CHAPTER I

ORIGIN AND DEVELOPMENT OF THE NATIVE COURTS IN SABAH

Native customary law is the basic law of the land. In Sabah therefore, apart from the body of Ordinances, subsidiary legislation and the common law of England, the customary law of Sabah also applies. By the Application of Laws Ordinance 1951, it is stated that, except where provisions have been or may be made by written law of the Colony, the common law of England, the doctrine of equity and the statutes of general application, as administered or in force in England at the commencement of the Ordinance, that is December 1951, shall be in force in the Colony. It is provided however, that they shall only be in force in so far as the circumstances of the Colony and its inhabitants permits and subject to such qualification as local circumstances and native customs render necessary. The Civil Law Act 1956, repeals the whole of the Application of Law Ordinance so far as it relates to any matter in the Federal List. Native Law is in the State's list and as such remains untouched. In Sabah then apart from the Ordinary Civil Court there is a special court called the Native Courts. Breaches of Native Law and customs are tried by the Native Courts.

Historically, the term native court (mahkamah anak negeri) is the creation of the British. The natives had their own system of settling disputes among themselves. Disputes between natives were

normally brought before a council comprised of elders with the headman as the head of the council. They will normally settle the dispute according to native law and custom. Thus when the British came they found that the natives had their own concept of administration of justice which is very different from theirs. As in other parts of the world, the British when they came to Sabah began to introduce their own laws. However, since the Native Customary Law is the basic law of the land, they could not totally disregard it. As such, for administrative purposes the "Council of Elders" of the natives was converted into a court system functioning as the ordinary British court system. The constitution of the Native Court was drafted.

The earliest written record which lead to a separate system of native law for the natives is evidenced by a letter from Overbeck[1] to Pryer[2] on 10th December 1873.[3] He wrote, "It will be your duty to cultivate friendly relations with the native authorities as well as

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[1]Overbeck was an Austrian consul who with Dent made a monetary payment to the Sultans of Brunei and Sulu in exchange of North Borneo territories. Sandakan, on which Pryer, one of Overbeck's men were to be Resident, was obtained through one of these payments following a treaty.

[2]Resident of the East Coast Residency.

[3]Overbeck to Pryer, 10th February 1878, K.G. Tregonning, "A History of Sabah 1881 - 1963," University of Malaya Press 1965, page 103.

with the people under your control and any change you may introduce shall be effected gradually and with due regard to the existing customs and habits of the people. Concillate them and secure their good will." Dent[4] too was alive to the importance of native administration and seeking a governor for the territory he wrote, "the prejudice of the natives will have to be respected in every way and where they lay will perhaps be ascertained best from a man who knows the customs and languages of these parts."

The Europeans on arrival found that it was the custom of the natives to acknowledge the authority of the headman and chief. With the arrival of Treacher and the beginning of a permanent and extensive system of Government, the support of the native authority was further recognised by the payment to the headman of a small salary in most cases $5 a month. This support for local institution was not given because of any belief in the theory of indirect rule. The young governors and the Court of Directors were faced with the task of keeping law and order in the large territory with an inadequate European staff. It was cheaper and it appeared satisfactory in its results to pay the Native Chiefs. It was a practical step aimed at overcoming a local difficulty and not the realization of any theory on native administration.[5]

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[4] A. Dent to E. Dent, 18th February 1878.

[5] Page 105, Tregonning.

The major contribution by the Chiefs and Headman to the administration of the country was made through the native courts. From the beginning, active participation by the Chiefs in the deliberation of justice had been a feature of the Government. In 1891 the Village Administration Ordinance, empowered the headman to try all cases that involve natives only except where the crime was murder, kidnapping or a major robbery. It stipulated that there should be in most cases a minimum of three headman on the bench and the case should be heard in the presence of both accused and prosecution. The decision was to be in accordance with local custom and although no written record of the case need be kept, a short summary should be given to the District Officer. Often in the early days, this was a verbal message.

The authority of the Chiefs were such that by 1910 the use of the police to fetch the accused to their court had long fallen into disuse. Their wisdom in deciding cases was at times reminiscent of a Soloman . At Kota Belud, long the home of Bajau cattle thieves, six unimpeachable witness swore in the Native Court in August 1912 that a young buffalo belonged to the plaintiff. Six equally unimpeachable witness swore that it was owned by the defendant. The presiding chief ordered them each to bring out what they said was the mother of the calf. The two animals were tethered, the calf released in between. She went at once to her mother. The plaintiff won back his buffalo.[6]

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[6] Page 116 - 117 Tregonning.

