ADMINISTRATION OF NATIVE COURTS AND ENFORCEMENT OF NATIVE CUSTOMARY LAWS IN SARAWAK

I. Introduction

> The Native Courts are purely a creature of statute, viz the Native Courts Ordinance (Cap. 43); Their jurisdiction is clearly defined by the legislature and the powers of the courts are strictly limited... The Native Courts including the District Native Court are statutory courts established not by the Federal law but by Sarawak State law. They administer a system of laws entirely different from that of the High Court and the Subordinate Courts in Sarawak.[1]

Native Courts are subordinate courts in East Malaysia and peculiar to the states of Sabah and Sarawak. They are courts of special jurisdiction and exercise jurisdiction over matters affecting native customary laws (*adat*) where parties are natives or at least one of the parties is a native. They have jurisdiction over certain civil cases and also minor criminal cases.

The main function of Native Courts in Sarawak is to administer the native courts system and to enforce native customs by settling cases under its jurisdiction as stipulated in the *Native Courts Ordi-*

[1]The decision given by the Honorable Seah J in the case of *Ongkong ak Salleh* v *David Panggau ak Sandin and Anor*, [1983] 1 MLJ 419 spelt out the unique position and jurisdiction of Native Courts. The District Native Court is not a court subordinate to the High Court and the High Court does not exercise supervisory power over it. See Lee Mei Pheng, *General Principles of Malaysian Law* (Fajar Bakti 1997) p. 55-56.

nance 1992. The objective is to maintain order, unity and harmony in native communities in Sarawak.[2]

The history of Native Courts and the enforcement of Native Customary Laws form an integral part of the history of Sarawak. When James Brooke first ruled Sarawak in 1841, there were already in existence well established systems of unwritten native customary laws that he could conveniently recognise and exploit to his advantage to strengthen his regime. The respect for and recognition of these customary laws removed what could have been a major source of confrontation with the native population. The Brookes relied a great deal on customs as sources of Sarawak laws especially during the pacification period of their administration. They started to modify the system only upon achieving comparative stability of their rule in the 1860's.

This was further entrenched by succeeding Rajahs, especially by Sir Charles Brooke. An administrative machinery based on the principle of respect for customs of native inhabitants was put in place which provided for frequent consultations with native chiefs. However, some aspects of the '*adat*' which were considered repugnant to the English common law were gradually removed and declared illegal,[3] when Sarawak became a British colony. The colonial government inherited this system of 'native judiciary'. And as a major condition of Iban support to cession in 1946,[4] the government committed to uphold native customary laws.

By the time Sarawak joined Malaysia in 1963, the Native Court system had long been an integral part of the state legal system. Under the Federal Constitution, native courts and the enforcement of native customary laws remain as state matters to be regulated by state laws. Currently, Native Courts are constituted under the *Native Courts Ordinance* 1992, a state law enacted by the state legislature of Sarawak.

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[2]The jurisdiction of Native Courts is defined under s.5 of the *Native Courts Ordinance* 1992.

[3]The Iban customs of headhunting, retaliatory wars, unjustified homicide, trials by ordeals and slavery were abolished by the Brookes.

[4]The Ibans of Sarawak supported cession on condition that the colonial government would continue to uphold *Adat Lama* (Ancient Laws) or customary laws. This condition was guaranteed by Rajah Charles Vyner Brooke at the Supreme Council meeting on 24.4.1946.

It defines the constitution, jurisdiction and powers of the court. Hence, the Native Courts are not under the supervision as the High Court of Sabah and Sarawak nor do they come under the same meaning of the expression 'subordinate'[5] as defined in the *Subordinate Courts Act* 1948,[6] being that they are courts of special jurisdiction.

The Native Courts are therefore created out of a principle of respect and recognition and the need to accommodate the existing peculiar customs of the native inhabitants of Sarawak within the state legal system. Such recognition was guided by the consideration of natural justice, and the prevention of oppression if alien systems were applied which were not modified to a local system. A. B. Ward reported that the previous Rajah (Sir Charles Brooke) used to say:

> There was nothing more simple than to impose a code of western law on submissive natives ... but for what purpose ... For hundreds of years we have been devising, elaborating, and amending our law, so that the most intelligent person has to spend large sums of money to hire professionals to unravel its intricacies. If we are puzzled, an untutored native is simply bewildered by them.[7]

He further commented:

> Sarawak is the home of much justice and little law.[8]

The above statements reflect the Brookes' respect, appreciation and recognition of the Dayak Laws and their legal systems, a guiding principle perpetuated by subsequent governments. This was clearly the

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[5]Refers to lower courts established under the *Subordinate Courts Act* 1948, a federal legislation. Such courts are Small Cases courts, session court and *Penghulu* courts (only for Semenanjung Malaysia). These courts are under the supervision of the High Court. A Native Court is constituted under the *Native Courts Ordinance* 1992 that is state law and hence not under the supervision of the High Court.

[6]Extended to Sarawak with effect from 1st June 1981 (*Extension Subordinate Courts Act Order* 1980).

[7]A. B. Ward, *Rajah's Servant* (Department of Asian Studies, Cornell University, Ithaca, New York, 1966): p. 202.

[8]*Ibid*, p. 203.

official philosophy starting from and throughout the era of the Brooke Regime, with selective modifications which were maintained during the colonial period and continued to be upheld in the post independence era. A series of orders, and legislation were promulgated and passed to protect and perpetuate this special court system. As such, the native court system has mantained its special place in the hierarchy of the courts.[9]

II. Definition of 'Native' and 'Customary Laws'

As the core business of the Native Courts is the just enforcement of native customary laws among people who are subject to the native system of personal law, it is necessary to define 'native', and 'customary laws' to understand, the jurisdiction of Native Courts.

'Native' means a citizen of Malaysia of any race which is now considered to be indigenous to Sarawak as set out in the schedule of races stipulated in the schedule to s. 3 of the Interpretation Ordinance 1958.[10] They include the Bukitans, Bisayahs, Dusuns, Dayaks (Sea), Dayaks (Land), Kadayans, Kelabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns, Ukits, and any admixture of the above with each other.

The customary laws of natives as defined above are subject matters that fall within the jurisdiction of the Native Courts. It must be borne in mind that the customs of the Muslim natives fall within the ambit of the Syariah Court as such. The native customary laws dealt with in this paper, refer to those of the non-Muslim natives generally refered to as the Dayaks.

In view of the numerous groups, this article will not delve into all their laws in detail, but rather attempt to provide an overview of the definition, concept, primary function and enforcement, aspects which

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[9]For the position of the Native Courts in the hierarchy of courts in Malaysia refer to Appendix A. See also Wu Min Aun, *An Introduction to the Malaysia Legal System* (Educational Books (Asia) Ltd. 1982): p 119.

[10](Cap. 1) 1958.

are common to all native customary laws in Sarawak. It is inevitable however that frequent references would be made to Iban customary laws because the Ibans constitute the biggest native group comprising 30% of the population of Sarawak. There is also more information available on the Iban customary law system than any other native group.

'Customary laws' also known as the *adat* refer to a custom or body of customs to which the law of Sarawak gives effect.[11] It can be defined as 'customs usages and practices that are sufficiently fixed and settled over a substantial area, known, recognised and deemed obligatory'.[12] A.J.N. Richards defined *adat* as 'a way of life, basic value, culture, accepted code of conduct, manners and conventions'.[13] The very concept of *adat* is therefore about a set of rules, sanctions and principal cannons considered often divinely inspired and revealed, and accepted as binding on all members of a community.

