BOOK REVIEWS

CASES ON NATIVE CUSTOMARY LAWS IN SABAH (1953–1972)

Compiled by Datuk Lee Hun Hoe
[Government Printing Office, Kota Kinabalu]

This collection of cases on Native Customary Law in Sabah compiled by the Honourable the Chief Justice, Borneo, Tan Sri Datuk Lee Hun Hoe, is indeed a valuable addition to the literature on Malaysian Law. It will be especially helpful to students in the Faculty of Law, University of Malaya, who offer customary law in their courses of study.

It was only in 1958 that the Native Courts Ordinance was amended to provide for appeals from the District Officer to be heard by the Native Court of Appeal comprised of a Judge of the Supreme Court as President, the Resident of the Residency in which the original proceedings took place and one Native Chief to be appointed *ad hoc* by the Government. Although Tan Sri Datuk Lee Hun Hoe has included the 1953 decision of the Court of Appeal in *Matusin bin Simbi* v. *Kawang binte Abdullah* (page 1), this was not an appeal from the Native Court. The other cases included are from and after 1958 and they raise the question as to how far the doctrine of *stare decisis* can be applied to the Native Courts. Are the decisions of the Native Court of Appeal binding on the Native Courts? In the case of *Tinggi bin Ungkok* v. *Tabar bin Lang* (page 35), the Native Court of Appeal held in 1962 that the Native Court had no jurisdiction to deal with the question of ownership of a buffalo and that the matter should be heard in the ordinary court. In *Binidict Tunal* v. *John Jomin* (page 90), a 1968 case, where the theft of a buffalo was alleged, the question of jurisdiction was raised on appeal but the Native Court of Appeal held that the "matter of jurisdiction should have been raised as early as possible" and it upheld the decision of the Native Court based on custom. In *Kalito bin Bantilan* v. *Chin Ah Hee* (page 158) the Native Court of Appeal in 1972 again held that the Native Court had no jurisdiction in the case of a dispute over the ownership of a buffalo, as no question of native custom or law was involved. Lee Hun Hoe J. (as he then was) said "It is a case clearly outside the jurisdiction of the Native Court and it should have been tried in the ordinary court of law. It is most important that every Native Court should be aware of its jurisdiction".

The question of *res judicata* again is raised in a number of cases. In

Dayang Minah binte Liudin v. *Sapiuddin bin Sarudin* (page 84), a 1968 case, judgment had been given in a succession case in favour of the respondent by the Native Court in 1948. In 1968 the appellant claimed to have rights over the land. The Native Court of Appeal held that the case should not have been allowed to come before the lower courts as the matter was *res judicata*. Lee Hun Hoe J. said:

"It is of utmost importance that the lower courts should see whether a case before them has been decided before. If it has been decided they should not hear the same matter again".

In *Ining binte Hassan* v. *Isin bin Hassan* (page 92) a 1969 case, the matter of succession had been decided in favour of the respondent by the Native Court in 1949. In 1968 the appellant claimed to be entitled to a half-share in the property. The Native Court held that the appellant was entitled to the half-share but on appeal, the District Officer held that the 1949 decision still stood and he questioned the decision of the Native Court. On further appeal, the Native Court of Appeal, held that the matter was *res judicata* and that the Native Court had no juridisction to alter the 1959 decision.

In *Hajat binte Saki* v. *Jaunah binte Sekah* (page 135) a 1971 case, it appeared that the respondent in 1954 had claimed certain land and she succeeded. In 1969 the appellant claimed the land as he said it belonged to his mother. The Native Court considered that since the *surat bicara* in 1954 was lost the Court would not know the reasons as to how the respondent was able to claim the *waris*. It held that according to Native Customs and Muslim Customs, the respondent had no right to succeed to the land and it ordered the land to be equally shared between the respondent and the appellant. This decision was set aside by the District Officer who decided that the Native Court was wrong to interfere with the earlier decision of the Native Court which had given judgment in favour of the respondent. The Native Court of Appeal dismissed the appeal from the District Officer. Lee Hun Hoe J. said:

"It is regretted that though the Native Court was aware of the decision of the Native Court in Case 29/54 it chose to overrule the earlier decision becuase it did not know the reasons behind the decision. Even if the earlier decision was wrong the Native Court has no jurisdiction to upset it".