In 1913, this whole system received the delayed blessings of the law. Section 10 of the Village Administration Proclamation[7] decreed that a Native Court should be constituted in every district. On it were to sit those people who had been sitting on it for the previous thirty years and Chiefs and Headman, and they were to try all offences arising from the breach in the laws and customs (religious, sexual or general) of the natives of the district. In the case of a sexual offence the courts were to be guided by the customs of the woman's race. The right of appeal lay not through a western trained judicial branch of the law but with the District Officer and Resident who were in far closer touch with and more sympathetic to local customs.

No interferance was made by the Government and the Chiefs rarely needed to ask for support. Some 2,000 cases, 2/3 of them on the West Coast were heard annually from 1920 onwards. This figure was approximately the same as the number of cases heard by the Magistrate and Sessions Court combined.[8]

The administration of the natives then was largely carried out through the medium of their own Chiefs and Headman and by their own institution, the Village Court. From the First World War (Great War) period, however some use was made by the Government of the more advanced natives in posts of direct administrative responsibility and

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[7]This Proclamation incorporated Proclamation III (1891), XIV (1903) III 1904 and Notification 124 (1898) and 55 (1904).

[8]Page 117, Tregenning.

these were known as Deputy Assistant District Officers, DADOs. The first such appointment was that of Pengeran Osman to the control of the Labuk and Sugut Rivers, a large sparsely inhabited district untouched by European enterprise. He reported direct to the Resident. By 1923, there were two other purely native areas being administrated by a DADO, the Kinabatangan River and Persiangan. A Chinese DADO was stationed at Kudat. The British found that the employment of Asiatics as DADOs has been successful with limitations, the officers selected being clerks with a long residence in their district and with a powerful influence over the people.

By 1938, there were natives in administrative control of the Labuk and Sugut districts, the Kinabatangan River and Persiangan, while other DADOs were at Papar and Tenam. By 1940 the Government was allocating them $11,520 while Native Chiefs were receiving $23,499.[9]

The constitution of Native Courts was revised by the Native Courts Ordinance 1953. Subject to the Governor's approval, a Resident may establish a Native Court and define the areas of its jurisdiction. The members of the court are the Native Chiefs resident in the area and such headman and imams from the area as the Resident may authorise. The Resident for good reasons shown may empower any Native Chief or Headman to adjudicate in any Native Court. There can be no adjudication unless at least two members are present. Decision is by

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[9] Page 119, Tregonning.

majority vote and if voting is equal the suit or prosecution fails. In any case arising from the breach of native law or custom one member of the court must belong to the race whose law or custom is alleged to have been broken. Native Courts having jurisdiction in cases arising from the breach of Native or Muslim law and custom where all the parties are all Muslims and all natives. If the sanction of the District Officer is obtained, the court has jurisdiction where only one party is a native, where the case arises from a breach of native, religious, matrimonial or sexual law or custom. A native court also has jurisdiction if it has been conferred by any other Ordinance. As punishment, a native court may inflict a fine, or imprisonment or both or any customary punishment not repugnant to natural justice and humanity, for example, the death by stoning of those guilty of incest. The punishment must also be proportionate to the offence. The proceedings of the Courts are subject to scrutiny and their sentences to confirmation by the District Officer. Appeals also lie to him and from him to the Resident and finally to the Governor. A defendant may apply to the Resident for the removal of the proceedings against him from the native court and the Resident may direct that the case be heard in the High Court.

The institution of native administration in North Borneo stands today where they stood when the Chartered Company[10] ceased

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[10] The British North Borneo (Chartered) Company was formed in 1881 to administer the territory of North Borneo, over which it had acquired soverign rights. For sixty years, (1881-1941) the Chartered Company governed the State, surrendering its sovereignity only in 1946. North Borneo including Labuan became a Crown Colony on 15th July 1946.

its administration in 1941.

The Native Courts are governed by the Native Courts Ordinance which in itself is an Ordinance to unify the law relating to the Constitution of the Native Courts.