Most of these customary laws are still unwritten and are orally transmitted from one generation to another, although the customary law of the Iban, Bidayuh and Kayan Kenyah communities have been codified. The *Majlis Adat Istiadat Sarawak*[14] (Council for Customs and Traditions, Sarawak) is in the process of codifying many more *Adat* and hopefully one day all the customary laws of the native communities would be codified. The *Adat* that are currently under the various stages of codification are those of the Lun Bawang, Kelabit, Kajang, Penan, Bisaya and Melanau Liko.

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[11] s.2 of the *Native Courts Ordinance* 1992.

[12] L Porritt Vernom, *The British Colonial Rule in Sarawak 1946-1963.*

(Oxford University Press, 1997 p. 3.

[13] *Ibid.* p. 4.

[14] *Majlis Adat Istiadat* (Council for Customs and Traditions) was first established in 1974. Under the *Majlis Adat Istiadat Ordinance* 1977, one of its primary functions is to initiate preliminary studies and researches into various *adat* of the Natives and make recommendations to the *Yang diPertua Negeri* on the need to standardize and codify the *Adat*. So far, it has codified *Adat Iban, Adat Bidayuh* and *Adet Kayan-Kenyah. Adat Lun Bawang* has been approved by the State Attorney General and the *Majlis Adat Istiadat* before submission to the State Cabinet. The State Attorney General has also consented to the draft on *Adat Kelabit* and *Adat Kajang*. The rest of the above *Adat* are still under examination by Drafting Committees.

In the codification exercise, the *Majlis Adat Istiadat Sarawak* resorts to both primary and secondary sources. The primary source is derived from interviews of the *Ketua Masyarakat*, headmen, other influential people, individuals and groups in their longhouses and villages. For the secondary source, the *Majlis* has to rely on subsidiary legislation, which include the *Iban Code of Fines* 1995 (*Tusun Tunggu* 1995), *Orang Ulu Customary Code of Fines* 1957 and other official texts and publications such as the *Dayak (Iban) Adat Law* 1963 and the *Dayak (Bidayuh) Adat Law* 1964.[15] The format of compilation for the *Adat Iban* 1993 has been used as a standard for the rest of the other native customary laws. There are numerous requests from other native communities to have their *Adat* codified, but in view of the sheer number of these groups and their small population, the Majlis Adat Istiadat would have to look carefully into these before advising the government whether to pursue separate codifications or accommodation into other major *Adat*. The rush for codification by natives should be responded to with great care, as this exercise is a very delicate undertaking. It should be impressed on them that the fact that the laws are unwritten does not dimminish their force or legitimacy.

In the early years of the Brooke administration, the Rajah relied on the system of unwritten customary laws as his guide in administering justice, and only gradually modified them as the regime stabilised. The *Sea Dayak (Iban) Fine* 1952 was codified under the *Native Customary Laws Ordinance* 1955 and extended to the then Fourth and Fifth Divisions of Sarawak. Another '*adat*' that the colonial administration codified in 1956 was the *Orang Ulu Customary Code of Fines* 1957. Other important Dayak *Adat* compilations are the *Dayak (Iban) Adat Law* 1963[16] and *Dayak (Bidayuh) Adat Law* 1964.[17] The former was compiled for use as a guide in settling disputes and redressing grievances in the *Iban* community of the former Second Division. The *Dayak (Bidayuh) Adat Law* 1964 was compiled for the use of the Bidayuh community. Although these two works were never codified

[15]These two texts were never gazetted under the *Native Customary Laws Ordinance* 1955, but only published under an administrative order.

[16]A.J.N. Richards.

[17]A.J.N. Richards.

under the *Native Customary Law Ordinance* 1955[18] they were published under an administrative order and proved to be invaluable for those dealing with cases affecting the Iban and the Bidayuh communities. The two works have been replaced by *Adat Iban* 1993[19] and *Adat Bidayuh* 1994.[20]

It may be noted that the *Native Customary Laws Ordinance* 1955 not only provided for records of list of fines but also empowered the *Yang diPertua Negeri* (in council) to amend any native system of personal laws with the consensus of the community concerned. That Ordinance was recently replaced by the *Native Customs Declaration Ordinance* 1996. The latter also enables any native customary laws to be codified.

III. Function Of the Adat

The primary function of the *adat* in a Dayak society is to maintain a harmonious relationship among members of the community and preserve the physical and spiritual well being of that society. Proper conduct in accordance with the *adat* keeps the community in a 'state of balance', i.e. between individuals and community with the physical and spiritual environment. The *adat* is primarily an effective tool of social control whereby disputes may be resolved effectively and efficiently so as to maintain order within the group. In this way the *adat* acts as a unifying force to keep the community together. It regulates desired relationships of individuals within a society to maintain unity. Any breach of these customary laws disrupt the state of balance or causes imbalance, and hence the status quo must be restored. It is believed that the state of imbalance would threaten the well-being of the community. Therefore, any actions that are contrary to *adat* and hence, the natural order, must be immediately dealt with by way of 'fines' and ritual propitiation to restore the balance between the individuals, environment and spiritual level.

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[18] Cap. 41.

[19] Effective in 1993.

[20] Effective in 1994.

A.J.N. Richard, a modern scholar of *adat* states that *adat* safeguards the state of affairs in which all parts of the universe are healthy and tranquil (*chelap lantang*) and in balance. Breaches of 'adat' disturb this state and are visited by "fines" or contribution to the ritual necessary to restore the balance and to allay the wrath, whether of individuals, the community or the dieties.[21] A prominent native leader Tan Sri Datuk Gerunsin Lembat wrote:

> '*Adat*' means many things to the Dayak: it is a system of justice; it regulates social relationship; it protects their beliefs and way of life; it guides them through change and development; it is a form of identity; it is the source of their existence and survival.[22]

While ordinary laws deal with offences against the norms of social behaviour and the right of individuals, *adat* deals with both offences against such norms and breaches of customs, taboos, faith and belief. Therefore in Dayak legal system, there is a distinction between offences against the norms of social behaviour which are punishable with *ukum* (fine) and breach of customs and taboos which must be restored through the provision of *tunggu* (restitution). There is a unique duality of custom among the Dayak communities as modern laws are not equipped to deal with the way society and life is organised in the Dayak world.[23] The native customary law as a tool of social control has two principal functions: firstly, it prescribes desired behaviours which maintain a state of balance or status quo in a community in which people at least feel that they are not a threat to others nor threatened by others physically, ritually, economically, and physiologically. It also controls behaviour likely to give rise to contentious situations. Secondly, when such contentious situations arise native cus-

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[21] A.J.N. Richards quoted in Vernom Albert Kedit, *Adat Iban - Customary Law of the Iban Of Sarawak. A study in Iban Jurisprudence and the legal concepts of Iban Social Control* (Staffordshire Polytechnic, 1992) p. 4.

[22] Tan Sri Gerunsin Lembat, "*The Dynamics of Customary Laws and Indigenous Identity: The case of the Dayak of Sarawak*" (Majlis Adat Istiadat Sarawak, 1993) p. 22.

