CASES ON NATIVE CUSTOMARY LAW IN SABAH (1953-1972). [Kota Kinabalu: Government Printer. 1973. xvii + 165 pp.]

In this volume are combined some sixty-two reports of selected appeals heard by the Native Court of Appeal in Sabah, together with three other reports of proceedings of the Court of Appeal of the Supreme Court of Sarawak, North Borneo and Brunei, the High Court of Sarawak, North Borneo and Brunei, and the High Court of Borneo.

Mr. Justice Datuk Lee Hun Hoe, in his Preface to the volume, makes the following general observations:

> Native Customary Law plays an important role in East Malaysia as it regulates the way of life of the natives (bumiputra). Each State in East Malaysia has its own hierarchy of Native Courts. Some Native Court cases have found their ways into the Sarawak, North Borneo and Brunei Supreme Courts Reports and after Malaysia into the Malayan Law Journal. However, none of the cases heard by the Native Court of Appeal in Sabah has, as far as can be ascertained, been reported elsewhere. Native Chiefs and District Officers in Sabah who have to hear cases involving native law and custom are at a disadvantage as they are unable to look for precedents. This collection of cases from traceable records at Kota Kinabalu is therefore an attempt to cater for their need. Some of the traceable cases were in such dilapidated condition that they are totally illegible. It becomes important to preserve those legible cases in permanent form. Opportunity is also taken to include in the collection recent cases. Some cases though not heard by Native Court of Appeal

* Contemporary Bourgeois Legal Thought (Moscow, 1974) p. 310.

are included in the collection because of special interest with reference to the Native Customary Law. This collection of cases is also of interest to others who like to know something of native law and custom.

To read this selection of cases is to enter another world: a world in which customary law is to be observed in a stage of rapid transition. Who would have supposed, for example, that in the year 1960 any legal system would retain a place for trial by ordeal as a substitute for the resolution of a dispute ? Yet that is precisely what the case of *Lagundi bin Koh and Lusiah binte Lagundi* v. *Regina* was about. Lagundi, the stepfather of Lusiah, was as a result of the pregnancy of Lusiah charged, together with his stepdaughter, with incest, on the complaint of his stepson. The case was heard by the Native Court; and on appeal Smith J. dramatically describes the confrontation between Lagundi and his stepson. The charges of incest were denied by both stepfather and stepdaughter: then, in the presence of three elders, the stepson and Lagundi were submerged in water. "As Lagundi came to the surface first he was declared to be the loser. . . . Then the question was put to Lusiah in this way: 'You Lusiah now that the swearing by dipping has been performed before the people and the Orang Tuas of the Kampong and you have lost, try to remember....' And Lusiah answered: 'We have lost in the dipping. It is true that we committed incest but I ask for the consideration of Government.' Subsequently Lusiah withdrew her confession and, so the judgment runs, 'stoutly maintained her innocence.' "

Faced with a nice problem, Smith J. rejected Lusiah's confession as unsatisfactory. "Before a person may be found guilty of a criminal offence there must be some clear evidence, implicating the accused, given to the court by a responsible witness or witnesses. (The stepson's) complaint seems. . .to have amounted to no more than that Lagundi contravened the *adat* by sleeping in close proximity to his daughter." As for the "dipping-in-water contest", the Court observed that "this method of eliciting the truth is entirely to be deprecated and should be discontinued.... Similar practices were abandoned in England about six hundred years ago, except ordeal by battle which remained in force theoretically till 1818." The comment of O.K.K. Ugi was quoted with approval: "The test is obviously unfair because a younger man, having as a rule stronger lungs than an old man, is much more likely to win the contest." The convictions (which involved imprisonment, fine and banishment) were therefore quashed, although any stepfather contemplating the digging of tapioca in the company of his stepdaughter might prudently ensure that he does so in the sight of reliable witnesses.

Most of the cases reported perhaps raise no profound legal issues: but the reader cannot fail to be impressed by the careful diligence addressed to an ascertainment of the relevant custom. The courts appear to base themselves firmly upon any relevant statute law — although this is necessarily limited in its scope; next, they take into account any relevant case law (to which end the volume under review must make a substantial contribution); further, and most important, perhaps, of all, the court seeks information on such custom as may be relevant to the case — in which context the work of G.C. Woolley (reprinted in 1962 but now, it seems, difficult to acquire) clearly carries considerable weight. In the field of Muslim law, I note a reference to the work of Syed Ameer Ali on Muhammedan Law.