In the Verbatim Report of the Legislative Meeting held at Jesselton in the Council Chambers on Saturday, 31st January 1953, Mr. R.G.P.N. Combe, Resident West Coast rose to move the second reading of the Native Court Bill and said: "The Bill contains nothing new of importance but is a redraft and a rearrangement of the relevant sections of the Mainland Native Administration Ordinance 1937, which was copied for Labuan in the Native Courts Labuan Ordinance 1950. In fact there is quite a lot of re-arrangement but there are only three new clauses. Clause 10 contains a new provision and provides that assessors may be called by any officer in his appellate jurisdiction to aid him in coming to any decisions. Clause 15 is new and it empowers the Resident, on application from the defendant in a case to order proceedings in the Native Court to be stopped for retrail in a High Court or a Magistrate Court having jurisdiction. The only other new clause is Clause 17 which is a normal provision for indemnifying officers acting judicially or officially."[11]

The Native Administration Ordinance in 1937 replaced the Village Administration Ordinance 1913 which no longer represented the existing practice, incorporated the provisions of the Mohamedan Customs Ordinance 1914 and added provision(a) to enable Native Authorities to be declared and given such powers as the Governor may think fit (b) to amplify the powers of the chiefs and headman (c) to set out more clearly the powers

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[11] Colony of North Borneo Government Gazette 1953.

of the Native Courts and (d) to enable the jurisdiction of the Native Courts to be extended.

In a memorandum dated 3rd October 1952,[12] His Excellency, the Governor Ralph Hone suggested for the consideration of the Residents that it is most important that the jurisdiction of the Native Courts should be limited to the matter referred to in Section 17 (1) of the Native Administration Ordinance, Number 2 of 1937, this is to say

(1) cases arising from the breach of Native Law or custom in which all the parties are natives;

(2) cases arising from the breach of Native Law or custom, religious, matrimonial or sexual if the sanction of the District Officer has been obtained to the institution of proceedings, where one party is a native;

(3) where two members of the Courts are Mohammedans cases arising from the breach of Mohamedan law and customs in which all the parties are Mohamedans;

(4) other cases if jurisdiction is conferred on the Native Courts by the Native Administration or any other Ordinance.

It was His Excellency's opinion that a mistake has been made in Africa in conferring upon Native Courts paralled jurisdiction with the subordinate courts in civil and criminal cases.

It was suggested that Section 19 of the Native Administration Ordinance which provides that the Governor may direct that powers equivalent

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[12] Recorded in the Secretariate North Borneo File Number 402/6/1 I.

to any of the Civil and Criminal powers of Magistrate Court of the first, second or third class shall be exercised by any particular Native Court in proceedings in which all parties are natives should be committed from the Unifying Ordinance which was contemplated.[13]

His Excellency also suggested for the consideration of the Residents that the provisions for appeals as at present laid out in Section 20(iii) of the Native Administration Ordinance by which appeal lies from a Native Court to the District Officer and from him to the Resident, with a final appeal to the Governor should be amended to provide that the only further appeal from the District Officer should be to a properly constituted appellate court which might comprise a judge of the High Court as President, the Resident of the area and a Grade I Chief nominated by the Resident.

The Native Court Bill states its objects and reasons as follows: Native Courts have been established in the mainland for many years and the law governing them is to be found in certain sections of the Native Administration Ordinance, 1937. That Ordinance dealt with several matters of which the parts relating to Native Administration in local areas were repealed by the Rural Government Ordinance 1951 and the remaining part which relates to Muslim Law and custom is now being enacted as a separate Ordinance. The Native Administration Ordinance 1937 has never been applied to Labuan but a Native Court was established for that part of the Colony by the Native Court (Labuan) Ordinance 1950. This Bill

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[13]The Unifying Ordinance is the Native Court Ordinance.

makes no alteration in principle in the present law but is designed to effect uniformity and to enable the repeal of the Native Administration Ordinance 1937, the title of which is now misleading and the provisions of which relating to Native Courts required minor amendment and re-arrangement.

By Section 19 of the Native Courts Ordinance 1953, section 16 to 30 and section 37 of the Native Administration Ordinance 1937 and the Native Court (Labuan) Ordinance were repealed.

The term native is generally defined in the Interpretation (Definition of Native) Ordinance as amended by the Interpretation (Defination of Native) (Amendment) Ordinance 1958. While that definition was correct for the general purpose of the law, it became apparent that it was too narrow for the purposes of Section 5 of the Native Court Ordinance. It was considered that Natives of certain neighbouring countries should be subject to the jurisdiction of the Native Courts.