[23] *Ibid*, p. 12.

tomary law provides adequate means to contain the consequences of such behaviour. This is reflected in the varying nature of penalties imposed for their breaches of social behaviour and custom.

A. Penalty And 'Fine'

In all Dayak communities, offences against the rules of social behaviour shall be subject to secular fines in the form of *ukum* specified in *kati*, $^1/_2$ *pikul* and 1 *pikul*, whereas breaches against customs shall be subject to 'ritual fines'. While the concept may be similar the ritual fine may be referred to by various terms, for instance it is called *tunggu* in Iban, *takud* in Bidayuh, *pelah* in Kayan-Kenyah, *kutang* in Bisaya and *pengapo* in Lun Bawang. The fines are specified as *mungkul*, *buah*, *lali*, *agung* and *uad*, respectively. In terms of monetary value 1 *kati* shall be the equivalent to RM1.00, 1 *pikul* equivalent to RM100. *Ukum* is imposed in units of 10 *kati*, $^1/_2$ *pikul* and 1 *pikul*. The value of 1 *mungkul*, 1 *buah*, 1 *lali*, 1 *uad*, shall be RM1.00 but 1 *agung* is RM5.00.

The ritual fines[24] are usually accompanied by provision of *genselan* or *enselan* (Iban), *prosis* (Bidayuh) and *tebara* (Kayan-Kenyah) to appease the spirits, to protect the souls of the victims and to cleanse the environment which is necessary for the restoration of the balance between individuals within communities, and within the environment and spiritual world. Such ritual payment may include a pig, or chicken (to appease the spirit), a piece of iron in the form of a knife, or spear (to strengthen the soul), jars or gong (to house or contain the soul), a traditional blanket (to cleanse the environment, and an offering (to appease the spiritual world).

It is important to note the distinction between the meaning of *ukum* which is a punishment for an offence, and a 'ritual fine' which is infact only restitution and consists of the element of restoration of balance and appeasement or atonement provided by the offender to the injured party. The 'ritual fine' has no element of punishment. The payment of such 'fine' is not an admission of guilt. In the Iban society

[24]Ritual fines are accompanied by provisions for ritual items, such as a chicken, or pig to appease the spirits, a piece of iron in the form of knife, ceremonial sword (*parang ilang*) to strengthen the souls, and jars, cups, plates, or gongs to protect the souls.

it is a practice for an offender to provide for '*genselan*' for offences against custom even before the settlement of a dispute[25] *Ukum* shall be paid to the government while ritual fines are paid to the aggrieved party. Upon codification of the various *adat* the quantums of *ukum* and ritual fines have been increased to reflect contemporary fiscal realities and to make them a deterrent.

IV. Native Courts Administration

The current native courts system is an outgrowth of the previous system established in the past, beginning with the Rajah Regime and extending through the colonial period and the post independence era. The succeeding system had undergone major modifications to adapt to the contemporary circumstances of rapid modernisation as well as the growing formalism and rigidity of native laws and native law administration. The enforcement of native customary laws and the determination of the '*adat*' principles are no longer the domain of administrative agencies but have become purely a judicial function in the statewide legal system. The evolution of the Native Courts system has resulted in numerous major changes and innovations to both its structure and sphere of jurisdiction. These changes are deemed imperative to improve the efficiency and effectiveness of administration of the enforcement of native customary laws to meet the aspirations of native communities in the state.

As the Dayak communities comprise 43.3 percent of the total state population and constitute the major target of the government development programmes, it would be logical to assume that the removal of constraints to development, such as disorder and disunity in rural communities through efficient enforcement of native customary laws, would be a matter of priority and urgency. Unfortunately this assumption is only wishful thinking because staggering backlogs of Native Courts cases were left unattended for years. As at 1st June 1993 the

[25] It is for this reason that A.J.N. Richards referred to it as 'fine', and Hooker used the term 'customary fine' whereas M. Heppell called it 'ritual fine' to describe this type of 'penalty'. It shows they have a good and correct grasp of the actual meaning.

state of backlog of cases for the Resident and District Native Court was as follows:

- District Native Court cases - 663
- Resident Native Court cases - 105[26]

There were an additional eight hundred outstanding cases for applications to be identified with native communities. Similar problems of backlog of cases also plagued the lower courts. In many instances, litigants had passed away while their cases were pending leaving their lawful heirs to 'inherit' their disputes. So pathetic was the situation that the courts were no longer regarded as effective avenues for the settlement of disputes. This resulted in a partial loss of confidence in the native judicial system, for the system that was supposed to dispense justice had become an obstruction. As the well known axiom says, "justice delayed was justice denied."

The problem was the conflicting roles that were required of the court administrators. As the principal agents and administrators of government development in the divisions and districts, the core role of Residents and District Officers was and is to gain the confidence and co-operation of the people for development in accordance with government policies and programmes. By sitting as Magistrates or Presiding Officers in court this would jeopardise their relationship with their people, especially those who would lose the cases. This contributed to their reluctance to preside over cases, hence the backlog. The problems needed to be circumvented and a review of the roles of these principal officers in court work had to be made. There was a dire need to relieve the Residents and District Officers of the burden of settling court cases so that they could devote more time to other equally pressing development matters. Alarmed by the colossal and embarrassing number of unattended cases the state government decided to speed up the disposal of cases by revamping the state Native Courts system. There needed to be a more effective and efficient native court administration system.

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[26]Empeni Lang, *Native Courts Sarawak: Activities of Native Courts Sarawak,* (Native Courts Central Registry, 1996).

A. *Native Court Ordinance* 1992

The *Native Courts Ordinance* 1955[27] was not an adequate vehicle for the revamping of the Native Courts. Chronic problems that semi-paralysed the system needed to be removed. The critical sources of problems identified were:-

(a) the total reliance on the Residents to preside in the Resident Native Court;
(b) the total reliance on the District Officers to preside in the District Native Court;
(c) unsatisfactory appeal system and procedures;
(d) lack of supporting structure to run the system;
(e) lack of rules to regulate Native Court activities and proceedings. The absence of such rules contributed to the confused management of Native Courts; and
(f) inability of the Courts to enforce judgments and orders.

The 1955 Ordinance was therefore repealed and *Native Courts Ordinance* 1992 and *Native Courts Rules* 1993 were legislated and came into force as of June 1, 1993. They were enacted to brace the government for the implementation of a new system (current system). For any system to function, there must be a competent administrative structure to manage it. Standardized rules were necessary to provide for common guidelines for court administrators, presiding officers, court officials, advocates and litigants. These enactments provided new features and uniform rules for a competent administrative machinery to run the new system. The absence of these features had contributed to a confused management of the native courts system in the past and it had resulted in the paralysis of the native judicial function. These new enactments repealed the *Native Courts Ordinance*[28] and marked the beginning of a more serious coordinated and concerted effort to administer and enforce native customary laws in Sarawak, a very significant milestone in the development of a native judiciary.

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[27] Cap. 43.

[28] Cap. 43.

