

CHAPTER VI

CONCLUSION

Native customary law is the basic law of the land in Sabah. By the Application of Law Ordinance 1951, English law as administered in England at the commencement of the Ordinance were in force subject to local circumstances and native customs.

The main reason why the Native Courts were set up were mainly due to the fact that with the limited European staff, the British had to release them from the burden of hearing cases from the natives. The Europeans on arrival found that it was the custom of the natives to acknowledge the authority of the headman and chiefs and so the custom was allowed to continue.

The Native Court Ordinance is an Ordinance to unify the law relating to the constitution of Native Courts. The Ordinance was enacted in 1953 and it has been amended from time to time.

In 1953, the Native Courts have the power to hear the following

- (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 the proceedings where one party is a native;

- (3) where two members of the Courts are Mohammedans, cases arising from the breach of Mohammedan law and customs in which all the parties are Mohammedans;
- (4) other cases if jurisdiction is conferred on the Native Courts by the Native Administration or any other Ordinance.

It should be noted that the term native is defined in the Interpretation (Definition of Native) Ordinance and while that definition was correct for the general purpose of the law, it was too narrow for the purposes of Section 5 of the Native Court Ordinance. So, for the purposes of Section 5, the word native shall also include any person within North Borneo one at least of whose parents was a member of a people indigenous to Brunei, Sarawak, the Federation of Malaya, Singapore, the Cocos-Keeling Islands, Indonesia or the Sulu group of the Philippine Islands.

In 1961, the Native Court Ordinance was amended and the amendment removed from the Native Court jurisdiction cases of 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 when all the parties are natives and will apply Muslim law so far as it is a native law or custom of the natives.

In Sabah now, cases involving Muslim law are heard by the Imam. All cases in which Muslims and natives are involved are heard by the Native Courts with an assessor from the Majlis Ugama Islam. Cases of Muslims breaching native law are heard by the native courts with an assessor from the same Majlis.

A certain amount of formality is maintained in the Native Court hearing similar to that of a Magistrate Court. However, unlike the defendant in the Magistrate Court, the defendant in the native court is usually encouraged to plead guilty. This is one highly unsatisfactory feature about a native court trial. The defendant is encouraged to answer yes or no and told that he might as well not try to be smart. This practice should be discontinued and the defendant be allowed to defend himself appropriately.

Another faulty thing is that cross examination is not allowed as of right but must be requested. However, the system of no cross examination at the appeal to the District Officer and in the Native Court of Appeal is in line with that of Civil Procedure and is applicable to each and every case so that there is no question of one person getting a better trial than the others. Also, other witnesses should not be present in the testimony of a fellow witness regardless of the nature of his testimony.

When a person is dissatisfied with the order of a Native Court, he or she may appeal to the District Officer within the period of appeal which is allowed by the Court. This period is usually fourteen days from the date of judgement. The appeal fee in this case is \$10, this appeal being from ^{the} Native Court to the District Officer. As a rule the District Officer upon receipt of an appeal will study the case docket and may then decide to do any of the following:-

- (1) uphold the judgement
- (2) quash the sentence, with due reasons being given
- (3) order a retrial by the Native Court
- (4) reduce or increase the penalty
- (5) conduct a retrial with the District Officer himself presiding.

If however, the appellant is still dissatisfied with the decision of the District Officer, he or she may further appeal to the Resident in which case the appeal fee is \$50. This appeal is not dealt with by the Resident but by the Native Court of Appeal with the Resident present. However, the Resident's approval need to be obtained before the case goes to the Native Court of Appeal. And he considers the following:-

- (1) the nature of the case
- (2) the customs involved
- (3) the nature of the sentence or judgement
- (4) the background of the offender.

As an illustration, Datu Hj. Bistari, Resident of the Kudat Residency said that he could not simply penalise a man to pay four buffaloes if his monthly income is only eighty ringgit with a large family to support. He has grounds to appeal even though the appeal is not against a customary punishment.

The jurisdiction of the Native Courts is limited to that stated in Section 5. It can hear cases arising from the breach of Native law

or custom when all the parties are natives and in 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. It can also hear other cases if jurisdiction is conferred on it by any other Ordinances.