Section 3 of the Native Courts (Amendment) Ordinance 1959 provided for an amendment of Section 5 of the principle Ordinance meaning the Native Courts Ordinance. Section 5 of the principle Ordinance is amended by inserting the following further sub-section to be numbered (4) at the end thereof:-

> (4) for the purposes of this section the word 'native' shall have the meaning assigned there to in the Interpretation (Definition of Native) Ordinance and shall further include any persons within North Borneo one at least of whose parents was a member of a people indigenous to Brunei, Sarawak and Federation of Malaya, Singapore, the Cocos-Keeling Islands, Indonesia or the Sulu Group of the Philippine Islands.

On 21st September 1961, the Governor of North Borneo assented to a further amendment to the Native Courts (Amendment) Ordinance 1961. The object of that amendment was to remove from the native courts jurisdiction in cases under Muslim law in which the parties are not natives. The courts will continue to have jurisdiction in cases arising from any breach of native law or custom in which all the parties are natives and will apply Muslim law in so far it is the native law or customs of the parties.

The following is an extract from the memorandum for the Executive Council on Native Affairs and Associated Bills. "It is desirable to work towards the eventual integration of different legal and particular judicial systems. Eventually everyone in North Borneo should be subject to the same law and the same courts. Those courts would of course take account of special customs where they are relevant to the issues before them and if necessary to hear expert evidence on them.

In principle, legislation should neither prevent a person from complying with his religious beliefs nor compel him to do so. Religious practices should not be enforced by law, but the law should allow an individual that practice if he wishes. But the observance of any of the many religious creeds in North Borneo should not be enforced by judicial penalties. Restrictions which have been imposed on a person's liberty in order to sustain native custom or religious tenets should not be retained any longer than is necessary to meet strong local feelings.

The Native Chiefs Conference held in November 1960 agreed that Islamic Law had, to varying degrees become part of Native Customary law

and that specific reference to Islamic law, other than Islamic marriage and divorce, should, so far as possible and so far as the Natives were concerned, be deleted from the law. It was also agreed that non-natives Muslims should no longer be subjected to native court jurisdiction any more than non natives. The conference wished, however, to retain the provision whereby Native Courts could exercise, subject to the consent of the District Officer in each case, jurisdiction over all non natives in cases arising from the breach of Native law or custom, religious, matrimonial or sexual, where one party is a native.

The removal of Muslim and Islamic law as such from the Native Court's jurisdiction calls for a review of the legal powers of an Imam. It was proposed that Imams should no longer be authorised to sit as members of Native Courts, though they could of course, still be called as expert witnesses. As it is unwise to enforce the observance of any religion through the courts and the Imams have not hitherto made use of the power given to them to make rules for the proper observance of public worship by Muslims, it was proposed to remove this provisions, so that, in future, the legal powers of Imams will be confined to the registration of Islamic marriage and divorce." The Bill was passed on 13th September 1961.

By the Administration of Muslim Law Enactment 1971, notwithstanding the provisions of any written law to the contrary a Native Court shall subject to subsection (2) have jurisdiction to try any offence under the Enactment or any rules made under it and to award the full punishment for any such offence. Sub-section (2) states that the trial shall be with the aid of two assessors who are Muslims. By the amendment of 2/74 to the Enactment, an appeal lies from any decision or judgement of a Native Court in exercising its powers under this section to a Board

of Appeal constituted by the Majlis.[14] An appeal shall lie: (1) as of right on any ground of appeal which involves a question of Muslim law alone; (2) with the leave of the Board of Appeal constituted hereunder on any ground of appeal which involves a question of fact alone or mixed law and fact or against a sentence of imprisonment or fine not less than one hundred dollars.[15]

The Syariah Courts have not been formally set up in Sabah. At the moment if one of the parties is a Muslim and the other a non Muslim, but both are natives, the matter is still settled by the Native Courts. However an official from the Majlis Ugama Islam will be an assessor to the trial. He advises the Native Chief. However, a different arrangement might be reached when the Syariah Court is set up.

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[14] Section 50(3). Majlis means Majlis Ugama Islam.

[15] Section 50(7)(a) and (b).