The objectives of the *Native Courts Ordinance* 1992 are to:

(a) streamline the Native Courts hierarchy;
(b) provide for proper procedure for appeal;
(c) facilitate speedy disposal of cases;
(d) enable an advocate or a representative of any party to appear before the courts;
(e) provide for increased penalties which any Native Court can impose;
(f) provide for flexibilities in courts proceedings; and
(g) relieve the residents and district officers of the burden of court work.[29]

B. *Native Courts Rules* 1993

Although the native court system had been in existence for about 38 years, prior to 1993, no native court rules had been formulated to regulate proceedings, or provide for the establishment of administrative structures to manage the system,which was one of the major contributing factors to the poor management of the system. For any court administration to function effectively and efficiently it is necessary to have rules regulating the proceedings before such courts. The *Native Courts Rules* 1993 made under section 29 of the *Native Courts Ordinance* 1992 constitute a very important innovation for the effective and efficient management of the new system. The primary objectives of the *Native Courts Rules* 1993 are to:

(a) provide guidelines to all persons on the steps to be taken and followed in regard to proceedings before the Native Courts;
(b) provide guidelines for persons administering the courts, and the procedure to be followed in dealing with the cases before them;
(c) lay down regulations on the keeping of records by the courts; *(Rules 32 and 36)*
(d) to provide explicit procedures for:-

[29] Abdul Razak Tready, A paper on *Ordinan Mahkamah Bumiputera 1992* (Pejabat Peguam Besar Negeri Sarawak, 1993) pp. 1-2.

(i) appeals against decisions of the Native Courts, and
(ii) revising of any decision of the lower native courts by either the Native Court of Appeal or the Resident

(e) set out procedure for the enforcement of judgments or decisions given in Native Courts; *(Rule 11)*
(f) provide guidelines for drawing up a list of assessors; *(Rule 34)*
(g) provide forms to be used in Native Courts;
(h) stipulate a scale of fees to be paid to court officials, assessors and witnesses; *(Rule 37)* and
(i) language to be used for proceedings before the Native Courts; *(Rule 31)*

The main objective of these rules is to give a clear understanding of the mode to of instituting proceedings to persons who have to avail themselves of the Native Courts. At the same time, to all persons whose duty it is to adjudicate disputes and the manner in which cases should be handled.[30]

V. Structure Of The Native Court Administration

The *Native Courts Rules*,[31] established an effective administrative structure to run the system, in the form of the Central Registry (Native Court Headquarters) and the District Registries. The setting up of a Central Registry is a new concept. Fifty-eight district registries at the district and sub-district levels have been officially established and gazetted.[32]

A. Central Registry

[30]Datuk Fong JC, paper on *Kaedah-Kaedah Mahkamah Bumiputera* (Pejabat Peguam Besar Negeri Sarawak, 1993), pp. 2-3.

[31]S. 29 of the *Native Courts Ordinance* 1992, makes provisions vide Rules 33 and 32 of the *Native Courts rules* 1993.

[32]These District Registries were gazetted vide Government Gazette No.1457 dated 10th June 1993, pursuant to Rule 32 (1) of the *Native Courts Rules* 1993.

The Central Registry, headed by the Chief Registrar and located at Kuching, is the headquarters of Native Courts. The Chief Registrar as the chief administrator supervises all Native Court Registrars throughout Sarawak. The Central Registry is responsible:[33]

a. for the preparation of yearly financial estimates;
b. for general charge and supervision of all the Registrars appointed under para. 4 of the *Native Courts Rules* 1993; *(Rule 33)*
c. to consult the State Attorney General on issues touching on the interpretation of the *Native Courts Ordinance* 1992 and *Native Courts Rules* 1993;
d. to liaise with the *Majlis Adat Istiadat* on issues touching on the interpretation of Native *adat* and to oversee the dissemination of native laws;
e. to assist in the enforcement of Native Court judgments;
f. for publication of important judgements of Native Courts;
g. to advise and discuss issues and procedures affecting the implementation of the Native Courts System with the Native Courts Registrars;
h. to liaise with the Native Courts Registrars regarding courses or briefings for the *Ketua Masyarakat* and *Ketua Kaum*;
i. to deal with any official matter assigned by the State Secretary from time to time;
j. giving advice and consultation to persons who have to avail themselves of the Native Courts as an avenue to resolve disputes as well as those whose duty is to adjudicate disputes;
k. compilation of returns of court proceedings;
l. translation of the *Native Courts Ordinance* 1992 and *Native Courts Rules* 1993 to native dialects;
m. to study proceedings in *Mahkamah Bumiputera*;
n. to liaise with the State Secretary in dealing with appeals to and revisions by the Native Court of Appeal; and

[33]Empeni Lang, *Native Courts Sarawak: Structure and Jurisdiction* (Native Courts Central Registry, 1997), pp 3-4.

o. to assist the *Majlis Adat Istiadat* (Council for Customs and Traditions) in the revision of native laws.

B. District Registry

A District Registry is established by way of notification in the gazette, under the provisio of Rule 32, for every district and sub-district. The District Registry shall be under the charge, control and supervision of a District Officer or Sarawak Administrative Officer, appointed as Registrars by the State Secretary upon recommendation by the Chief Registrar under Rule 33(4). Where no appointment is made, any District Officer or any Sarawak Administrative Officer In-Charge of a sub-district shall have and may exercise all the powers of a Registrar. These Registrars are responsible to the chief registrar. The roles of a District Registry are:

a. to accept lodgements of claims, complaints, appeals and other legal applications;
b. to keep records of case registers;
c. to assist in the completion of Native Courts Forms;
d. to set file for each case and transmit documents filed therein to the presiding officers of the relevant court;
e. to keep case files and records of proceedings;
f. to furnish copies of records of court proceedings when applied for and upon payment;
g. to transmit case files of appeals to the appropriate appellate court;
h. to receive court fees, deposit and fines;
i. to assist in the enforcement of court judgments and orders; and
j. to submit periodic returns of Native Courts proceedings, cases filed in the Registry, in accordance with Rule 33(3).

It is to be noted that Native Courts in Sarawak constitute a section of the Chief Minister's office. Hence the Chief Registrar, Registrars and all the Registry Subordinate Officers shall in exercising their powers and duties have regard to any general directives of the State Secretary.

C. Powers of a Resident

The Native Courts Ordinance 1992 confers much power on a Resident in the enforcement of native customary laws. Other than sitting as an ex-officio First Class Magistrate under the *Subordinate Courts Act* 1948 and being a Presiding Officer for the Resident's Native Court, a Resident also exercises tremendous executive powers on judicial matters. He constitutes an important structure within the Native Courts system for the following reasons:-

a. he appoints Presiding Officers of Native Courts under the provision of section 4(2) of *the Native Courts Ordinance* 1992;
b. he is empowered to stay or stop proceedings in certain circumstances;
c. requires submission of returns of all cases tried in Native Courts;
d. transfer of cases and orders of retrial;
e. accepts appeals from Resident's Native Court;
f. gives leave to appeal on grounds other than native laws and custom; and
g. furnishes reports for the exercise of revisionary powers by the Native Court of Appeal.

D. Powers of a District Officer

Apart from a Resident, a District Officer is also conferred with wide powers, both administrative and judicial, in the enforcement of native customary laws in addition to his appointment as a District Registrar. He performs a crucial dualrole in the management of Native Courts. Not only does he sit as an Ex-Officio First Class Magistrate, he is also required to:

a. provide a panel of assessors;
b. require submission of return of all cases tried in such court;
c. accept lodgment of appeals from decisions of Native Courts in his District; and
d. provide reports and state opinions for Native Court of Appeal.