The case of James Lee Kui Wah is of importance in that it held that where an act is at once an offence under the Penal Code and a breach of native law or custom it is the law that a person who commits an act contrary to the provisions of the Penal Code shall be punished under the Code and not otherwise. This case supports the opinion that the Sabah Native Court Ordinance is not as precise as is hoped in many respects. It should be conformed to that of the Sarawak Ordinance whereby Native Courts have no power to hear offences under the Penal Code.¹ It is hoped that the Native Chief Conference which aim to improve the system would look into this matter. Even though, at the moment, the problem is reduced in Kota Kinabalu by a system set up by the enterprising District Chief whereby the matter is referred to the Police Department or to the Legal Department as to whether the Native or Magistrate Court hears the case, it is not certain that this is done in other districts. Again, this system of enquiry will lead to a delay in the case being tried.

¹ Lee Hui Hoe C.J., Cases on Native Customary law in Sabah in his Preface.

The system of Native Courts go hand in hand with the institution of Native Chiefs. There are three types of natives chiefs, namely the Ketua Kampung, the Native Chief and the District Chief.

Native chiefs are appointed on the ground of competency. The Ketua Kampung is appointed with a strong recommendation from the Native Chiefs or District Chiefs. The District Officer will then add his comments. The Resident will endorse the recommendation and pass it on to the Rural Development Committee for approval and the Resident can reject the idea if he thinks that a Ketua Kampung is not yet necessary. The appointment of a Native Chief is based on merits, social standing and his basic knowledge of adat. The recommendation of the Resident is necessary too. The District Chief is appointed among the Senior Native Chiefs because of his vast experience in his work and knowledge of the customs. Another factor which is considered is the age of the candidates for all these posts. Too young a chief may lack the confidence of the people.

The present system of appointment of chiefs should continue as too many elections would confuse the people. Elections inevitably lead to ill feelings between the two factions. Such state of affairs should not be allowed in a kampung where it is important that everybody work as one. Life in a kampung is quite different from a town. In the kampungs people live as one big family and the peace that prevails can be disrupted by the election of chiefs.

Section 42 of the Rural Administration Ordinance states the duties of a headman or Native Chief. He should

- (1) communicate forthwith to the District Officer any information which he may obtain respecting**
 - (i) the presence of any person whom he may reasonably believe to be an escaped convict, proclaimed offender or notoriously bad character**
 - (ii) occurrence of any death of a sudden or suspicious character**
 - (iii) the commission of or attempt or intention to commit any offence**
 - (iv) any dissatisfaction, disturbance or outbreak of contagious or infectious disease**
- (2) assist generally the officers of the Government and of the Local Authority in the execution of their duties, and in particular in the preservation of peace, the prevention and punishment of crime, the detention and arrest of the offender and the prevention and suppression of disease and vice**
- (3) aid in the collection of revenue and money due to the Government and to the Local Authority as and when required by the Resident, District Officer or Local Authority**
- (4) generally assist all Government officers and all officers of the Local Authority in the execution of their duties**

- (5) keep such official records as may be directed by the District Officer
- (6) perform any other duties imposed on him by the Yang di-Pertua Negara for the good government or defence of Sabah.

The system of Native Courts and the institution of native chiefs in Sabah has maintained the peace and stability of the kampungs. Petty cases are heard by the Ketua Kampung. If he cannot settle it he will bring the matter to the Native Chief. The Native Chief will try to settle it outside the court. However, if the parties to the dispute are not satisfied then a case is set up for hearing. If the system of Native Courts were to stop, the District Officer will be the one who will have to deal with all these cases. This will have many disadvantages mainly because a District Officer is not well versed in the customs of all the races. He also has vast other duties and inevitably a back logged of cases will begin.

However, the Native Chiefs must have an in service training and especially on the method of recording the reasons for a case judgement and the customs that were breached. This is the main defect at the moment. The Native Chief should also try to keep themselves up with present views of social and moral standards. This will help them to be fair in cases involving the urban young who are inevitably influenced by Western culture and morals.

In 1958, a Native Chief Conference was held for the first time. Since then it was aimed at trying as far as possible to have a uniform system of native laws. In addition it also discussed the day to day role

of the Native Chiefs in the villages. The Conference also study the various native laws and try to discourage the continuance of laws which hamper economic development. The Native Chief Conference must be revitalised as improvements are still necessary. It should be held once in at least two years.

The Native Court system together with the institution of native chiefs are no doubt good. The system has proved useful all these years. The system must continue as it governs the way of life of the natives and maintains peace and stability in the kampung. But improvements are necessary to increase their efficiency.