the jurisdiction provided by the Native Courts Enactment 1992.

The statutory framework therefore places the Native Courts in a particular position within Sabah's legal system. They exercise jurisdiction specifically associated with native law and custom, but that jurisdiction operates within boundaries prescribed by legislation and alongside the jurisdiction of other courts. This legal position is central to understanding the



role of the Native Courts in preserving customary law: preservation takes place not outside the formal legal system, but through the exercise of legally defined jurisdiction over matters in which native law and custom remain applicable.

### **The Role of Native Courts in Preserving Indigenous Customary Law**

The preservation of indigenous customary law depends, to a considerable extent, on its continued application in matters affecting native communities. In Sabah, the Native Courts provide the principal institutional setting in which native law and custom are applied to disputes falling within their jurisdiction. Section 6 of the Native Courts Enactment 1992 confers jurisdiction over breaches of native law or custom and a range of matters governed by customary law, including marriage, divorce, adoption, guardianship and succession. The significance of this jurisdiction lies in the opportunity it provides for customary rules to remain applicable to actual disputes rather than existing only as recorded traditions or historical practices (Native Courts Enactment 1992, s. 6; Salleh et al., 2024). The continuing legal relevance of customary practices may also be seen in *Nancy Kual v Ho Thau On* [1994] 1 MLJ 545. The dispute concerned a customary marriage involving a native of Sabah and a non-native and required consideration of the legal effect of a Kadazan Tatana customary marriage. Although the case arose outside the ordinary exercise of Native Court jurisdiction, its relevance lies in the recognition that questions concerning customary practices may have legal consequences beyond the immediate customary setting. It also illustrates the interaction between native custom and the wider legal system when rights or relationships depend upon the legal effect attributed to a particular custom. Preservation also involves the interpretation of customary law. This presents particular difficulties because customary practices in Sabah are not necessarily uniform and their content may differ between communities. Nor are all customs comprehensively recorded in legislation or other written sources. Rule 58 of the Native Courts (Native Customary Laws) Rules 1995 is relevant in this regard. It recognises the inherent powers of the Native Courts in matters involving customary laws that are not expressly provided for in the Rules but are otherwise recognised under the customary law of the relevant native community. The provision leaves room for the court to deal with recognised customs that have not been expressly reduced to written rules (Native Courts (Native Customary Laws) Rules 1995, r. 58; Salleh, 2021).

This position also places considerable importance on those who possess knowledge of the relevant customs. The participation of Native Chiefs and persons familiar with local customary practices allows such knowledge to be brought into the adjudicative process. This is particularly relevant where a custom continues to be transmitted orally or through community practice rather than through written legal materials. At the same time, reliance on orally transmitted knowledge raises questions concerning how particular customs are identified, recorded and applied consistently. Hussin et al. (2021) and Salleh (2021) point to the importance of records and documentation in the administration and continued understanding of native law. The recording of Native Court decisions is therefore relevant not merely as an administrative matter but also to the preservation of customary legal knowledge. Decisions may provide a record of the customs considered by the courts, the circumstances in which they were applied and the manner in which particular disputes were resolved. Such records can assist later courts and researchers in understanding the application of native law. Nevertheless, documentation must be approached with some care. Customary law derives much of its character from the practices and understandings of particular communities, and recording a custom should not necessarily be treated as fixing that custom permanently in the form in which it was recorded. This point is especially important because preservation does not require customary law to remain unchanged. Social conditions within indigenous communities continue to develop, and customary practices operate within those changing circumstances. The role of the Native Courts is therefore not simply to preserve earlier formulations of custom, but to determine and apply relevant native law within the jurisdiction entrusted to them. Rena and Dahlan (2024) and Salleh et al. (2024) indicate that the continuing relevance of the Native Court system must be considered against changes affecting customary practices and the administration of native law.

The contribution of the Native Courts to preservation can thus be understood through their continued application and interpretation of customary law and through the institutional record created in the course of adjudication. These functions also reveal a broader difficulty. The preservation of customary law requires sufficient certainty for a court to identify and apply a relevant custom, while at the same time recognising that customary practices may vary between communities and may develop over time. How this balance is maintained is closely connected with the legal and institutional challenges presently faced by the Native Court system.

### **Challenges and Measures for Strengthening the Native Court System**

Notwithstanding their statutory recognition, the Native Courts face a number of difficulties in the administration and preservation of indigenous customary law. Some arise from the nature of customary law itself, while others concern jurisdiction, institutional arrangements and changes within native communities. These issues are interconnected and have implications for the manner in which customary law is identified and applied in practice (Hussin et al., 2021; Rena & Dahlan, 2024; Salleh, 2020; Salleh et al., 2024).