VI. Enforcement of Native Customary Laws

> The Dayak people possess a system of law *(adat)* which they traditionally administer themselves without the assistance of any outside agency and which include rules dealing with matters such as religion as well as a range of topics such as marriage and inheritance.[34]

M.B. Hooker's observation of the Dayak people correctly reflects the nature of their *adat* enforcement, particularly in decades of their dominance that predated the Brooke administration and the period immediately prior to that regime.

For minor breaches of custom or rights of individuals, valuable ritual possessions such as cups, bowls, plates, small jars and pieces of iron were used to compensate the aggrieved party while pigs, chicken and eggs were used in ritual propitiation to 'cool' the environment and appease the spirits. Enforcement of customary laws for major offences were by way of native traditional conventions, in the form of ordeals, homicide, appropriation of properties, retaliatory wars, clubbing *(bepalu)*, and josling *(betempuh)*. The ordeal system included, dipping of hands in boiling water, diving and cockfighting. Most of these conventional enforcements were undertaken by the local communities themselves, without the involvement of other communities. The assistance of other longhouses was usually sought, but the authorities were themselves and their gods.

The establishment of the Brooke Regime in 1841 marked the beginning of the gradual transformation of the Dayak *adat* enforcement with the gradual transfer of power from the Dayak community to a central authority, thereby diminishing native dominance in administering their own affairs. The creation of the posts of *Penghulu*[35], *Pemanca* and *Temenggong* had established bigger ambits of *supra local* authority structure that drew natives into greater government control. The restructuring of native societies initiated by the Brookes, accelerated by the British colonial rulers, followed by the Malaysian

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[34] M. B. Hooker, *The Personal Laws of Malaysia*, (Oxford University Press, London New York, 1976), p. 98.

[35] The post of a Penghulu was first created in 1883. It established a supra local authority in Dayak Society. His duties were to execute government policy and settle disputes.

government has had a tremendous impact on the system of *adat* enforcement. The structure and authority of native societies had been transformed and it now depends on external authority to a great extent.

Although the Brooke administration relied on the *adat* to manage native affairs during the first decade of its rule, the comparative stability of its government by the 1860's saw the gradual abandonment of native traditional conventions of dispute settlement. The systems of ordeal, homicide based on *adat* retaliatory wars, and appropriation of properties were outlawed. They were replaced by a new system of arbitration or mediation (*bicara*), a system which is totally alien to traditional Dayak communities.

A. Traditional Conventions

Prior to the arrival of the Brookes, there were certain breaches of *adat* for which Dayaks could be killed with impunity. These were the offences of incest within the family *bilek*, adultery, arson and unjustified homicide. Penalty for incest was death by driving bamboo *(aur)* through their bodies. Adulterers could also be killed by the spouses, provided that the case had not been reported or brought to public attention. It was usually conducted through stealth. Similarly, unjustified homicide would be revenged through retaliatory killing by the victim's family, relatives or hired killers.

Thrashing and clubbing were also mechanisms for settling disputes. Though these means were supervised and weapons controlled, fatalities often resulted and severe injuries were common. Violence and brute force characterised these conventions.

Appropriation of properties *(ngerampas)* was a mechanism used for the enforcement of orders of reparation which was not complied with. As force was used to gain reparation, this method usually ended in fatalities that far exceeded the original quantum of compensation. The submission of the offending party to the offended could avoid fatalities or serious injuries.

B. Ordeals

Ordeals on the other hand were resorted to when other means failed to reach a settlement. The Dayaks believed that in any ordeal, the intervention of their gods was called for to assist the party who was right. The principle here was, human decisions were fraught with mistakes, but the just decisions of god always sided the winner of the ordeal process.

For instance, the administration of the ordeal of scalding took one of two forms. Sometimes all the members of the longhouse had to dip their fingers into boiling water. The most common however was for the accuser and the accused to dip their hands in boiling water. The proof of innocence or guilt depended on whether a party or parties came out unscathed or scalded from the ordeal.

In the ordeal of diving *(kelam ai)* usually a bigger stake was added to the original subject matter of dispute. If any party refused to have a *kelam ai*, he or she automatically lost the case. Originally, parties to the dispute had to contest the ordeal themselves but later on, they could pick representatives to dive for them. The diver who surfaced later won the contest. However if both divers emerged unconscious, each party must revive them and he who regained consciousness first and shouted would be declared a winner. To avoid unnecessary suffering to the divers, it was a normal practice for the relatives of the divers to hold them immersed in order to prevent forced immersion. Uniquely, it was the losing diver who commanded a greater fee.

The desire to reduce suffering to divers gave rise to another ordeal namely cockfighting. The procedure was the same as the diving ordeal except there was no additional stake. Instead of divers, it was the fighting cocks which acted as "advocates". Cockfighting as a method of settling dispute was still being used even after '*kelam ai*' was declared illegal because Dayaks, believed that god intervened in this administration of justice and god is infallible and fair.

Despite the dangers it was this strong faith in the righteousness of god's intervention that made the system of ordeal popular among the Dayaks. The ordeal of scalding had often resulted in injuries to both parties, whereas the diving ordeal had at times resulted in death through forced immersion. Towards the later part of the Rajah's Regime and even during the colonial period the ordeal of diving as still resorted to but subject to the approval of a Resident or District Officer.

Although, the ordeal system did not involve brute force, it still favoured the strong and healthy. There is no doubt that the element of luck played an important role in this type of decision making process especially in cockfighting. It was not surprising that this method of dispute settlement created more problems than it solved.[36] Today however, all ordeal systems are outlawed.

C. Mediation

With the guidance of the Brookes, the Dayaks realised that the traditional conventions and ordeals relied too much on strength, brute force, and luck. They had resulted in fatalities, injuries, violence and injustice, and were not conducive to the proper development of native societies. They encouraged the concept of 'go-betweens' where neutral leaders were invited by or agreed to by both parties to negotiate. They were usually people of higher authority than the litigants. The mediation process was characterized by the involvement of a third party, to avoid face to face confrontation. It was better than submission of offending party to the offender and there was no loss of face. There was at least the maintenance of communication between the parties, although there was no guarantee of a solution or enforcement of the mediation process.

Out of this system of mediation, came the concept of blood compensation in the form of valuable jars for the offence of homicide. This concept was instrumental in the prevention of retaliatory homicide.

D. Arbitration/Adjudication

[36]Quite a number of diving contests did not solve the problems they were supposed to solve. The diving contest between Nyemungan and Bintong in the Lubok Antu District ended in a shooting incident a few years later. It was settled by the writer among others some years later. The diving contest between Stengin and Jelukong in the Engkilili sub-district years ago did not solve anything at all. The lands that were the subject matter of the dispute are still under dispute today. It will be brought to court for decision.

The system of arbitration or adjudication was introduced by the Brookes in the 1860's and along with it came the concept of the fine *(ukum)*. The features of adjudication are that the parties are face to face with each other before a presiding officer, in the presence of many people in open court. The introduction of the fine *(ukum)* was easy to enforce, and appeal was allowed.

This system gradually developed into the current adjudication process, a purely judicial function (win, lose or zero sum). The settlement of disputes among the Dayak communities, nowadays are the domain of the Native Courts. It is undeniable that some small breaches of the *adat* are still settled administratively based on compromise.[37] Nevertheless major breaches of the *Adat* and disputes are brought to Native Courts. The administration and enforcement of the *adat* of the Dayak communities today are more complex. They are no longer the exclusive affairs of the Dayak themselves but involve outside authorities and agencies at the vortex of their administration and enforcement,[38] for the Dayaks represent one component of a large and complex Native Court system.