Earlier he said: "It must be remembered that there was no appeal against the decision of the Native Court at any time after the decision was given. The decision must stand and cannot be questioned by another Native Court of equal standing. If one Native Court can disturb the decision of another Native Court of equal standing on land matters then there will be chaos, causing considerable upset to the Native Community in the State."

It would appear to be at least doubtful whether the doctrine of precedent or even the doctrine of *res judicata* can be applied in the customary law. The aim of customary law is not only to settle the dispute between the parties, but to try and arrive at a total settlement which will bring peace and harmony to the community. As stated in the customary saying:—

"Buruk dibaiki, kusut diselesaikan
Kusut benang, cari ujong dan pangkal
Kusut rambut, ambil minyak dan sikat
Tidak ada keruh yang tidak jernih
Tidak ada kusut yang tidak selesai."

In the administration of justice under the custom one cannot rely on formal rules like precedent and *res judicata* to prevent a settlement of the dispute, which brings disharmony to the community. However once we have a system of formal courts superimposed on the customary methods of adjudication and settlement, it is hard to see how we can avoid following the rules of precedent and *res judicata.* For this a system of reports of cases is essential and as the system of precedent seems to affect only the lower Native Court (the Native Court of Appeal presumably not being bound by its own decision) it is important that the judgments be given in, or at least translated into, the Native language.

Another more serious matter is the one raised in the case of *Re James Lee Kui Wah* (page 37). In that case the Native Court, sitting at Tawau, convicted James Lee of attempts to rape several immigrant Indonesian women contrary to secton 5 of the Native Court Ordinance and sentenced him to three months imprisonment and a fine of $100/-. He applied to the High Court for an order of *certiorari* for the purpose of quashing the conviction for want of jurisdiction. Ainley C.J. held that the accused, who was not a native, could not be convicted by the Native Customary Court for an offence punishable under the Penal Code which is also a breach of customary law. He said that the accused could not be tried by a court which has no jurisdiction to administer criminal justice under the Penal Code.

As the Honourable Justice Tan Sri Datuk Lee Hun Hoe says in his preface "The Sabah Native Court Ordinance (Cap. 86) is not as precise as is hoped in many respects. It is not impossible 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 same native system or personal law. The difficulty arises where one of the parties is a non-native and the Native Court decides to assume jurisdiction. In Sarawak it is expressly laid down

that Native Courts have no power to hear offences under the Penal Code. There is no similar provision in Sabah."

In a recent case of *Harley* v. *Onong binte Ah Hing* (K.K. Native Court of Appeal No. 1 of 1973) it was held that where only one party is a native the sanction of the District Officer must be obtained when proceedings are instituted, that is, when the summons is issued against the defendant.

The question of whether the Native Customary Law is the law of the land on the analogy of the Muslim law in the Malay States (see *Ramah* v. *Laton* (1927) 6 F.M.S.L.R. 128) has not been raised in Sabah. The Courts both in Sabah and in Sarawak appear to have allowed the evidence of experts on the native custom or even on Muslim law and custom to be given. Thus in *Matusin bin Simbi* v. *Kawang binti Abdullah* (page 1) the court heard the evidence of two senior Malay Native officers on the administration of the Hukum Syarak in Sarawak. In *Re Application of Sipang b. Logong* (page 18) the District Officer took the advice of the District Imam of Kota Belud. As however the Native Courts and the Native Court of Appeal have the advantage of having assessors who are knowledgeable in the customary law, it would appear to be unnecessary to have such expert evidence. More often the President of the Court, as in *Asang bin Lintubun* v. *Yatun bin Datu Bidin* (page 76) would accept the views of the experienced members of the Court sitting with him.