One of the more difficult issues concerns the identification and documentation of customary law. Sabah is home to different indigenous communities whose customary practices may vary according to community and locality. In addition, some customs continue to be maintained through oral knowledge and community practice rather than through formal written sources. This can present practical difficulties where a court is required to ascertain the existence, content or application of a particular custom (Rena & Dahlan, 2024; Salleh, 2021). The issue is therefore not simply an absence of written law, but how sufficient certainty can be achieved without disregarding the community-based character of customary law. More systematic documentation of customary laws and Native Court decisions may assist in addressing this difficulty. Written records can provide useful reference points for Native Court personnel, practitioners and communities, particularly where similar questions arise in subsequent proceedings. Documentation, however, should not be treated as a complete codification of customary law. A recorded custom reflects the context in which it was identified and applied, whereas customary practices may differ between communities and may change over time. Any effort to improve documentation should therefore preserve sufficient scope for the relevant community context to be considered. Jurisdiction presents a different set of concerns. Section 9 of the Native Courts Enactment 1992 excludes matters that fall within the jurisdiction of the Civil Courts or Syariah Courts. The statutory boundary appears clear as a matter of principle, but difficulties may arise where a dispute involving native law or custom also contains issues governed by another legal system. In such circumstances, determining the appropriate forum may itself become an important preliminary question (Native Courts Enactment 1992, s. 9; Salleh et al., 2024). Clearer procedural guidance may assist parties and court personnel in identifying the appropriate forum while maintaining the jurisdictional limits imposed by the Enactment.

Institutional capacity is another concern identified in the existing literature. Hussin et al. (2021), in their study of the Native Courts in Kudat and Matunggong, reported differences in administrative arrangements as well as difficulties involving support personnel and the preservation of court records. Salleh (2020) similarly examined administrative issues affecting the Native Court system in Sabah. These concerns are significant because the effective administration of customary law depends not only upon the existence of statutory jurisdiction but also upon the institutional capacity to exercise that jurisdiction. Improvements in this area may require attention to training, administrative support and record management. Training for Native Court personnel is particularly relevant to matters of customary law, evidence and court procedure, while effective record management is necessary for maintaining reliable accounts of proceedings and decisions. The development of appropriate digital record-keeping may also assist in preserving Native Court records and making them more accessible for institutional reference. Such measures should, however, complement rather than displace the customary knowledge held within native communities. A further concern relates to the transmission of customary knowledge. Changes in patterns of education, migration, economic activity and community life may affect the manner in which customary knowledge passes from one generation to another (Salleh et al., 2019; Salleh, 2021). This is particularly relevant where knowledge of a custom has traditionally depended upon oral transmission and participation in community practices. A decline in such transmission may eventually make it more difficult to establish the content and continuing acceptance of particular customs.

The Native Courts cannot, by themselves, address all of the social changes affecting the transmission of customary knowledge. They can nevertheless contribute to its preservation through the recording of decisions and the continued involvement of persons with knowledge of the customs concerned. Community participation remains important in this process because the authority and content of customary law cannot be understood solely through institutional records. Measures directed at preservation should therefore involve both the Native Court system and the communities from which the relevant customs originate. These challenges suggest that strengthening the Native Court system is not simply a matter of expanding its jurisdiction or reducing customary law to a comprehensive written code. The more immediate concern is to improve the conditions under which existing jurisdiction is exercised. Better documentation, clearer procedural guidance, adequate institutional support and continued engagement with customary knowledge may improve the administration of native law while retaining its connection with the communities in which it operates. The question is ultimately one of maintaining sufficient legal and administrative certainty without removing the contextual character that distinguishes customary law from ordinary statutory rules.

## Conclusion

The Native Courts continue to provide an important legal forum for the administration of indigenous customary law in Sabah. Their position under the Native Courts Enactment 1992 enables native law and custom to be applied within a recognised judicial structure. Their contribution, however, extends beyond the determination of individual disputes. Through the hearing of customary matters, the interpretation of relevant customs and the recording of decisions, the Native Courts also contribute to the continued presence of customary law within Sabah's legal system. The discussion in this paper shows that the preservation of customary law cannot depend on statutory recognition alone. Difficulties in identifying and documenting particular customs, questions concerning jurisdictional boundaries, limitations in institutional and administrative capacity, and changes in the transmission of customary knowledge continue to affect the



operation of the Native Court system. These issues are particularly significant because customary law derives its content from the practices of different native communities and cannot always be approached in the same manner as written statutory rules. Any effort to strengthen the Native Courts must therefore take account of both their institutional requirements and the character of the law they administer. Better documentation and record management may provide greater consistency and preserve valuable customary legal knowledge, while clearer procedural guidance and appropriate training may assist the courts in exercising their existing jurisdiction. At the same time, these measures should not detach customary law from the communities in which it has developed. Community knowledge and participation remain relevant to the identification and continued understanding of customary practices. The future role of the Native Courts consequently involves a continuing balance between legal certainty and the community-based character of customary law. Preservation should not require customary practices to be treated as fixed or incapable of development. Rather, the Native Court system should remain capable of administering native law within its statutory jurisdiction while recognising the social context from which that law derives. Maintaining this balance is important if the Native Courts are to continue serving both as institutions for the administration of native justice and as part of the legal framework through which Sabah's indigenous customary law is preserved.

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