The progressive changes to the Dayak system of *adat* enforcement, from traditional conventions that had relied on brute force, and luck that had resulted in fatalities, violence, indecision and injustice, to the current adjudication process, represent the constant efforts undertaken to evolve an efficient system of dispute settlements, to ensure the continuity and prosperity of the groups. As Heppell noted:

> Native judicial decision need not result in what a westerner would regard as a just solution, but it does result in adversaries openly

[37] In Baram District, many of the disputes among the *Orang Ulu* are settled administratively. Temenggong Pahang always impresses among the *Ketua Masyarakat* and *Ketua Kaum* to advise their people to resort to court action last. This is to preserve unity among the *Orang Ulu* group.

[38] The constitution of Native Courts under sections 4 and 13 of the *Native Courts Ordinance* 1993 confers authority beyond the Dayak communities to preside on appeal cases:

agreeing to the terms which extinguish a dispute and enable a modicum of harmony to be restored to the group".[39]

To obtain a greater insight into the enforcement process and its place in relation to the other court system, an analysis of the structure, the constitution and jurisdiction of the courts is necessary.

VII. Native Courts Structure, Constitution and Jurisdiction

A. Courts of Original Jurisdiction

The *Native Courts Ordinance* 1992 defines courts of original jurisdiction in descending order:

a. The District Native Court;
b. The Chief's Superior Court;
c. The Chief's Courts; and
d. The Headman's Court.[40]

In terms of the constitution of the courts of original jurisdiction[41] the District Native Court shall consist of a Magistrate and two assessors; the Chief's Superior Court shall consist of a *Temenggong* or *Pemanca* sitting with two assessors, or both *Temenggong* and *Pemanca* sitting with one assessor; the Chief's Court shall consist of a *Penghulu* and two assessors; and the Headman's Court shall consist of a Headman and two assessors. Section 4 provides that a Headman's Court or a Chief's Court in which the proceeding is commenced may, on its own motion or on application by any party to the proceedings, order that the case be referred for trial by a Chief's Superior Court. Further, no officer of the Sarawak administrative service shall preside over a Chief's Superior Court if the case can be dealt with by a *Temenggong* or a *Pemanca*.

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[39] Michael Heppell, *Iban Social Control: The Infant and the Adult.* (unpublished Ph.D. dissertation, Australian National University,1975), p 301.

[40] Section 3 of the *Native Courts Ordinance* 1992.

[41] Section 4, *ibid.*

It is significant to note that in any case in which the native system of personal law applicable is the law of a particular community, the headman or chief presiding shall be a member of that community. Provision is made however that, subject to the directions of the Resident within whose division such case arises, any person who is or has been a Sarawak Administrative Officer or any person who, in the opinion of the Resident, is versed in the native system of personal law of the relevant community applicable thereto, may be appointed to preside over a Native Court notwithstanding that he is not a member of the community to which the relevant system of personal law applies; and the person so appointed may exercise the powers and jurisdiction of that Native Court.

Be that as it may, where any question of native law or custom is involved, at least one assessor shall be a member of the community, the law or custom of which is relevant to the determination thereof. Where that is not possible he could be some other native who in the opinion of the District Officer is versed in such law or custom. The assessors in each case shall be appointed by the presiding officer in accordance with prescribed rules.

A Magistrate may sit in and constitute any court lower than the court which he had power to constitute, as if he were the presiding officer of such lower court.

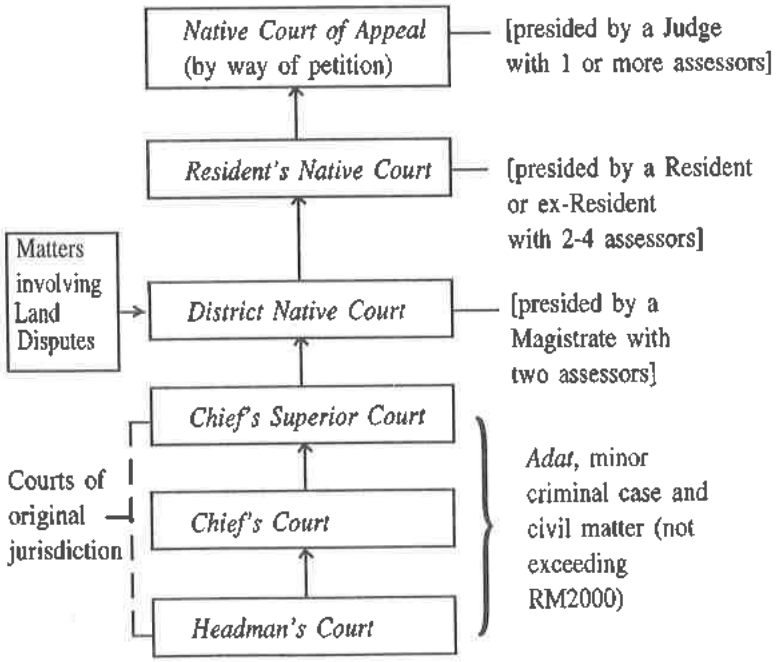
Notwithstanding anything contained in section 4, in the case of any community following an Iban system of personal law the following courts of original jurisdiction may be constituted thus:

a. a Headman's Court may be constituted by a *Tuai Rumah* sitting without assessors;
b. a Chief's Court may be constituted by a *Penghulu* sitting with two *Tuai Rumahs* to assist him;
c. a Chief's Superior Court may be constituted by a *Temenggong* or a *Pemanca*, or both *Temenggong* and *Pemanca* sitting in either case with two assessors.[42]

[42]Section 4(6) of the *Native Courts Ordinance* 1992.

B. Structure and Constitution of the Appellate Courts

The appellate structure of Native Courts is as follows:[43]



The Chief's Superior Court is the final court of appeal in respect of:

(a) breach of native laws, or customs relating to matrimonial, religious and sexual;
(b) civil case in which the value of subject matter does not exceed RM2000.00 and all parties are subject to the same system of personal laws; and
(c) petty criminal offences under native laws.

[43] Empeni Lang, *Native Courts Sarawak, Structure and Jurisdiction*. (Native Courts Central Registry, 1997), p. 10.

The only appeal cases that are brought to District Native Courts and other higher appellate courts are ones that involve land disputes. This set-up not only relieves the appellate courts of the tremendous burden of court work involving breach of *adat* but also speeds up prompt settlements for breaches of native customs.