Among the native races in Sabah are the Muslim Malays, Bajaus, Ilanuns, Suluks and others. One criticism of the collection of cases is that it is not made clear in every case whether the parties are Muslims or not. In reading the cases it is important to note the effect of the amendments to the Native Courts Ordinance and the Muslims Ordinance in 1961, the effect of which as stated in the case of *Haji Abdullah bin Damar* v. *Rupah binte Inal* (page 65) is that "other than in the case of wills made according to Islamic law to which the provisions of the Wills Ordinance apply, the law to be applied by the Native Court is Native law and custom of the district and that Muslim law, as such, is not applied, unless it forms part of Native law and custom. The Native Court has no jurisdiction in cases which arise from breach of Muslim law and custom." In that case, the Native Court had made an order for the distribution of *pencarian* property and on appeal it was argued that the Native Court was wrong as it did not follow Muslim law exclusively. The appeal was dismissed, the Native Court of Appeal holding that the land titles in dispute were all clearly obtained during coverture and as such were properly *pencarian* and were properly distributed.

In the case of *Tubong binti Runggan* v. *Lunkoyan binti Gungkah* (page 74) the facts were that the appellant's husband died intestate having certain *sepencarian* land. He left his surviving widow and six children. The District Officer had divided the property according to custom, that is one

third share to the widow and the remaining two shares to the heirs of the deceased, 4/27 share to each male child and 2/27 share to each female child. This was upheld by the Native Court of Appeal.

The Muslim law of inheritance in Sabah is applied subject to section 7 of the Civil Law Ordinance, 1938 which enacts that adopted children are to be treated as legitimate children (see *Matusin bin Simbi* v. *Kawang binti Abdullah* (page 1).

The Wills Ordinance of Sabah (as amended in 1961) provides that nothing in the Ordinance shall enable any native to dispose of his property by will in a manner contrary to any law or custom having the force of law applicable to him at the time of his death. In *Mohamed Arshad bin Rabim* v. *Rimboi binte Ujob* (page 48) however a disposition of *pencarian* land by a woman was held to be valid. Smith J. giving the judgment of the Native Court of Appeal said: "It is clear that the property was *pencarian* property and that Jabidah was at liberty to dispose of these two pieces of land in the manner which was clearly indicated in the will."

In a recent unreported judgement, *Awang Bakar bin Awang Dewa* v. *Dayang Jakian binte Awang Ismail* (K.K. Native Court of Appeal No. NCA/W/3 of 1974) it was held that it is incumbent on the Native Court to consider the question whether the bequests in the will are in accord with or in conflict with native law or custom or Muslim law.

Unlike the position in Sarawak where it has been held that questions of inheritance do not fall within any of the matters which the Native Courts are competent to try and therefore such matters should be referred to the ordinary courts (*Mandi* v. *Tima* (1950) SCR 3), in Sabah the administration of Native and Small Estates Ordinance provides that where an application for distribution is made to the Collector of Land Revenue, he can refer the application to the Native Court, unless he is of the opinion that the estate is of such magnitude that it should be sent to the High Court. Thus we find that the Native Courts in Sabah do deal with cases of distribution of property. The Ordinance only applies to native estates and requires the Native Court to make a distribution order having regard to the Wills Ordinance and the law or custom having the force of law applicable to the deceased.

In the case of *Asang bin Lintuhun* v. *Yatun bin Datu Bidin* (page 76) the facts were that a girl, Riyaan informed her father the respondent that the appellant had sexual intercourse with her. As a result respondent approached appellant's father and they agreed to an engagement for their children despite the appellant's disagreement. The Native Court decided that the appellant must marry Riyaan and pay the dowry and this decision was upheld by the District Officer. On appeal however, the Native Court of Appeal held that the order must be set aside as it was contrary to native custom and Muslim law to force a man to marry against his will. Harley J. strangely enough referred to Syed Ameer Ali's Mohamedan law as

authority for the statement that according to Muslim law the consent of an adult person is necessary to the validity of the marriage but he also relied on the advice of the other two members of the Court who were of the opinion that it is not the Native custom to force children to marry against their consent. We are not told however whether any other punishment under the custom was imposed on the appellant.