Of course, the question of interpretation of statutes is one best avoided. Ainley C.J. in the case of *James Lee Kui Wah* observed that "The Native Court of Appeal for all its impressive constitution is not ideally suited to answer questions which turn on the construction of written laws, and I strongly doubt whether it was even intended to do so. Appeal lies to that court, as of right, upon questions of native law and custom only. Mixed questions of law and fact may be brought to the Native Court of Appeal by leave of the Resident only. It is not at all clear how a question of jurisdiction, which does not depend upon native law and custom, can reach the Native Court of Appeal at all." On the question of whether *certiorari* lay to a native Court, the Chief Justice applied a vigorous, indeed robust commonsense, both on the principle of the case and its facts. The High Court could issue an order of *certiorari* to a Native Court, and that Court had jurisdiction in cases arising from the breach of native law or custom, religious, matrimonial or sexual. In that case the applicant, a Chinese, had been convicted of an attempted rape: but as the Chief Justice observed, if he had hit the lady concerned on the head "with a club, or had otherwise assaulted her without indecency, the jurisdiction of the Native Court would have been ousted."

Section 2 of the Penal Code provided that "every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provision thereof of which he shall be guilty." Criminal justice under the Penal Code was therefore beyond the jurisdiction of the Native Courts, which could however "try offences which constitute breaches of native law and custom." A man committing an offence against the Penal Code must be punished under the Code, *and not otherwise* (the Chief Justice's italics); he cannot be punished under a law providing punishment for breaches of customary law; and he cannot be tried by a court having no jurisdiction to administer criminal justice under the Penal Code. "I reach this decision with considerable reluctance", added the Chief Justice, "because the effect of my decision, if it is not set aside, is likely to spread beyond the confines of this case and cause some confusion". Datuk Lee Hun Hoe draws attention to the case in his Preface, but makes no comment thereon, other than to draw attention to the Chief Justice's plea for a little more precision in the "all-important matter of jurisdiction". A similar cry of anguish can sometimes be heard from others who wrestle with the problem of whether and if so to what extent a non-native is subject to the jurisdiction of a native court.

Let us take the case of *Kupok binte Lampangon* v. *Kondilong binte Lantayan.* Kupok and Abing, both presumably natives, went through a ceremony of Christian marriage. Two days after the marriage Kupok went back to her grandfather. A year later she gave birth to a child, and a dispute arose over the return of the *brian* — a question somewhat premature, as Harley J. observed, since the husband and wife, while possibly in the eyes of native law divorced, would have to go to the High Court if they wanted a divorce. Having opted, as it were, for a Christian marriage, one had to seek a Christian divorce.

Some readers will find a rare charm in the conciseness of judgments not overloaded with precedent and the agony of distinguishing one case from another. For such, the comments of Harley J. on one litigant will be refreshing: "In my view there are more words and wind than truth in this appellant...." Others will find food for thought in such judgments as that of the same judge in *Asang bin Lintuhun v. Yatun bin Datu Bidin,* in which the Court held that "regardless of the question of public policy...it is contrary to Native custom and contrary to Muslim law to force a man to marry against his will." Yet others, again, will find *(Gulis bin Lundani* v. *Malon bin Golunang)* that failure to invite one's prospective brothers-in-law to the wedding of their only sister can have expensive consequences.

We see, then, in this series of cases a system of law in course of evolution, operating in a society in which there is of necessity some confusion between natural and legal relationships: not that more sophisticated societies have escaped from the entertaining dramas of conflict between these two relationships. In resolving this confusion the Native Courts administer a broad and beneficent equity, in which trained judges are assisted by experienced laymen. That the system works the volume itself testifies. Here, in this vivid collection of cases, we see the people of rural Sabah, their customs, lovemaking, disputes over land and buffaloes and so on, seeking and obtaining justice under a system of living customary law virtually unaffected by the iron bands of statute. It is a notable collection.

The standard of production and proof-reading reflects credit on those responsible for this invaluable collection, and it is one likely to prove of continuing interest to both lawyer and sociologist. Errors are few, and no lawyer can fail to be grateful for such a rare lapse as that involved in a reference to a "Naive Court" (p. 137). Typography and lay-out are clear and helpful to the eye, and the classification of subjects is practical and concise, even although the majority of cases inevitably involve disputes over land and other property, testate and intestate succession, and divorce.

What the price of the volume may be I do not know, but I suspect that it is unlikely to prove expensive, and therefore urge those with any interest in customary law to purchase a copy before it is out of print. The book has a foreword in the Bahasa Malaysia by Tun Datu Haji Mustapha bin Datu Harun, and in view of the need for a book on case law on the subject it may well be that any subsequent edition appears (as Datuk Lee Hun Hoe also hopes) in that language — to the greater benefit of the Native Courts and the natives of Sabah.

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