The Native Court of Appeal may, either upon the application of the aggrieved party or on its own motion, exercise any of the powers of revision vested in the High Court in such manner as the justice of the case may require, where it appears that in any original, revision or appellate proceeding, an error material to the merit of the case or where it involved a miscarriage of justice. But it may refuse to exercise its power if rights of appeal have not been exhausted. However no proceeding shall be revised after the expiration of a 12 months period from termination of such proceeding or, could the proceeding be further revised, if, it has been subjected to revision by a Resident. However it is observed that in practice, aggrieved parties usually file their cases in the High Court for order of revision (certiorari).[44]

The Resident's Native Court shall be constituted of a person for the time being holding or acting in the office of Resident of a Division sitting with not less than two but not more than four Assessors who shall be the persons whom the Resident has reason to believe are versed in the customary law relevant to the determination of the appeal. However for the purpose of speedy despatch of the business of the Resident Native Courts the *Yang diPertua Negeri* may appoint any person who has held the office of a Resident in the State or such person as he may deem fit or proper to preside in the Resident's Native Court, and the person so appointed shall have all the powers conferred on a Resident by the *Native Courts Ordinance* 1992.[45]

The Native Court of Appeal shall be presided over by a Judge and shall consist of one or more persons who the *Yang diPertua Negeri*

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[44]There had been two cases in which an application for the order of certiorari was filed in High Court. In *Gong ak Laing* v *Penghulu Anyi's* case, Gong filed for an order of certiorari in the Miri High Court. The order was granted. In the case of *Samling* v *Orang Ulu community, Belaga*, the application by Samling was rejected by the High Court at Sibu.

[45]The appointment of presiding officers other than the Residents, to constitute Resident's Native Courts, speed up the disposal of cases in the said court.

is satisfied have necessary knowledge of the customary laws relevant to the determination of the appeal. However for the speedy despatch of the business of the Native Court of Appeal, the *Yang diPertua Negeri* may appoint any person, who is qualified for appointment as a Judge of the High Court, or any person who has held high Judicial Office in the State, to preside in the Native Court of Appeal.[46] The person so appointed shall have the power to perform such functions and powers of a Judge of a Native Court of Appeal. The majority of members of each such court shall be natives of Sarawak.

Assessors for all levels of courts with the exception of the Native Court of Appeal and the Headman's Court are appointed by the presiding officers in accordance with such rules as may be prescribed by *the Native Courts Rules* 1993. Rule 34 provides for the establishment of a panel of assessors in every district. Appointment of assessors to this panel is made by the resident of a division upon recommendation by the relevant district officer. The presiding officers shall appoint assessors from this panel only. The presiding officers of Native Courts shall be the Headman, Chief, Sarawak Administrative Officers, Magistrate, Judge or such other person as may be appointed to preside over a Native Court under the *Native Courts Ordinance* 1992.

VIII. The Jurisdiction of Native Courts

The jurisdiction of Native Courts should not encroach into the civil courts and the *Syariah* Courts within the national legal system. Both the Native Courts and *Syariah* Courts are state courts but are regulated by different state laws, whereas the national legal system is regulated by Federal Legislation. The jurisdiction of Native Courts is regulated by the *Native Courts Ordinance* 1992 which defines its powers and jurisdiction. The Ordinance also prescribes for procedure in situations where a case is both a breach of custom and any other written law. It is an established practice that, when any act or omission constitutes an offence under more than one written law, the offender shall be

[46] Since 1993 there has been no sitting of the Native Court of Appeal. There are about thirty cases pending for hearing.

liable for prosecution under one law and shall not be liable to another prosecution and punishment under another law for the same offence. In the event a conflict between customary law and written laws, the latter will prevail.

A. Jurisdiction

At the outset, it must be emphasised that the Native Courts jurisdiction does not cover any matters that fall under the *Undang-undang Keluarga Islam 1991* or the Malay Custom of Sarawak, any civil case, being a case under the jurisdiction of any of the Syariah Courts constituted under the *Ordinan Mahkamah Syariah*, 1991.[47]

The Native Court's jurisdiction covers cases arising from the breach of a native law or custom in which all the parties are subject to the same native system of personal law. These include:

a. cases arising from the breach of native law or custom (other than the Ordinance *Undang-Undang Keluarga Islam*, 1991, or the Malay Custom of Sarawak) relating to any religious, matrimonial or sexual matter where one party is a native. Where the parties are of different sexes and are not of the same community, or are by virtue of any written law deemed to belong to or be identified with different communities, the Native Court shall, unless the contrary is expressly provided in any written law, be bound by the law or custom of the community of which the woman is deemed to be a member;
b. the court's jurisdiction extend to cases where the value of the subject matter does not exceed two thousand ringgit;
c. any criminal case of a minor nature which are specifically enumerated in the *Adat Iban* or any other customary law by whose custom the court is bound and which can be adequately punished by a fine not exceeding that which, under section 11, a Native Court may award; and any matter in respect of which

[47] See the *Federal Constitution* A121A which provide that all Syariah law matters fall under the purview of the Syariah Courts.

it may be empowered by any other written law to exercise jurisdiction;

d. cases concerning disputes involving land to which there is no title issued by the Land Office and in which all the parties are subject to the same native system of personal law shall be heard at the first instance before a Chief's Court exercising jurisdiction in the area in which such land is situated;
e. the question whether a non-native has become identified with a particular native system of personal law. This is for the purpose of section 9 of the Land Code (Cap. 81) to be read together with section 8 of the said Code;
f. the question whether a person is subject to a particular system of personal law; including the question whether a person subject to the personal law of a particular native community ceased or has ceases to be so subject and
g. contempt of court proceeding.[48]

B. Exceptions to Jurisdiction of the Court

The Native Courts jurisdiction exclude the offences that fall under the civil courts which include:

a. offences under the Penal Code;
b. where a person is charged with an offence where death ensues;
c. marriage or divorce under the Law Reform (Marriage and Divorce) Act 1976 and the *Registration of Marriages Ordinance* 1952 (unless the claim is in respect of bride-price or adultery and founded only on native law and custom);
d. land with title or interest in land registered under the Land Code (Cap 81);
e. breach of native law or custom where the maximum penalty authorised is less severe than the minimum penalty prescribed for such offence;

[48]The *Native Courts Ordinance* 1992, section 5

f. breach of *Ordinan Undang-Undang Keluarga Islam*, 1991 or the Malay Custom of Sarawak;
g. matters falling within the jurisdiction of the Syariah Courts constituted under the *Mahkamah Syariah*, 1991; and
h. in proceedings taken under any other written law in the state.[49]

C. Power to Impose Penalties

The following penalties may be imposed by the various Native Courts[50]:

a. District Native Court	Imprisonment not exceeding two years and a fine not exceeding five thousand *ringgit*.
b. Chief's Superior Court	Imprisonment not exceeding one year and a fine not exceeding three thousand *ringgit*.
c. Chief's Court	Imprisonment not exceeding six months and a fine not exceeding two thousand *ringgit*.
d. Headman's Court	Fine not exceeding three hundred *ringgit*.

However the above limits shall not prevent a Native Court to award compensation in excess thereof, if it is authorised under *adat*.

D. Power to Recover Penalties or Compensation and to Award Compensation

A Native Court is empowered to order the recovery of penalty or compensation by the sale of property belonging to the person affected thereby, provided that the order of seizure and sale of property shall

[49] *Ibid*, Section 28.

[50] *Ibid*, Section 11.

be signed by a presiding officer and endorsed by a magistrate if the presiding officer is not a magistrate.[51]

Section 19 empowers a Native Court to award compensation that may include costs and expenses incurred by a successful party or his witness. The court may also direct any penalty to be paid to the person injured or order the restitution of any property.