This case was followed in the recent unreported case of *Ahmad bin Sapalu* v. *Jemediah binte Asmaul* (K.K. Native Court of Appeal No. 12 of 1974) where the Native Court of Appeal set aside the order of the Native Court of Papar requiring the appellant to marry the respondent or on failure to do so to go to prison. In that case however the order of the Native Court that the appellant should pay a fine of $150.00 was confirmed and the Native Court of Appeal also ordered the appellant to pay the respondent *berian* of $100.00.

In the case of *Re Sipang bin Logong* (page 18), the Native Court of Appeal seems to have ignored the Muslim law in allowing a man to marry his step-daughter after he was divorced from the mother of the girl. The headnote of the case "that once he was divorced from his step-daughter's mother according to Muslim law there would be no obstacle to prevent him marrying the step daughter" is with respect not correct. The Native Court would appear rightly or wrongly to have applied the native custom and allowed the marriage "for the purpose of legitimizing the child". Smith J. in fact said:

> "It should be made clear that Sipang did not ask that the parties should be allowed to marry in the ordinary sense of the word, that is to live together as man and wife. He asked that they should be permitted to marry merely for the purpose of giving a status to the child that was born as the result of the union."

The book is well-printed and is a pleasure to read. There is one serious mistake at page 66 where in dealing with the amendments to the Administration of Native and Small Estates Ordinance it is stated that certain words were added to the definition of "native estate". In fact the words referred to were deleted from the definition.

We must all be grateful to the Honourable the Chief Justice Borneo for this collection of cases on the native customary law in Sabah. We hope that he will continue his interest in the native customary law and in time give us a collection of cases on the native customary law in Sarawak.

Professor Ahmad Ibrahim

STUDIES IN EARLY HADITH LITERATURE (AND THE HISTORY OF ITS CODIFICATION) TOGETHER WITH A CRITICAL EDITION OF SOME EARLY TEXTS

by Mohammad Mustafa A'zmi,
[Beirut 1968, XX + 348 + 164 pages of Arabic Text
Price £5.50.]

This book is based on the thesis submitted to the University of Cambridge, England in 1967. The late Professor A.J. Arberry was so much impressed by it that he says: "it is in my opinion one of the most exciting and original investigations in this field of modern times."

Hadith Literature is something unique in the religious and historical history of the world. It concerns what a single individual, the founder of the world's latest religion said, did or tactitly approved among his disciples – a biography, if one likes, by first hand witnesses – yet so rich and so enormous that volumes of thousands of pages contain it and yet one must confess that the material is far from being exhausted and that these volumes represent but a selection of the data. It concerns both private and even conjugal life and the public life of a person who founded a religion (and saw at least half a million converts before he breathed his last) and founded a state in a place where none had ever existed, beginning with, a part of a tiny town just a few villages and extending over three millions of square kilometers, when he was recalled to his Lord, ten years later. In the "conquest" of these vast lands was not shed the blood in the battle-fields, of even two individuals of the enemy side every month at an average, in the course of ten years, the Muslim losses being much less! He inaugurated a new legal system which cedes to none other, even after 14 centuries of its existence in a rapidly changing world. .

No other religion, no other civilization, past or present, has produced such an enormous material on the biography of a single individual. According to a classical Muslim writer, the number of those companions of the Prophet who have transmitted at least one single report on the master – and there are among them who have narrated as much as ten thousand reports – is more than one hundred thousand.

It began, of course, with the companions of the Prophet, first hand witnesses, and has been preserved from generation to generation with a care that is unparalleled in the history of human science, even up to our