E. Power to Issue Warrants and Summonses

A Sarawak Administrative Officer, Chief or any person who exercises jurisdiction in a Native Court may:

a. issue a warrant of arrest;
b. either verbally or in writing summon any party or any witness who may be required in any case; Provided that (i) a warrant of arrest shall be endorsed by a Magistrate and
c. if the person on whom a summons is to be served resides outside the jurisdiction of the Court, the summons shall be in writing and shall be endorsed by a Magistrate.[52]

F. Imprisonment in Default of Penalty

A Native Court may direct an offender to suffer a period of imprisonment for default of payment of penalty, in accordance with the following scale:[53]

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[51] *Ibid*, section 17.

[52] *Ibid*, section 24.

[53] *Ibid*, section 18.

Amount of penalty	Period of imprisonment shall not exceed
1. does not exceed fifty *ringgit*	one month
2. exceeds fifty *ringgit* but does not exceed one hundred *ringgit*	two months
3. exceeds one hundred *ringgit* but does not exceed two hundred ringgit	four months
4. exceeds two hundred *ringgit* but does not exceed five hundred *ringgit*	six months
5. exceeds five hundred *ringgit*	twelve months

Notwithstanding the above, no Native Court which is not presided over by a Magistrate, has jurisdiction to direct that any person be imprisoned. If an offender is to be imprisoned, such Court shall refer to commit him (offender) to a court presided over by a Magistrate for sentence.

IX. Conclusion

The features of the Native Courts system have been shaped by continuous adaptations to rapidly changing environments that have directly or indirectly affected native communities. The enforcements of native customary laws which evolved from the use of traditional native conventions (ordeals, retaliatory wars, homicide and appropriation of properties) to adjudication, has placed sole responsibility on Native Courts as a mechanism for *adat* administration. The enforcement of native customary laws is now purely a judicial function in the state legal system. The system of the immediate past had failed to effectively enforce and administer native laws in today's prevailing condition making it imperative to devise innovations to circumvent previous

weaknesses, in order to mould a mechanism for an effective and efficient *adat* enforcement.

The structure of Native Courts system has undergone major changes by streamlining the hierarchy of courts of original jurisdiction and eliminating unsatisfactory appellate courts system as well as the creation of critical administrative structures in the form of the Central Registry together with 58 District Registries. With the changes to the appellate system, the highest appellate court for breaches of *adat*, and offences relating to matrimonial, sexual, religious, civil cases and minor criminal offences, is the Chief's Superior Court. Only cases involving land disputes and native status could go beyond this Court, thus relieving District Officers and Residents of the burden of court work in such cases.

The conferment of powers on a Resident and the *Yang diPertua Negeri* (Governor) to appoint presiding officers for the District Native Court and the Resident Native Court respectively, has removed the total reliance on the District Officers and Residents to hear cases, thereby speeding the disposal of cases at these levels. It was the reluctance of these senior executives to preside on cases that was the root cause of the paralysis of the Native Courts system in the past.

The jurisdiction of Native Courts has also been affected by developments like the enactments of the *Syariah Court Ordinance* 1991, *Undang-Undang Keluarga Islam* 1991 and the codifications of the various native customary laws. The said Ordinances have excluded the natives professing the religion of Islam from the jurisdiction of the Native Courts, with the exceptions of matters under sections 5(3), 20 and 23 of the *Native Courts Ordinance* 1992. The changes in jurisdiction also empowers a Native Court to impose greater penalties to accommodate upward revisions of fines as provided for in the *adat* of all native communities. The quantum has been revised upward to keep in tandem with contemporary fiscal realities, to make penalties meaningful and deterrent.

It cannot be understated that the earnest efforts by the Government of Sarawak through the *Majlis Adat Istiadat Sarawak*, to codify native customary laws reflect of the adat in the maintenance of order, peace and tranquility. There will be no development and progress without order, and there will be no order without *adat*. The creation of this

order, is the very goal of the enforcement of native customary laws, the objective of the Native Courts administration. Hence this important goal is development oriented. It is all the more important because it involves not less than 800,000 non-muslim Dayaks that constitute about 43.3% of the population of Sarawak - a large target group for any development policy and hence critical to its success or failure.

The implementation of the current native courts system and the structural reforms represent a serious governmental effort to develop an effective and efficient native judiciary that dispenses justice, within the nationwide legal system. The maintenance of order, stability, harmony, and unity as well as the acceleration of development within native communities is an attainment which future generations of Dayaks would inherit, with great pride and a sense of identity.

Empeni Lang*

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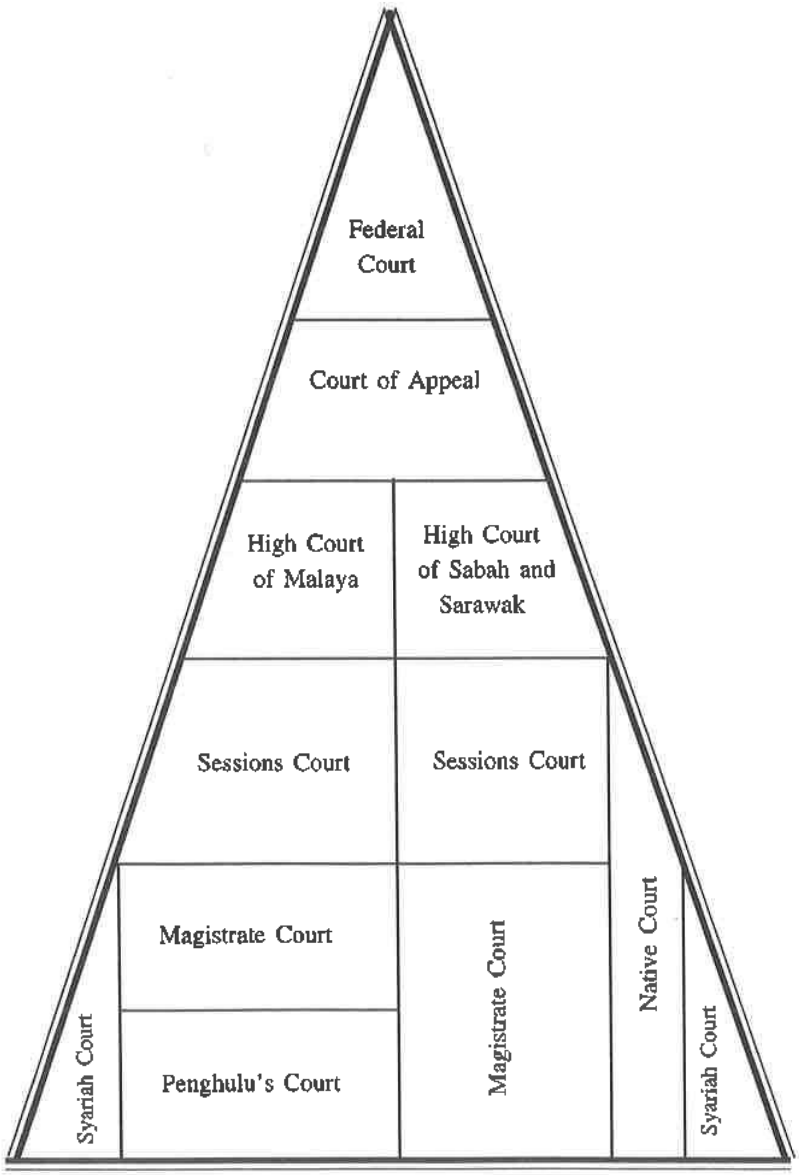
Appendix A

HIERARCHY OF COURTS IN MALAYSIA



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